IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOHNSON & JOHNSON; and
JOHNSON & JOHNSON
CONSUMER COMPANIES, INC.,
Petitioners,

v.

S. Ct. No. S-1-SC-39284

THE HONORABLE MATTHEW
JUSTIN WILSON,
Respondent,

and

STATE OF NEW MEXICO, EX REL.
HECTOR BALDERAS, ATTORNEY
GENERAL; ET AL.,
Real Parties in Interest

PETITIONERS' SUPPLEMENTAL BRIEF IN CHIEF

Appeal from the First Judicial District Court
County of Santa Fe
The Honorable Matthew Justin Wilson

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This appeal asks the Court whether the State can hide behind supposed limitations in the Attorney General's authority in order to evade its discovery obligations.

The State of New Mexico, acting "ex rel." its attorney general Hector Balderas, brought claims for both damages and civil penalties against defendants Johnson & Johnson ("J&J") and LTL Management LLC ("LTL")[1] (collectively, "the J&J defendants") based on allegations that the J&J defendants' cosmetic talcum powder products were contaminated with asbestos. The parties proceeded to discovery, during which each side propounded interrogatories and requests for production on the other. The State, however, largely refused to produce discovery, arguing that because the attorney general is elected separately from the governor, he has neither the obligation nor the ability to provide discovery or to answer interrogatories on behalf of his client. Instead, the Attorney General took the

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[1] The case was initially filed against J&J and Johnson & Johnson Consumer, Inc. ("Old JJCI"). Consistent with the caption of the case below, the petition for a writ of superintending control was filed in the name of J&J and Old JJCI. In 2021, Old JJCI completed an internal corporate restructuring. As a result of that restructuring, Old JJCI ceased to exist and two new companies were created. The first new company is LTL. Pursuant to the restructuring, LTL became solely responsible for Old JJCI's liabilities arising from talc-related claims against it (other than claims for which the exclusive remedy is provided under a workers' compensation statute or similar laws), and the defense of those claims. LTL is the entity responsible for the claims asserted in this case, and is the proper defendant-appellant.

position that the State would only produce documents and answer interrogatories based on the small amount of nonprivileged information within the files of the Office of the Attorney General. The practical result of the State's position is that, while the J&J defendants have produced hundreds of thousands of documents totaling millions of pages, the State has produced two documents totaling four pages. The district court denied the J&J defendants' motion to compel, accepting the State's position that only the Attorney General's office needs to participate in party discovery. As a result, the J&J defendants are limited to the circumscribed tools of third-party discovery in preparing their defense for trial, precluding them from propounding interrogatories or requests for production, enabling state agencies to make burden objections that are not available to a plaintiff, and raising questions about whether deposition testimony by agency representatives will bind the State at trial.

The district court's order is clearly wrong, and this Court should reverse for four interrelated reasons. First, the State of New Mexico, not the Office of the Attorney General, is the party-plaintiff in this case, and the State of New Mexico includes its component parts. The fact that the Governor and the Attorney General are elected independently does not alter the State's litigation obligations, and the State has never identified any constitutional or statutory authority suggesting that it does. Second, the Attorney General is clearly empowered to produce documents

from state agencies. Third, regardless of any theoretical distinction between the State as a party to this case and the component agencies that comprise it, the requested discovery is appropriate under Rules 1-033 NMRA, and 1-034 NMRA. And fourth, the State's position would have the effect of unfairly tilting the playing field in this case and in all State enforcement actions by requiring party discovery from one side but not the other.

SUMMARY OF PROCEEDINGS

This case was brought by "Plaintiff, the State of New Mexico . . . , by and through its Attorney General, Hector Balderas" (First Amended Complaint ("FAC"), *State of New Mexico ex rel. Balderas v. Johnson & Johnson*, No. D-101-CV-2020-00013 (N.M. Dist. Ct. Mar. 3, 2020) at p. 1; *see id.* ¶¶ 5 ("This action is brought for and on behalf of the State of New Mexico in its sovereign and *parens patriae* authority, by and through its duly elected Attorney General, Hector Balderas."), 19 ("This action is brought by the State of New Mexico as the sole plaintiff . . . .").) The State seeks declaratory and equitable relief and civil penalties (*id.* ¶ 1), as well as damages, primarily for "the cost of treating asbestos-related cancers [allegedly] caused by those products" through programs like Medicaid and employee and retiree health benefits (*id.*; *see also id.* (seeking restitution for "the costs of [purchasing] [d]efendants' [t]alc [p]roducts")).

Plaintiff initially advanced seven causes of action, but two were dismissed for failure to state a claim under Rule 1-012(B)(6) NMRA. The surviving claims arise under: (1) the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009); (2) common law fraud and negligent misrepresentation; (3) common law negligence; (4) common law unjust enrichment; and (5) the New Mexico False Advertising Act, NMSA 1978, §§ 57-15-1 to -10 (1965, as amended through 1967). As to all claims except the false advertising claim, the State seeks damages or restitution based on the theory that the J&J defendants' alleged misconduct was the cause of the State's alleged harm. (*See* FAC ¶¶ 133 ("direct and proximate result"), 178 ("injuries . . . directly caused by"), 183 ("induced" expenditure of state funds), 197 ("direct and proximate result"), 203 ("as a result of").) The harms were alleged to have been suffered by a host of state agencies, including the "Human Services Department [("HSD")], the . . . Department of Health, the . . . Department of Corrections, the Risk Management Division of the General Services Department, the Retiree Health Care Authority[,] and/or the Public Schools Insurance Authority." (*Id.* ¶ 1(e).) In addition to the substantive claims for relief, the State seeks to toll any applicable causes of action (to the extent they run against the sovereign) based on the theory that it "could not have possibly . . . determine[d] the nature, extent[,] and identity of [allegedly talc-]related health risks." (*Id.* ¶ 118.)

Although the State has informally represented to the J&J defendants, and to this Court, that it would limit the number of state agencies for which it seeks monetary damages (*see* Real Party's Resp. to Pet. for Writ of Superintending Ctrl. ("State's Br.") at 3-4), it has not amended its FAC to disclaim damages from any agency. And even if its representation were accepted, the State continues to insist that it will seek both money on behalf of the State as a whole, as well as damages specifically for expenditures by HSD. (*See id.* at 4.)

The J&J defendants served discovery on the State, including requests for production of documents and interrogatories, in order to ascertain the basis for the State's claims. Among other things, the J&J defendants sought to understand how the State was allegedly deceived by the J&J defendants' marketing and the basis for the State's claims of monetary damages, and to discover facts and documents that may contradict or undermine the State's theory of the case. In response to the J&J defendants' requests for production, the State claimed that it "does not represent any . . . State agencies" other than the Office of the Attorney General and lacks "possession, custody, or control of documents within other branches, agencies, departments or other entities of the State . . . government." (State's Suppl. Resps. to RFPs at 3 (attached as Ex. 1); *id.* at Resps. 34, 43, 47.) The State produced two documents totaling four pages from the Attorney General's own files: one, a handwritten letter from a private citizen asking to be involved in the

lawsuit, and the other, the Attorney General's internal docket sheet from the present case. (*See* State's Doc. Produc. (attached as Ex. 2).) Later, after the J&J defendants filed a motion to compel, the State submitted what it termed a third-party subpoena to HSD. But the subpoena sought only information related to the total number of cancer cases in New Mexico (i.e., information that the State wanted to pursue its own theories), rather than the type of information sought by the J&J defendants' discovery requests. (*See* State's Subpoena to HSD, Jan. 26, 2022 (attached as Ex. 3).) The spreadsheet that HSD ultimately produced contained 240,000 lines but did not reference or otherwise address the talcum powder products at issue in this litigation.

The State's response to the J&J defendants' interrogatories was similarly unhelpful, merely asserting that "information within other branches, agencies, [or] departments . . . [wa]s not 'available' to the Attorney General." (State's Answers to Defs.' Interrogs. Obj. ¶ 11 (attached as Ex. 4).)

After the parties met and conferred, the J&J defendants moved to compel, but the district court denied the motion, accepting the State's argument that "the Attorney General"—counsel to the State—"is not obligated pursuant to the rules of discovery to produce documents located with or controlled by agencies of the executive branch that operate independently of the Attorney General." (Order Den. Mot. to Compel ¶ 9, Feb. 4, 2022 (Pet. Ex. 7).) The court's order cited only a

single unpublished case from New York. (*See id.* ¶¶ 5-8 (citing *United States v. Am. Express Co.*, No. 10-CV-04496 (NGG) (RER), 2011 WL 13073683 (E.D.N.Y. July 29, 2011)).)

The J&J defendants thereafter filed a motion to reconsider the order and certify the question for interlocutory appeal. The district court agreed that the issue presented "a substantial basis for a difference of opinion"; indeed, a different judge in the same district had ruled the other way in an indistinguishable case. Nonetheless, the district court declined to certify the issue because it was pending before this Court in that other case, *State ex rel. Balderas v. Mathew*, and the district court assumed the decision in that matter would "resolve the question." (Order Den. Mot. to Amend, Mar. 16, 2022 (Pet. Ex. 12).)

This petition for a writ of superintending control followed. After briefing and argument, and after dismissing the petition in *Mathew* without reaching the merits, this Court concluded that the issue needed to be resolved, stayed the proceedings below, and invited this round of supplemental briefing.

STANDARD OF REVIEW

Although this appeal arose out of an extraordinary writ, the Court has already stayed proceedings in the trial court and determined that the issue should be resolved despite any associated delay in the trial proceedings. Thus, all that remains to be determined is the correctness of the district court's decision, a pure

question of law. This Court reviews questions of law de novo. *See, e.g.*, *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 6, 142 N.M. 527 ("Interpretation of our rules of civil procedure and statutes is a question of law that we review de novo."); *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102 (same).

ARGUMENT

"The Rules of Civil Procedure, including those involving discovery, are made for arriving at the truth; and unless every man receives his fair day in court, the rules will fail in the proper administration of justice," *Davis v. Westland Dev. Co.*, 1970-NMSC-039, ¶ 16, 81 N.M. 296 (citing *Salitan v. Carrillo*, 1961-NMSC-176, 69 N.M. 476), and undermine the parties' fundamental right to due process, *see Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶ 31, 129 N.M. 639 (recognizing that a party's discovery violations jeopardize the due process rights of her opponent). Consistent with these principles, New Mexico's discovery rules are "designed to 'make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 54, 96 N.M. 155 (citation omitted); *see also Griego v. Grieco*, 1977-NMCA-018, ¶ 57, 90 N.M. 174 (New Mexico law provides for "liberal pretrial discovery to enable the parties to obtain the fullest possible knowledge of the facts before trial").

While discovery may sometimes be onerous, the judiciary "demand[s] as the price of possible legal victory[,] full participation in the disclosure of relevant information by those who stand to profit from the ultimate outcome." *United Nuclear*, 1980-NMSC-094, ¶ 67. Thus, "[w]hen a plaintiff in a civil action files a lawsuit, [its] adversaries are entitled to generally understand . . . that compliance will be had with the Rules of Civil Procedure, including those relating to discovery." *Pizza Hut of Santa Fe, Inc. v. Branch*, 1976-NMCA-051, ¶ 7, 89 N.M. 325. The district court's order, which nullified these principles in cases brought by the State, was clearly wrong and should be reversed for four interrelated reasons.

First, the State is the plaintiff in this lawsuit, as evidenced by the caption of the case and repeated references to the State in the body of the operative complaint. The Complaint specifically invokes the power of the State (*see* FAC ¶ 5; *see also infra* at 12 n.3), and there is no disputing that the Attorney General is not the plaintiff—he is merely the plaintiff's attorney. Nor can the State be separated from its constituent parts, including the various state agencies on whose behalf it seeks damages and whose alleged harms it seeks to vindicate. The fact that the Attorney General happens to be elected separately from the governor does not change these fundamental realities, and the State has never even tried to explain why it would.

Second, the Attorney General is obligated to produce discovery from his client, the plaintiff State, and he is clearly capable of obtaining and producing

discovery on behalf of its various component agencies. The statutes he invokes in bringing this lawsuit in the name of the State grant him broad authority over state litigation—authority that necessarily includes the ability to collect and produce documents and gather information for interrogatory and other discovery responses from his client.

Third, even if the various state agencies were theoretically distinct from the State—and they are not—the documents and information that those agencies possess would still be available to the Attorney General under the liberal standards of Rules 1-033 and 1-034, and therefore would be subject to production.

And ***finally***, the policy consequences of allowing the State to evade discovery in actions brought by the Attorney General would be profoundly unfair, as the nearly 1,000,000:1 ratio of documents produced in this case makes clear. The State suggests that any information it possesses is irrelevant, but that argument ignores its allegations and the J&J defendants' potential defenses. And while the State contends that defendants can serve third-party subpoenas on the various state agencies, such subpoenas are no substitute for adequate participation in party discovery. Many discovery tools are either entirely unavailable, or substantially less valuable, when served on third parties. And even the tools that are potentially available would be hampered by the greater ability of third parties to quash discovery that they deem burdensome.

For all of these reasons, discussed below, the district court order should be reversed.

I. THE PLAINTIFF IS THE STATE, INCLUDING ITS COMPONENT PARTS.

The State of New Mexico as a whole—not the Office of the Attorney General specifically—is the plaintiff in this action. And the State includes its constituent parts, even though some of those parts happen to be headed by gubernatorial appointees and the Governor is elected separately from the Attorney General.

A. The Plaintiff In This Case Is The State Of New Mexico.

The discovery obligations in this case fall on the State of New Mexico, not solely on the Office of the Attorney General. Although Plaintiff has sought, at times, to characterize this suit as one brought not by the State, but by the Attorney General, that position is entirely without merit, as made clear by: 1) the statutory role of the Attorney General; and 2) the complaint and other papers filed in the case.

The statutory role of the attorney general is to represent the State, rather than to stand in for it as the party. *See State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶¶ 4-6, 85 N.M. 521 ("*Credit Bureau*"). In *Credit Bureau*, this Court confronted essentially the precise question raised here: whether the party was "the State of New Mexico or its attorney general?" *Id.* ¶ 4.

Based on a "careful reading of" the statutory duties of the attorney general,[2] the Court concluded "that the attorney general is . . . cast in the role of attorney for the State of New Mexico, and that the latter is the proper party litigant rather than the former." *Id.* ¶ 5. The *Credit Bureau* ruling applies here, too. The powers of the attorney general "are determined entirely by statute," *State v. Block*, 2011-NMCA-101, ¶ 15, 150 N.M. 598, and the statutory scheme presupposes that the State is the proper party by empowering the attorney general to "prosecute and defend" actions "in which ***the state may be a party*** or interested," or those brought by or against state agency heads and employees, but not to initiate litigation in his own name. Section 8-5-2(A)-(C) (emphasis added); *see also, e.g.*, §§ 57-12-8 (attorney general "may bring an action ***in the name of the state*** alleging violations of the Unfair Practices Act"), 57-12-11 ("recover[] ***on behalf of the State of New Mexico***") (emphases added).[3]

To the extent there is any doubt about the scope of the attorney general's statutory power, the complaint and other papers filed in this case eliminate any doubt that the State is the party here. Again, *Credit Bureau* is instructive. In that

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[2] Then codified at NMSA 1953, § 4-3-2, now codified at NMSA 1978, § 8-5-2 (1975).

[3] The State has specifically invoked the authority of these statutes. (*See* FAC ¶ 5 (invoking, inter alia, "Sections 8-5-1 et seq. [and] the New Mexico Unfair Practices Act . . . Sections 57-12-1 et seq.").)

case, this Court found it clear that the State was the proper party because "[t]he complaint . . . [wa]s captioned 'State ex rel. David Norvell, Attorney General,' etc. [and t]he notice of appeal recite[d] that 'the plaintiff, State of New Mexico,' appeal[ed]." 1973-NMSC-087, ¶ 6.

The papers are equally clear here. The complaint is captioned "State of New Mexico ex rel. Hector H. Balderas, Attorney General" versus the defendants. (FAC at p. 1.) The very first words of the body of the complaint are "Plaintiff, the State of New Mexico." (*Id.*) And it continues in the same vein. (*See, e.g., id.* ¶ 19 ("This action is brought by the State of New Mexico as the sole plaintiff . . . ."), p. 59 ("Plaintiff, the State of New Mexico, prays for judgment . . . .").) The State's causes of action almost all include some sort of allegation that the State—not the Attorney General—was harmed as a result of the defendants' alleged conduct. (*See, e.g., id.* ¶¶ 133 ("The State of New Mexico . . . ha[s] suffered . . . damage and injury as a direct and proximate result"), 183 ("induced a misallocation of State funds"), 197 ("As a direct and proximate result . . . the State of New Mexico has suffered . . . damages . . . .").) Even on appeal, Plaintiff stated that "[i]n the case below, the State of New Mexico seeks damages and civil penalties." (State's Br. at 1.)

Occasionally, the State has suggested that only the Attorney General's office should be considered the plaintiff, but it did so only as part of its effort to avoid

statewide discovery obligations—e.g., in discovery responses, where it improperly attempted to redefine the plaintiff as "the Attorney General's Office." (*See* State's Suppl. Answers to Defs.' Interrogs. Obj. ¶ 26, Answers 10, 24 ("the Plaintiff in this case is the New Mexico Attorney General's Office") (attached as Ex. 5).) Needless to say, a party cannot avoid its litigation obligations by redefining itself in discovery responses, while continuing to seek recovery in the name of the State throughout its Complaint. *See, e.g.*, *In re Opioid Litig.*, No. 400000/2017, 2019 WL 4120096, at *1 (N.Y. Sup. Ct. Aug. 14, 2019) (trial order) (state was the party for discovery purposes because "[t]he issues framed by the pleadings determine the scope of discovery"). For this reason alone, the district court's order should be reversed.

B. The State's Obligation To Produce Discovery Extends To Its Constituent Agencies.

Because the State is obligated to produce discovery, it must do so on behalf of all its constituent parts, including state agencies. Although this Court has never confronted the precise question here, both the logic of its prior precedents and the weight of out-of-state authority make that clear. The Court long ago acknowledged that although private parties like partnerships are "composed of and can only act through [their] constituent" parts, they cannot exploit that fact to "avoid all meaningful discovery" of those constituent parts. *United Nuclear*, 1980-NMSC-094, ¶ 61. The State should not be allowed to do so either.

As a general rule, when the attorney general or a district attorney represents the State, "he also necessarily represent[s] all state agencies that were foreseeably affected." *Collyer v. State Tax'n & Rev. Dep't, Motor Vehicle Div.*, 1996-NMCA-029, ¶ 10, 121 N.M. 477. Accordingly, litigation in the name of the State can bind those agencies to significant obligations. *See id.* ¶¶ 10-13 (Motor Vehicle Division required to abide by plea agreement by continuing to license drunk driver); *Lyle v. Luna*, 1959-NMSC-042, ¶¶ 15-27, 65 N.M. 429 (attorney general had power to bind state and state revenue agencies to settlement releasing potential tax liability).

While no New Mexico appellate court has addressed the applicability of this general principle to civil discovery, it is well established in the context of criminal discovery that the State includes any "other arms of the state involved in investigat[ion]." *Case v. Hatch*, 2008-NMSC-024, ¶ 46, 144 N.M. 20 (citation omitted); *see also Mathis v. State*, 1991-NMSC-091, ¶ 10, 112 N.M. 744 (discovery required from state as a whole in criminal prosecution; state cannot "divorc[e] from the prosecutorial team such agencies as the state crime lab, motor vehicle department, corrections, human services[,] and others"); *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 n.35 (10th Cir. 1995) (cited with approval in *Case*) ("The duty to produce the requested evidence falls on the state; there is no

suggestion in *Brady*[4] that different 'arms' of the government are severable entities . . . .") (citations omitted). As a result, "regardless of whether the prosecutor is able to . . . enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office." *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991).

The case for treating agencies as part of the State, and therefore subject to discovery, is even stronger here than in the criminal context, because the State is specifically suing for harm suffered by those very agencies. The FAC alleges that "[t]he State, ***through its programs, departments[,] and agencies***, expended substantial sums for injuries [supposedly] caused" by the J&J defendants' products. (FAC ¶ 178 (emphasis added).) And it seeks to "recover the costs of [d]efendants' [t]alc [p]roducts as well as the cost of treating asbestos-related cancers [allegedly] caused by those products"—costs that were borne by a laundry list of identified state agencies. (*Id.* ¶ 1.)

Unsurprisingly, then, trial courts in New Mexico and across the country have held that agencies are part of the State, and therefore subject to party discovery, in materially identical circumstances. *See, e.g.*, Order, *State ex rel. Balderas v.*

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[4] *Brady v. Maryland*, 373 U.S. 83 (1963), governs the State's obligations to produce exculpatory evidence in criminal cases.

Purdue Pharma, L.P., No. D-101-CV-2017-02541, slip op. at 3, 5-6 (N.M. Dist. Ct. July 22, 2020) ("*New Mexico v. Purdue*") ("Plaintiff is obligated to respond to discovery requests based on information and documents available to state agencies, departments[,] and boards" because "[i]t would be fundamentally unfair to allow" the State to assert "claims on behalf of these agencies without requiring [them] to participate in discovery as a party"), *aff'd sub nom. State ex rel. Balderas v. Mathew*, No. S-1-SC-38581, 2022 WL 3042845 (N.M. June 2, 2022); *In re Opioid*, 2019 WL 4120096, at *2 ("The [s]tate shall search and produce documents from agencies likely to possess responsive documents . . . ."); *State ex rel. Rutledge v. Purdue Pharma L.P.*, 624 S.W.3d 106, 108 (Ark. 2021) (noting that trial court "ordered the [a]ttorney [g]eneral to provide discovery responses from the five agencies referenced in the [s]tate's complaint"); *State v. Cardinal Health, Inc.*, No. 279-3-19, slip op. at 1 (Vt. Super. Ct. Aug. 13, 2020) (Pet. Ex. 15) ("To the extent that the [s]tate seeks damages for costs expended by certain [s]tate agencies, it is acting as counsel for those agencies and it must produce documents for them."); *Washington v. GEO Grp.*, No. 3:17-cv-05806-RJB, 2018 WL 9457998, at *3 (W.D. Wash. Oct. 2, 2018) ("[W]here the plaintiff is the State of Washington, discovery addressed to the State of Washington includes its agencies.").[5]

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[5] At oral argument, Chief Justice Bacon asked whether there is appellate authority on this topic. To the best of the J&J defendants' knowledge, no appellate *(cont'd)*

Notably, all these states, like New Mexico, independently elect their attorneys general. *Compare* N.M. Const. art. V, § 1, *with* N.Y. Const. art. V, § 1; Ark. Const. art. 6, § 3; Vt. Stat. Ann. tit. 3, § 151; Wash. Const. art. III, § 1.

The only authority cited by the court below in support of its contrary conclusion, *United States v. American Express Co.*, No. 10-CV-04496 (NGG) (RER), 2011 WL 13073683 (E.D.N.Y. July 29, 2011), is both inapposite and wrongly decided. *American Express* was an antitrust enforcement action by the federal government and a series of states (not including New Mexico). The court determined that it could not compel document production or interrogatory responses from state agencies that the court did not consider relevant to the litigation. Nevertheless, it encouraged those agencies to "produce information absent a formal subpoena" and suggested that "the [s]tate [a]ttorneys [g]eneral's [o]ffices take an active role in encouraging cooperation." *Id.* at *4.

American Express is inapposite because it turned in large part on the fact that the case had not been brought "on behalf or in protection of any state

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court has decided the precise discovery question at issue here in the context of a state lawsuit against a private party—it was raised in *Rutledge*, but the court "lack[ed] jurisdiction to consider the [s]tate's interlocutory appeal" on the merits, 624 S.W.3d at 111. However, as discussed below, the Supreme Court of Kentucky has held that the Attorney General has the authority to obtain agency documents to determine whether a suit should be filed in the first place. *See Strong v. Chandler*, 70 S.W.3d 405, 409 (Ky. 2002).

agencies," and "no monetary damages [we]re sought on their behalf." *Id.* at *2 & n.7. It was also wrongly decided because the court's ruling depended on the bare assertion—devoid of any legal support—that although the attorneys general could practically obtain agency cooperation, as a matter of legal formality, they "ha[d] no . . . way of compelling production . . . if an agency refuse[d] to cooperate." *Id.* at *3. This reasoning is erroneous for several reasons. As an initial matter, it incorrectly focuses on the attorneys general rather than the states, which were the parties. In addition, at least under New Mexico law, it is not correct that attorneys general lack the ability to produce documents or obtain interrogatory responses. (*See infra* at 21-24.) And even if the attorneys general did lack such formal authority to compel production, discovery must be made if it can be obtained "as a practical matter." *United Nuclear*, 1980-NMSC-094, ¶¶ 58, 59 & n.15.

The conclusion that state agencies constitute part of the State for purposes of party discovery is entirely consistent with the dual executive structure of an independently elected governor and the attorney general. This Court implicitly determined as much when it held that criminal discovery obligations fall on the State as a whole despite the independent election of district attorneys. *See, e.g.*, *Case*, 2008-NMSC-024, ¶ 46.

Even as between entirely different branches of government—such as the executive and legislative—New Mexico law "contemplates . . . certain instances

where the overlapping of power exists." *State ex rel. Dickson v. Saiz*, 1957-NMSC-010, ¶ 21, 62 N.M. 227. And the same is all the more true within the executive branch. The Attorney General is specifically granted a host of powers that "overlap[]" with the powers of gubernatorially-controlled agencies. He or she "shall" "prosecute and defend" not only actions involving the State as a whole, but also "all actions and proceedings brought by or against any state officer or head of a state department, board[,] or commission"—i.e., appointees of the governor. Section 8-5-2(A)-(C).[6] "Attorneys General routinely appear . . . on behalf of state agencies" in court. *New Mexico v. Purdue*, slip op. at 3. In fact, state agencies are not even permitted to hire lawyers outside the attorney general's office absent special authorization. *See* NMSA 1978, § 8-5-4 (1933). And as counsel for the State acknowledged at oral argument, the Attorney General's power over agency litigation is such that he or she can sue to recover damages on behalf of a state agency even against that agency's wishes. (Tr. of Oral Arg. 16:25-17:8, Sept. 19, 2022.) Given the many ways in which the Attorney General is already deeply

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[6] This includes the authority to bring litigation on behalf of both the State and agencies in the first instance, since "[i]nherent in the [A]ttorney [G]eneral's duty to 'prosecute' is the power to initiate civil lawsuits." *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8 ("'[P]rosecute' . . . includes the commencement or institution of suits.") (citation omitted).

intertwined with agencies in litigation, there is no basis to conclude that producing documents for them is somehow a step too far.

II. THE STATE CAN AND MUST OBTAIN DOCUMENTS FROM ITS CONSTITUENT AGENCIES.

The State has also resisted its discovery obligations by arguing that "the Attorney General" lacks the power "to command gubernatorially-controlled state agencies to produce discovery." (State's Br. at 13.) That is irrelevant and, in any event, untrue.

First, it is irrelevant whether the Attorney General has statutory authority to compel state agencies to produce documents or otherwise respond to discovery because, as discussed above, the State of New Mexico, including its constituent agencies, is the party to this litigation, not the Attorney General. The Rules of Civil Procedure therefore obligate the ***State*** to respond to interrogatories with "such information as is available," Rule 1-033(A), and to produce all "documents . . . which are in the possession, custody, or control of the party," Rule 1-034(A)(1). Simply put: the discovery obligations in Rules 1-033 and 1-034 apply to parties, not just to their counsel. *See, e.g.*, *United States v. Quebe*, 321 F.R.D. 303, 310 (S.D. Ohio 2017).[7]

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[7] "When . . . state court rules closely track the language of their federal counterparts, . . . federal construction of the federal rules is persuasive authority for the construction of New Mexico rules." *Albuquerque Redi-Mix, Inc. v. Scottsdale* *(cont'd)*

Nor is there any exception for large and complex organizations (such as, for example, J&J) or for government plaintiffs. *See, e.g.*, *State ex rel. State H'wy Dep't v. Fox Trailer Ct.*, 1971-NMSC-097, ¶ 2, 83 N.M. 178 (affirming applicability of discovery rules against State in eminent domain proceedings). Moreover, if a party—here the State, including its agencies—refuses to cooperate in discovery, the "***party's*** failure" can entail consequences, *Quebe*, 321 F.R.D. at 310-11 (emphasis added), regardless of its lawyer's ability to obtain the client's compliance.

Second, and in any event, the State is wrong to suggest that the Attorney General lacks the authority to produce discovery for state agencies. The Attorney General enjoys unencumbered power to "prosecute and defend" litigation brought by the State or its agency heads.[8] In addition, state litigation is entirely "under the management and control of the . . . attorney general." NMSA 1978, § 36-1-22 (1875-1876). These statutory powers add up to "entire dominion over" suits in the

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Ins. Co., 2007-NMSC-051, ¶ 9. The relevant New Mexico rules closely track the federal rules, rendering federal authority persuasive. *Compare* Rule 1-033, *with* Fed. R. Civ. P. 33, and Rule 1-034, *with* Fed. R. Civ. P. 34.

[8] He also enjoys the power to determine "when . . . the interest[s] of the state" require him to participate in litigation, § 8-5-2(B), and, as discussed above, the authority to determine whether a case should be brought in the first instance, *see supra* at 20 n.6.

name of the State, *Lyle*, 1959-NMSC-042, ¶ 23,[9] including, among other things, binding state agencies to criminal plea agreements, *see Collyer*, 1996-NMCA-029, ¶ 10, and to civil settlements, *see Lyle*, 1959-NMSC-042, ¶¶ 15-27.

Had the Legislature wished to exclude the power to review and produce state documents from the broad authority to "prosecute[,] defend," "manage[,] and control" litigation, §§ 8-5-2, 36-1-22, it could have done so. *See Block*, 2011-NMCA-101, ¶ 19 ("[H]ad the Legislature intended . . . a limitation on the attorney general's authority . . . it could have included such limiting language . . . ."). Absent any such exclusion, "[i]t would certainly appear that the 'management and control' of litigation would include the authority to obtain responsive discovery from a relevant state agency." *New Mexico v. Purdue*, slip op. at 3; *see Strong*, 70 S.W.3d at 409 ("The power to institute actions must include the ability to inspect and review documents and information . . . ."); *see generally State ex rel. Otto v. Field*, 1925-NMSC-019, ¶ 64, 31 N.M. 120 ("[T]he powers necessary to the exercise of a power clearly granted will be implied[.]") (citation omitted).

Moreover, if the Attorney General lacked the power to obtain documents from State agencies, his authority to bring litigation would be severely hindered.

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[9] In briefing before this Court, a previous attorney general claimed "virtually plenary authority in the representation of the State of New Mexico, including representation of its agencies and officers." (*See* Pet. for Writ of Mandamus, *King v. Kendall*, No. 14 34852, 2014 WL 10321207, at *6 (N.M. Aug. 13, 2014).)

Without the ability to obtain documents from the State and relevant agencies, the Attorney General would frequently be unable to satisfy the pre-suit obligation to determine whether "there is good ground to support" a complaint. Rule 1-011(A) NMRA. This was one concern noted by the Supreme Court of Kentucky in holding that the Attorney General of that state had the inherent authority to obtain agency documents. *See Strong*, 70 S.W.3d at 409 (noting that the ability to obtain documents is necessary "to a determination of whether a good faith belief exists in order to bring legal action"). And the Attorney General must also have access to relevant documents to properly make the discretionary "judgment" about whether "the interest of the state requires" suit. Section § 8-5-2(B); *see Valley Sav. & Loan Ass'n*, 1981-NMSC-108, ¶ 6 (discussing attorney general's discretion to "determin[e] when the public interest requires him to bring a civil action"). For this reason, too, the State's arguments should be rejected and the district court's order should be reversed.

III. EVEN IF THE AGENCIES WERE NOT PARTIES TO THE LAWSUIT, THE STATE WOULD STILL HAVE THE AUTHORITY AND RESPONSIBILITY TO PRODUCE THEIR DOCUMENTS.

Even if the State were correct that its constituent agencies were somehow distinct from the party to the case, that would not alter the State's obligation to produce agency discovery because party discovery reaches beyond information and things in the immediate possession of the party. *See, e.g., Super Film of Am., Inc.*

v. UCB Films, Inc., 219 F.R.D. 649, 651 (D. Kan. 2004). Rather, under Rule 1-033, a party must answer an interrogatory with "such information as is available to" it, and under Rule 1-034, the party must produce any documents within its "possession, custody, or control." These rules "are 'equally inclusive in their scope'" and are to be construed liberally. *United Nuclear*, 1980-NMSC-094, ¶ 56 (citation omitted). "[I]t is immaterial . . . that the party subject to the discovery orders . . . does not have actual physical possession of" the documents. *Id.* ¶ 58 (footnotes omitted).

Party discovery is subject to "only two limitations": (1) that the party from which discovery is requested "is []capable of procuring" it; and (2) that "the opposing party is [not] equally capable of obtaining [it] on its own." *Id.* ¶ 57; *see also, e.g.*, *Landry v. Swire Oilfield Servs., L.L.C.*, 323 F.R.D. 360, 382 (D.N.M. 2018) ("Simply put, if a person, corporation, or a person's attorney or agent can pick up a telephone and secure the document, that individual or entity controls it."). Production is required if a party has the "*practical ability* to obtain" the information, regardless of whether the party is legally entitled to it. *Landry*, 323 F.R.D. at 397 (emphasis added) (citations omitted); *see, e.g.*, *United Nuclear*, 1980-NMSC-094, ¶ 59.

In *United Nuclear*, a partner of a partnership involved in litigation argued that because it was "not itself a party," it could "not be ordered to answer

interrogatories . . . or to produce documents." 1980-NMSC-094, ¶ 49. This Court rejected that position, explaining that it was "unnecessary to consider the extent to which a partnership is a separate legal entity," because "partner documents" were "'available' to" the party "as a practical matter" and were therefore "subject to discovery." *Id.* ¶¶ 53, 59.

Here, too, even if the various state agencies were somehow separate from the State itself, the State would still have the practical ability—and by extension, the legal obligation—to obtain documents and interrogatory answers from them. The State's practical ability to produce agency discovery is amply demonstrated by the fact that it did so in the opioid litigation. *See United Nuclear*, 1980-NMSC-094, ¶ 59 ("little doubt" that documents were available since they were "ultimately produced" following trial court's order). Moreover, the state agencies have every incentive to provide any responsive discovery since the State stands to gain from this lawsuit. *See id.* ¶ 67 (obligated to produce discovery from partners because they "st[oo]d to profit from the ultimate outcome"). As discussed above, the FAC asserts claims for damages to a host of agencies. And even if money were only collected as civil penalties, it would go into the State's general treasury, where it would likely fund agency programs.

In sum, there is no exception to general discovery rules when an Attorney General sues to recover for alleged damages or seeks penalties; indeed, such an

exception would violate basic due process. Accordingly, the State, like any other litigant, must produce all responsive documents in its "possession, custody or control," and provide interrogatory responses for a similarly broad set of topics.

IV. ALLOWING THE STATE TO SHIRK ITS DISCOVERY OBLIGATIONS WOULD CREATE AN UNEVEN PLAYING FIELD.

Courts in New Mexico and across the country have consistently cautioned that "[d]iscovery is not a one-way proposition" for either side in a particular litigation; rather, "[i]t is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant." *Knight v. Presbyterian Hosp. Ctr.*, 1982-NMCA-125, ¶ 16, 98 N.M. 523 (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)); *see also, e.g.*, *Akridge v. Alfa Mut. Ins. Co.*, 1 F.4th 1271, 1278 (11th Cir. 2021) ("'[D]iscovery is not a one-way proposition,' and issues . . . 'cannot be resolved by a doctrine of favoring one class of litigants over another.'") (citation omitted).

The central thread underlying this authority is a recognition that "discovery is mutual," *Hickman*, 329 U.S. at 507 n.8 (citation omitted); *see also State ex rel. N.M. State H'wy Comm'n v. Taira*, 1967-NMSC-180, ¶ 12, 78 N.M. 276 (noting "the necessity of mutual discovery" in civil litigation) (citation omitted)—i.e., that both sides are obligated to provide full and meaningful discovery, *see City of Fresno v. Harrison*, 154 Cal. App. 3d 296, 301 (1984) ("The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in

idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry.") (citation omitted). Such mutuality of disclosure furthers the truth-finding function of our justice system, ensures that all parties are afforded a fair and full opportunity to litigate their claims or defenses, and promotes cost-effective resolution of cases short of trial. *See, e.g.*, *Akridge*, 1 F.4th at 1278 (reciprocal-based approach to discovery is essential to "obtaining a full and accurate understanding of the facts in the pursuit of a just result").

Absent reversal of the district court's ruling, each of these goals will be thwarted, because the district court has allowed the State to effectively transform the traditional "two-way" approach to discovery into a "one-way proposition." As noted above, corporate defendants are expected to produce documents and answer interrogatories on behalf of all their divisions as well as legally-distinct entities as long as they are "interrelated." *United Nuclear*, 1980-NMSC-094, ¶ 64. That is why defendants have produced ***millions of pages*** of documents across their divisions, departments and offices. Yet, the State wants an entirely different rule for itself—one that has thus far allowed it to produce a mere ***four pages*** of party discovery, as well as an irrelevant spreadsheet from HSD that does not even mention the products at issue. Such a disparity in discovery would eviscerate the J&J defendants' ability to properly prepare and mount a fair defense.

In response, the State has argued that: (1) because the focus of this lawsuit is on the J&J defendants' allegedly false marketing, "Johnson & Johnson would hold almost all discoverable material related to liability, causation, and penalties"; and (2) defendants can obtain any necessary information directly from the state agencies themselves. (*See* State's Br. at 2, 17.) Neither argument has any merit.

First, the court below did not rule on the relevance of any documents held by state agencies, and, despite a few passing references to relevance in its district court brief, the State has not seriously argued either to that court or this one that the J&J defendants' requests for production, interrogatories and other discovery are irrelevant. Instead, it has primarily advanced dubious constitutional and statutory arguments that should be rejected for the reasons set forth in Parts I and II, *supra*. As a result, any suggestion that the J&J defendants' discovery requests seek irrelevant information has been waived. *See Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 41, 111 N.M. 319 (argument "not raised below" is waived).

In any event, the notion that all relevant information can be found in the J&J defendants' own files is not only illogical, but belied by the State's own allegations. The very first paragraph of the FAC makes clear that "Plaintiff seeks to recover the costs of . . . treating asbestos-related cancers *[allegedly] caused by those products, including, but not limited to, expenditures*" made by numerous state agencies. (FAC ¶ 1(a)-(f) (emphasis added); *see also, e.g., id.* (seeking to

recover "the costs of Defendants' Talc Products"); *id.* ¶ 24 (Defendants' allegedly false statements regarding the talc products "proximately caused Plaintiff's harm").)

Nonetheless, the State has refused to provide any discovery regarding the costs it allegedly incurred in paying for the products, much less the expenditures it made for treating the cancers in question. Such basic information—which is part and parcel of the State's theory of injury and damages—cannot possibly be gleaned from materials found in the J&J defendants' files. The same is true with respect to the circumstances surrounding the State's treatment of New Mexico citizens' cancers, including whether those individuals had risk factors for cancer, such as family history, genetic predispositions, obesity, tobacco usage and the like. And the State has refused to produce any information related to its own knowledge, if any, of the alleged risks associated with talc. This sort of discovery is essential to defendants' ability to test the State's allegation that it was defendants' conduct and defendants' talc products—as opposed to other factors—that "caused" the harms requiring the expenditure of State funds. Again, the State's failure to provide such information has deprived the J&J defendants of the kind of discovery necessary to fairly and adequately defend against plaintiff's theories of causation, injury and damages.

The State's other allegations similarly highlight why the J&J defendants require discovery. For example, a central theme of the FAC is that the J&J defendants failed to disclose various studies that the State claims support its theory that the talc products are dangerous (FAC ¶ 33; *see also, e.g.*, *id.* ¶¶ 34, 81, 82-103)—some of which were allegedly reported by "various newspapers, including the New York Times and the Washington Post" many decades ago (*id.* ¶ 34). The FAC also repeatedly alleges that the State "lack[ed] . . . knowledge" of the allegedly carcinogenic properties of talc (*id.* ¶ 123(g)) and therefore "reasonably and in good faith relied upon" the J&J defendants' allegedly false representations (*see, e.g.*, *id.* ¶ 70). And the FAC likewise contains multiple allegations that the J&J defendants "failed to warn . . . ***Plaintiff***" of the purported hazards associated with cosmetic talc products. (*See, e.g.*, *id.* ¶ 75 (emphasis added); *id.* ¶ 110 ("Defendants . . . have elected not to warn or inform . . . Plaintiff, or this State's consumers . . . .").) The only way the J&J defendants can test the veracity of these allegations is to ascertain the extent of the State's talc-related knowledge and exposure to talc-related marketing, again matters that are exclusively within the domain of the State.

Second, the State has also argued that its supposed inability to provide discovery is of no moment because the J&J defendants can "obtain state-agency information directly from the state agencies." (*See* State's Br. at 17.) But third-

party discovery is not an adequate substitute for party discovery, for multiple reasons. For one thing, certain types of discovery (e.g., requests for admission and interrogatories) are not even available through third-party practice. *See, e.g.*, Rule 1-036(A) NMRA ("A party may serve upon any other ***party*** a written request for the admission.") (emphasis added); Rule 1-033(A) ("Without leave of court or written stipulation, any party may serve upon any other ***party*** written interrogatories . . . .") (emphasis added). Although subpoenas for documents and depositions can theoretically be served on third parties, the process for doing so is arduous and fraught with significant challenges. *See Apple Inc. v. Match Grp., Inc.*, No. 21-mc-80184-YGR (TSH), 2021 WL 3727067, at *5 (N.D. Cal. Aug. 19, 2021) ("In general, party discovery is more convenient and less burdensome than subpoenaing a non-party for the same information.").

Even with respect to those forms of discovery that are available from third parties, the J&J defendants would be left guessing which agencies possess relevant information on which particular topics—something the State and its counsel the Attorney General are much better positioned to determine. Moreover, it is far from clear whether the J&J defendants would be able to successfully subpoena even the agencies explicitly identified in the FAC for documents or depositions given that non-parties are generally afforded more protection in opposing discovery requests. *See Boshea v. Compass Mktg., Inc.*, No. ELH-21-309, 2021 WL 4425765, at *3-5

(D. Md. Sept. 27, 2021) ("[T]he [c]ourt does conclude that limiting the discovery is appropriate, given [subpoena recipients'] status as nonparties."). And there is a significant risk that agencies would respond inconsistently, with some potentially agreeing to provide information, while others vigorously oppose third-party discovery requests. The result would be successive, burdensome and expensive motion practice, draining the parties' and the Court's resources, wasting time and needlessly protracting the litigation.

Finally, the State has previously taken the position that deposition testimony from state agencies or their personnel would *not* be binding on the State as party admissions. (Plaintiff State of New Mexico's Brief Regarding the Identity of the Plaintiff at 4-6, *State ex rel. Balderas v. Purdue Pharma, L.P.*, No. D-101-CV-2017-02541 (N.M. Dist. Ct. July 22, 2022).) By contrast, the State will undoubtedly seek to use testimony elicited from the J&J defendants against them in pursuing its claims. This is just one more imbalance that is built into the State's distorted and erroneous assessment of its discovery obligations.

CONCLUSION

For the foregoing reasons, as well as those articulated in the J&J defendants' Verified Petition For A Writ Of Superintending Control, the Court should vacate the district court's order denying the J&J defendants' motion to compel.

Respectfully Submitted,

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Certificate of Service

I certify that the foregoing *Petitioners' Supplemental Brief in Chief* was filed through the Odyssey File-and-Service electronic filing system this 3rd day of October, 2022, and that on the same date a copy of the filing was served on:

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