IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC39284

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

Petitioners,

v.

THE HONORABLE MATTHEW JUSTIN WILSON,

ORAL ARGUMENT REQUESTED

Respondent,

and

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

Real Party in Interest.

ANSWER BRIEF OF REAL PARTY IN INTEREST THE STATE OF NEW MEXICO

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INTRODUCTION

In their petition, Johnson & Johnson and Johnson & Johnson Consumer Inc. (collectively "Johnson & Johnson" or "Petitioners"),[1] incorrectly assert that their need for easy access to information from New Mexico's non-party state agencies outweighs the foundational constitutional and statutory structure of the State government. According to Petitioners, Respondent the Hon. Matthew Wilson has fundamentally deprived Johnson & Johnson of their ability to defend themselves in the case below. But Johnson & Johnson's petition really centers on a narrow discovery dispute about a subset of potential damages claimed by the State, not Johnson & Johnson's overall liability or causation.

The State of New Mexico seeks damages and civil penalties through the following causes of action: the New Mexico Unfair Trade Practices Act, the New Mexico False Advertising Act, Fraud, Negligent Misrepresentation, and Negligence. The State bases these causes of action on the central allegations that Johnson &

[1] In Petitioners' brief and in oral argument, Petitioners erroneously assert that "LTL is the entity responsible for the claims asserted in this case, and is the proper defendant-appellant." (Pets.' Supp. Brief at 1, n.1). While LTL may be one of the legal corporate successors to Johnson & Johnson Consumer Inc., Johnson & Johnson is a separate Defendant in the case. The State has asserted claims against both Petitioners, and Petitioners cannot unilaterally apportion liability amongst themselves or make determinations about which one is the "proper" party. Only a court or a jury can make those determinations, despite any claims by the Petitioners to the contrary. Further, Petitioners have not made any formal substitution of LTL in this case.

Johnson marketed, advertised, and sold talcum powder products to consumers in the State of New Mexico with the knowledge that these products could cause ovarian cancer and mesothelioma.

Since these causes of action center on marketing, advertising, and sales undertaken by Johnson & Johnson, Johnson & Johnson holds almost all discoverable material related to liability, causation, and penalties. Primarily, the State seeks civil penalties (as opposed to damages) related to Johnson & Johnson's false and misleading statements made in the marketing, advertising, and sales of these products.

As a limited part of these causes of action, however, the State also seeks damages arising from expenditures made by the State through its Medicaid agency—the New Mexico Human Services Department (HSD)—for medical expenses incurred in the treatment of ovarian cancer and mesothelioma traceable to Johnson & Johnson's talcum powder products. Since 2020, the State has asserted (and ultimately the district court agreed) that the State, acting through the Office of the Attorney General, does not have possession, custody, or control of documents or information held by gubernatorially controlled State agencies due to the constitutional and statutory structure of the executive branch. Further, while the State's damages claims arise from expenditures of State funds, which were spent via HSD, HSD is not a party to the underlying case. HSD holds no claims in the case,

and HSD is not represented in the underlying case by the Attorney General. Further, the State is not seeking monetary damages that would be provided directly to HSD.

In order to obtain needed information from HSD, the State itself was forced to subpoena the agency, and then promptly produced those documents to Johnson & Johnson. As a result, the State and Johnson & Johnson are in the same legal and procedural position when it comes to discovery of documents from state agencies.

Nonetheless, Johnson & Johnson argues that the District Court should have compelled the State to produce discovery from non-party state agencies, despite the facts that: (1) New Mexico's executive-branch structure clearly prohibits the Attorney General from exercising authority over gubernatorially-controlled agencies, and (2) Johnson & Johnson can obtain information from non-party state agencies via third-party process in the same manner afforded to the Attorney General.[2]

The discovery order denying Johnson & Johnson's motion to compel production from non-party state agencies was well within the District Court's sound

[2] Ultimately, if the State is not able to obtain documents from state agencies demonstrating expenditures, then the State will not be able to use those documents to pursue its damages claims, and Petitioners will not have to defend against those claims as a result. In other words, if the State is unsuccessful in getting this information, the State will be unsuccessful in proving up its damages. This clear dissonance indicates that Johnson & Johnson's motive in filing the writ is to delay the State's case, rather than a good-faith attempt to ask this Court to intervene in a district court discovery dispute.

discretion. Therefore, and for the reasons detailed below, the Court respectfully should deny Johnson & Johnson's petition.

LIMITED RESPONSE TO JOHNSON & JOHNSON'S SUMMARY OF THE PROCEEDINGS

Although Johnson & Johnson has accurately stated the procedural history in their writ petition and supplemental brief, the State needs to correct several misstatements by Johnson & Johnson.

Johnson & Johnson claims that the State alleges "harms . . . suffered by a host of state agencies[.]" (J&J Supp. Brief at 4). While that may have been true in 2020 when the State filed its First Amended Complaint, the State has since represented in meet and confers, in multiple court filings, at a hearing at the district court, and at oral argument in this Court that the State now only seeks damages related to expenditures from one agency, HSD. (*See* State's Opp. to J&J Mot. to Compel, Oct. 28, 2021 at 3 n. 1; State's Opp. to J&J Mot. for Interlocutory Appeal, Mar. 4, 2021, at 6 n. 5).[3] And the State has already produced all documents received from HSD to Johnson & Johnson. In their supplemental brief, Petitioners claim that the State has

[3] Johnson & Johnson claims that because the State has not yet amended its complaint, it must pursue discovery from all of these agencies. (J&J Pet. at 17 n. 5). The Court and Johnson & Johnson can and should rely on the State's representations about the damages it currently seeks. While the constitutional issue at the heart of this dispute is important, Johnson & Johnson is willfully ignoring and downplaying the State's position in a vain attempt to make the burden imposed on Johnson & Johnson by the District Court's decision appear much larger than it really is.

made these representations "informally" and complains that the State "has not amended its FAC . . . ." (J&J Suppl. Brief at 5). There is nothing informal about making these representations in written briefs and at multiple oral arguments in the district court and in this Court.

Johnson & Johnson claims it has "little idea what facts, if any, the State's claims are premised on[]." (J&J Pet. at 11). Johnson & Johnson's absurdly narrow view requires the Court and the parties to disregard more than a decade of very public litigation surrounding their talcum powder products brought by tens of thousands of individual victims across the United States premised on similar facts related to the marketing, advertising, and sale of its talcum powder products.[4] In short, the evidence supporting the State's allegations is well understood, and similar cases have resulted in record-setting personal injury verdicts against Petitioners. Johnson & Johnson has even initiated a massive corporate restructuring in order to declare bankruptcy in an attempt to stave off the litigation.[5] This is not a one-off case in

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[4] In addition to the thousands of personal injury lawsuits, there has been another case brought by the Mississippi Attorney General, a securities action brought by shareholders, and civil investigations undertaken by Congress, federal agencies, and a number of state attorneys general.

[5] *See* LTL Management LLC, Equitable Resolution of All Current and Future Talc Claims, available at: https://ltlmanagementinformation.com/ (Last Accessed: Aug. 4, 2022) ("On October 14, 2021, LTL Management LLC, a subsidiary of Johnson & Johnson, voluntarily filed for Chapter 11 bankruptcy protection. This action was taken to resolve all claims related to cosmetic talc in a manner that is equitable to all parties, including any current and future claimants.") The State strongly opposes

which Johnson & Johnson is developing its defense for the first time. For Johnson & Johnson to claim that it does not know what facts the State's claims are premised on strains credulity.

Johnson & Johnson next misconstrues the record below when it asserts that the "State produced two documents totaling four pages from the Attorney General's own files[] . . . ." (J&J Supp. Brief at 5). In making this statement, Johnson & Johnson misleads the Court about where the vast majority of relevant documents will come from in this case: Johnson & Johnson itself. It is Johnson & Johnson, not the State, that holds the key to discovery in this case as it relates to liability, causation, and damages. On August 19, 2021, the State served supplemental responses to 43 of the Petitioners' requests for production. In the supplemental responses, the State referenced hundreds of documents responsive to Petitioners' requests, all of which either are in the custody and control of Petitioners, or are equally available to them through public sources.

Additionally, the State also produced an extensive spreadsheet obtained from HSD with over 240,000 lines of data. Johnson & Johnson alleges that this spreadsheet "did not reference or otherwise address the talcum powder products at

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Johnson & Johnson's efforts (through its subsidiary, LTL) to abuse the laws and Constitution of the United States and laws of the State of New Mexico through a sham bankruptcy.

issue in this litigation." (J&J Supp. Brief at 6). Not true. The fact that the spreadsheet does not mention talcum powder products is not surprising – these are consumer products excluded from any expenditures for medical treatment. Instead, the spreadsheet contains expenditures made by HSD for medical treatment of cancers the State alleges were *caused by* talcum powder products. Further evidence related to the issues of causation will be developed through expert witnesses in the case who are expected to link the sale to and use of talcum powder products by New Mexico consumers to the resulting expenditures by HSD for treatment of cancer.

Johnson & Johnson further alleges that the State failed to respond to interrogatories. (J&J Supp. Brief at 6). Again, not true. The State responded to Petitioners' 33 interrogatories on July 23, 2020, and then supplemented its responses to 22 of those interrogatories on August 19, 2021. Additionally, of the 33 Interrogatories served on the State by Petitioners, most were not directed to specific state agencies, but rather to the entirety of State government. Only about half of the Interrogatories specifically seek responses from state agencies, although it is not always clear which agencies Petitioners are seeking information from (and again, none are parties to this case).

Lastly, in their writ petition, Johnson & Johnson claims that the State's position in this case "contradicts the stance previously taken by the State before this Court and before the First Judicial District Court." (J&J Pet. at 6). But the State's

position is not inconsistent. In *State of New Mexico, et al. v. The Honorable Francis J. Mathew*, the district court granted Petitioners' request to compel the State to produce state-agency documents and to treat non-party state agencies as parties for purposes of discovery despite clear constitutional issues. Here, the district court correctly denied a nearly identical request from the same Petitioners. The courts of New Mexico have taken inconsistent positions on this issue, but the State's position has been the same: a gubernatorially-controlled state agency cannot be made a party to a lawsuit filed by the Office of the Attorney General against its will simply because it may hold information relevant to the claims asserted therein.

STANDARD OF REVIEW

Although Petitioners gloss over the standard of review in their supplemental brief and simply declare that the standard of review is de novo, the State must reiterate that the standard for a writ of superintending control still applies. Johnson & Johnson filed a petition for a writ of superintending control, and for the Court to grant any relief to Petitioners, it must grant a writ.

Article VI, Section 3 of the New Mexico Constitution grants the New Mexico Supreme Court superintending control over the district courts. *Grisham v. Reeb*, 2021-NMSC-006, ¶ 8, 480 P.3d 852. However, "matters entrusted to the trial court's discretion ordinarily are not matters over which this Court should exercise its jurisdiction to grant extraordinary relief . . . . Neither the writ of prohibition nor the

writ of superintending control should be used as a substitute for a decision on direct or interlocutory appeal." *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836.

The Supreme Court may correct specie of error "via extraordinary writs, but it employs them only in exceptional circumstances: where the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and unusual burdens of expense." *Grisham v. Romero*, 2021-NMSC-009, ¶ 15, 483 P.3d 545 (quotation omitted).

Johnson & Johnson does not address what it means for an injury to be "irreparable." "An injury that is irreparable is without adequate remedy at law." *State ex rel. State Highway and Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128. "The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm." *Id.* (quotation omitted).

Here, Johnson & Johnson does not possess an actual and substantial injury for which there is no adequate remedy at law. Despite Johnson & Johnson's assertion that it will be irreparably harmed by the district court's ruling, Johnson & Johnson's own exhibits in support of its petition demonstrate that it is already obtaining the information it desires from third-party state agencies through subpoenas (as the State

itself has done). The State is no more capable than J&J of obtaining documents from state agencies. As multiple avenues exist for Johnson & Johnson to obtain the third-party discovery it desires, there is no irreparable injury and thus no basis for extraordinary relief in this case.

Even if the Court determines that the standard for a writ of superintending control no longer applies, appellate courts in New Mexico review rulings on motions to compel for an abuse of discretion. *Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 13, 127 N.M. 446, 982 P.2d 497. "An abuse of discretion occurs when the trial court's ruling is against the facts, logic, and circumstances of the case or is untenable or unjustified by reason." *Id.*

Here, the District Court did not abuse its discretion. After having reviewed the briefing and holding a hearing, the District Court ruled based on the application of the facts and the law under these particular circumstances. Therefore, there was no abuse of discretion, and the District Court's discovery ruling denying Johnson & Johnson's motion to compel should respectfully be affirmed.

ARGUMENT

1. The Constitution and laws of the State of New Mexico limit the ability of the Attorney General to obtain information from non-party state agencies.

Johnson & Johnson's motion to compel was based on the incorrect presumption that New Mexico executive agencies, ultimately under the control of

the Governor of New Mexico, are "parties" to this action within the meaning of the New Mexico Rules of Civil Procedure. The District Court correctly determined that independent executive agencies are not parties to this action.

As detailed below, the New Mexico Constitution, state statutes, and the common law all provide that New Mexico executive agencies are not parties to this action as a result of the Attorney General's exercise of his constitutional and statutory power to bring suit to protect the interests of the State of New Mexico. Finally, the protections afforded the accused in a criminal proceeding are grounded in constitutional principles not implicated by the present civil discovery dispute. The State will address each grant of power, and lack thereof, to the Attorney General concerning civil discovery in turn.

A. New Mexico Constitution

The New Mexico Constitution divides the power of the Executive Branch amongst the Governor, the Attorney General, and four other independently elected officials. N.M. Const. art. V, § 1. The Governor is the "supreme" executive authority and has appointment and removal power over the heads of all executive state agencies and departments, excluding the other independently elected Executive Branch officials. N.M. Const. art. V, § 4, 5; NMSA 1978, § 9-1-4 (1977); NMSA 1978, § 9-1-1 through 9-29-12 (1977, as amended through 2022) (listing state agencies under Governor's control); *see also, e.g., State ex rel New Mexico Judicial*

Standards Comm'n v. Espinosa, 2003-NMSC-017, ¶¶ 26-27, 134 N.M. 59 ("Governor has plenary authority to remove his appointees"). The removal power gives the Governor full "control over administration." *Id.* ¶ 25; *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 47 ("cabinet agencies" are "under the ultimate control of the Governor").

The Governor's power necessarily includes the subordinate power of maintaining control over agency documents. *See, e.g., Republican Party*, 2012-NMSC-026, ¶ 43 (Governor may invoke executive privilege to withhold agency documents); *Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, ¶¶ 13-26 (reviewing Department of Health's determination that it need not disclose records requested under the Inspection of Public Records Act). The Governor's authority also encompasses the power to decide whether her agencies should initiate litigation. These positions were advanced by the Governor herself as an amicus in the matter of *State of New Mexico, ex rel. Hector Balderas v. The Hon. Francis J. Mathew*, No. S-1-SC-38581, *writ denied* 2022 WL 3042845 (June 2, 2022), attached as Exhibit 1.[6]

For example, most executive agencies possess either the power to enforce their orders or to sue and be sued. *See, e.g.*, NMSA 1978, §§ 9-1-5(A), (B)(5) (all

[6] The Governor has likewise given notice to the Parties of her intention to file a motion to participate in this action as *Amicus Curiae* pursuant to Rule 12-320 NMRA.

cabinet-level agencies have authority to "enforce the laws" and to enforce administrative actions in court); § 24-1-3(U) (2017) (Department of Health may sue and be sued); § 27-1-2(B)(1) (2007) (Human Services Department may sue and be sued); § 26-1-4 (1967) (Board of Pharmacy has authority to enjoin violations of New Mexico Drug Device and Cosmetic Act); § 51-1-40 (1991) (divisions within Department of Workforce Solutions may sue and be sued).

In contrast, the Attorney General is an independent executive official, not removable by the Governor, with direct authority over only his or her own office. *See* N.M. Const. art. V, § 1; NMSA 1978, § 8-5-1 (Attorney General heads the department of justice (now called the Office of the Attorney General)). The Attorney General's powers are conferred solely by statute and include the authority to bring actions in the name of the State when he or she deems it to be in the public interest. *See, e.g., State ex rel. Attorney General v. Reese*, 1967-NMSC-172, ¶ 7, 78 N.M. 241 ("No grant of powers to the office [of the Attorney General] is set forth here [Art. V, § 1] or anywhere else in the constitution."); NMSA 1978, § 8-5-2(B) (1975) (Attorney General "shall prosecute and defend . . . all actions . . . in which the state may be a party or interested when, in his judgment, the interest of the state requires such action"). No statute grants the Attorney General substantive or operational authority over executive agencies, which are exclusively under the Governor's control. *See* N.M. Const. art. V, § 4, 5; NMSA 1978, § 9-1-4.

One of the primary purposes of such a divided executive, common to many states, is to ensure political independence of the attorney general. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2467 (2006). Such independence is designed to give the attorney general exclusive discretion over the initiation of public interest litigation, which otherwise might fall victim to conflicting political goals of the governor, executive agencies, or other state instrumentalities. Marshall, 115 Yale L.J. at 2453, 2455-56, 2460; *State ex rel. Bingaman v. Valley Say. & Loan Ass'n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8 (recognizing Attorney General's statutory "power to initiate civil lawsuits when, in his judgment, the interest of the state is in need of protection").

Thus, under the constitutional structure of the State of New Mexico, the Governor and Attorney General possess finely delineated powers. Both hold independently elected positions. Where the Governor is the "supreme executive" over the agencies that comprise the executive branch, the Attorney General retains exclusive discretion over the decision to bring suit in the name of the State of New Mexico. Under such a dual executive constitutional system, the independent decision of the Attorney General to bring suit in the name of the State of New Mexico does not make executive agencies under the supreme control of the Governor parties for the purposes of civil discovery.

B. New Mexico Statutes

Johnson & Johnson spends considerable time arguing in its petition that the district court's order disregards the statutory law of New Mexico. However, neither the statutes nor caselaw cited by Johnson & Johnson empower the Attorney General to command gubernatorially controlled state agencies to produce party discovery requested by defendants for cases brought by the Attorney General on behalf of the State to protect the public interest.

Section 8-5-2(C), upon which Johnson & Johnson relies, is not at issue here. Section 8-5-2(C) authorizes the Attorney General to "prosecute and defend all actions and proceedings *brought by or against* any state officer or head of a state department, board or commission." NMSA 1978, § 8-5-2(C) (1975) (emphasis added). That provision simply authorizes the Attorney General to represent state agencies and officers in actions that have already been initiated by (or against) them. In an action brought "by or against" an executive agency, there is no question as to whether such agency is a party because the action was brought either by that agency or against it. Unlike Section 8-5-2(B), which allows the Attorney General as a *party* to initiate cases in the name of the State based on "his judgment," Section 8-5-2(C) simply allows the Attorney General to serve as *counsel* to other state officers and agency heads. That section, therefore, does not permit the Attorney General to unilaterally initiate litigation on behalf of state agencies.

Johnson & Johnson's reliance on NMSA 1978, Section 36-1-22 (1875-1876) is also misplaced. Section 36-1-22 grants the Attorney General and district attorneys "management and control" of civil litigation in district courts, including authority to initiate, conduct, dismiss, or settle a case, "in which the state or any county may be a party." NMSA 1978, § 36-1-22; *see also State ex rel. State Engineer v. San Juan Agricultural Water Users Ass'n*, 2018-NMCA-053, ¶ 4.

The authority granted to the Attorney General in Section 36-1-22 is the management and control over civil litigation in which the State is a party. It does not grant the Attorney General the authority to supplant the Governor and take control of gubernatorially-controlled state agencies that are not part of that litigation, own no claims or defenses in that litigation, have no interest in that litigation, and are not represented by the Attorney General in that litigation. Indeed, if Section 36-1-22 were read the way Johnson & Johnson suggests, it would allow not only the Attorney General but locally-elected district attorneys themselves to force the Governor's agencies into court as involuntary plaintiffs subject to party discovery whenever those attorneys so chose.

The fact that the Attorney General could not unilaterally comply with a court order compelling discovery but must rely on the cooperation of the Governor and his or her agencies, underscores that the district court's decision was entirely correct. If the Governor's agencies refuse to provide the requested discovery, the Attorney

General has no means to effectuate an order and runs the risk of being sanctioned or held in contempt. Thus, such an unenforceable court order would provide the Governor with an effective veto power over the Attorney General's action, undermining his or her exclusive control over public interest litigation as guaranteed by Section 8-5-2(B).

Finally, the rules of civil procedure do not require that independent state executive agencies must produce party discovery in cases initiated by the Attorney General in the name of the State. Johnson & Johnson claims without any support that "the Legislature cannot have intended for the Attorney General to have complete management and control of civil suits and yet leave him powerless to produce party discovery from his client." (J& J Pet. at 16). As explained above, no state agency or department is a party to the Attorney General's action or stands to directly benefit from it. Thus, the rules for party discovery (not to mention the district court's jurisdiction) do not extend to them.

Nor is there any state law that supports interpreting a suit brought in the name of the State to encompass all component state entities as *parties*. The most relevant caselaw suggests the contrary. *See Res-Can of New Mexico, Inc. v. State ex rel. New Mexico Dep't of Health*, No. A-1-CA-31,521, 2013 WL 7752631, *2-3 (N.M. Ct. App. Dec. 4, 2013) (individual state agencies sued in contract were the parties; they could not be aggregated as "a single party—the State"). Moreover, the Attorney

General does not generally have possession, custody, or control of agency documents.

A review of other statutes provide support for the State's position. For example, NMSA 1978, Section 9-8-7, one of the statutes governing HSD, provides that "[HSD] shall have access to all records, data and information of other state departments, agencies and institutions, including its own organizational units not specifically held confidential by law."[7] No such statute exists providing the Office of the Attorney General with access to documents held by state agencies. The New Mexico Legislature could have enacted a similar statute providing the Office of the Attorney General with access to state agency documents but has not done so.

Finally, Johnson & Johnson claims that "[w]ithout 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. (J&J Supp. Brief at 24). The Attorney General did not need state agency documents to satisfy Rule 11, nor did Petitioners ever actually challenge the State's complaint on that basis.[8]

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[7] *See also* S.C. CONST. Art. IV, § 17 (discussed at note 16 *infra*).

[8] J&J did file a Motion to Dismiss for failure to state a claim under Rule 1-012(B)(6), which was granted in part and denied in part by the District Court. Neither Rule 11 nor the district court's Rule 12(B)(6) decision are before the Court for review at this time.

There is no dispute that under the statutes of New Mexico that the Attorney General is granted exclusive control over the management of cases in which the State or a county is a party. This, however, does not answer the question presently before this Court for resolution: whether that authority extends to the power to compel *party* discovery from non-party executive agencies. Because that power is not granted to the Attorney General, the District Court correctly denied Johnson & Johnson's motion to compel.

C. Caselaw

As a result of the Constitutional structure and statutes in New Mexico, the State is only in possession and custody of documents held by the Office of the Attorney General in civil litigation. The caselaw supports this position.

Earlier this year, the Circuit Court for Wayne County, Michigan, vacated an order by a special master which had directed the Michigan Attorney General to produce discovery from various Michigan agencies and departments. *State of Michigan, ex rel. Dana Nessel, Attorney General v. Cardinal Health, Inc., et al.*, Case No. 19-016896 (April 26, 2022), attached as Exhibit 2. The court concluded that the Attorney General has brought the action on behalf of the people of the State of Michigan and was not seeking to recover on behalf of any state agency. *Id.* at 3

("While the complaint references damages incurred by various entities as a result of the diversion of opioids, there is no suggestion of agency-specific recompense.")

The court based its decision on the Michigan Constitution which divides the executive branch among several elected officials, renders the Attorney General subservient to the Governor, and places each department under the Governor's supervision. *Id.* at 4 (citing MI CONST Art. 5, §§ 1, 3, 8, 21). The court also rejected the special master's finding that, for purposes of discovery, the Attorney General is akin to a parent corporation, with other state agencies and departments as its subsidiaries. *Id.* at 5. "Assuming governmental agencies can be likened to corporate affiliates, there is no support for the conclusion that Plaintiff has control over the agencies' documents under the circumstances of this case." *Id.*

As is the case here, the Michigan court also found that the application of third-party discovery rules, such as subpoenas, was not unduly burdensome. *Id.* at 6. "Because the executive agencies and departments are nonparties whose documents are not within the possession, custody, or control of the Attorney General, Walgreens may only compel production from executive agencies via subpoena." *Id.*

Further, the Michigan court distinguished contrary decisions from South Carolina, Arkansas, and New York:

> the South Carolina court relied on a provision of the state's constitution that expressly provided the attorney general with access to information from all executive agencies, but

> no comparable provision exists in Michigan. Neither the New York court nor the Arkansas court provided persuasive analysis on the issue of the attorney general's possession, custody, or control of agency documents.

Id. at 6.

To the best of the State's knowledge, the ruling of the Michigan court is the most recent order that squarely addresses the issue before this Court, and strongly supports the State's argument in this case that documents held by independent executive agencies are not subject to party discovery in actions initiated by the Attorney General on behalf of the State.[9]

In New Mexico, as in Michigan, there is no statute providing the Office of the Attorney General with authorization to access documents in the possession of independent executive agencies. Further, while the State is partly alleging damages incurred in the form of funds paid by the State through HSD, the State is not seeking to recover those damages on behalf of HSD or provide compensation directly to

[9] As discussed during oral argument, no appellate court has directly ruled on this issue. The order in the State of Michigan case provides the most recent and most persuasive authority on this issue.

HSD. Any damages or penalties in this case will go into the general fund, not to any specific agency.[10]

Johnson & Johnson misunderstand how the New Mexico constitution and the structure of state government impact this discovery issue. According to Johnson & Johnson, its discovery theory is bolstered by the fact that "New Mexico[] independently elect[s the] attorney[] general." (*see* Pet. Supp., 18). Contrary to Johnson & Johnson's misunderstanding of state government, one reason that the State, through the Office of the Attorney General, cannot compel production of documents from nonparty departments or agencies is ***because*** New Mexico has a dual executive branch (also known as a "divided executive" branch), meaning the Attorney General and the Governor are independently elected officials with separate duties under the New Mexico Constitution.[11] This "divided executive" model empowers the people to elect an Attorney General that may operate independent of gubernatorial control. *See In re Gold King Mine Release in San Juan Cnty., Colorado on Aug. 5, 2015,* No. 1:18-MD-02824-WJ, 2020 WL 13563527, at *2 (D.N.M. Dec. 23, 2020) ("The New Mexico Attorney General is an elected official

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[10] Petitioners concede this fact in their Supplemental Brief. (J&J Supp. Brief at 26 (. . . it would go into the State's general treasury[].")

[11] *See* N.M. Const. Art. V, § 1 (election of Governor and Attorney General); *see also* NMSA 1978, §§ 9-1-1 to -28-7 (listing New Mexico departments and agencies under gubernatorial control).

whose duties include the representation of the State of New Mexico in litigation. NMSA 1978, § 8-5-2(B). The Attorney General does not answer to the Governor, who is a separately elected official."); *United States v. Am. Express Co.*, No. 10-CV-04496, 2011 WL 13073683, at *2 (E.D.N.Y. July 29, 2011) (*American Express*) ("[T]he State Attorneys General are independent, elected officials pursuant to the States' constitutions. In all cases, the dual structure of the States' executive branches was purposeful; the State Attorneys General are to operate independently of the State Governors.") (note omitted).[12]

Citing the divided executive branch structure in New Mexico, the trial court in *In re Gold King Mine* found that, where the named plaintiff was the State on behalf of the New Mexico Environment Department, the New Mexico Attorney General could not compel any other State department or agency to produce documents or witness testimony in response to a federal discovery request. 2020 WL 13563527, at *3. "This ruling is supported by a number of cases across the United States that have dealt with similar discovery issues in states where the state has adopted a divided executive branch system." *Id.* (citing *New York ex rel., Boardman v. National R.R. Passenger Corp.*, 233 F.R.D. 259 (N.D.N.Y. 2006) ("*Boardman*")).

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[12] Forty-three states have adopted a "divided executive" model, similar to New Mexico's. *See* Council of State Governments, 53 The Book of States 126, *located at* https://issuu.com/csg.publications/docs/bos_2021_issuu (last visited Oct. 19, 2022) & Table 4.10 ("Selected State Administrative Officials: Methods of Selection") (in 43 states, the attorney general is elected by the public).

Courts across the country have held that state agencies are not parties to the action when the attorneys general are independent elected officials pursuant to the states' constitutions, and the offices of the attorneys general and the other agencies are not under common executive control. Accordingly, a state attorney general cannot compel independent nonparty state agencies and departments to produce documents and deponents that the office of the attorney general does not have in its own possession, custody, or control. *See, e.g., Boardman*, 233 F.R.D. at 265-68 (rejecting Amtrak's assertion "that when a governmental agency is a plaintiff, it may be required to produce the documents of another agency" and holding that the New York Attorney General had no obligation to produce documents in the possession of the Comptroller); *In Re Jointly Managed R.S. 2477 Road Cases Litig. v. United States*, Case Nos: 2:10–cv–10732:11–cv–1045, 2018 WL 2172934, at *2 (D. Utah May 10, 2018) ("Courts that have dealt with these issues in the state agency context have resisted treating various state agencies as parties when there is a 'duality of the State's executive branches' such that the states' attorneys general cannot "force the separate state entities to produce documents." (quoting *American Express*; also citing *Boardman*)); *Torres v. Artus*, No. 14CV62S, 2016 WL 1105840, at *5 (W.D.N.Y. March 22, 2016) (denying motion to compel production of nonparties' materials and concluding that "although the New York State Attorney General's office represents defendants here as well as various state agencies . . . , those agencies

are not parties to this action to compel defense counsel here to produce documents from them in this case. State agencies are not 'entities of each other"'); *United States v. Novartis Pharms. Corp.*, No. 11CIV8196(CM)(JCF), 2014 WL 6655703, at *9 (S.D. N.Y. Nov. 24, 2014) ("I agree with *Boardman* that the mere fact that a state or a state agency sues does not mean that the records of all state agencies may be discovered . . . . Rather, there must be a showing that the agency at issue has control over requested information." (citing *Boardman*, 233 F.RD. at 267, and federal rule, and ordering meet and confer)); *Commonwealth v. Ortho-McNeil-JanssenPharm., Inc.*, No. 2011-2811-BLS, 2012 WL 5392617, at **2-3 (Mass. Super. Ct. Oct. 5, 2012) (reasoning that first, "agencies are not part of a monolithic whole," and that second, the Governor and Attorney General are elected officials "operating independently of the other. 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.") (citing examples); *American Express*, 2011 WL 13073683, at *2 ("In almost every case, the State Attorneys General are independent, elected officials pursuant to the States' constitutions. In all cases, the dual structure of the States' executive branches was purposeful; the State Attorneys General are to operate independently of the State Governors .... [T]hese state agencies ... are neither subject to common executive

control nor interrelated with the State Attorneys General, and so should not be aggregated together for discovery purposes.") (notes omitted); *Colorado v. Warner Chilcott Holdings Co. III, Ltd.*, No. 05-2182(CKK)(AK), 2007 WL 9813287, at *4 (D.D.C. May 8, 2007) (noting that *Boardman* "firmly supports the view that, where two government agencies are neither interrelated nor subject to common executive control, they will not be aggregated together for purposes of discovery," and finding that the court could not compel states' attorneys general to produce documents in the possession of the respective state's Medicaid agency).[13]

Consistently, in *People ex rel. Lockyer v. Superior Court*, 122 Cal. App. 4th 1060, 1081, 19 Cal. Rptr. 3d 324, 339 (2004) ("*Lockyer*"), an action filed by the People of California against vision companies for violation of optometry-practice statutes, the appeals court issued a writ of mandate compelling the trial court to set

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[13] *Cf. U.S. v. Davis*, 140 F.R.D. 261 (D.R.I. 1992) (where the Department of Justice (DOJ) initiated an action on behalf of the Environmental Protection Agency (EPA) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, to recover money expended at a superfund site, the government was not required to provide a log of documents in the possession of the House of Representatives and its subcommittees; such documents and logs were not in the possession, custody, or control of the DOJ or the EPA); *In re Sunrise Sec. Litig.*, 109 B.R. 658 (E.D. Pa. 1990) (fact that counsel for Federal Savings and Loan Insurance Corporation (FSLIC) may have had access to documents did not establish that FSLIC had possession, custody or control of documents where federal regulation stated that documents were property of the Federal Home Loan Bank Board); *U. S. v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1335 (D.D.C. 1978) (stating there is no basis for holding that a quasi-legislative agency, which the law regards as an independent body created to execute regulatory responsibilities, becomes a plaintiff when the DOJ files suit on the United States' behalf).

aside its order requiring the People to produce testimony and documents from nonparty state agencies. Considering the agencies' independence and public policy, *Lockyer* finds defendants were "required to serve subpoenas directly upon state agencies to obtain their documents or witnesses." *Id.* at 1079, 19 Cal. Rptr. 3d at 338. *See also In re Gold King Mine*, 2020 WL 13563527, at *4 (discussing *Lockyer* and finding case analysis of governmental agencies under dual executive branch persuasive in decision decided under New Mexico law); *Greyhound Lines, Inc. v. Dep't of Cal. Highway Patrol*, 213 Cal. App. 4th 1129, 1134-35, 152 Cal. Rptr. 3d 492, 495-96 (2013) (finding *Lockyer* persuasive on the subject of state department independence).

Indeed, Johnson & Johnson's demand that governmental subdivisions be treated indiscriminately for discovery purposes appears to be a minority position.[14] Certainly, Petitioners' compilation of trial court decisions fails to show otherwise. *South Carolina v. Purdue Pharma L.P.*, No. 2017CP4004872, 2019 WL 3753945

[14] *See, generally,* Production of Documents—Government Agency, 21 No. 3 Federal Litigator 10 ("The fact that a government agency is a plaintiff in a lawsuit does not mean it may be compelled to produce documents in the possession of a different agency."); *id.* (the argument that discovery obligations extend to the government as a whole "is not a compelling argument"); Government as Party Subject to Production and Inspection Requirements of Rule 34, 10A Fed. Proc., L. Ed. § 26:573 (citing cases brought by DOJ in which federal commissions/agencies were not treated as parties for federal discovery purposes; "practice tip" suggests FOIA requests instead).

(S.C. Com. Pl. Jul. 5, 2019),[15] illustrates the type of inapposite state constitution and statutes that ***might*** support Petitioners' argument—only ***if*** New Mexico law mirrored South Carolina's. It does not. *South Carolina v. Purdue* relied on the South Carolina constitution's express empowerment of the attorney general at the governor's direction to "require all State officers, agencies, and institutions . . . to give him information in writing upon any subject relating to" the offices' duties and functions, and statutory provisions forbidding South Carolina agencies from hiring independent counsel.[16] Based on South Carolina's constitutional authority, combined with statutes forbidding agency employment of counsel absent written Attorney General approval, the South Carolina court concluded that the Attorney General had actual "possession of information from various executive agencies." 2019 WL 3753945, at *1. Here, by contrast, the New Mexico "attorney general **may** charge state agencies . . . for the provision of legal services in noncriminal cases **requested by the agencies**" (NMSA 1978, § 8-5-2.1 (emphasis added)), and the

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[15] Cited at Verified Emergency Petition for a Writ of Superintending Control and Request for Stay, 19.

[16] *See* 2019 WL 3753945, at *1 (brackets and quotation marks omitted; quoting S.C. CONST. Art. IV, § 17; also citing S.C. CONST. Art. IV., § 15; S.C. CODE § 1-7-80 (South Carolina departments "forbidden to employ any counsel . . ."); S.C. CODE § 1-7-160 ("A department or agency of state government may not" employ counsel without "written approval of the Attorney General"); S.C. CODE § 1-7-170 (substantively same).

Constitution does not contain the same powers relied upon in *South Carolina v. Purdue*.[17]

Analogous to *South Carolina*'s distinguishable reliance on that state's constitutional provision empowering attorney general authority over certain writings, *Strong v. Chandler*, 70 S.W.3d 405, 409 (Ky. 2002) (cited at Pet. Supp. 18 n.5), cited a statute empowering the Kentucky attorney general to access "papers of any of the officers of the Commonwealth." Ky. Rev. Stat. § 15.060(2) (quoted and cited at 70 S.W.3d at 408-10).

Also distinguishable, in *State v. Cardinal Health, Inc.*, No. 279-3-19 (Vt. Sup. Ct. Aug. 13, 2020) (cited at Pet. Supp., 17, and as Pet. ex. 15), the trial court found

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[17] *See, generally,* N.M. Const. Art. V, § 1 (defining executive department as including attorney general and providing for election of same). Johnson & Johnson cites NMSA 1978, § 36-1-22 for the proposition that the attorney general "entirely" controls litigation (Pet. Supp., 22), omitting that the language it quotes also applies to district attorneys. *See* NMSA 1978, § 36-1-22 ("all such civil suits and proceedings shall be entirely under the management and control of the said attorney general **or district attorneys**") (emphasis added); *contrast* Pet. Supp., 22 (omitting "or district attorneys").

Section 8-5-2.1 also contrasts with Wash. Rev. Code § 43.10.040, which provides that Washington's "attorney general shall . . . represent . . . all officials, departments, boards, commissions and agencies of the state." Independently, the litigation context in *Washington v. GEO Grp., Inc.*, No. 3:17-CV-05806-RJB, 2018 WL 9457998, at **3-4 (W.D. Wash. Oct. 2, 2018) (cited at Pet. Supp., 17), is distinguishable; there the state AGO undercut its position with the trial court by refusing to respond to discovery not only outside but also "within the AGO," by "exaggerat[ing] its burden," by being "unclear" with the court regarding what it had produced, and by potentially "manipulating the information."

that the attorney general in that case was "acting as counsel for those agencies."[18] Here, the New Mexico Human Services Department includes an Office of General Counsel that represents that Department.[19]

The appellate court in *State ex rel. Rutledge v. Purdue Pharma L.P.*, 624 S.W.3d 106, 111 (Ark. 2021) (cited at Pet. Supp. 17-18 & n.5), did not reach a decision on the merits of the discovery dispute, finding that, "we lack jurisdiction." Therefore, there was no appellate decision on the Arkansas trial court's series of discovery orders in that litigation.

Johnson & Johnson's repeated reliance on *United Nuclear Corp . v. Gen. Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, is also misplaced. *United Nuclear* has no relevance to the constitutional issue. In *United Nuclear*, the court relied on a specific provision of Rule 1-033 that only applies when a private party served is a

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[18] Pet. ex. 15, 1 ¶1.

[19] *See, e.g.*, 8.206.500.15 NMAC (referencing existence of the human services department's office of general counsel); https://www.hsd.state.nm.us/about_the_department/office_of_general_counsel/ (last visited Oct. 20, 2022) (defining Human Services Department's Office of General Counsel).

partnership, which is clearly inapplicable in this case involving constitutionally- and statutorily-constructed public entities. *United Nuclear*, 1980-NMSC-094, ¶ 55.

Ultimately, Johnson & Johnson disagrees with the District Court's decision on a limited discovery dispute. Its decision, however, was based on a review of the facts of this case, the practical and legal realities of the constitutional structure in New Mexico, and the application of instructive law from another jurisdiction given the lack of controlling authority in New Mexico. The District Court's order did not disregard the law, and thus no abuse of discretion occurred in denying Johnson & Johnson's motion to compel the State to produce documents in the possession of independent executive agencies

D. Criminal Law Context

Finally, Johnson & Johnson's reliance on precedent from the realm of criminal law does nothing to support its position, because those precedents do not turn on issue of procedure, but rather on distinguishable questions of due process. From this state, Johnson & Johnson cites to *Case v. Hatch*, 2008-NMSC-024, 138 P.3d 905, *Mathis v. State*, 1991-NMSC-091, 112 N.M. 744, 819 P.3d 905, and *Smith v. Sec'y of N.M. Dept. of Corrections*, 50 F.3d 801 (10th Cir. 1995). Each of these cases turned on purported *Brady* violations, an issue fundamentally distinguishable from the present civil discovery dispute.

Brady v. Maryland stands for the bedrock principle of criminal law that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194 (1963). While there is no dispute that *Brady*'s prohibition against the suppression of material evidence extends beyond the prosecutor's office to "other arms of the state involved in investigative aspects of a particular criminal venture," *Smith*, 50 F.3d at 824, that principal is not relevant to the State's discovery obligations in a civil proceeding. This is because, while *Brady* deals in discovery obligations, it is fundamentally centered on questions of constitutional due process, not the rules of civil procedure.

As stated by this Court in *Mathis*, the prosecutor in a criminal matter plays a fundamentally different role than the plaintiff in a civil suit: "[T]he interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done." 1991-NMSC-091, ¶ 10 (quotation omitted). This statement is consistent with the Supreme Court's elucidations of the underlying principles in *Brady*, as set forth in the *Smith* opinion: "*Brady* and its progeny are thus grounded in notions of fundamental fairness and they embody a practical recognition of the imbalances inherent in our adversarial system of criminal justice." 50 F.3d at 823. The Supreme Court

continued, noting that "*Brady* acknowledges that the prosecutor's role transcends that of an adversary because the prosecutor, acting as the representative of the sovereign, has an obligation to ensure not that it shall win a case, but that justice shall be done." *Id.* (quotations omitted).

Because of the unique role of the prosecutor in a criminal case, "[t]he disclosure principles of *Brady* are not rooted in the discovery rules of the Federal Rules of Criminal Procedure . . . Rather, they are grounded in the constitutional guarantee of due process of law contained in the Fifth and Fourteenth Amendments of the Constitution." *Id.* at 822; *see also United States v. Bonnett*, 877 F.2d 1450, 1459 (10th Cir. 1989) ("*Brady* is not a discovery rule, but a rule of fairness, and minimum prosecutorial obligation." (Citations omitted)).

In asserting that the State's discovery obligations in a civil matter do not extend to executive agencies over which the Attorney General lacks supreme executive authority, the State is by no means calling into doubt these bedrock principles of criminal law and due process. The issue instead is that, as discussed above, there is a fundamental difference between the prohibition against the suppression of material exculpatory evidence in a criminal proceeding and the State's discovery obligations in a civil matter.

Brady, and its progeny, are not derived by the rules of procedure, but instead are governed by an accused's right to a fair trial under the Constitution. Unlike in a

criminal trial, where fairness to the accused is the paramount consideration, civil discovery disputes are fundamentally governed by Rule 1-001(a) NMRA, which provides that "[t]hese rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Therefore, a prosecutor's obligations under *Brady*—and the United States Constitution—are fundamentally distinct from a plaintiff's discovery obligations under the New Mexico Rules of Civil Procedure. Johnson & Johnson's reliance on criminal precedent discussing the State's obligations under *Brady* is therefore simply inapposite to the matter at hand.

2. Petitioners Are in the Same Procedural Position as the State When It Comes to Obtaining Discovery from Non-Party Executive Agencies.

Because, for all the reasons detailed above, the Attorney General's office is neither in possession of documents held by independent executive agencies, nor granted statutory access to those items, the State and Johnson & Johnson are in the exact same procedural position when it comes to seeking the production of discoverable information held by independent executive agencies. Johnson & Johnson cites *Landry v. Swire Oilfield Servs., L.L.C* for the proposition that party discovery is subject to "only two limitations." *Landry v. Swire Oilfield Servs.*, L.L.C., 323 F.R.D. 360 (D.N.M. 2018). Petitioners spend a great deal of time discussing the first limitation, "that the party from which discovery is requested is '[]capable of procuring' it."—all while ignoring the second—"that 'the opposing party is [not] equally capable of obtaining [it] on its own." *Landry*, 323 F.R.D. at

382. Here, Johnson & Johnson is equally capable of obtaining documents from state agencies. This highlights the fact that there are multiple other legal and practical remedies available to Johnson & Johnson rather than the extraordinary remedy of a writ.

First and foremost, Johnson & Johnson can obtain state-agency information directly from the state agencies. Since July 23, 2020, the State has been consistent in its position that – "the Attorney General for the State of New Mexico has neither possession, custody or control of documents within other branches, agencies, departments, or other entities of State of New Mexico government, nor, unless otherwise advised by the State, the practical ability to get documents from those agencies." (*See* Pls.' Objections and Responses to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.'s First Set of Requests for Production, July 23, 2020).

Since the district court's ruling denying interlocutory appeal certification, Johnson & Johnson has subpoenaed all the state agencies it claims have the information it seeks and has received responses from six of those agencies. There is no reason to think they will not be able to obtain whatever documents those state agencies might have in their possession in an efficient manner. While Johnson & Johnson claims they "are forced to conduct burdensome third-party discovery to obtain documents and information[,]" there's no reason to believe this process has

been burdensome. Johnson & Johnson simply issued and served ***identical*** subpoenas with the same 33 document requests to eight state agencies. The State is unaware of any significant burden imposed upon Johnson & Johnson thus far in serving these subpoenas.

Practically, the State would have to undertake the same exact process to obtain documents from state agencies, as evidenced by the fact that the State had to subpoena HSD to obtain information. It is not clear how the process would be any more efficient if the State had to subpoena these documents for Johnson & Johnson instead of Johnson & Johnson seeking the documents directly from the state agencies. In fact, it would be more efficient for Johnson & Johnson to seek the information directly from the state agencies so that they have the benefit of conducting negotiations with those state agencies over the scope of their requests.

Johnson & Johnson spuriously claims that "it is far from clear whether the J&J defendants would be able to successfully subpoena even the agencies explicitly identified in the [First Amended Complaint] for documents or depositions given that non-parties are generally afforded more protection in opposing discovery requests." (J&J Brief at 32). But as mentioned previously, of the eight agencies subpoenaed by

Petitioners, six provided responses prior to the most recent stay of the case below.[20] There's absolutely no evidence to support Petitioners' dubious assertion.

Petitioners claim that the district court's ruling "foreclosed Petitioners' ability to utilize interrogatories and requests for admission[.]" (J&J Pet. at 2). This argument rings hollow. Petitioners have not served any requests for admission in this case, and Petitioners omit the fact that they could obtain sworn answers to questions and admissions by deposing state agencies through subpoena. To date, Petitioners have served zero depositions notices on any state agencies.

Second, if Petitioners ultimately lose this case and remain convinced that the lack of state-agency documents caused that loss, then Petitioners could challenge the District Court's discovery rulings on direct appeal from the verdict.

As these examples demonstrate, Johnson & Johnson has numerous procedural avenues available to it to obtain the information that it seeks from independent executive agencies. Because the Attorney General does not have statutory authorization to obtain this information from non-party independent executive agencies absent their consent, for all the reasons detailed above, the State stands in exactly the same position as Johnson & Johnson when it comes to compelling the production of information in the possession of these gubernatorially controlled

[20] There has been no assertion that the two outstanding agency responses to J&J's subpoenas are untimely. The district court proceedings have undergone several lengthy stays during the pendency of the subpoena requests.

executive agencies. Because the District Court correctly denied Johnson & Johnson's motion to compel on these bases, this Court respectfully should deny Johnson & Johnson's petition for extraordinary relief.

CONCLUSION

For these reasons, the Court should deny Johnson & Johnson and Johnson & Johnson Consumer Inc.'s petition for a writ of superintending control and affirm the district court's order.

Dated: October 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(F)(3) of the New Mexico Rules of Appellate Procedure, I certify that this brief was prepared using Time New Roman, a proportionally-spaced font, in 14-point size, and the body of the response contains 9, 178 words. I relied on Microsoft Word 2016's word count feature to obtain that count.

By: */s/ Majed Nachawati*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October 2022, I filed the foregoing electronically through the e-file and serve system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the notice of electronic filing.

By: */s/ Majed Nachawati*