IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOHNSON AND JOHNSON, et al.,
Petitioners,

v.

THE HONORABLE MATTHEW JUSTIN WILSON,
Respondent,

No. S-1-SC-39284

and

STATE OF NEW MEXICO, *EX REL.* HECTOR BALDERAS, ATTORNEY GENERAL, et al.,
Real Parties in Interest.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

Mass tort lawsuits brought by state attorneys general have become increasingly common throughout the country since the tobacco litigation of the 1990s. The members of the Chamber—some of whom may face such lawsuits in the future—have a strong interest in ensuring that defendants in these types of actions are still afforded fundamental procedural safeguards, including the right to fair party discovery. As a result of its familiarity with mass tort litigation

[1] Pursuant to N.M. R. App. P. 12-320(C), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. Due to the short deadline for filing this *amicus curiae* brief, counsel for the Chamber notified counsel for the parties of their intention to file this brief six days before the filing deadline.

throughout the country, the Chamber is uniquely situated to assist the Court in understanding the impact of the Court's ruling on the business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition in this case raises important issues about the fairness of discovery proceedings in government mass tort litigation. The trial court in the proceedings below concluded that, although the State of New Mexico is the plaintiff, only the office of the Attorney General is required to participate in party discovery. Consequently, if the defendants want to obtain discovery from other government agencies, they must rely on third-party discovery. Because discovery is supposed to be a two-way street, this imbalance is fundamentally unfair to the defendants.

The Court's resolution of the question presented in the petition will potentially have consequences that extend beyond the State of New Mexico. Many states structure their executive branches in the same way as New Mexico, with an attorney general who is elected separately from the governor and other executive officers. Yet, so far, only a few courts throughout the country have considered whether this structure limits the state's reciprocal discovery obligations. When other courts inevitably confront this question in the future, they will undoubtedly look to this Court's decision for guidance.

I. Basic principles of fairness, as well as numerous cases applying these principles, create a background presumption that, when the government brings an action and seeks discovery, the defendant has a reciprocal right to obtain party discovery that extends beyond the office of the attorney general to other agencies. That background presumption is not overcome by the fact that a state attorney general is elected separately from other members of the executive branch. And nothing in the New Mexico Constitution or the statutes defining the office and duties of the attorney general suggests otherwise.

II. Preserving a fair, reciprocal discovery process is especially important in the context of government mass tort litigation, which has become increasingly common over the last few decades and poses unique challenges. Businesses faced with the enormous pressures of state-sponsored litigation frequently decide to settle. For those few defendants that do litigate, it is vitally important that they are still afforded basic legal protections, including the right to meaningful party discovery against the State.

ARGUMENT

I. The Mere Fact That a State Attorney General Is Separately Elected Does Not Limit Party Discovery.

Discovery, as both this Court and the United States Supreme Court have observed, "is 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.*, 629 P.2d 231, 245 (N.M. 1980) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)). Accordingly, "discovery must be a two-way street." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). "[T]o require a defendant to divulge the details of his own case" while simultaneously denying him the reciprocal privilege would be "fundamentally unfair." *Id.* at 476. In addition, the rules of discovery "must be liberally construed in order to insure that a litigant's right to discovery is broad and flexible." *United Nuclear Corp.*, 629 P.2d at 246 (internal quotation marks omitted).

When these principles are applied to cases in which either the United States or a State is a party, it is apparent that a fair process of party discovery cannot be limited to a single government office, department, or division. Requiring a corporate defendant to include all of its offices in its responses to a discovery request, while at the same time permitting the government plaintiff to limit its discovery responses to only a single office, would not be a "fair contest" by any stretch of the term. *Id.* at 245 (quoting *Procter & Gamble*, 356 U.S. at 682). It is both unfair and contradictory for the government to wield the vast resources of its bureaucracy as a sword while at the same time relying on the typically departmentalized structure of that bureaucracy as a shield. Moreover, an imbalanced discovery process would not ensure that the "basic issues and facts"

are "disclosed to the fullest practicable extent." *Id.* (quoting *Procter & Gamble*, 356 U.S. at 682). And it would not provide the defendants with a "broad and flexible" right to discovery. *Id.* at 246 (internal quotation marks omitted).

In cases involving the federal government, courts from numerous jurisdictions have reached conclusions consistent with these principles. Specifically, they have uniformly ruled that when the named plaintiff is the United States, party discovery is not limited to the Department of Justice but instead extends to other agencies of the Executive Branch. *See, e.g.*, *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995); *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (en banc); *United States v. Nat'l Broad. Co.*, 65 F.R.D. 415, 419 (C.D. Cal. 1974); *United States v. AT&T Co.*, 461 F. Supp. 1314, 1334 (D.D.C. 1978); *United States v. LaRouche Campaign*, 695 F. Supp. 1265, 1281 (D. Mass. 1988); *United States v. UBS Sec. LLC*, No. 1:18-cv-6369, 2020 WL 7062789, at *6 (E.D.N.Y. Nov. 30, 2020); *United States v. Comco Mgmt. Corp.*, No. SACV 08-0668, 2009 WL 4609595, at *3–4 (C.D. Cal. Dec. 1, 2009).

These decisions rest upon the same underlying logic. When the named plaintiff in a suit is the United States, "[t]he plaintiff is the Government of the United States acting on behalf of its citizens," "not just the Department of

Justice." *Nat'l Broad. Co.*, 65 F.R.D. at 419; *see also AT&T Co.*, 461 F. Supp. at 1333 ("This action, as its caption indicates, was brought not on behalf of the Department of Justice but on behalf of the United States of America."); *Comco Mgmt.*, 2009 WL 4609595 at *3 ("[T]he plaintiff in this action is not a particular division or office of the IRS. The plaintiff is the United States of America."). Moreover, restricting discovery to a single department would allow a prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *United States v. Poindexter*, 727 F. Supp. 1470, 1478 (D.D.C. 1989) (citing *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977)).

To be sure, at least one court has ruled that discovery does not extend to independent, or "quasi-legislative," agencies such as the Federal Communications Commission. *AT&T Co.*, 461 F. Supp. at 1335. But essential to that ruling was the fact that independent agencies sometimes adopt positions at odds with the United States. *See id.* at 1335 n. 61 (citing *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659 (1975); *United States v. Interstate Com. Comm'n*, 221 F. Supp. 584 (D.D.C. 1963)). Outside of this unusual exception, however, courts treat the numerous agents of the Executive Branch as if they represent a single party. *See id.* at 1333 ("An ambassador negotiating with a foreign government,

the Secretary of the Treasury who authorizes the floating of a bond issue, a military contingent taking action on foreign soil—they all do so not on behalf of their respective departments but on behalf of this nation as represented by its government.").

The cases on party discovery against the federal government affirm a background presumption that, when the plaintiff in a lawsuit is the government—be it federal or state—discovery extends beyond the specific department responsible for filing the lawsuit to the rest of the executive branch. A contrary presumption would result in a process for party discovery that would not be "a two-way street." *Wardius*, 412 U.S. at 475. And such a process would be "fundamentally unfair." *Id.* at 476.

Several courts reviewing discovery challenges to state governments have also reached conclusions consistent with this background presumption. This Court, for example, explained in *Case v. Hatch*, in the context of criminal discovery, that the prosecution "encompasses not only the individual prosecutor handling the case, but extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of the case." 183 P.3d 905, 918 (N.M. 2008) (alteration adopted) (quoting *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995)). In the opioid litigation in New York state court, the Supreme Court of New York in

Suffolk County ruled that, because the action had been brought on behalf of "the People of the State of New York," the state attorney general was required to search for responsive documents in more than just eight offices and state agencies. *In re Opioid Litig.*, No. 400000/2017, slip op. at 2 (N.Y. Sup. Ct. Aug. 14, 2019). And in *League of United Latin American Citizens v. Abbott*, the U.S. District Court for the Western District of Texas ruled that, for purposes of party discovery, the "State of Texas" was not limited to the office of the Secretary of State but also encompassed other "state executive agencies or officials who have information that is relevant to the factual basis for the claim." No. 3:21-cv-00299, 2022 WL 1540589, at *3 (W.D. Tex. May 16, 2022).

The mere fact that a state attorney general is elected separately from the governor does nothing to alter this background presumption. Although a few unpublished opinions have analogized state attorneys general to independent federal agencies, *see Colorado v. Warner Chilcott Holdings Co. III*, No. 1:05-cv-02182, 2007 WL 9813287, at *4 (D.D.C. May 8, 2007); *United States v. Am. Express Co.*, No. 1:10-cv-04496, 2011 WL 13073683, at *2 (E.D.N.Y. July 29, 2011), their reasoning depends on a false equivalence. State attorneys general are not remotely similar to independent agencies. For one thing, they do not exercise "quasi-legislative" power. *AT&T Co.*, 461 F. Supp. at 1335. Their constitutional and statutory roles, including prosecuting criminal and civil actions on behalf of

the state and serving as the state's defense counsel, are purely executive in nature. Moreover, unlike with independent agencies, it is not possible that a state attorney general, acting in her official capacity, would find herself in an adversarial litigation position *against* the state.[2] For purposes of litigation in which she has filed a lawsuit *ex relatione* in the name of the state, she is *representing* that state as its lawyer. *See State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40, 43 (N.M. 1973) ("[T]he attorney general is . . . cast in the role of attorney for the State of New Mexico, and . . . the latter is the proper party litigant rather than the former."). Simply put, the fact that a state attorney general is separately elected does not transform the office into a fourth branch of government.

Nothing in the constitution or laws of New Mexico suggests that the New Mexico attorney general is the exception to the rule. The attorney general is listed in Article V, Section 1 of the New Mexico Constitution as one of seven elected members of the state's executive department. In addition to the governor, these other separately elected officers include the lieutenant governor, the secretary of

[2] State attorneys general have occasionally filed lawsuits against their state governors, but in those cases the governor was not acting in a representative capacity for the state. *See, e.g.*, *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 366 (Ky. 2016) (holding that the Kentucky Attorney General has standing to bring an action, on behalf of the people of the Commonwealth of Kentucky, "for declaratory and injunctive relief against state actors, including the Governor, whose actions the Attorney General believes lack legal authority or are unconstitutional").

state, the state auditor, the state treasurer, and the commissioner of public lands. *See* N.M. Const. art. V, § 1. No authority suggests that these officers exist outside of the executive branch, even though, like the attorney general, they are separately elected. In addition, the statutes laying out the powers and duties of the attorney general describe functions that are purely executive in nature, such as "prosecut[ing] and defend[ing]" all cases in which the state or a state officer is a party, representing the state before any court or regulatory agency at the request of the governor, and "giv[ing] his opinion in writing upon any question of law submitted to him by the legislature." N.M. Stat. Ann. § 8-5-2. None of the relevant statutes suggests that the attorney general exercises any quasi-legislative power akin to that of an independent agency.

In the absence of any constitutional or statutory language suggesting that the New Mexico attorney general falls outside of the executive branch or is otherwise akin to an independent agency, the Court should apply the background presumption that party discovery extends beyond the office of the attorney general to other agencies. Accordingly, the Court should vacate the ruling below and direct the trial court to grant the motion to compel.

II. Defendants in High-Stakes Government Mass Tort Suits Should Not Be Deprived of Basic Procedural Safeguards.

A ruling by this Court that vindicates the discovery rights of the petitioners is especially important in light of the context of the litigation below. Mass tort

suits initiated by state attorneys general are a unique and important form of litigation that can be used to vindicate the interests of the public. But they also place enormous pressures on defendant businesses to settle, sometimes at enormous costs and even when those businesses are not actually liable for the alleged misconduct. To protect innocent defendants and to ensure the integrity of the legal system as a whole, defendants in government mass tort lawsuits must have adequate procedural safeguards, including the right to reciprocal discovery against the state.

There is no question that, as a general matter, state attorneys general enjoy the "power and discretion" to vindicate the "public interest." *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976). When filing mass tort lawsuits on behalf of their citizens, and when acting in coordination with other agencies in the executive branches of state governments, they are able to bring vast bureaucracies and almost unlimited resources to bear against their targets. In many instances, the lawsuits they bring result in settlements of billions of dollars, pushing the defendant companies to the verge of—and sometimes into—bankruptcy.

Historical examples demonstrate the high stakes of government mass tort suits. The mid-1990s saw a surge in these types of actions. *See* Margaret S. Thomas, *Parens Patriae and The States' Historic Police Power*, 69 SMU L. Rev.

759, 762 (2016). In 1994, Mississippi Attorney General Michael Moore hired a plaintiffs' firm on a contingency-fee basis to sue several major cigarette manufacturers for Medicaid expenses incurred by his state as a result of tobacco-related health problems. *See* U.S. Chamber Inst. for Legal Reform, *Mitigating Municipal Litigation: Scope and Solutions* at 5 (Mar. 2019) [hereinafter ILR Report], https://www.instituteforlegalreform.com/research/mitigating-municipality-litigation-scope-and-solutions. He then recruited other state attorneys general to file similar suits with the stated goal of "bring[ing] the tobacco industry to its knees." William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 Tul. L. Rev. 1885, 1901 n.99 (2000).

Over the next few years, more than 40 states followed Mississippi's example, filing their own lawsuits against the tobacco industry. ILR Report, *supra* at 5. The costs of litigating these suits, in addition to negative publicity and whistleblower revelations, caused the tobacco companies to pursue a settlement. *Id.* Starting in 1997, the tobacco industry reached individual settlement agreements with Mississippi, Florida, Texas, and Minnesota totaling $35 billion. *Id.* The following year, it reached a master settlement agreement with the remaining states totaling $206 billion, payable over 25 years. *Id.* At the time, this agreement was the largest settlement in the history of civil litigation. *Id.* at 5–6.

The tobacco litigation was considered "unprecedented," Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 Tul. L. Rev. 1859, 1860 (2000), and it quickly inspired lawsuits by states and municipalities against other industries based on similar legal theories. Some of these lawsuits involved products associated with personal injury, such as firearms and lead paint. *See* ILR Report, *supra* at 6. But others were not limited to potentially dangerous products and instead targeted automobile emissions, the prices of electronic books, subprime mortgages, and pharmaceuticals. *See id.*; Thomas, *supra* at 762–63. In the years since the tobacco litigation, "suits brought by states on behalf of citizens [have become] an increasingly prominent feature of a wide variety of complex litigation." Thomas, *supra* at 762.

In these types of cases, defendants are faced with enormous pressures and frequently agree to significant settlements even when they are not liable for the alleged misconduct. "Final settlements usually include a large cash settlement for the states or for state consumers, along with mandates that the defendant(s) will not repeat the forbidden activity, yet they rarely include an admission of guilt on the part of the defendant(s)." Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 Pol'y Rsch. Q. 609, 609 (2006). The specter of drawn-out court battles and

expensive litigation costs convinces many management teams that they are better off settling than betting the company against an adversary with the resources of, and who bears the imprimatur of, the state.

Under these circumstances, it is vitally important—not only to the defendants, but also to the truth-seeking function of the legal system as a whole—that those few defendants who decide to litigate against the government instead of settling are afforded adequate procedural safeguards. One of the most fundamental of these safeguards is the right to discovery. *Cf. Bromley v. Mich. Educ. Ass'n-NEA*, 82 F.3d 686, 693 (6th Cir. 1996) ("Among the procedural safeguards available in a judicial forum are . . . discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing."). And discovery is only fair if it is a "reciprocal" privilege that forms "a two-way street." *Wardius*, 412 U.S. at 475–76.

It is no answer that a defendant can resort to using third-party discovery against other government agencies. First, third-party discovery is more limited than party discovery because it does not permit the use of interrogatories and requests for admission. *See, e.g.,* N.M. R. Civ. P. Dist. Ct. 1-033(A) (limiting the service of interrogatories to "any other party"); N.M. R. Civ. P. Dist. Ct. 1-036(A) (limiting the service of requests for admission to "any other party"). Instead, a defendant seeking third-party discovery must rely solely on subpoenas for

documents and depositions. *See* N.M. R. Civ. P. Dist. Ct. 1-034(C); N.M. R. Civ. P. Dist. Ct. 1-045. Second, third-party discovery is more challenging and expensive than party discovery. In addition to the added time and costs spent obtaining, serving, and enforcing third-party subpoenas, defendants also have to determine at the outset which agencies even have the relevant documents and should be named in the subpoenas. By contrast, the state attorney general—who will likely need to obtain these documents for her own office before trial anyway—naturally has a better understanding of how state records are kept and how they may be accessed. Requiring a defendant to use third-party discovery to obtain relevant information from other government agencies is inadequate, inefficient, and overly burdensome. And the added burden is particularly difficult to justify given the enormous costs that are already placed on defendants in mass tort litigation.

For mass tort lawsuits initiated by state attorneys general, as with every other form of litigation, the system works only if defendants are able to offer a meaningful challenge to the State's charges against them. And defendants can offer a meaningful challenge to the State's charges only if they are able to obtain party discovery from more offices than just that of the attorney general.

CONCLUSION

The Court should vacate the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), I certify that the foregoing brief complies with the type-volume limitation of N.M. R. App. P. 12-318(F)(3). According to Microsoft Office Word 2016, the body of this brief, as defined by Rule 12-318 (F)(3), contains 3,609 words.

/s/ *William R. Levi*
William R. Levi

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2022, a true and correct copy of the foregoing *Brief of the Chamber of Commerce of the United States of America as* Amicus Curiae *Supporting the Petitioners* was served upon all counsel entitled to receive notice via the Court's e-file and serve system, as more fully described in the Notice of Electronic Filing.

By: */s/ William R. Levi*
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