Docket No. 23-1600

In the

United States Court of Appeals

For the

Eighth Circuit

In re North Dakota Legislative Assembly, Senator Ray Holmberg, Senator Richard Wardner, Senator Nicole Poolman, Representative Michael Nathe, Representative William R. Devlin, Representative Terry Jones, Senior Counsel at the North Dakota Legislative Council Claire Ness,

Petitioners.

On Petition for a Writ of Mandamus
To The United States District Court for the District of North Dakota
In Case No. 3:22-cv-00022

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE REQUESTED RELIEF

This petition seeks review of the district court's orders enforcing subpoenas against current and former members of the North Dakota Legislative Assembly and its legal counsel. (App113-118; App210-214.) The Plaintiffs' stated purpose for issuing the subpoenas is to uncover an "illicit motive" of one or more state lawmakers in the 141-member Assembly with respect to its approval of a 2021 redistricting plan. (App184.)

In their quest to discover an "illicit motive," Plaintiffs issued a deposition subpoena to Representative William R. Devlin (App004-006) and seven subpoenas seeking seven identical categories of documents to Senator Ray Holmberg (App007-013), Senator Richard Wardner (App014-020), Senator Nicole Poolman (App021-027), Representative Michael Nathe (App028-034), Representative William R. Devlin (App035-041), Representative Terry Jones (App042-048), and Senior Counsel at the North Dakota Legislative Council Claire Ness (App049-055) (collectively "State Officials"). The subpoenas demand the select State Officials produce virtually all documents and communications related to the 2021 redistricting plan in their personal files.

Petitioners timely objected to all subpoenas on grounds of legislative privilege, attorney-client privilege, and also asserted compliance would impose an undue burden. After numerous motions and briefing, the district court held the State

Officials must comply with all eight subpoenas. The district court ignored three recent circuit court opinions which held legislative privilege bars this discovery. Further, the district court held the Petitioners undue burden argument failed. However, the record shows a cursory key-word search of the State Official's email accounts uncovered over 64,000 emails that contained one or more of the searched key words. A cursory review of the results consumed approximately 64 hours of Legislative Council staff attorney's time to briefly scan for responsiveness and sort into one of the three categories of senders and recipients. The district court also disregarded the Legal Division Director for the North Dakota Legislative Council's explanation that full compliance with the document subpoenas will require approximately 640 hours of staff attorney time. In dismissing these claims, the district court determined any burden could be alleviated by utilizing outside counsel.

The First Circuit recently held a similar situation presented an "extraordinary case" as it raises unsettled legal questions about legislative privilege as applied to state lawmakers and lower courts have developed divergent approaches to answering them. American Trucking Associations, Inc. v. Alviti, 14 4th 76, 84 (1st Cir. 2021). In light of the district court's refusal to follow American Trucking and the two circuit court cases preceding it on this issue, this remains an "extraordinary case" in need of immediate review.

The Assembly is currently in session. The district court's order requires the legislative branch of a sovereign government to detract from its official duties and respond to discovery in a private civil law suit to which it is not a party. The North Dakota Constitution, common-law doctrines, and numerous recent circuit court decisions prohibit this type of judicial interference upon the legislative branch of a sovereign state government.

Nonetheless, the district court misapplied directives of the Supreme Court and our sister circuits on legislative privilege. Further, it erroneously determined a fishing expedition to seek evidence of an "illicit motive" by one or more lawmakers through these subpoenas was relevant and needed to prove a Section 2 vote dilution claim under the Voting Rights Act. The district court's decision misapplied the law and imposes a substantial burden upon the Petitioners. Further, the district court's order ignores well-recognized doctrines of federalism and comity and opens the door to force state lawmakers to comply with discovery of their personal files whenever a member of the public is unhappy with a legislative decision.

This Court should issue a writ of mandamus directing the district court to quash the subpoenas in this private civil action. The Petitioners have no other adequate means to attain the desired relief and the district court's rulings are clearly erroneous. In accordance with the holdings of our sister circuits, appellate review is appropriate to protect a properly asserted privilege and prohibit a private party from

engaging in a fishing expedition in hopes of finding evidence indicating one or more lawmakers had an "illicit motive" in a challenge to a legislative act approved by the Legislative Assembly.

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STATEMENT OF THE ISSUES PRESENTED

(1) Whether the district court abused its discretion when it failed to properly apply legislative privilege and quash the deposition subpoena directed to Representative Devlin?

(2) Whether the district court abused its discretion when it failed to properly apply legislative privilege and this Court's precedent when it issued an order enforcing the document subpoenas directed to all Petitioners?

STATEMENT OF THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

With the exception of Claire Ness, all State Officials are current and former Assembly members[1]. The Petitioners' involvement in this case stems from the above-described subpoenas served upon them by the named Plaintiffs - Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. The Plaintiffs' Complaint in the underlying action asserts the 2021 redistricting plan violates Section 2 of the Voting Rights Act.

1. Background of Underlying Litigation.

Before 2021, all senators and representatives in North Dakota's 47 legislative districts were elected at-large. In light of the requirement in the Constitution of North Dakota to redistrict after each census, the Legislative Assembly passed legislation establishing a Redistricting Committee to develop and submit a redistricting plan to Legislative Management. In addition, to the statutory Tribal and State Relations Committee also held public meetings related to redistricting. These Committees held numerous public meetings during the summer and fall of 2021 where both oral and written testimony were received from various tribal members, tribal leaders, and others. On November 1, 2021, the Redistricting Committee

[1] Ness was senior counsel at the North Dakota Legislative Council during the 2021 Special Session. Effective May 9, 2022, the North Dakota Attorney General appointed Ness as Deputy Attorney General for the State of North Dakota.

submitted its final report to the Legislative Management. The final report recommended passage of House Bill 1504 which created subdistricts in District 9 which encompasses the Turtle Mountain reservation.

Through executive order, the Governor convened a special session of the Legislative Assembly on November 8, 2022, to provide for redistricting. Numerous hearings were held on House Bill 1504 and alternatives to the proposed redistricting plan were discussed. Written testimony on behalf of the Spirit Lake and Turtle Mountain tribes also was received by the Joint Redistricting Committee during these hearings.

On November 9, 2022, the House of Representatives debated and ultimately passed House Bill 1504. The Senate debated and passed House Bill 1504 the following day. House Bill 1504 was signed by Governor Burgum on November 11, 2021, and became law the following day when filed with the Secretary of State. The district descriptions are now codified in N.D.C.C. § 54-03-01.14. As a result of the redistricting plan, District 9 is divided into two House subdistricts. One member of the House is elected from Subdistrict 9A and one member of the House is elected from Subdistrict 9B. Subdistrict 9A encompasses the Turtle Mountain reservation.

The Plaintiffs' Complaint alleges the redistricting plan violates Section 2 of the Voting Rights Act and results in vote dilution. During the pendency of this litigation, the Plaintiffs served the above-described subpoenas on the State Officials.

2. Representative Devlin Deposition Subpoena

Representative Devlin moved to quash the subpoena commanding him to appear and provide testimony as it improperly sought the disclosure of information protected by legislative privilege and/or attorney-client privilege. (App056-059; App060-078.) The Magistrate Judge denied the motion to quash in a consolidated December 22, 2022, order[2]. (App079-100.) The Petitioners appealed this decision to the district court. (App101-112.) On March 14, 2023, the district court denied the appeal erroneously finding legislative privilege did not bar his testimony. (App113-118.) Neither order placed any limits or parameters on Devlin's testimony.

3. Document Subpoenas to all State Officials.

Upon receipt of the above-described document subpoenas, the State Officials promptly objected to the subpoenas on grounds of legislative privilege and claimed the subpoenas created an undue burden. (App119-127.) To substantiate the extent of the burden, Legislative Council's Legal Division performed a cursory review of the Petitioners' email accounts searching for specific key words that may generate responsive documents. (App216.) This cursory search required approximately 64 hours of the Legislative Council's staff attorneys' time and generated 64,849 emails containing key-word hits. (App216; App128-129.) The results of this cursory search

[2] The Magistrate Judge's Order also addressed Representative Jones' motion to quash his deposition in a companion case entitled Walen v. Burgum, Case No. 1:22-cv-31.

were provided to the Plaintiffs. The Plaintiffs moved to enforce the subpoenas. (App132-146.) The Petitioners resisted the motion on grounds of legislative privilege, attorney-client privilege, and undue burden. (App147-167.) The Magistrate Judge granted the Plaintiffs' motion. (App168-187.) The Petitioners appealed to the district court and raised the same arguments. (App188-209.) The district court affirmed the Magistrate Judge's order on March 14, 2023. (App210-214.) The Petitioners now seek review to correct the district court's clear errors.

REASONS WHY THE WRIT SHOULD ISSUE

I. Mandamus is Appropriate to Review Discovery Orders That Impede Upon Privilege or Order the Production of Irrelevant Information.

Pursuant to the All-Writs Act, the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This Court has "found mandamus to be an appropriate vehicle to review orders compelling the production of documents or testimony claimed to be privileged or covered by other more general interests in secrecy." Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 953-54 (8th Cir. 1979). More recently, this Court noted "[d]iscovery orders likewise are not ordinarily appealable, but mandamus may issue in extraordinary circumstances to forbid discovery of irrelevant information, whether or not it is privileged, where discovery would be oppressive and interfere with important state interests." In re Lombardi, 741 F.3d

888, 895 (8th Cir. 2014). Where claims of legislative privilege are denied by the district court it creates an "extraordinary case" where mandamus is appropriate. American Trucking v. Alviti, 14 4th 76, 84 (1st Cir. 2021). This is because "the degree to which state officials may be subjected to discovery in civil cases alleging violations of [federal law] raises important questions about the appropriate balance of power between the states and the federal government." Id. at 85.

This Petition presents an extraordinary circumstance where the Petitioners properly claimed legislative privilege as a bar to discovery in a civil case. Absent relief from this Court, the State Officials' privilege will be lost forever if they are required to comply with these subpoenas. The discovery sought is oppressive and will interfere with the biennial Assembly's official duties. If the district court order stands, state lawmakers will be forced to split their time between what the people elected them to do – legislating – and responding to discovery requests from their political adversaries in federal court. Ultimately, candid discussions – which are vitally important to the legislative process – will cease for fear of being discovered in a federal civil action.

II. There is a Circuit Split with Respect to Whether Discovery Orders Involving Claims of Legislative Privilege are Properly Reviewed Pursuant to Supplemental Jurisdiction or Mandamus.

There is a circuit split as to whether the exercise of supplemental jurisdiction or mandamus proceedings are proper for review of discovery orders involving state

lawmakers' claims of legislative privilege. In the Eleventh and Fifth Circuits, "one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit." In re Hubbard, 803 F.3d 1298, 1305-06 (11th Cir. 2015); see also League of United Latin American Citizens Abbott v. United States, 2022 WL 2713263 at *1 n.1 (5th Cir. May 20, 2022) (Not reported in Fed. Rptr.)[3].

The First Circuit reached a different conclusion when considering former lawmakers' appeal from a discovery order rejecting their claims of legislative privilege in American Trucking, 14 F.4th at 83-84. While noting the "ordinary course of perfecting an appeal by incurring a contempt order is sometimes 'less readily available' to state actors than to private parties," the First Circuit determined no exception applied to invoke appellate jurisdiction under its precedent. Id. at 84. Rather, the First Circuit found mandamus appropriate to address the "state lawmakers' claims of legislative privilege" because it had "little doubt that it will become increasingly common to subpoena state lawmakers in connection with such claims if we do not review the district court's order at this juncture." Id. at 85.

[3] Notably, the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981." Hubbard, 803 F.3d at 1305, n. 6. It appears this narrow jurisdictional issue is controlled in both the Fifth and Eleventh Circuits by the same pre-1981 Fifth Circuit precedent. Compare Hubbard, 803 F.3d at 1305; League of United Latin American Citizens Abbott, 2022 WL at *1, n. 1.

While this Court has not yet addressed this narrow issue, it has "occasionally treated a notice of appeal as a petition for a writ of mandamus" where the "propriety of mandamus was raised from the outset…has been fully briefed, and…the interests of the district court have been actively presented…." Iowa Beef Processors, 601 F.2d at 953 n. 3. This Court noted immediate appellate attention is required when the discovery dispute gives "rise to serious policy considerations" and there is a dearth of precedent on the issue. Id. at 954. Moreover, Judge Kelly recently noted mandamus would be the appropriate means of seeking to quash a discovery order requiring disclosure of deliberations of a state judiciary. In re Kemp, 894 F.3d 900, 910 (8th Cir. 2018) (dissent).

With respect to this narrow issue, there is authority for the Court to consider this issue through either its supplemental jurisdiction or by this Petition. Regardless, the "legislative privilege is important. It has deep roots in federal common law" and its deep roots are being attacked here. See Hubbard, 803 F.3d at 1307. This presents extraordinary circumstances and the district court's orders must be reversed to preserve this important and historic privilege.

III. Legislative Privilege Predates the Constitution and Principles of Comity Apply to Prevent the Federal Judiciary from Inquiring into the Motivations of Individual Lawmakers of a Sovereign Legislative Body in a Private Civil Action.

A. The historical significance of legislative privilege.

The district court's orders infringe upon a deeply rooted privilege that "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The Supreme Court explained: "Since the Glorious Revolution in Britain…the privilege has been recognized as an important protection of the independence and integrity of the legislature…In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." U.S. v. Johnson, 383 U.S. 169, 178 (1966). Further, in "Virginia, as well as in the other colonies, the assemblies had built up a strong tradition of legislative privilege long before the Revolution." Tenney, 341 U.S. at 374 n. 3. In fact, "[t]hree State Constitutions adopted before the Federal Constitution specifically protected the privilege." Id. at 373. Consistent with this longstanding principle, both the United States and North Dakota Constitution protect the privilege by their respective Speech or Debate Clauses. See U.S. Const. Art. 1, § 6; N.D. Const. Art. 4, § 15.

B. Legislative privilege applies to state legislators

Assertions of legislative privilege by state lawmakers "are governed by federal common law rather than the Speech or Debate Clause;" however, "the interests in legislative independence served by the Speech or Debate Clause remain relevant in the common-law context." American Trucking, 14 F.4th at 87. As a result, "it is well-established that state lawmakers possess a legislative privilege that

is 'similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.'" Hubbard, 803 F.3d at 1310 n. 11; see also Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) ("We therefore hold that state and local legislators may invoke legislative privilege."); American Trucking, 14 4th at 86-87 (holding same). This is because there are "important comity considerations that undergird the assertion of a legislative privilege by state lawmakers." American Trucking, 14 F.4th at 88. Put another way, the "rationale for the privilege…applies equally to federal, state, local officials" as well as their aides and assistants. Lee, 908 F.3d at 1187.

C. When properly applied, legislative privilege protects lawmakers from responding to discovery in civil actions.

The district court's orders ignore and/or misapply the entire purpose of legislative privilege. "The legislative privilege 'protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts.*" Hubbard, 803 F.3d at 1310 (emphasis in original) (quoting United States v. Brewster, 408 U.S. 501, 525 (1972). Legislative privilege protects lawmakers from "distraction" and prevents them from diverting "their time, energy, and attention from their legislative tasks…." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975). This is especially true when "a civil action is brought by private parties" because "judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." Id. "This is why the privilege extends to

discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Hubbard, 803 F.3d at 1310; see also MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive."). "The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Hubbard, 803 F.3d at 1310 (emphasis added).

Even a "claim of unworthy purpose does not destroy the privilege" because the "privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader...." Tenney, 341 U.S. at 377. This is consistent with the "unquestioned" Supreme Court "holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L. Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators." Tenney, 341 U.S. at 377. See also Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (noting that "inquiries into legislative motives are a hazardous matter...What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of other to enact it." (Quotations omitted)).

The proper application of the above case law has resulted in an unbroken chain of recent appellate courts finding a request for discovery – issued by a party that is

not the United States - to state or local lawmakers in a civil case is barred by common-law legislative privilege. See Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88; American Trucking, 14 4th at 88-91. The district court failed to follow this well-reasoned precedent of our sister circuits.

In Hubbard, the Eleventh Circuit considered a case in which four lawmakers filed a motion to quash subpoenas on the grounds legislative privilege exempted them from responding to the subpoenas. Hubbard, 803 F.3d at 1304. The subpoenas sought production of documents relating to the contents and passage of a legislative act, similar proposals, "as well as any communications regarding [the act] and the other plaintiffs in the lawsuit."[4] Id. at 1303. The district court denied the lawmakers' motions and ordered production of the documents. Id. at 1304. The lawmakers sought review by filing petitions for writs of mandamus and notices of appeal. Id. at 1305. After staying the district court's order, the Eleventh Circuit reversed the district court's order because "the legislative privileges must be honored and the subpoenas quashed." Id. at 1305, 1312.

In Lee, the Ninth Circuit considered "whether the City primarily sought to maximize the voting power of certain racial groups over others when drawing Council Districts and subordinated all other considerations to that priority." Lee, 908

[4] The list of documents requested in the subpoena served upon the lawmakers requests information substantially similar to subpoenas at issue here. See Hubbard, 803 F.3d at 1303 n. 4.

F.3d at 1178. The plaintiffs sought to depose city officials of Los Angeles who were "involved in the redistricting process." Id. at 1186. The district court denied the plaintiffs' deposition requests. Id. After analyzing the Supreme Court's analysis of legislative privilege, the Ninth Circuit explained "plaintiffs are generally barred from deposing local legislators, even in extraordinary circumstances." Id. at 1187-88 (internal quotations omitted). While acknowledging "claims of racial gerrymandering involve serious allegations," Lee explained these were not "within the subset of 'extraordinary instances' that might justify an exception to the privilege…we conclude the district court properly denied discovery on the ground of legislative privilege." Id. at 1188.

In American Trucking, the First Circuit issued a writ of mandamus "reversing the decision to allow the discovery sought from Rhode Island's former governor, from the former speaker of Rhode Island's legislature, and from a former state representative." American Trucking, 14 4th at 80-81. The plaintiff "sought to enforce subpoenas seeking documents and deposition testimony from several non-party drafters and sponsors of [the act]…to bolster its discriminatory intent claims." Id. at 83. The First Circuit held the state officials' petition presented an "extraordinary case" because the "petition raises unsettled legal questions about the scope of the legislative privilege as applied to state lawmakers." Id. at 84. Like this Court, the First Circuit had "never addressed these questions" and noted "the lower courts have

developed divergent approaches to answering them." Id. Importantly, like here, "no representative of the federal government asserts any interest in overbearing the assertion of legislative privilege in this case. We have before us neither a federal criminal case nor a civil case in which the federal government is a party." Id. at 88. The First Circuit acknowledged "[b]oth courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." Id. (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). In reliance on Supreme Court precedent, the First Circuit found evidence of an individual legislators' motives "is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose." Id. at 90. The First Circuit concluded "the need for the discovery requested here is simply too little to justify such a breach of comity" and issued a writ reversing the district court's discovery order allowing discovery from the former state officials. Id. at 90-91.

The Plaintiffs failed to cite any appellate court decision indicating a request for discovery – issued by a party who is not the United States – to an individual lawmaker in a civil case was not barred by legislative privilege. The district court relied on none, and the Petitioners are unaware of any [5]. As such, in light of the

[5] The only appellate decision upon which Plaintiffs cited below in support of their argument was League of United Latin Am. Citizens Abbott v. United States, 2022 WL 2713263 (5th Cir. May 20, 2022). This order denied the appellants' request to stay district court depositions pending appeal. Id. at * 2. The following day, appellants requested an emergency application for a stay to the Supreme Court in a

American Trucking holding, now all three "courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." See American Trucking, 14 4th at 88. If the district court's decision is affirmed, it would create a circuit split.

D. The district court did not properly apply legislative privilege.

Not only did the district court stray from the unanimous decisions of the circuit courts, but it imported an inapplicable five-factor test in doing so. The district court simply concluded a "qualified balancing analysis (five-factor test) is a better fit in this type of redistricting case, as opposed to the per se rule and absolute bar the Assembly advocates for." (App116.) The district court relied on non-persuasive authority from other district courts and did not follow the decisions of the sister circuits in reaching this conclusion.

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consolidated case entitled Guillen et al v. League of United Latin American Citizens, Sup. Ct. Case No. 21A756 (Docket Entry May 21, 2022). The United States, as a plaintiff in the underlying consolidated lawsuit responded to the emergency application and explained "the United States' complaint alleges that Texas's 2021 Congressional redistricting plan violates Section 2 of the Voting Rights Act." Sup. Ct. Case No. 21A756 (Docket Entry May 23 "Response to application from respondent United States" at p. 6). The United States served deposition subpoenas on state legislators. Id. at p. 7. The United States differentiated American Trucking, Hubbard, and Lee by explaining those cases "arose in a private suit, not an enforcement action by the United States." Id. at p. 25. Therefore, this case is inapplicable.

Petitioners do not contend that legislative privilege is absolute. The Supreme Court explained the privilege is qualified in U.S. v. Gillock, 445 U.S. 360 (1980) as follows:

> Although *Tenney* reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, *Tenney* was a civil action brought by a private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of **federal criminal liability as a restraining factor on the conduct of state officials**.

Id. at 372 (emphasis added).

The Court further explained "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at **civil actions**." Id. at 373 (emphasis added). In drawing on these cases, Gillock held "that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the **enforcement of federal criminal statutes**, comity yields." Id (emphasis added). This was explicitly acknowledged in Hubbard, Lee, and American Trucking. See Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1187 n. 10-11; American Trucking, 14 F.4th at 87.

The district court's error in determining a "five factor test[ ] is a better fit in this type of redistricting case" is best exhibited in Lee. As the district court readily acknowledges, the "five-factor balancing test" utilized by the Magistrate Judge was "derived from the deliberative process privilege." (App116-117; App093-098.)

Interestingly, the Ninth Circuit adopted a multi-factor test which mirrors the test applied by the district court for the purpose of the deliberative process privilege. Compare F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (listing the factors applicable to the deliberative process privilege) with Doc. 48 at pp. 16-19; Doc. 63 at p. 5. However, "the *common-law* deliberative process privilege [is] weaker than, and thus more readily outweighed than, the constitutionally-rooted legislative process privilege." Kay v. City of Rancho Palos Verdes, 2003 WL 25294710 at *18 (C.D. Cal. Oct. 10, 2003). When the Ninth Circuit analyzed legislative privilege in the scope of a discriminatory gerrymandering claim it refused to apply this multi-factor test even though it was raised by the parties[6]. Lee, 908 F.3d 1186-1188. Rather, Lee followed Supreme Court precedent and reasoned categorical exception whenever a claim "directly implicates the government's intent" would render "the privilege of little value." Lee, 908 F.3d at 1188. Importantly, neither the First nor Eleventh Circuits applied the "five-factor test" derived from the weaker deliberative process privilege either. See American Trucking, 14 F.4th at 86-91; Hubbard, 803 F.3d at 1310-1312. Instead, the Circuits recognized there are limitations to legislative privilege as it does not apply to the enforcement of federal criminal statutes or in cases where the federal

[6] The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege." Lee, Case 15-55478, Dkt Entry: 29-1 (Appellees Brief) at P. 53 of 60 (per PACER).

government is a party to a suit seeking to vindicate civil rights. However, the "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments" (Hubbard, 803 F.3d at 1310) and this is especially true when someone other than the United States seeks "discovery in a civil case." American Trucking, 14 4th at 88. The district court's order clearly misapplied legislative privilege and remains unsupported by any appellate court decision.

E. The district court's misapplication of legislative privilege has drastic policy implications.

The policy behind the holdings of the sister circuits is sound, as the First Circuit noted it had "little doubt that it will become increasingly common to subpoena state lawmakers" if it did not reverse the district court's order and put a stop to the practice. See American Trucking, 14 4th at 85. If this Court affirms the district court's decision, it will allow any private individual to harass members of the Assembly with subpoenas to engage in a fishing expedition in hopes of finding an "illicit motive" to undercut legislation with which they disagree. Even the Magistrate Judge acknowledged this is exactly what the Turtle Mountain Plaintiffs attempt to do here. (App184.) (noting Plaintiffs seek "communications demonstrating 'illicit motive' by one or more legislators….").

Further, the district court erroneously held this "case requires at least some judicial inquiry into the legislative intent and motivation of the Assembly."

(App116.) This statement by the district court flies directly in the face of longstanding Supreme Court precedent. Tenney, 341 U.S. at 377 (holding it is "not consonant with our scheme of government for a court to inquire into the motives of legislators."); See also State of Arizona v. State of California, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [Act], this court may not inquire."); Dobbs, 142 S.Ct. at 2255 ("inquiries into legislative motives are a hazardous matter…."). This is because "an isolated statement by an individual legislator is not sufficient basis from which to infer the intent of the entire legislative body." Rosentiel v. Rodriguez, 101 F.3d 1554, 1552 (8th Cir. 1996) The rationale behind this rule is clearly explained as follows:

> When construing a statute, our task is to ascertain the intent of the Legislature as a whole. Generally, the motive or understanding of an individual legislator is not properly received as evidence of that collective intent, even if that legislator was the author of the bill in question. Unless an individual legislator's opinions regarding the purpose or meaning of the legislation were expressed in testimony or argument to either house of the Legislature or one of its committees, there is no assurance that the rest of the Legislature even knew of, much less shared, those views.

McDowell v. Watson, 59 Cal.App.4th 1155, 1161 n. 3 (1997).

Put another way, to "the extent that legislative intent is at issue…the examination of such intent should be limited to the official legislative history, which does not include post-enactment opinions from legislators." Phelps-Roper v. Heineman, 2014 WL 562843 at * 1 (D. Neb. Feb. 11, 2014) (citing Weinberger v.

Rossi, 456 U.S. 25, 35 n. 15 (1982)). Even within the official legislative history, the Supreme Court has "eschewed reliance on the passing comments of one Member and casual statements from floor debates." Garcia v. U.S., 469 U.S. 70, 76 (1984).

Here, the subpoenas seek documents from six of the 141 Assembly members, and deposition testimony from one. If it is improper for the Court to rely upon a comment from a member of the legislator during a floor debate, discovery seeking information from individual legislators - outside of the official legislative record - serves no purpose other than to divert attention from the Assembly's official duties. Allowing such discovery would undoubtedly set a dangerous precedent as it will chill candid communication and open the floodgates for abuse of the federal court system to imperil legislative independence.

IV. The District Court's Discovery Order Imposes an Undue Burden on the Assembly and the Stated Purpose of the Discovery Sought is Irrelevant and not Needed Under Supreme Court precedent.

A. Petitioners are non-parties to this litigation

The Petitioners are not named as parties to this litigation and only became involved when the Plaintiffs served the above-described subpoenas. This district court disregarded the Assembly's evidence explaining the burden imposed upon it. The Magistrate Judge reached the unfounded conclusion that the Petitioners – as

non-parties – could simply hire outside counsel to alleviate the burden. (See App186.)

Upon receipt of the subpoenas, all eight attorneys in the Legislative Council's Legal Division cooperatively performed a keyword search on each of the Petitioners' email accounts to provide a general estimate of the communications sought by the subpoenas. (App216.) The "total number of search results, generated by the key word search, were recorded." (App224.) This resulted in 64,849 emails containing the key word searched. (App129.) The communications identified in the initial key word search "were not reviewed in any detail other than to identify the sender and recipients and eliminate any correspondence that, at a glance, clearly could be identified as nonresponsive, such as daily or weekly publication list serve items." (App216.) Based on this extremely cursory review, any items identified as clearly non-responsive (such as list serve items) were excluded from the remaining portions of the initial cursory analysis. (Id.) This cursory review alone "averaged a full 8 hours per attorney" or a total of 64 hours. (Id.)

Legal Division Director, Emily Thompson, explained the following in her affidavit:

> If the Legislative Council's Legal Division is mandated to review the documents identified in the "key word" search to determine whether each document actually is responsive to the Plaintiffs' request and perform an additional search and review of correspondence that was not flagged in a key word search, but may be responsive to the Plaintiffs'

> request, I estimate this more extensive review, along with a review of any other documents that may be responsive to the subpoena, would require approximately ten 8-hour days for eight attorneys. It is my estimate that compliance with the Plaintiffs' subpoenas would require approximately 640 hours of Legislative Council's time. This estimate does not include the additional hours needed for each subpoenaed individual to review the documents produced on their behalf.

(App216-217.)

Thompson was involved and had first-hand knowledge of the process. Based on this first-hand knowledge of what was required to compile the initial cursory search, she estimated a more comprehensive review to find every document responsive to the Plaintiff's subpoena would take ten times as long. (Id.) In light of the definitions within the subpoena and the limited review already performed which identified more than 64,000 communications, Thompson's estimate is entirely reasonable. (App216.) Notably, this did not account for the additional detailed privilege log ordered by the Magistrate Judge which must include "the general nature of the document, the identity of the author, the identities of all recipients, and the date on which the document was written." (App187.) It is well-settled that privilege logs are not required with respect to a claim of legislative privilege because the burden of producing one is not consistent with the privilege. Hubbard, 803 F.3d at 1308-09 (holding "that the privileged documents be specifically designated and described, and that precise and certain reasons for preserving the confidentiality be given—was also an error of law…Given the purpose of the

legislative privilege…there was more than enough under Rule 45 to assess the claim of privilege and to compel the granting of the motions to quash.").

To further complicate matters, the North Dakota biennial legislative session commenced on January 3, 2023. (App217.) The Legislative Council's Legal Division anticipated it would be tasked with drafting over 1,000 bills, along with providing daily research and legal advice -- "akin to an aide to the legislators." (Id.) The Magistrate Judge determined the burden imposed by the discovery order could simply be alleviated by engaging outside counsel. (App186.) While the district court's discovery orders are in direct violation of legislative privilege as explained above, it also runs afoul of Fed. R. Civ. P. 26, 45 and ignored precedent on this issue.

This Court previously held "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 927 (8th Cir. 1999) (quoting Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998)). Put another way, "[t]he Federal Rules also afford nonparties special protection against the time and expense of complying with subpoenas." Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 799 (9th Cir. 1994). Further, "a court may use Rule 26(b) to limit discovery of agency documents or testimony of agency officials if the desired discovery is relatively unimportant

when compared to the government interests in conserving scarce government resources." Id. at 799-80. The "district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance…or undue burden or expense….' Rule 26(c)." Herbert v. Lando, 441 U.S. 153, 1549 (1979). Further, "when reviewing subpoenas directed to nonparties, a court should also examine issues related to the expected compliance costs in light of Rule 45's provision that nonparties be protected against significant expense." Wilmas v. Renshaw, 2021 WL 1546142 at *2 (E.D. Mo., Apr. 20, 2021) (slip copy).

The Respondents are at a loss as to what they possibly could do to explain the burden of responding to these subpoenas without actually performing over 700 hours of work, recording their time and effort, and then claiming undue burden after the fact. The district court would have the Respondents undertake an undue burden to establish the subpoenas would subject them to an undue burden.

The D.C. Circuit considered a similar situation in MINPECO, S.A., where the appellant served subpoenas on the Custodian of Records and the Staff Director for a House Subcommittee seeking identities of a stenographer, payments, and third-party communications relating to the publication of an allegedly altered transcript. MINPECO, 844 F.2d at 857-58 (D.C. Cir. 1988). While finding legislative privilege applied as a bar to the subpoena, the court also acknowledged the subpoena "might arguably contain material unrelated to the subcommittee's protected investigatory

activities" including correspondence with third-parties. Id. at 862. The court held that enforcing the subpoenas "would be to authorize a fishing expedition into congressional files." Id. at 862-63 (emphasis added). "For a court to authorize such open-ended discovery in the face of a claim of privilege" would "appear inconsistent with the comity" that exists between separate branches of government. Id. at 863. The court further noted that if the appellants' requested discovery were allowed, "each time a subpoena is served on a committee, an initial judicial inquiry would be required to calibrate the degree to which its enforcement would burden the committee's work. Such a consequence would be absurd." Id. at 860.

This is exactly what the district court's order invites here. The Petitioners claimed legislative privilege; however, the district court's order permits a "fishing expedition" in hopes to find an "illicit motive" of one or more legislators. If the district court's order is allowed to stand, each time a subpoena is served upon a member of the Assembly, a judicial inquiry would be required to calibrate the degree to which its enforcement would burden the Assembly's work. This consequence "would be absurd." See Id.

The district court's order permits exactly what Rules 26, 45, and the cases interpreting them – especially in light of a claimed privilege - are designed to prevent. The district court disregarded the detailed first-hand sworn statement of Emily Thompson which explained the extensive burden imposed by these

subpoenas. It also ignored fundamental principles of comity and impermissibly determined a non-party cannot establish an undue burden when it can simply shift its burden upon outside counsel. The district court's discovery order must be reversed as it imposes an undue burden.

V. The Plaintiffs' Stated Purpose for the Discovery Sought is not Needed and Irrelevant in a Section 2 Claim Under the VRA.

The Magistrate Judge acknowledged the Plaintiffs' subpoenas seek to find "communications demonstrating 'illicit motive' by one or more legislators" and argued they would "certainly be relevant" under Section 2 of the VRA's "totality of the circumstances test." (App184.) The Magistrate Judge went on to acknowledge "legislative intent is not central to Turtle Mountain's claims," but found "such evidence may nonetheless be relevant." Id. The district court affirmed this order and determined the requested discovery "is relevant in assessing the Assembly's discriminatory intent (or lack thereof) and motivations presented against or in favor of the redistricting plan." (App116.) This is inconsistent with Supreme Court precedent and arguments of the parties below.

The totality of the circumstances test under Section 2 of the VRA is derived from the "Senate Committee report that accompanied the 1982 amendment to the Voting Rights Act…." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1021 (8th Cir. 2006). The Supreme Court explained the intent of an individual official is irrelevant to the totality of the circumstances test as follows:

> The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters…The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question."…The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Thonburg v. Gingles, 478 U.S. 30, 43-44 (1986) (emphasis added) (footnotes and internal quotations omitted).

An inquiry into the intent or motive of individual officials "asks the wrong question" because inquiries into an individual lawmaker's motives are not only barred by legislative privilege (See Hubbard, 803 F.3d at 1310), but are also an "impracticable," "futile," and "hazardous matter." See Soon Hing v. Crowley, 113 U.S. 703, 710-711 (1885); Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022). Clearly, Gingles forecloses consideration of individual intent in a Section 2 "totality of the circumstances" analysis.

This Court's holding in Bone Shirt is consistent with Gingles and makes no reference of "illicit motive" or "intent" of one or more lawmakers under its "totality of the circumstances" analysis. Bone Shirt, 431 F.3d at 1021-22. Rather, Bone Shirt provides: "Two factors predominate the totality-of-circumstances analysis: the

extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." Id. at 1022 (internal quotation omitted). This is consistent with Gingles and explains why neither party in this case argued the intent or motives of an individual lawmaker were necessary in their summary judgment submissions. See ECF Nos. 59, 65, 73. These inquiries are simply not necessary for the analysis.

Even if the district court were correct that motives of an individual legislator were relevant – which they are not – there is no need for this information as it addresses "the wrong question" under the "totality of the circumstances" test. Gingles, 478 U.S. at 43-44 (1986). It has long been the law of this Court that "discovery may not be had on matters irrelevant to the subject matter involved in the pending action, and even if relevant, discovery is not permitted where no need is shown..." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) (citations omitted). As explained above, the information sought is not relevant, and even if it were, there is no need for it. This is an especially important consideration when a state lawmaker asserts a claim of legislative privilege. American Trucking, 14 F.4th at 90 (holding that even if legislative privilege might yield, "the need for the discovery requested here is simply too little to justify such a breach of comity."). In sum, the district court's order imposes an undue burden upon a sovereign's legislative branch to allow Plaintiffs to

engage in a fishing expedition in hope of finding evidence of an "illicit motive" of one or more legislators which has absolutely no bearing on the disposition of the underlying action. This decision cannot stand and must be reversed.

CONCLUSION

This case implicates an important privilege and presents an extraordinary situation where the district court ignored consistent precedent of our sister circuits. Clearly, under Lee and the cases cited therein, Representative Devlin's deposition is barred by legislative privilege. Further, the document subpoenas clearly create an undue burden, seek information which is not needed, and the State Officials' obligation to respond is barred by legislative privilege. For the aforementioned reasons, the district court's discovery orders should be reversed and all subpoenas issued to the State Officials should be quashed.

Dated this 28th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) as it uses the proportionally spaced typeface of Times New Roman in 14-point font.

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The electronic version of the foregoing Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28(A)(d) was scanned for viruses and that the scan showed the electronic version of the foregoing is virus free

Dated this 28th day of March, 2023.

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2023, I electronically submitted the foregoing **PETITION FOR WRIT OF MANDAMUS** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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