No. _____

In the Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,
Petitioners,

v.

NORTH DAKOTA STATE LEGISLATIVE ASSEMBLY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Paul M. Smith
Mark P. Gaber
Molly E. Danahy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200

Timothy Q. Purdon*
ROBINS KAPLAN, LLP
1207 West Divide Ave., Ste. 200
Bismarck, ND 58501
(701) 255-3000

Bryan L. Sells
THE LAW OFFICE
OF BRYAN L. SELLS, LLC
P.O. Box 5493
Atlanta, GA 31107
(404) 480-4212

John Echohawk
Counsel of Record
Matthew Campbell
Michael S. Carter
Allison Neswood
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave.
Boulder, CO 80302
(303) 447-8760
Jechohwk@narf.org

Samantha Kelty
NATIVE AMERICAN RIGHTS FUND
950 F Street NW, Ste. 1050
Washington, DC 20004
(202) 785-4166

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Counsel for Petitioners
**Counsel for Petitioners* Turtle Mountain Band of Chippewa Indians and Spirit Lake Tribe

QUESTIONS PRESENTED

1. Should this Court vacate the Eighth Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)?

2. Are state legislators absolutely immune from civil discovery, including from producing documents and communications that involved or were shared with third parties, or is the state legislative privilege a qualified one, based on principles of comity, that yields where important federal interests are at stake?

PARTIES TO THE PROCEEDING

The following were plaintiffs in the district court, respondents in the Eighth Circuit, and are Petitioners in this Court:

The Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, Collette Brown, Wesley Davis, and Zachary King.

The following were defendants in the district court:

North Dakota Secretary of State Michael Howe.

The following were movants in the district court, petitioners in the Eighth Circuit, and are Respondents in this Court:

The North Dakota Legislative Assembly, North Dakota state representative Michael Nathe, former North Dakota state representatives William Devlin and Terry Jones, former North Dakota state senators Ray Holmberg, Nicole Poolman, and Richard Wardner, and former legislative counsel Clare Ness.

STATEMENT REGARDING RELATED PROCEEDINGS

The following related proceedings are currently pending before federal trial and appellate courts:

Walen v. Burgum, No. 1:22-cv-0031 (D.N.D. Nov. 2, 2023), *direct appeal to the Supreme Court noticed* January 2, 2024.

Turtle Mountain Band of Chippewa Indians, et al. v. Michael Howe, No. 3:22-cv-0022 (D.N.D. Nov. 17, 2023), *appeal docketed*, No. 23-3655 (8th Cir. Dec. 6, 2023)

Turtle Mountain Band of Chippewa Indians, et al. v. Michael Howe, No. 3:22-cv-0022 (D.N.D. Dec. 12, 23), *appeal docketed sub nom Turtle Mountain Band of Chippewa Indians v. North Dakota Legislative Assembly*, No. 23-3696 (8th Cir. Dec. 15, 2023).

Turtle Mountain Band of Chippewa Indians, et al. v. Michael Howe, No. 3:22-cv-0022 (D.N.D. Jan. 8, 2024), *appeal docketed sub nom Turtle Mountain Band of Chippewa Indians, et al. v. North Dakota Legislative Assembly*, No. 24-1171 (8th Cir. Jan. 30, 2024).

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The opinion of the United States Court of Appeals for the Eighth Circuit, *In re North Dakota Legislative Assembly*, is reported at 70 F.4th 460 and is reprinted in the Appendix to the Petition ("App.") at 1. The order of the United States Court of Appeals for the Eighth Circuit denying rehearing is unreported and is reprinted at App. 78. The opinions of the United States District Court for the District of North Dakota are unreported and are reprinted at App. 63 and App. 71.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on June 6, 2023. Petitioners' timely motion for rehearing was denied on September 6, 2023. On November 28, 2023, this Court granted Petitioners' application to extend the time to file a petition for certiorari from December 5, 2023, to February 3, 2024. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal does not involve any constitutional or statutory provisions but rather involves the equitable doctrine of *Munsingwear* vacatur and the scope of the federal common law legislative privilege afforded to state legislators.

INTRODUCTION

In ruling on a discovery dispute arising out of a claim for unlawful vote dilution in violation of the Voting Rights Act of 1965, a divided panel of the Eighth Circuit held that state legislators are absolutely immune from civil discovery in federal courts. This expansive conception of the legislative privilege is at odds with every other circuit to have considered the issue, as well as relevant precedent from this Court, which requires the state legislative privilege to yield when important federal interests are at stake.

While this collateral order was on its way to this Court for review, the district court entered judgment in favor of Petitioners on their Voting Rights Act claim, mooting the parties' discovery dispute. Accordingly, this petition seeks vacatur of the Eighth Circuit ruling below. Vacatur is warranted here because the dispute became moot by no fault of the parties, and because the ruling below is legally consequential, and will have significant impacts beyond this dispute.

The panel majority's ruling is particularly concerning in light of its scope. Petitioners sought only documents and communications that involved or were shared with third-party non-legislators and non-legislative staff. Because the panel majority found that the legislators were absolutely immune from civil discovery, however, it precluded Petitioners from obtaining any nonprivileged or otherwise discoverable information from Respondents whatsoever. Remarkably, the panel even quashed the district court's order compelling Respondents to produce a privilege log under Fed. R. Civ. P. 26(b)(5). A common method used to

fulfill the burden of establishing privilege, a privilege log would have allowed Petitioners to test whether responsive documents and communications that had been shared with third-party non-legislators were within the scope of legitimate legislative activity or whether they were improperly withheld on based on a blanket assertion of the legislative privilege.

Because the parties' discovery dispute was mooted before Petitioners had the opportunity to obtain review in this Court of the panel's erroneous decision, Petitioners respectfully request that the Court grant this petition and vacate the Eighth Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

STATEMENT OF THE CASE

Petitioners, two Tribal Nations and three individual Native American voters, brought suit against North Dakota Secretary of State Michael Howe alleging that the state legislative redistricting plan enacted by the North Dakota Legislative Assembly after the 2020 decennial census violated Section 2 of the Voting Rights Act of 1965 ("Section 2"). App. 2; *see also Turtle Mountain Band of Chippewa Indians, et al. v. Howe*, No. 3:22-cv-0022, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023). Specifically, Petitioners alleged that the 2021 plan had the effect of diluting the votes of Native Americans living on and around the Turtle Mountain and Spirit Lake Reservations in north-central North Dakota. *Id.*

I. The Privilege Dispute

During the discovery period, Petitioners sought discovery from six state legislators and one legislative staffer under Federal Rule of Civil Procedure 45. App. 2. Petitioners served document subpoenas on each of the individual Respondents seeking documents and communications on topics related to the redistricting process. App. 2. Petitioners also served a deposition subpoena on one of the Respondents. App. 2. All seven individuals subject to Petitioners' Rule 45 subpoenas had been involved in the legislative redistricting process and had been identified by the defendant Secretary of State as having discoverable information that he might use to support his case. App. 40.

The individual Respondents objected to the document subpoenas and, joined by the Legislative Assembly itself, moved to quash the deposition subpoena. App. 14. Petitioners then moved to enforce the document subpoenas. App. 40. Except for one Respondent not at issue here, Petitioners only sought to obtain nonprivileged documents and communications that involved or had been shared with any individual who was neither a legislator nor a legislative staffer. App. 44-45. Petitioners also sought a privilege log identifying responsive documents withheld by the Respondents on the basis of legislative or other privilege. App. 45.

The magistrate judge granted Petitioners' motion to enforce, ordering Respondents to produce nonprivileged communications involving non-legislative third parties. App. 61. The magistrate judge determined that "the state legislative privilege does not protect

information a legislator discloses to a third party." App. 50. Finally, the magistrate judge ordered Respondents to produce a privilege log for any remaining responsive documents withheld on the basis of legislative or other asserted privilege. App. 62.

The magistrate judge also denied the motion to quash the deposition subpoena. App. 38. Applying a five-factor test the magistrate judge concluded that the legislative privilege is a qualified one and that under the circumstances, Petitioners' need for deposition testimony outweighed Respondents' interest in nondisclosure. App. 38.

The district court affirmed both orders. App. 64; App. 72.

Respondents, only one of whom was still serving in the North Dakota Assembly at the time, petitioned the Eighth Circuit for mandamus relief from both discovery orders. App. 2. In a divided decision, the panel granted the petition in relevant part and directed the district court to quash all but one of the document subpoenas.[1] App. 8. The divided panel also directed the district court to quash the deposition subpoena. App. 8.

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[1] The magistrate court, affirmed by the district court, also found that one Respondent had waived his legislative privilege by appearing voluntarily to testify about his involvement in the legislative redistricting process in a separate federal proceeding. App. 8. Respondents did not challenge this determination in their mandamus action and the Eighth Circuit denied mandamus relief with respect to that Respondent. App. 8.

The panel majority held that the state legislative privilege is an "absolute bar" that applies whenever legislators are "acting in the sphere of legitimate legislative activity." App. 4. Because the subpoenas sought documents, communications, and testimony on topics related to the legislative enactment of the challenged plan, the panel majority found that any responsive discovery was categorically privileged, regardless of whether it had been shared with or involved non-legislative third parties. App 5. The lower court's conclusion to the contrary, the majority explained, was based on an incorrect view of the state legislative privilege as a qualified one that depends on the circumstances of the case. App. 5-6.

Concurring and dissenting in part, Judge Kelly concluded that the district court did not engage in a "judicial usurpation of power" nor a "clear abuse of discretion" when it determined that the legislative privilege is qualified and enforced the Rule 45 subpoenas. App. 9. Judge Kelly agreed that the state legislative privilege is qualified and found that the majority's ruling to the contrary "sweeps too broadly." App. 10. Judge Kelly further noted that the state legislative privilege can be waived and that a privilege log "is an appropriate mechanism for resolving any privilege disputes that may arise." App. 11. Judge Kelly also noted that the court below could assess any assertion of legislative privilege if a legislator declined to answer specific questions during a deposition. App. 12. Judge Kelly thus found that Respondents had failed to demonstrate that they were entitled to the "drastic and extraordinary" remedy of mandamus relief. App. 8.

II. The Proceedings on the Merits

The Eighth Circuit's ruling was issued on June 6, 2023, just six days before trial began on Petitioners' Section 2 claim. App. 1; App. 61. To preserve their opportunity to challenge the mandamus ruling, Petitioners made an offer of proof that the legislative discovery would be relevant for two purposes — to demonstrate the legislature's nonresponsiveness to the concerns of Petitioners Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and the two Tribal Nations' members, as well as the tenuousness of the defendant's justifications for the challenged districts. App. 152. The trial court accepted the offer of proof, but stated on the record that it would not consider the offer in ruling on Petitioners' claim. App. 153, 150-1.

After trial concluded, Petitioners filed a timely motion for rehearing with the Eighth Circuit, which the court denied. App. 78. On November 17, 2023, before Petitioners' deadline to seek review of the Eighth Circuit's ruling in this Court, the district court entered its judgment on the merits. *Turtle Mountain Band of Chippewa Indians, et al.*, 2023 WL 8004576 at *17. The district court found that the Petitioners had established all three *Gingles* factors and that the totality of the circumstances demonstrated that the 2021 plan diluted the votes of the members of the Petitioner Tribal Nations and the individual Petitioners. *Id.*

Defendant Howe timely appealed the merits ruling, and briefing is ongoing in that appeal. *See Turtle*

Mountain Band of Chippewa Indians v. Howe, No. 23-3655 (8th Cir. Dec. 6, 2023).

REASONS TO GRANT THE PETITION

The Court should grant the petition and vacate the ruling below because the controversy between the parties became moot on its way to this Court. The Court should further grant the petition because the Eighth Circuit panel majority's ruling that state legislators enjoy an "absolute" privilege against civil discovery in federal court is in conflict with other circuits and with relevant decisions of this Court.

I. The Court should vacate the panel majority's ruling under *United States v. Munsingwear* because the privilege dispute is now moot.

"The established practice of [this] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *see also*, *e.g.*, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023) ("Our *Munsingwear* practice is well settled."); *id.* (collecting cases). This practice ensures that "the rights of all parties are preserved; none is prejudiced by a decision which . . . was only preliminary." *Munsingwear*, 340 U.S. at 40.

Under *Munsingwear*, "[v]acatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997)

(quoting *U.S. Bancorp Mortgage Co.*, 513 U.S. 18, 23, 29 (1994)). Thus, this Court has routinely vacated decisions by appellate courts that became unreviewable where the relevant controversy is mooted by intervening events. *See, e.g., Ritter v. Migliori*, 143 S. Ct. 297 (2022) (Mem.) (vacating challenge to ballot counting procedures after election mooted Petitioner's claim); *see also*, *e.g.*, *Trump v. Citizens for Ethics and Responsibility in Washington*, 141 S. Ct. 1262 (2021) (Mem.) (vacating ruling on plaintiffs' emoluments claim against former president after new president was inaugurated).

Here, the parties' dispute became moot when the district court entered judgment in Petitioners' favor on the merits of their Section 2 claim on November 17, 2023—approximately two weeks before Petitioners' initial deadline to seek certiorari, which fell on December 5, 2023.[2] *Turtle Mountain Band of Chippewa Indians, et al.*, 2023 WL 8004576 at *17. Having obtained a judgment in their favor in the collateral action, Petitioners no longer have any need for the relevant discovery from Respondents. Although the defendant Secretary of State in *Turtle Mountain v. Howe* has appealed the merits ruling, his appeal is limited to two issues: (1) Whether Petitioners have a cause of action to enforce their Section 2 claim under 42 U.S.C. § 1983; and (2) whether Petitioners established the first and second *Gingles* prongs. *See* Appellant's Opening Brief, *Turtle Mountain v. Howe*, No. 23-3655 (Jan.

[2] In the wake of the district court's decision, Petitioners sought and were granted an extension of the deadline until February 3, 2024.

25, 2023). The legislative discovery at issue in this collateral action is not relevant to either of those elements of Petitioners' claim on the merits. Thus, even if it were possible for Petitioners to reopen the record, the evidence sought would have no bearing on the Secretary's appeal. Because the decision from the district court came while Petitioners' privilege dispute with Respondents was "on its way" to this Court, *Munsingwear* vacatur is appropriate here. 340 U.S. at 39.

Specifically, vacatur is appropriate because the parties' discovery dispute became moot "due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 83 (1987). Petitioners diligently sought to enforce the third-party subpoenas against Respondents and took steps to preserve their right to seek review of the Eighth Circuit's ruling, despite the fact that it was issued mere days before trial began in *Turtle Mountain v. Howe*. *See* App. 152 (making offer of proof at trial with respect to the discovery sought). Had Petitioners succeeded in obtaining reversal of the panel decision, either from the Eighth Circuit sitting *en banc* or from this Court, they could have supplemented the trial record as needed before the district court's judgment was entered. Because the district court has entered its judgment on the merits in their favor, Petitioners no longer have any need to obtain, opportunity to use, or basis to enforce the subpoenas against Respondents. *See Camreta v. Greene*, 563 U.S. 692, 710-11 (2011) (finding case moot and subject to vacatur where plaintiff no longer had need of the relief sought below).

Although Petitioners diligently and properly preserved their appellate rights in this matter, there was simply not enough time for Petitioners to obtain review of the erroneous decision between the issuance of the Eighth Circuit's ruling and the district court's entry of judgment in the collateral action, which mooted this case.[3] Vacatur is therefore appropriate here. *See id.* at 711-13 (finding vacatur appropriate where time stymied the Court's ability to consider the petition); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1984) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.").

This is not a circumstance where a party obtained a judgment in their favor and then dismissed their claim or entered into a settlement to preclude further review. *Cf. id*. Nor is this a case where the losing party failed to preserve their appeal of an adverse judgment. *Cf. Karcher*, 484 U.S. at 83. Petitioners here *lost* in the

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[3] Notably, after judgment was entered in the case, and the Secretary's appeal had been noticed, Respondent the North Dakota Legislature moved to intervene in the case for purposes of appeal, despite having previously relied on its non-party status to preclude Petitioners' discovery. Because the record was already closed, Petitioners are also foreclosed from seeking review of the Eighth Circuit's ruling on the grounds that Respondents' waived privilege by intervening voluntarily in the case. *See, e.g.*, *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001); *Mi Familia Vota v. Fontes*, No. CV-22-00509, -- F. Supp. 3d -- , 2023 WL 8183557 (D. Ariz. Sept. 14, 2023), *mandamus denied sub nom In re Ben Toma*, No. 23-70179, 2023 WL 8167206 (9th Cir. Nov. 24, 2023), *stay denied sub nom Toma v. U.S. District Court for the District of Arizona*, 144 S. Ct.443 (2023).

Eighth Circuit and promptly acted to preserve their appeal rights and seek immediate review of the adverse ruling. It is only because of the passage of time that circumstances have overtaken this appeal, such that Petitioners are precluded from obtaining review of the Eighth Circuit's erroneous ruling below. This is precisely the sort of "happenstance" precluding review that justifies vacatur. *Camreta*, 563 U.S. at 713 (finding case moot where minor plaintiff became adult before case was resolved).

Vacatur is particularly appropriate because the Eighth Circuit's erroneous determination that legislators are absolutely immune from civil discovery is a "legally consequential" decision, which will have significant impacts beyond just the dispute between the parties here. *Camreta*, 563 U.S. at 713 (finding vacatur of lower court ruling on qualified immunity for state actors legally consequential). Thus the "normal rule" of vacatur should apply "to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Id.* (quoting *Munsingwear*, 340 U.S at 40-41).

Finally, vacatur is appropriate here because the Eighth Circuit's ruling is out of step with this Court's precedent and the other circuits that have considered the issue, such that it would have merited review from this Court absent mootness. *See* U.S. Sup. Ct. Rule 10(a), (c); *infra* parts II-III.

II. The panel majority's conclusion that legislative privilege is "absolute" is erroneous and conflicts with this Court's precedent.

The Court should also grant the petition and vacate the ruling below because the panel's rationale for extending an absolute privilege to state legislators is erroneous and inconsistent with this Court's precedent in *United States v. Gillock*, 445 U.S. 360 (1980).

Legislative privilege is an evidentiary privilege governed by federal common law and applied through Rule 501 of the Federal Rules of Evidence. As the panel majority recognized, the Supreme Court has spoken authoritatively on the scope of the state legislative privilege in criminal cases. In *Gillock*, 445 U.S. at 372-73), this Court held that state legislators do not enjoy the same evidentiary privilege as federal legislators in criminal cases. While *federal* legislators enjoy an absolute privilege rooted in the Constitution's Speech or Debate Clause, state legislators enjoy only a qualified privilege, based on principles of comity, that yields "where important federal interests are at stake." *Id.* at 373.

The Speech or Debate Clause provides that "for any Speech or Debate in either House" of Congress, Senators and Representatives "shall not be questioned in any other place." U.S. Const. art. I § 6, cl. 1. Although the Clause's plain text refers only to oral statements made on the House or Senate floor, this Court has interpreted the provision "broadly to effectuate its purposes," which are (1) to "ensur[e] the independence of the legislature" and (2) to "reinforce[e] the separation of powers so deliberately established

by the Founders." *United States v. Johnson*, 383 U.S. 169, 178-180 (1966). The privilege applies when federal legislators or their aides are acting "within the 'sphere of legitimate legislative activity.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). And it applies in both civil and criminal cases. See *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995).

But the Speech or Debate Clause "by its terms is confined to federal legislators." *Gillock*, 445 U.S. at 374. As a result, this Court has explicitly declined to recognize an absolute evidentiary privilege for state legislators, holding instead that any such privilege must yield "where important federal interests are at stake." *Id.* at 373. In reaching that conclusion, moreover, this Court rejected an argument that the historical and policy considerations that inspired the Speech or Debate Clause should lead the Court to recognize a comparable privilege for state legislators. *See id.* at 368-74. The Court explained that the separation of powers doctrine underlying the Speech or Debate Clause does not support a state legislative privilege because state legislatures are not a "coequal branch" of the federal government. *Id.* at 370. The Court also reasoned that the principle of comity between the federal and state governments does not require the extension of a "speech or debate type privilege" to state legislators because "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *Id.* at 370; *see also id.* at 373. In other words, comity does not require federal courts to provide state

legislators with special evidentiary privileges when they are accused of violating federal law. *See id.*

Although this Court recognized that denying an evidentiary privilege to state legislators "may have some minimal impact on the exercise of [their] legislative function," it nonetheless concluded that the legitimate interest of the federal government in enforcing its criminal statutes outweighed that level of intrusion. *Id.* at 373. *Gillock* thus establishes that legislative privilege offers more limited protection for state lawmakers than the absolute evidentiary privilege available to federal legislators through the Speech or Debate Clause.

Instead of applying this more limited construction of the state legislative *privilege*, the panel majority drew expressly on cases involving legislative *immunity*—a concept that is distinct from legislative privilege. This Court has held that the Speech or Debate Clause immunizes federal legislators from liability in "civil as well as criminal actions" arising from activities "within the 'legitimate legislative sphere.'" *Eastland*, 421 U.S. at 502-03. This immunity shields Members of Congress not only from liability for "the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). When it applies, legislative immunity is "absolute." *Eastland*, 421 U.S. at 503.

This Court has also held that state and local legislators enjoy "an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Ct. of Va. v.*

Consumers Union, 446 U.S. 719, 732 (1980) (citing *Tenney*, 341 U.S. at 367). But though state and federal legislators enjoy a similar legislative *immunity* from civil damage suits over actions that fall within the sphere of legislative activity, the *Gillock* court rejected the argument that the same equivalency applies to the evidentiary state legislative *privilege*. While acknowledging its previous ruling that state legislative *immunity* is justified due to the potentially disruptive effect of civil damage actions against state legislators, the Court nonetheless determined that the recognition of state legislative *privilege* would afford only a "speculative benefit" to the state legislative process. *Id.* at 371-73.

The Court thus expressly rejected the "interference" rationale relied on by the panel majority. *Id.* at 370. In concluding that state legislators do not enjoy a comparable legislative privilege to their federal counterparts, the Court described the impact of denying state legislators an absolute evidentiary privilege as "minimal." *Id.* at 373. And it placed significant countervailing weight on the federal interests involved in enforcing federal law. *Id.* at 371-73. Here, the panel correctly observed that "the Supreme Court otherwise has generally equated the legislative *immunity* to which state legislators are entitled to that accorded Members of Congress under the Constitution." App. 3 (citing *Consumers Union*, 446 U.S. at 733). But the panel then asserted that "there is no reason to conclude that state legislators and their aides are entitled to lesser protection than their peers in Washington," with respect to the evidentiary privilege because "[l]egislative privilege, like legislative

immunity, reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation." App. 4 (cleaned up). The panel therefore concluded that "[t]he bar to interference extends beyond immunity from liability to the compelled discovery of documents or testimony, because legislators 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" App. 4 (quoting *Dombrowski*, 387 U.S. at 85).

In contrast with *Gillock*, the panel placed substantial weight on the risk that civil discovery would distract Respondents from their legislative duties and failed to place sufficient weight on the value of enforcing federal law. And it did so despite the fact that at the time the petition was filed, only one Respondent was still serving in the legislature, App. 2, and thus subject to the risk of interference with or distraction from his legislative duties. Moreover, the panel failed to explain why the "minimal," *Gillock*, 445 U.S. at 373, impact of having to respond to non-party subpoenas in civil cases is on a par with disruptive effect of defending against suits seeking criminal or civil liability for legislative activity. Nor did they explain why the "speculative benefit to the state legislative process" of rendering legislators immune from discovery, *Gillock* at 373, is sufficient to override important federal interests in civil cases (including those involving fundamental constitutional rights) but not in criminal cases. Finally, the panel compounded its error by

categorically extending this absolute legislative privilege to non-legislators.

Because the Eighth Circuit's ruling is erroneous and conflicts with *Gillock*, the Court should grant review and vacate under *Munsingwear*, *see supra* part I.

III. The ruling below that state legislative privilege is "absolute" is erroneous and is in conflict with other circuit courts.

The circuit courts have generally acknowledged *Gillock*'s holding that the privilege is qualified, not absolute, and can be overcome in some cases to vindicate important federal interests. *See, e.g.*, *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish*, 849 F.3d 615, 624 (5th Cir. 2017) ("While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified"); *id.* ("This privilege must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.") (internal quotations omitted); *see also League of United Latin American Citizens v. Abbott*, No. 23-50407, 2022 WL 2713263 at *1-2 (5th Cir. May. 20, 2022) (allowing discovery against state legislators to proceed in redistricting case and noting that "[b]oth this court and the Supreme Court have confirmed that the state legislative privilege is not absolute" and that the privilege "must not be used as a cudgel to prevent the discovery of non-privileged information or to prevent the discovery of the truth in cases where the

federal interests at stake outweigh the interests protected by the privilege."). Even where courts have determined that the issue before them does not present sufficiently important federal interests, they have nonetheless acknowledged that *Gillock* left open the possibility that the privilege could be overcome in the civil context. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021) (holding that state legislative privilege is "less protective" than its federal counterpart, and may be overcome by "important federal interests" but finding that case presented did not involve sufficiently important federal interests); *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015) (holding that "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests" but finding that plaintiffs had failed to state a valid federal claim); *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023) (acknowledging that the state legislative privilege may be overcome by important federal interests, but finding that civil rights claims are not sufficiently important to fall within the *Gillock* exception). Moreover, at least two circuits have indicated that more guidance from this Court would aid in resolution of these disputes. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (acknowledging that state legislative privilege is not absolute but noting the absence of guidance from this Court regarding the circumstances in which it may be overcome); *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1344 (11th Cir. 2023) (expressing reluctance to engage in the balancing test set forth in

Gillock in civil cases absent further guidance from this Court).

Consistent with *Gillock* and the circuit courts' acknowledgement that the legislative privilege is qualified, lower courts have regularly ordered state legislators to comply with civil discovery requests over assertions of legislative privilege when necessary to enforce important federal voting rights. See, e.g., *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 456-58 (N.D. Fla. 2021); *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 2335805, at *4-5 (E.D. Mich. May 23, 2018); *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553, 555 (D. Md. 2017), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339, 343 (E.D. Va. 2015*); Veasey v. Perry*, No. 2:13-cv-193, 2014 WL 1340077, at *2-3 (S.D. Tex. Apr. 3, 2014); *Favors v. Cuomo*, 285 F.R.D. 187, 218-219, 221 (E.D.N.Y. 2012).

Breaking with the other circuits, the panel majority found that the state legislative privilege is an "absolute bar" to civil discovery against state legislators and directed the district court to quash the legislative subpoenas in their entirety. Moreover, the panel majority vacated the magistrate judge's order requiring the legislators to produce a privilege log. Given that Petitioners only sought documents and communications that involved or were shared with third parties, however, there was a legitimate question as to whether the privilege—even assuming it extends to third-party non-legislators—had been waived, and whether the specific third-party documents and

communications actually fell within the scope of legitimate legislative activity. App. 3, 7; *see also* App. 10-11 (Kelly, J., concurring in part and dissenting in part). Nonetheless, the panel majority vacated the order requiring production of a privilege log because it found that "the use of compulsory evidentiary process against legislators and their aides" is "barred by the legislative privilege" even when the evidence sought has been disclosed beyond the legislature. App. 6.

This breadth of this holding is remarkable in light of the third-party nature of the communications at issue. The categorical rule adopted below elevates the state legislative privilege far above other privileges traditionally viewed as more robust and important, such as the attorney-client privilege. And it shields from discovery material that is plainly not privileged.

The panel majority's ruling conflicts with the decisions of every other circuit that has considered the issue. No other circuit has held that the state legislative privilege is an absolute bar to civil discovery against legislators. This lopsided circuit split is reason enough to grant this petition and vacate the ruling under *Munsingwear*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Eighth Circuit should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted,

Paul M. Smith
Mark P. Gaber
Molly E. Danahy
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200

John Echohawk
Counsel of Record
Matthew Campbell
Michael S. Carter
Allison Neswood
Native American Rights Fund
250 Arapahoe Ave.
Boulder, CO 80302
(303) 447-8760
Jechohwk@narf.org

Timothy Q. Purdon*
Robins Kaplan, LLP
1207 West Divide Ave., Ste. 200
Bismarck, ND 58501
(701) 255-3000

Samantha Kelty
Native American Rights Fund
950 F Street NW, Ste. 1050
Washington, DC 20004
(202) 785-4166

Bryan L. Sells
The Law Office of Bryan L. Sells, LLC
P.O. Box 5493
Atlanta, GA 31107
(404) 480-4212

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Counsel for Petitioners
**Counsel for Petitioners* Turtle Mountain Band of Chippewa Indians and Spirit Lake Tribe