IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, et al., Plaintiffs, v. ALVIN JAEGER, in his official capacity as Secretary of State of the State of North Dakota, Defendant.	Civil No. 3:22-cv-00022-PDW-ARS

PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS SERVED ON MEMBERS OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL STAFF

Plaintiffs respectfully move to enforce the subpoenas duces tecum served on North Dakota State Senators Ray Holmberg, Nicole Poolman, and Richard Wardner, State House Representatives William Devlin, Terry Jones, and Michael Nathe, and Clare Ness (collectively "Respondents") for documents and communications relevant to this matter.[1] Respondents erroneously assert that the legislative privilege provides an absolute bar against any obligation to respond to discovery in this matter, including with respect to documents and communications they admit were shared with non-legislators and non-legislative staff. But the legislative privilege is at best a qualified privilege, which federal courts routinely pierce in redistricting litigation, and which does not extend to documents and communications shared with third parties. Further, at least one of the Respondents has waived his legislative privilege with respect to the 2021 Redistricting Plan by voluntarily appearing and testifying about the Plan in a separate matter. Finally, the

[1] The subpoenas are compiled and attached as Exhibit 8, hereto.

Respondents' claim that they withhold responsive documents or communications on the grounds that identifying non-privileged documents and communications imposes an undue burden on a non-party fails in light of the number of communications at issue—at most 1,407 total across seven Respondents, and likely far fewer—and would render Rule 45 a nullity.

Respondents played integral roles in enacting the 2021 Redistricting Plan, including the challenged subdistrict. Representative Devlin and Senator Holmberg served as Chair and Vice Chair of the Redistricting Committee, respectively, with Senators Poolman and Representative Nathe serving as Committee members. Senator Wardner is the Chair of the Tribal State Relations Committee, on which Representative Jones also served, and both heard testimony in that Committee from Tribal Leaders and Tribal Members on the redistricting process. Representative Jones also testified before the Redistricting Committee and has funded a separate lawsuit challenging the subdistrict at issue here. Finally, Ms. Ness served as Senior Counsel at the North Dakota Legislative Council during the 2021 Redistricting Process. Defendant identified all of these individuals as having information relevant to this matter in their initial disclosures, *see* Ex. 1 at 3 ¶ 11, 8 ¶ 43, 9 ¶ 53 (Defendant's Rule 26(a)(1) Disclosures), and indeed Respondents' responses to the subpoenas demonstrate they have non-privileged documents and communications relevant to this case. Respondents are not entitled to withhold this information simply because they are non-party legislators. The court should grant Plaintiffs' motion to enforce.

BACKGROUND

I. Respondents' Refusal to Comply with Rule 45 Subpoenas

Between September 30 and October 11, 2022, Plaintiffs served subpoenas for production of documents on North Dakota State Senators Ray Holmberg, Nicole Poolman, and Richard Wardner, State House Representatives William Devlin, Terry Jones, and Michael Nathe, and

former legislative counsel Clare Ness. Collectively through counsel, Respondents provided their objections to the subpoenas on October 14, 2022. *See* Ex. 2 (Initial Objections). Respondents objected (1) that the subpoenas imposed an undue burden to the extent they sought information about the redistricting process that was available on the Redistricting Website, (2) that the October 31 deadline to respond was unduly burdensome because it did not provide sufficient time to identify which responsive documents and communications in the Respondents' possession were non-privileged and not already publicly available, and (3) that the subpoenas requested documents that were subject to the legislative, deliberative process, and attorney-client privileges. *See* Ex. 2 at 2-5.

On November 9, 2022 Plaintiffs' counsel met and conferred with Respondents' counsel, confirmed that Plaintiffs were not seeking publicly available material from the Redistricting Website, and asked Respondents to provide a reasonable timeline for reviewing the responsive documents and communications, identifying and producing non-privileged documents and communications, and providing a privilege log for any items withheld. After conferring with his clients, Respondents' counsel indicated that two weeks would be a sufficient time to collect the documents and provide a privilege log. Ex. 3 (Nov. 9 Email from S. Porsborg).

On December 1, 2022, Respondents provided a supplemental objection to the subpoenas, labeled "Privilege Log." *See* Ex. 4 (Supplemental Objection). The Supplemental Objection includes a boilerplate assertion of attorney-client and deliberative process privilege but does not identify any category of documents or communications, nor any specific documents or communications, that are protected by attorney-client or deliberative process privilege. *See* Ex. 4 at 1. Instead, the privilege analysis rests entirely on the assertion that the subpoenaed documents and communications are protected by legislative privilege. Ex. 4 at 1-2. The Supplemental

Objection further asserts that because any non-privileged documents are public, a privilege log is not required by Rule 45. Ex. 4 at 2.

Next, the Supplemental Objection describes a series of keyword searches undertaken by Respondents to identify potentially responsive communications in their emails, Teams messaging software, and text messages, and provides the number of total keyword hits for each Respondent, as well as the number of communications containing those keywords for each of three categories: (1) communications between Respondents and other legislators; (2) communications between Respondents and legislative council staff; and (3) communications between Respondents and individuals who are not legislators nor part of the legislative council staff. Ex. 4 at 4. While the Supplemental Objection does not provide the total number potentially responsive documents or communications, a hand calculation shows that for all seven Respondents, there are approximately 51,679 total keyword hits across at most 1,407 communications, with at most 543 communications between Respondents and other legislators, 438 communications between Respondents and legislative council staff, and 426 communications between Respondents and non-legislators and non-legislative council staff. Ex. 4 at 4-14.[2] The Supplemental Objection does not identify dates, the specific recipients, the subject matter, or the specific privilege asserted for the relevant documents and communications—information which is necessary for Plaintiffs to evaluate Respondents' claim of privilege. Ex. 4 at 4-14.

[2] Because the Supplemental Objection lists total communications per keyword hit, rather than providing the actual number of total communications identified, the calculation of 1,407 communications does not account for communications that contained more than one keyword. For example, a communication that stated "the 2021 Redistricting Plan subdivides Senate District 9 into House Subdistrict 9A and 9B" would be counted three times, since it contains three keywords. It likewise does not account for communications between two or more Respondents. For example, if Rep. Devlin sent an email with responsive keywords to Rep. Holmberg, this communication would be counted twice in the total. As such, it is likely that there are significantly fewer than 1,407 total documents or communications that have been identified as potentially responsive.

The Supplemental Objection further notes that with respect to Ms. Ness, the search of her emails was ongoing and the results would be produced once the search was complete. Ex. 4 at 3. It went on to note that Respondents had been provided instructions by counsel to search their phones and text messages, that search results had not yet been produced by Representative Jones, but that the results would be provided to Plaintiffs once received. *See* Ex. 4 at 3. Counsel for Respondents has represented that these limited search results will be provided early in the week of December 26, 2022.

On December 6, Plaintiffs' counsel met and conferred again with Respondents' counsel, and noted that the purported privilege log was inadequate, and that Respondents appeared to be asserting privilege over documents and communications they admitted were shared with non-legislators and non-legislative staff. Respondents' counsel stated that pursuant to caselaw cited in Representative Devlin's motion to quash the deposition subpoena served upon him, Respondents were asserting an absolute legislative privilege against responding to discovery and would neither supplement the purported privilege log nor produce any responsive documents or communications.

II. Representative Jones' Waiver of Privilege Regarding Communications Related to the 2021 Redistricting Process.

During the legislative debate on the North Dakota legislative redistricting plan, Rep. Jones—who was directly affected by the creation of subdistricts within legislative district 4—testified in opposition to the creation of subdistricts, saying "[i]f we leave subdistricts in this bill as is proposed, we will be guilty of racial gerrymandering, according to [a redistricting attorney] that I was talking to. . . . I was told today by this attorney, that is racial gerrymandering."[3] Although he revealed the content of the legal advice he was provided, he did not identify the attorney.

[3] Nov. 9 House Floor Session, 67th Leg., 1st Spec. Sess. 1:44:49 (N.D. Nov. 9, 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211109/-1/22663.

On May 5, 2022, the three-judge panel in *Walen* held a hearing on *Walen* Plaintiffs' motion for a preliminary injunction. *Walen* Plaintiffs' first witness was Rep. Jones, who voluntarily appeared and testified on behalf of *Walen* Plaintiffs. *See* Ex. 5 (May 5, 2022 PI Hrg. Tr. Excerpt). On direct examination, Rep. Jones testified that "[t]here was information coming to me from members on the Redistricting Committee that they were considering subdistricts in Districts 4 and District 9" and that eventually "the members on the committee were telling me that it was getting very serious." *Id.* at 9:19-24. He testified in Court that he had testified to the Redistricting Committee in opposition because "the information I was getting as I was studying was that what was happening was not appropriate, was unconstitutional." *Id.* at 10:7-10. When asked on direct whether "[i]n addition to attending meetings, did you discuss with members of the Redistricting Committee your concerns about the redistricting process and subdistricts in Districts 4 and 9," Rep. Jones testified, "[y]es, I did." *Id*. at 10:15-19. Testifying about these private conversations, Rep. Jones stated that "[s]omehow in my discussions with them and in the stuff that I was watching them discuss they missed the point that you had to meet all three of [the *Gingles* preconditions], and so I was desperately trying to explain to them that there's more than just one criteria that had to have been met." *Id.* at 11:14-19.

Rep. Jones was asked on direct examination whether race predominated in the drawing of subdistricts, and the Court overruled Defendant's objection that the question called for a legal conclusion. *Id.* at 12:2-16. "It does call for a legal conclusion in part. However, I think his understanding of what the process was as a member of the legislature is relevant, and I'll hear it for what it's worth." *Id.* at 12:9-12.

Plaintiffs' counsel also asked Rep. Jones to testify about conversations Rep. Jones had regarding the Legislative Council's work. Rep. Jones testified that he asked Redistricting

Committee members "whether voting data had been compiled" to analyze the requirements of the Voting Rights Act, and affirmed that his questions to members were about "whether Legislative Council had performed those analyses for the Redistricting Committee" and he was told they had not. *Id.* at 33:23-34:15. On recross, Rep. Jones testified that he also asked Legislative Council attorney Clair Ness specifically about this:

> Q: Have you ever talked to Clair Ness about analyses that she may have run?
> A: Yes.
> Q: You have spoken with her?
> A: Yes.
> Q: When did you speak with her?
> A: I can't say exactly the time but it was during this time when we were working on this stuff to find out what had been done.
> . . . .
> Q: You'd indicated earlier that someone told you that Legislative Council did not perform a data analysis; is that correct?
> A: Yes.
> Q: Who told you that?
> A: I was talking to [Rep.] Austen Scahuer and I was talking to the chairman of the committee.

Id. at 36:3-22.

Walen Plaintiffs also revealed in their depositions that Rep. Jones voluntarily spoke with them about the redistricting process, and specifically discussed the constitutionality of the subdistricts and their lawsuit. Ex. 6 at 25:12-27:23 (Henderson Deposition Tr.); Ex. 7 at 19:2-14, 21:10-22:14 (Walen Deposition Tr). During his testimony, Mr. Walen revealed that he speaks with Rep. Jones "almost four or five times a week," and has discussed the subdistrict boundaries and his lawsuit, which challenges the subdistrict at issue here. *Id*. at 30:17-20. Mr. Walen likewise testified that Rep. Jones has contributed funds to attorney fees for the *Walen* lawsuit. *Id.* at 21:10-15. Likewise, in response to questioning about how he became a plaintiff in *Walen*, Mr. Henderson revealed that Rep.

Jones had contacted him after the Legislature adopted the 2021 Redistricting Plan to discuss the constitutionality of the subdistricts. Ex. 6 at 25:12-27:23.

ARGUMENT

I. Respondents Must Produce Documents and Communications Shared with Third Parties.

At the outset, Respondents assert privileges against production of documents over which no reasonable claim of privilege exists. The Supplemental Objection identifies up to 426 communications between Respondents and individuals who are not legislators nor legislative council staff. Courts routinely require legislators to produce such communications because there is no reasonable claim that communications with third parties are covered by the legislative privilege. *See, e.g.*, *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) ("To the extent, however, that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications."); *Michigan State A. Philip Randolph Inst. v. Johnson*, No. 16-CV-11844, 2018 WL 1465767, at *7 (E.D. Mich. Jan. 4, 2018) (holding "communications between legislators or their staff and any third party are not protected by the legislative privilege."); *Jackson Mun. Airport Auth. v. Bryant*, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017) ("The Court finds that to the extent otherwise-privileged documents or information have been shared with third parties, the privilege with regard to those specific documents or information has been waived."); *Almonte v. City of Long Beach*, No. CV 04-4192(JS)(JO), 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) ("Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative

process or the basis on which to invoke privilege."). As such, this Court should compel Respondents to produce all responsive documents that fall into this category.

Nonetheless, during the meet and confer counsel for Respondents erroneously claimed that the legislative privilege shields them from producing *any* discovery in this matter, including communications with third parties. Plaintiffs are not aware of any case that holds such, and none of the cases relied on by Respondent Devlin in moving to quash the deposition subpoena involved an invocation of privilege over the production of communications with third parties. *See, e.g.*, *In re Hubbard*, 803 F.3d 1298, 1308, 1312 (11th Cir. 2015) (overturning district court ruling that legislators failed to properly assert legislative privilege, finding that plaintiffs had no interest in obtaining the subpoenaed material because they failed to state a claim, and remanding with a suggestion that the district court *sua sponte* revisit its denial of the defendants' motion to dismiss). The Court should reject Respondents' expansive assertion of legislative privilege and order Respondents to produce responsive communications that involved non-legislative parties. *See supra* (collecting cases holding that such communications are not privileged).

II. Representative Jones Has Waived Privilege with Respect to the 2021 Redistricting Plan.

Representative Jones has waived any legislative privilege with respect to his documents and communications related to the 2021 redistricting. Waiver of legislative privilege "need not be 'explicit and unequivocal,' and may occur either in the course of litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (quoting *Almonte v. City of Long Beach*, No. CV 04-4192 (JS) (JO), 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005)). This is a settled proposition. *See, e.g.*, *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (holding that legislative privilege was "clearly waived" where legislators

"testified extensively as to their motives in depositions with their attorney present, without objection"); *Trombetta v. Bd. of Educ., Proviso Township High Sch. Dist. 209*, No. 02 C 5895, 2004 WL 868265, at *5 (N.D. Ill. April 22, 2004) (explaining that legislative privilege "is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters"); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."); *see also Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3rd Cir. 1985); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). The reason for this rule is straightforward: the legislative privilege may not be used as both shield and sword whereby a legislator "strategically waive[s] it to the prejudice of other parties." *Favors*, 285 F.R.D. at 212.

Rep. Jones waived any legislative privilege when he voluntarily inserted himself into litigation challenging the Plan. Specifically, Rep. Jones testified in *Walen* in support of Plaintiffs' preliminary injunction motion about his motivations, his private conversations with other legislators, legislative staff, and outside advisors and attorneys, and his understanding of what analyses the Redistricting Committee or Legislative Council did or did not conduct. "[B]y voluntarily testifying, the legislator waives any legislative privilege on the subjects that will be addressed in the testimony." *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). Rep. Jones likewise waived privilege over matters related to drawing of subdistricts when he voluntarily contacted potential plaintiffs and discussed the constitutionality of subdistricts in Legislative Districts 4 and 9, the latter of which is at issue here. *See* Ex. 6 at 25:12-27:23; Ex. 7 at 19:2-14, 21:10-22:14, 29:11-30:20. Rep. Jones may not strategically waive the privilege by

revealing only that information he deems beneficial to his cause and then refuse to produce documents and communications and preclude the parties from probing his public, non-legislative statements on those matters.

III. Respondents' Boilerplate Assertion of the Attorney-Client and Deliberative Process Privileges Is Insufficient.

Respondents also seek to withhold responsive documents and communications on the basis of attorney client privilege. *See* Ex. 2 at 5; Ex. 4 at 1. However, Respondents have not identified with any specificity the documents and communications to which they claim this privilege applies. As courts have observed in other litigation involving state legislators, it is "highly unlikely . . . that all of the disputed requests involve documents that fall under the attorney-client and work product protection." *Doe v. Nebraska*, 788 F. Supp. 2d 975, 986 (D. Neb. 2011). As such, "[a]sserting a blanket privilege for these documents simply is not sufficient." *Id.* To the extent Respondents allege that any document or communication is withheld on the basis of attorney-client or deliberative process privilege, they must produce a privilege log that identifies those documents with specificity and provides sufficient information—including dates, recipients, and an explanation of the privilege asserted and the basis therefor privilege—to allow Plaintiffs and this court to evaluate the claim.

IV. Production of the Responsive Documents Is Not Unduly Burdensome.

Respondents argue that production of responsive documents is unduly burdensome because the subpoenas request information that is available online and because Plaintiffs do not provide sufficient time for a response. *See* Ex. 2 at 2-4; Ex. 4 at 1-2. However, Plaintiffs made clear in the initial meet and confer that they were not seeking information that is already publicly available online, and Respondents represented that two weeks would be sufficient time to review the materials and produce a privilege log. *See* Ex. 3 (Nov. 9 Email from S. Porsborg). Further,

Plaintiffs provided Respondents *more* than the requested two weeks to complete their review of the responsive materials and produce a privilege log. *See* Ex. 4 (Supplemental Objection produced December 1). Respondents newly broadened assertion that conducting a privilege review in response to a subpoena is unduly burdensome because they are non-parties would nullify Rule 45. And it is particularly unreasonable here where Respondents have already reviewed and categorized the majority of the potentially responsive documents and communications,[4] such that the additional burden of producing them is minimal. The Court should order Respondents to produce a privilege log containing sufficient detail to allow Plaintiffs to evaluate the claimed privilege with respect to any specific communications ultimately withheld.

V. Respondents Clare Ness and Terry Jones Must Complete their Searches and Produce Responsive Documents.

In the Supplemental Objection, Respondents indicated that Ms. Ness had yet to complete her search for responsive emails, and that Representative Jones had yet to complete a search of his text messages, but that these results would be forthcoming. Counsel for Respondents has represented that these additional limited search results will be provided early the week of December 26, 2022. Plaintiffs respectfully request the Court order that Ms. Ness produce any non-privileged responsive documents and communications identified in her search, including documents or communications shared with third parties, and produce a privilege log with respect to any documents withheld; and that Representative Jones produce all responsive documents and communications identified in his search as he has waived privilege over the same.

[4] This is particularly so given that so far the seven Respondents have identified at most 1,407 total potentially responsive documents. The small number of potentially responsive documents identified by the seven Respondents so far demonstrates that the subpoenas were narrowly targeted and not unduly burdensome.

CONCLUSION

For the foregoing reasons, this Court should order Respondents to comply with the subpoenas and produce all responsive non-privileged documents and communications, as well as responsive documents and communications over which privilege has been waived, and produce a privilege log containing individualized descriptions of each responsive document Respondents are withholding on the basis of privilege.

December 22, 2022

Respectfully submitted,

/s/ Michael S. Carter
Michael S. Carter
OK Bar No. 31961
Matthew Campbell
NM Bar No. 138207, CO Bar No. 40808
mcampbell@narf.org
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80301
Telephone: (303) 447-8760

Samantha Blencke Kelty
AZ Bar No. 024110, TX Bar No. 24085074
kelty@narf.org
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Ste. D
Washington, DC 20005
Telephone: (202) 785-4166

/s/ Mark P. Gaber
DC Bar No. 988077
mgaber@campaignlegal.org
Molly E. Danahy
DC Bar No. 1643411
mdanahy@campaignlegal.org
Nicole Hansen
NY Bar No. 5992326
nhansen@campaignlegal.org
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
Telephone: (202) 736-2200
Fax: (202) 736-2222

Bryan Sells (admitted *pro hac vice*)
GA Bar No. 635562
bryan@bryansellslsaw.com
THE LAW OFFICE OF BRYAN L. SELLS, LLC
PO Box 5493
Atlanta, GA 31107-0493
Telephone: (404) 480-4212

Attorneys for Plaintiffs

/s/ Timothy Q. Purdon
Timothy Q. Purdon
ND Bar No. 05392
TPurdon@RobinsKaplan.com
ROBINS KAPLAN LLP

1207 West Divide Avenue, Ste. 200
Bismarck, ND 58501
Telephone: (701) 255-3000
Fax: (612) 339-4181

Attorney for Plaintiff Spirit Lake Nation

CERTIFICATE OF SERVICE

I certify that on December 22, 2022, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber