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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	)	**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS SERVED ON MEMBERS OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNSEL STAFF**

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I. INTRODUCTION

The Plaintiffs' motion seeks to enforce a subpoena against members of the North Dakota Legislative Assembly and their counsel to produce documents covered by privilege. The doctrine of legislative privilege is derived from both the United States and North Dakota Constitution and will be abolished for all intents and purposes if the Plaintiffs' motion is granted. The Plaintiffs rely almost exclusively on various district court cases in support of their argument while ignoring the clear guidance of the Supreme Court and Circuit Courts.

In accordance with the decisions of the sister circuits, the Plaintiffs' motion should be denied because it is barred by privilege and the subpoena is unduly burdensome. Forcing members of the Legislative Assembly to comply with a subpoena in a private civil action flies in the face of legislative privilege.

II. BACKGROUND

The Court is familiar with the background of the nature of this litigation; therefore, this

brief will focus primarily on the facts related to the subject subpoenas. In general, this litigation arises from the North Dakota Legislative Assembly's decision to create House District 9A which substantially follows the border of the Turtle Mountain Indian Reservation. The effect of District 9A's creation is that North Dakota Legislative District 9 will continue to elect one senator at-large, but each subdistrict within District 9 will elect its own representative to serve in the Legislative Assembly.

The Plaintiffs allege the creation of District 9A is in violation of the Voting Rights Act. Doc. 1 at pp. 29-31. In the course of discovery, the Plaintiffs issued the following subpoenas upon the Respondents:

- Senator Ray Holmberg (Doc. #47-8 at pp. 9-15)
- Senator Richard Wardner (Doc. # 47-8 at pp. 44-50)
- Senator Nicole Poolman (Doc. # 47-8 at pp. 37-43)
- Representative Michael Nathe (Doc. #47-8 at pp. 23-29)
- Representative William R. Devlin (Doc. No. 47-8 at pp. 2-8)
- Representative Terry Jones (Doc. No. 47-8 at pp. 16-22)
- Senior Counsel at the North Dakota Legislative Council – Claire Ness[1] (Doc. No. 47-8 at pp. 30-36)

Each subpoena contained an "Attachment A" which commanded each individual to produce the following documents:

> 1. All Documents and Communications regarding Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.
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> 2. All Documents and Communications regarding tribal input, including regarding written submissions or verbal testimony from tribal representatives, with respect to the 2021 Redistricting Process or Maps.
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> 3. All Documents and Communications regarding redistricting criteria for the 2021 Redistricting Process or Maps.
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> 4. All Documents and Communications regarding District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents

[1] Effective May 9, 2022, Attorney General Drew Wrigley appointed Ness as Deputy Attorney General for the State of North Dakota.

> and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.
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> 5. All Documents and Communications regarding trainings provided to legislators in preparation for or as a part of the 2021 Redistricting Process.
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> 6. All Documents and Communications reflecting the identity of map drawers in the 2021 Redistricting Process.
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> 7. All Documents and Communications related to racial polarization or demographic studies conducted by the Redistricting Committee or Legislature as a part of or in preparation for the 2021 Redistricting Process.

See Doc. No. 47-8 at pp. 7-8, 14-15, 21-22, 28-29, 35-36, 42-43, 49-50.

The Respondents objected to the subpoenas on the grounds the subpoenas were unduly burdensome and the information sought is protected by privilege. Doc. No. 47-2. The Respondents provided the Plaintiffs a supplement to the initial objection and privilege log on December 1, 2022. Doc. No. 47-4. The supplement cited case law indicating a privilege log is not required under these circumstances and further provided:

> Nonetheless, in an effort to comply with Rule 45 to the extent practical…a key word search of each subpoenaed individual's official email and Microsoft Teams messages for the time period of January 1, 2020, through November 16, 2022. We believe the search terms used have captured all relevant communications. Further review of each key word hit would require extensive resources and clearly be unduly burdensome to a non-party.

Id. at p. 3.

The results of the key word hit search were disclosed to the Plaintiffs. Id. at pp. 5-15. Counsel for the parties met and conferred about the issues relating to the subject subpoenas on December 6, 2022. Doc. 47 at p. 5. No meeting was ever held with the magistrate, and the Plaintiffs filed their Motion to Enforce Subpoenas on December 22, 2022. Doc. 47. Results from the key word search of Claire Ness' computer were provided in an additional supplement to the

privilege log on December 30, 2022. Attached hereto as Exhibit # 1. The Plaintiffs' Motion should be denied.

III. LAW AND ARGUMENT

A. Legislative Privilege bars the Plaintiffs' motion.

The Plaintiffs' motion seeks to enforce a subpoena to compel state lawmakers and legislative counsel to produce virtually all documentation related to the 2021 Redistricting Process. The First, Ninth, and Eleventh Circuits recently have held legislative privilege bars the exact type of discovery the Plaintiffs seek. The Respondents are aware the Magistrate already rejected legislative privilege as a bar to state lawmakers' deposition testimony; however, that decision does not account for the Eighth Circuit's "policy that a sister circuit's reasoned decision deserves great weight and precedential value" in an effort to "maintain uniformity in the law among the circuits" and avoid "needless division and confusion" to prevent "unnecessary burdens on the Supreme Court docket." Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). The Magistrate's previous Order and the Plaintiffs' position are in direct conflict with the Eighth Circuit in light of the First Circuit's opinion in American Trucking Assoc. Inc. v. Alviti, 14 F. 4th 76 (1st Cir. 2021), the Ninth Circuit's opinion in Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018), and the Eleventh Circuit's opinion in In re Hubbard, 803 F.3d 1298 (11th Cir. 2015). All three of these recent Circuit Court opinions held legislative privilege is a bar to conducting discovery on state lawmakers. Reliance upon district court opinions when the sister circuits have decided this exact issue is a clear error under Eighth Circuit precedent. See Miller, 610 F.2d at 541. The Plaintiffs' motion should be denied.

1. Under Eighth Circuit Precedent, the Plaintiffs' Reliance on Various District Court Opinions Should be Disregarded.

The Plaintiffs rely on various district court opinions that failed to apply legislative privilege

in accordance with the Circuit Courts. As one district court noted, "federal courts have had to determine in a piecemeal fashion what protections should be afforded to state legislators." Jackson Municipal Airport Authority v. Bryant, 2017 WL 6520697 at *3 (S.D. Miss. Dec. 19, 2017). These "piecemeal" determinations by district courts have led to drastically different results. Compare Florida v. U.S., 886 F.Supp. 2d 1301 (N.D. Fla. 2012) (holding legislative privilege barred state lawmakers' discovery participation in Voting Rights Act case); Benisek v. Lamone, 241 F.Supp.3d 566, 576-77 (D. Md. 2017) (requiring lawmakers to testify subject to a post-testimonial protective order before any testimony became public). Further, "[s]ome courts have held that state legislative privilege provides no bar against discovery because legislative privilege is one of non-evidentiary use…not one of non-disclosure. *This approach is clearly in the minority*[2]…." American Trucking Assoc., Inc. v. Alviti, 496 F.Supp.3d 699, 715 (D. R.I. 2020) (internal citations and quotations omitted) (first emphasis in original).

The district court of Rhode Island's decision in Alviti is perhaps most emblematic because the First Circuit granted a writ of advisory mandamus to "assist other jurists, parties, or lawyers" in addressing claims of legislative privilege. Alviti, 14 F.4th at 85 (1st Cir. 2021). The First Circuit took this drastic step after the district court failed to apply legislative privilege as a bar to subpoenas issued to state lawmakers seeking documents nearly identical in scope and nature to those at issue here[3].

Alviti noted the "legal questions about the scope of the legislative privilege as applied to state lawmakers" were "unsettled" and "the lower courts have developed divergent approaches to

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[2] Notably, the Alviti district court opinion followed the minority view and was reversed on a writ of mandamus by Alviti, 14 F.4th 76 (1st Cir. 2021).

[3] A comparison of the discovery sought in Alviti will be explained more thoroughly in the unduly burdensome section of this argument.

answering them." Id. at 85. In its analysis, Alviti overturned the district court's denial of the state lawmakers' motion to quash subpoenas and correctly noted "[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. at 88 (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). The First Circuit's observation certainly is accurate upon a review of the Ninth Circuit's decision in Lee and the Eleventh Circuit's decision in Hubbard.

Importantly, the Ninth Circuit recently held legislative privilege barred local lawmakers from participating in discovery in racial gerrymandering case. See Lee, 908 F.3d 1175 (9th Cir. 2018). Likewise, the Eleventh Circuit held legislative privilege barred state lawmakers from responding to a subpoena to produce documents and reversed the district court's denial of the lawmakers' motion to quash the subpoenas. Hubbard, 803 F.3d 1298 (11th Cir. 2015). In light of these Circuit Court opinions, the First Circuit also held state lawmakers were not required to respond to a subpoena commanding the production of various documents because they were subject to legislative privilege. Alviti, 14 4th at 87 (1st Cir. 2021).

Alviti, Hubbard, and Lee deserve "great weight and precedential value" because the Eighth Circuit strives to "maintain uniformity in the law among the circuits" to avoid "unnecessary burdens on the Supreme Court docket." Miller, 610 F.2d at 541. The Eighth Circuit cautioned that unless our "courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system." Id.

The "needless division and confusion" on the issue of legislative privilege is a product of the district courts' inconsistent application of legislative privilege across the federal court system. The "divergent approaches" of district courts failed to account for the history and purpose of

legislative privilege. The Circuit Courts have not adopted the framework this Court applied in the Magistrate's previous Order and these decisions defeat the Plaintiffs' arguments here. There is no need to further the "needless division and confusion" the Eighth Circuit strives to avoid by disregarding the Circuit Courts. The Plaintiffs' motion impermissibly seeks to carve out an exception where the sister circuits have refused to do so.

a. Legislative Privilege Was First Recognized in the United States by the States.

One of the first Supreme Court cases explaining the importance of extending legislative privilege to state lawmakers was Tenney v. Brandhove, 341 U.S. 367, (1951). Tenney explained the extension of legislative privilege to state lawmakers was a necessity because the Speech or Debate Clause "was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege[4]." Tenney, 341 U.S. at 786. Tenney further noted legislative privilege is secured for the intention of enabling state representatives "to execute the functions of their office" and should be liberally applied "without inquiring whether the exercise [of the functions of their office] was regular according to the rules of the house, or irregular and against their rules." Id. at 373-74 (quoting Coffin v. Coffin, 4 Mass. 1, 19 (Mass. 1808)). Against this rationale, Tenney explained even a "claim of unworthy purpose does not destroy the privilege." Id. at 377. Twenty-four years after Tenney, the Supreme Court reiterated "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the [Speech or Debate] Clause, then the Clause simply would not provide the protection historically undergirding it…The wisdom of congressional approach or methodology is not open to judicial veto." Eastland, 421 U.S. 491,

[4] Notably, North Dakota also has specifically protected the privilege in its constitution. N.D. Const. Art. 4, § 15.

508-09 (1975). The Court explained the Clause's purpose "is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process." Brewster, 408 U.S. at 524. "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers...." Id. "In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) (internal quotation omitted).

To be sure, legislative privilege is not absolute as the Supreme Court has "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." U.S. v. Gillock, 445 U.S. 360, 372 (1980). However, "in protecting the independence of state legislatures, *Tenney* and subsequent cases...have drawn the line at civil actions." Id. at 373. More recently, the Supreme Court acknowledged "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace." Bogan v. Scott-Harris, 523 U.S. 44, 44-45 (1998). Clearly, the Supreme Court's directives are inconsistent with the Plaintiffs' arguments.

b. The Circuit Court Decisions Are Consistent with the Supreme Court's Decisions.

Under Supreme Court precedent, the Circuit Courts acknowledge the Speech or Debate Clause shields "legislators from private civil actions that create [ ] a distraction and force [ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. 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." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (alterations in original) (internal quotation omitted) (emphasis added). The Circuits also recognized "it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause." Hubbard, 803 F.3d at 1310 n. 11 (11th Cir. 2015); see also Lee, 908 F.3d at 1187 ("We therefore hold that state and local legislators may invoke legislative privilege.")

The Ninth Circuit explained:

> While *Tenney's* holding rested upon a finding of immunity, its logic supports extending the corollary legislative privilege from compulsory [discovery] to state and local officials as well. Like their federal counterparts, state and local officials undoubtedly share an interest in minimizing the 'distraction' of 'divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation.

Lee, 908 F.3d at 1187 (quoting Eastland, 421 U.S. at 503) (second alteration in original).

Circuit Courts explain the "rationale for the privilege—to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box—applies equally to federal, state, and local officials." Id. One of legislative "privilege's principal purposes is to ensure that lawmakers are allowed to focus on their public duties." Hubbard, 803 F.3d at 1310 (internal quotation omitted). "That 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." Id (emphasis added).

The Circuit Courts recognize claims of discrimination are important and involve the government's intent; however, even where - as here – the "Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render the privilege 'of little value.'" Lee, 908 F.3d at 1188 (citing Tenney,

341 U.S. at 377); see also Alviti, 14 F. 4th at 88; Hubbard, 803 F.3d at 1312. This is especially true when the lawmakers are not named as a party to the pending litigation because complying with discovery requests detracts from the performance of official duties. Hubbard, 803 F.3d at 1310; see also MINPECO, S.A., 844 F.2d at 859 (D.C. Cir. 1988).

In an effort to clarify the "divergent approaches" of the district courts' application of legislative privilege, the First Circuit correctly followed its sister circuits which "considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." Alviti, 14 F.4th at 88-89 (emphasis added). Three circuit courts held the type of discovery sought by the Plaintiffs here is barred by legislative privilege. Notably, the Eighth Circuit's policy of affording "great weight and precedential value" to "sister circuit's reasoned decision[s]" also was stated in light of "three decisions of our sister circuits" in which arguments presented by Plaintiffs were rejected. Miller, 610 F.2d at 539 (8th Cir. 1979). Under Eighth Circuit precedent this Court should follow the recent decisions of the sister circuits and deny the Plaintiffs' motion as it is barred by legislative privilege.

B. The Subpoenas are Unduly Burdensome

In addition to the requested information being covered by legislative privilege, complying with the subpoena is unduly burdensome. It is well-settled "district courts should not neglect their power to restrict discovery where justice requires [protection for] a party or person from…undue burden…." Herbert v. Lando, 441 U.S. 153, 177 (1979). It is also well-established "concern for unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Misc. Docket Matter No. 1, 197 F.3d at 927 (8th Cir. 1999). Further, nonparties are afforded "special protection against the time and expense of complying with subpoenas." Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 779 (9th Cir. 1994).

"Factors which may be considered by the Court in determining whether an undue burden exists include: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the discovery request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed." American Broadcasting Companies, Inc. v. Aereo, Inc., 2013 WL 5276124 at *8 (N.D. Iowa Sept. 17, 2013). "When a non-party is subpoenaed, however, the Court is 'particularly mindful' of Rule 45's undue burden and expense cautions." Id. (citing Misc. Docket Matter No. 1, 197 F.3d at 927.)

1. The Plaintiffs Have Not Shown How the Subpoenaed Information is Relevant or Needed to Prove Their Case.

In the Eighth Circuit, "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). The Plaintiffs have not shown why the information they seek from the Respondents is needed in this litigation. Their Complaint states a claim for relief under Section 2 of the Voting Rights Act and asserts the Legislative Assembly's decision continues "to dilute the votes" of the Plaintiffs' "in violation of Section 2 of the VRA." Doc. No. 1 at pp. 30-31 at ¶¶ 124-131.

> To succeed on a § 2 vote dilution claim, a plaintiff initially must prove three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive" (i.e., that members of the group generally vote the same way); and (3) that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

Alabama State Conf. of Nat'l Assoc. for Advancement of Colored People v. Alabama, 2020 WL 583803 at * 9 (M.D. Ala. Feb. 5, 2020) (quoting Thonrburg v. Gingles, 478 U.S. 30, 50 (1986)).

The information sought by the subpoena does not help the Plaintiffs meet their burden[5]. Clearly, the Plaintiffs simply are trying to discern the intent of individual legislators based on documents generated during the redistricting process. See Doc. No. 47-8 at pp. 7-8, 14-15, 21-22, 28-29, 35-36, 42-43, 49-50. They cannot go on a fishing expedition through the use of a subpoena to obtain this privileged information. See United States v. One Assortment of 93 NFA Regulated Weapons, 897 F.3d 961, 967 (8th Cir. 2018) (noting the Federal Rules do not allow fishing expeditions in discovery.) The subpoenaed information is not needed to prove the elements of the Plaintiffs' claim under the Voting Rights Act and the requested information lacks probative value in assessing the validity of a legislative act.

"It is a familiar principal of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive…What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." U.S. v. O'Brien, 391 U.S. 367, 384 (1968). This fundamental principal dates back to the 1800's when the Supreme Court explained the following:

> As the rule is general, with reference to enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators…will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments...The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

[5] If the Plaintiff meets their initial burden, they must then satisfy a multi-factor "totality of the circumstances" test. Id. VRA, "the totality-of-circumstances inquiry asks whether a neutral electoral standard, practice, or procedure, when interacting with social and historical conditions, works to deny a protected class the ability to elect their candidate of choice on an equal basis with other voters." Id. at * 11 (quotations omitted). Clearly, the motives of a single legislator are not needed to answer this inquiry.

Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885) (emphasis added).

This longstanding principle remains the Supreme Court's directive nearly 140 years later. See 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)).

In light of this clear Supreme Court precedent, the First Circuit quashed a subpoena directed toward state lawmakers in part because "evidence that will likely bear on the presence or absence of discriminatory effects in the actual result of [the legislative act] is more probative and more readily discoverable than evidence relating to legislative intent." Alviti, 14 F.4th at 90.

Alviti is instructive on the issue of relevance and need of information subpoenaed from a state legislator. In Alviti, the plaintiff issued subpoenas to Rhode Island state legislators "to bolster discriminatory-intent claims" arising from the passage of a legislative act called "RhodeWorks" which sought materials related to:

> (1) any efforts to mitigate the economic impact on Rhode Island citizens; (2) the expected or actual impact of the toll caps on in-state vs. out-of-state truckers; (3) the expected or actual impact of tolling only certain classes of trucks on in-state vs. out-of-state truckers; (4) the potential impact on interstate commerce; (5) alternative methods for raising funds; (6) drafts of RhodeWorks and related, failed bills, including mark-ups, comments, red-lines, revisions, etc.; (7) communications between the former Governor and legislators regarding RhodeWorks or other methods of raising funds; and (8) the public statements made by the movants and others.

Alviti, 14 F.4th at 83.

This closely resembles the type of information sought by the Plaintiffs in the subject subpoenas. See Doc. No. 47-8. While Alviti held the subpoenaed information was protected by legislative privilege, it also explained the subpoena should be quashed because the information simply was not needed by the plaintiffs. Alviti, 14 4th at 88-91. The court explained:

> To the extent that discriminatory intent is relevant, the probative value of the discovery sought by American Trucking is further reduced by the inherent challenges of using evidence of individual lawmakers' motives to establish that the legislature as a whole enacted RhodeWorks with any particular purpose. The Supreme Court has warned against relying too heavily on such evidence. Thus, when evaluating whether a state statute was motivated by an intent to discriminate…we ordinarily look first to "statutory text, context, and legislative history," as well as to "whether the statute was 'closely tailored to achieve the [non-discriminatory] legislative purpose' " asserted by the state. To be clear, we do not hold that evidence of individual legislators' motives is always irrelevant per se; we mean only to point out that it is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose, and this case does not appear to present a contrary example.
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> In sum, even assuming that a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest, the need for the discovery requested here is simply too little to justify such a breach of comity. At base, this is a case in which the proof is very likely in the eating, and not in the cook's intentions.

Id. at 90 (emphasis added) (internal citations and quotations omitted).

The analysis in Alviti is directly applicable here and is ample grounds alone for denying the Plaintiffs' motion as there is no need for the subpoenaed information.

2. The Breadth of the Request and Burden Imposed Upon the Respondents is Clearly Unreasonable.

While the Plaintiffs have not established any need for the information and it lacks probative value, the breadth of the request and burden imposed upon the Respondents is substantial. The subpoena demands the Respondents produce essentially every single document and communication related to the 2021 Redistricting Process. Doc. No. 47-8 at pp. 7-8, 14-15, 21-22, 28-29, 35-36, 42-43, 49-50. In an effort to explain the breadth of this request, Legislative Council tasked all 8 attorneys in the Legislative Council's Legal Division with conducting a "key word" search for terms that may be useful in identifying at least some of the documents requested in the subpoena. Affidavit of Emily Thompson at ¶¶ 3-4. The attorneys did not read the emails in any detail other than to identify the sender and recipients and eliminate any emails that clearly were

not responsive, such daily or weekly publication list serve items. Id. at ¶ 4. This combined time required to conduct this very cursory key word review averaged a full 8 hours per attorney. Id. at ¶ 4. It is estimated that reviewing the actual documents identified in the keyword search and performing an additional search to identify various other documents that may be responsive to the subpoena would require approximately ten 8-hour days for 8 attorneys. Id. at ¶ 6. In other words, complying with these subpoenas would require approximately 640 hours of Legislative Council's time during the limited 80-days allotted for the legislative session. Id. at ¶ 6, 8. This excludes hours needed for each Respondent to review the documents to be produced on their behalf. Id.

This clearly is a substantial intrusion that undoubtedly conflicts with the legislative privilege's purpose "to ensure that lawmakers are allowed to focus on their public duties." Hubbard, 803 F.3d at 1310 (11th Cir. 2015). The North Dakota Legislative Assembly is in session beginning January 3, 2023. Thompson Aff'd. at ¶ 7. The Legislative Council's Legal Division serves as the primary drafters of bills and resolutions introduced by the Legislative Assembly's 141 legislators during the legislative session. Id. at ¶ 8. Drafting services for over 1,000 bills have been requested of the Legislative Council staff in each of the past four legislative sessions. Id. Reallocating staff time to conduct a detailed document review to comply with the subpoena would severely hamper the Legal Division's ability to provide staff services to the Legislative Branch. Id. at ¶ 11. Complying with this subpoena would detract from their significant public duties. Id. Even if legislative privilege was inapplicable, the limited probative value of the information sought and the substantial burden upon the Respondents provide ample grounds to deny the Plaintiffs' motion.

C. The Plaintiffs' Assertions About the Insufficiency of the Privilege Log Lack Merit.

The Plaintiffs' argument that "the purported privilege log was inadequate" lacks merit. Doc. 47 at p. 5. As an initial matter, the Eleventh Circuit specifically explained that denial of the

"lawmakers' legislative privilege claims based on the other two requirements – that the privileged documents be specifically designated and described, and that precise and certain reasons for preserving confidentiality be given – was also an error of law." Hubbard, 803 F.3d at 1309. Merely asserting legislative privilege through counsel by written response was the only requirement. Id. Requiring lawmakers to "personally review the documents and raise their claim by affidavit" flies in the face of the purpose of legislative privilege and is not necessary. Id. at 1308-09. Further, when the requested information falls within the scope of a privilege and the non-privileged information requested by a subpoena is readily available to the public or of limited relevance to the Plaintiffs' burden, a privilege log under Fed. R. Civ. P. 45 is not required. Jordan v. Commissioner, Mississippi Dept. of Corrections, 947 F.3d 1322, 1328 n. 3 (11th Cir. 2020).

As explained above, the requested information falls within the scope of privilege. Further, the non-privileged information at issue in this litigation is all a matter of public record. Obviously, the subpoenas were issued in an attempt to discern the intent of individual legislators based on documents generated during the redistricting process. See Doc. No. 47-8 at pp. 7-8, 14-15, 21-22, 28-29, 35-36, 42-43, 49-50. As explained above, the motives of individual legislators lack probative value in assessing the validity of a legislative act.

Even if this information is considered "relevant," it still is protected by legislative privilege. See Lee, 908 F.3d at 1188 (9th Cir. 2018) (holding a categorical exception whenever a claim implicates the government's intent would render the legislative privilege "of little value."); See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977) (holding legislative privilege is a bar to obtaining information from lawmakers about their purpose of an official action in a case alleging discrimination).

No privilege log was required in this case. However, in an effort to comply with the rules and to support the alternative claim of unduly burdensome discovery requests, legislative staff performed a cursory keyword search and the results were disclosed to the Plaintiffs. Doc. No. 47-4. This was done in an effort to uphold the purpose of legislative privilege (not to distract lawmakers from their duties), while also providing evidence in support of the claim that the Plaintiffs' subpoena was unduly burdensome. The Plaintiffs' argument that the privilege log was insufficient lacks merit. See Hubbard, 803 F.3d at 1309; Jordan, 947 F.3d 1322, 1328 n. 3.

D. Representative Jones' Decision to Testify at the Preliminary Injunction Hearing is Not a Wholesale Waiver of Legislative Privilege and Does Not Negate the Burden Imposed by the Subpoena.

Even though Representative Jones testified at the preliminary injunction hearing, it does not negate the fact the subpoena commanding documents is unduly burdensome under the analysis above, which is incorporated herein. This alone is a sufficient ground to deny the Plaintiffs' motion. However, Jones cannot be compelled to produce documents that are subject to privilege. Even a lawmaker who waives a testimonial legislative privilege cannot be compelled to produce evidence through discovery as to "the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege[6]." Cano v. Davis, 193 F.Supp.2d 1177, 1179 (C.D. Cal. 2002). The information sought in the subpoena clearly includes information protected by privilege and compliance with the subpoena would be unduly burdensome as explained above. Therefore, the Plaintiffs' motion should be denied.

E. The Plaintiffs' Motion Also Should be Denied as to Claire Ness.

Ness served as Senior Counsel to the Legislative Assembly prior to being appointed as Deputy

[6] Respondents do not concede that Representative Jones has waived his legislative privilege. This argument is made only in the alternative.

Attorney General on May 9, 2022. The Legislative Council staff serves various roles that span from drafting bills for various legislators to testifying at legislative bill hearings and providing research services. Thompson Aff'd. at ¶ 9. This role often involves activities akin to acting as an aide to the legislators. Id. at ¶ 10. The Supreme Court has noted "for the purpose of construing the privilege a Member and his aide are to be treated as one." Gravel v. U.S., 408 U.S. 606, 616 (1972). Put another way legislative privilege – as derived from the Speech or Debate Clause – "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member itself." Id. at 618. It has been recognized that legislative privilege in Voting Rights Act cases "extends to staff members at least to the extent that the proposed [discovery] would intrude on the legislators' own deliberative process and their ability to communicate with staff members on the merits of proposed legislation." Florida v. U.S., 886 F.Supp.2d 1301, 1304 (N.D. Fla. 2012). Therefore, the legislative privilege extends equally as to Ness as it does to the lawmakers.

Alternatively, the Legislative Council also provides legal advice to lawmakers. Thompson Aff'd. at ¶ 9. In civil suits, "the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." In re County of Erie, 473 F.3d 413, 418.

> …[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest:
>
> > We believe that, if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting

> public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

Id. at 418-19 (internal quotations omitted).

While legislative privilege applies to Ness as explained above, her communications are also protected by attorney-client privilege. Additionally, responding to the subpoena would be unduly burdensome as explained in the analysis above. See Thompson Aff'd. at ¶ 11. As a result, the Plaintiffs' motion as directed toward Ness should be denied.

IV. CONCLUSION

The Plaintiffs' reliance on district court opinions in support of their argument is misplaced. The First Circuit granted a writ of advisory mandamus to "assist other jurists, parties, or lawyers" in addressing claims of legislative privilege because it was an "unsettled" area of law and district courts "developed divergent approaches" in its application. Alviti, 14 F.4th at 85 (1st Cir. 2021). Altivi quashed subpoenas to state lawmakers because they were barred by legislative privilege and correctly noted its conclusion was consistent with the Ninth and Eleventh Circuits. Id. at 88. The sister circuits deserve "great weight and precedential value" and should not be disregarded in favor of district court decision. See Miller, 610 F.2d at 541 (8th Cir. 1979).

Further, the information sought simply is not needed for the Plaintiffs to prove their case. See Alabama, 2020 WL 583803 at * 9; see also Alviti, 14 4th at 90 (quashing a subpoena in part because "the need for discovery requested here is simply too little to justify such a breach of comity.") Additionally, the subpoenas clearly constitute an undue burden and should not be enforced. Therefore, the Respondents request the Plaintiffs' motion be denied.

Dated this 5th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2023, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS SERVED ON MEMBERS OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNSEL STAFF** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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