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. Michael Howe, in his official capacity as Secretary of State of North Dakota. Defendant	**NORTH DAKOTA LEGISLATIVE ASSEMBLY; SENATORS RAY HOLMBERG, RICHARD WARDNER, AND NICOLE POOLMAN; REPRESENTATIVES MICHAEL NATHE, WILLIAM R. DEVLIN, AND TERRY JONES; AND SENIOR COUNSEL AT THE NORTH DAKOTA LEGILSATIVE COUNCIL – CLAIRE NESS NOTICE OF APPEAL FROM MAGISTRATE JUDGE'S FEBRUARY 10, 2023, ORDER GRANTING MOTION TO ENFORCE PLAINTIFFS' SUBPOENA**

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 72(a) and D.N.D. Civ. L.R. 72(D)(2), the North Dakota Legislative Assembly, Senators Ray Holmberg, Richard Wardner, and Nicole Poolman; Representatives Michael Nathe, William R. Devlin, and Terry Jones; and former Senior Counsel at the North Dakota Legislative Council – Claire Ness (collectively "Respondents") appeal the Magistrate Judge's February 10, 2023 Order granting the Plaintiffs' motion to enforce subpoena in the above-captioned case[1]. The Magistrate Judge's Order is contrary to the law and should be modified or set aside in accordance with Fed. R. Civ. P. 72(a) and D.N.D. L.R. 72(D)(2).

II. SPECIFICATION OF ISSUES FOR APPEAL

Respondents specify the following issues for appeal:

[1] In accordance with D.N.D. Civ. L.R. 72.1(D)(2), the Magistrate Judge's Order subject to this appeal is dated February 10, 2023, and filed as Document No. 63 in Case No. 3:22-cv-22. There was no hearing before the Magistrate Judge on this motion; therefore, no transcripts exist.

1) The Magistrate Judge erred by failing to find legislative privilege is a bar to responding to the third-party subpoenas; and

2) The Magistrate Judge erred by failing to find the subpoenas issued to Respondents were unduly burdensome.

III. BASIS FOR OBJECTIONS TO MAGISTRATE JUDGE'S ORDER

A. Specification of Error No. 1 – The Magistrate Judge erred by failing to find legislative privilege bars the Respondents from complying with the discovery subpoena.

The Magistrate Judge's Order acknowledged – but failed to follow – the Eighth Circuit's "policy that a sister circuit's reasoned decision deserves great weight and precedential value." Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). Respondents relied on three opinions of three different sister circuits, all of which held legislative privilege bars discovery against state or local legislators. American Trucking Assoc. Inc. v. Alviti, 14 F. 4th 76 (1st Cir. 2021) (reversing district court's denial of state lawmakers' motion to quash subpoena to produce documents of a nature and scope similar to those requested here); In re Hubbard, 803 F.3d 1298 (11th Cir. 2015) (reversing the district's order denying state lawmakers' motion to quash subpoena to produce documents based on legislative privilege and relevance); Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018) (holding legislative privilege barred the plaintiff's attempt to obtain discovery from local lawmakers in a racial gerrymandering case). The Magistrate Judge failed to give these cases the "great weight and precedential value" required under Eighth Circuit precedent.

The Magistrate Judge's analysis of these opinions was incomplete and led to erroneous conclusions. For example, the Magistrate Judge concluded the "discovery sought in American Trucking was depositions of state legislators on the theory that a state law passed with a purpose of discriminating against out-of-state business. The First Circuit concluded no important federal interest was at issue." Doc. 63 at p. 6. The Magistrate Judge was wrong that the plaintiff in

American Trucking only sought depositions of state legislators. Rather, the plaintiff "sought to enforce subpoenas seeking documents and deposition testimony from several non-party drafters and sponsors of [the law]…to bolster its discriminatory-intent claims." American Trucking, 14 F.4th at 83 (emphasis added). In fact, the plaintiff sought precisely the types of documents sought here, as the Court described:

> Specifically, the subpoenas sought materials relating 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. The State Officials each moved to quash the subpoenas on the grounds that the legislative privilege shielded them from the discovery sought.

Id.

Even more important was the Magistrate Judge's error in concluding American Trucking held there was "no important federal interest was at issue." Doc. 69 at p. 6. In fact, American Trucking noted the federal interest at stake in that case – the dormant Commerce Clause – "reflect[s] a 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention." American Trucking, 14 F.4th at 88 (quoting Tenn. Win & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449, 2461 (2019). Further, American Trucking held legislative privilege must apply "because proof of the subjective intent of state lawmakers is unlikely to be significant enough in this case to warrant setting aside the privilege." Id. at 88-89. The Magistrate Judge's analysis of American Trucking was not only incomplete but also inaccurate. Compare Id.; Doc. 69 at p. 6.

The Magistrate Judge also erred in analyzing the Eleventh Circuit's decision in Hubbard.

First, the Magistrate Judge summarized that case by stating "it was apparent from the face of the document subpoenas that none of the requested information could have been outside the legislative privilege." Doc. 63 at p. 7. In fact, Hubbard held "[N]one of the relevant information sought in this case could have been outside of the legislative privilege." Hubbard, 803 F.3d at 1311 (emphasis added).

As will be shown below, this is a significant and dispositive difference.

Second, the Magistrate Judge summarized Hubbard by noting it "recognized a qualified state legislative privilege but concluded no important federal interest was at stake in the litigation." Doc. 63 at p. 7. On the contrary, Hubbard held:

> AEA's [Alabama Education Association's] subpoenas do not serve an important federal interest. Don't misunderstand us. We are not saying that enforcing the First Amendment is not an important federal interest or that it does not protect important constitutional values. Obviously it is and does. What we are saying is that, as a matter of law, the First Amendment does not support the kind of claim AEA makes here: a challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it. And because the specific claim asserted does not legitimately further an important federal interest in this context, the legislative privileges must be honored and the subpoenas quashed.

Id. at 1312 (emphasis added).

Finally, the Magistrate Judge ignored Hubbard's explanation of how legislative privilege is "qualified." Doc. 69 at p. 7. Hubbard stated:

> …a state lawmaker's legislative privilege must yield in some circumstances when necessary to vindicate important federal interests such as the enforcement of federal criminal statutes. But the Supreme Court has explained that, for the purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government.

Hubbard, 803 F.3d at 1311 (emphasis added) (quotation omitted).

The final circuit case misinterpreted by the Magistrate Judge was Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018). Doc. 63 at pp. 6-7. The Magistrate Judge's Order

inaccurately summarized Lee as follows: "Though recognizing there are circumstances in which a legislative privilege must yield to a decision-maker's testimony, the plaintiff's request for depositions of city officials was denied because of inadequacy of the factual record. Id. at 1188. In the present case, the factual record is adequate to consider Turtle Mountain's motion." Id. A lengthy quote from Lee is appropriate here to reveal the inaccurate and conclusory nature of the Magistrate Judge's summary:

> 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." 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. "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference…
> …
>
> Although the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony, it has repeatedly stressed that "judicial inquiries into legislative or executive motivation represent a substantial intrusion" such that calling a decision maker as a witness "is therefore 'usually to be avoided.
> …
>
> … While the Court acknowledged that "[t]he legislative or administrative history may be highly relevant," it nonetheless found that even "[i]n extraordinary instances ... such testimony frequently will be barred by privilege." Applying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in "extraordinary circumstances."
>
> We recognize that claims of racial gerrymandering involve serious allegations….Here, Defendants have been accused of violating that important constitutional right.
>
> But the factual record in this case falls short of justifying the "substantial intrusion" into the legislative process. Although 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…*Village of Arlington Heights* itself also involved an equal protection claim alleging racial discrimination – putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of "extraordinary instances" that might justify an exception to the privilege. Without sufficient grounds to

> distinguish those circumstances from the case at hand, we conclude that the district court property denied discovery on the ground of legislative privilege.

Id. at 1187-88 (emphasis added) (internal citations omitted).

What is the difference between the "factual record" in this case and that in Lee? What about this case requires the North Dakota Legislative Assembly to forego a long-standing privilege that "extends to discovery requests, even when a lawmaker is not named a party in the suit" because "complying with such requests detracts from the performance of public duties?" Hubbard, 803 F.3d at 1310. The Magistrate Judge does not say.

The Magistrate Judge is silent on these issues and instead disregarded circuit court precedent – most importantly Lee - to simply conclude "[h]ere, an important federal interest – the right to vote without racial discrimination – is at issue." Doc. No. 69 at p. 6. This conclusory statement is unsupported by the circuits which have considered the issue. In fact, American Trucking specifically noted – as here – "[w]e have before us neither a federal criminal case nor a civil case in which the federal government is a party…Both 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." American Trucking, 14 F.4th at 88 (1st Cir. 2021). The Magistrate Judge failed to explain any valid grounds upon which the subpoenas directed to the Respondents should be treated differently than the discovery sought in the First, Ninth, or Eleventh Circuits[2].

[2] It should be noted that the Magistrate Judge's Order held Representative Jones waived his state legislative privilege to withhold documents in this lawsuit because he previously testified in another lawsuit. Doc. 63 at pp. 5, 12, 19. The Respondents do not concede that Representative Jones's testimony at the Walen preliminary injunction was a waiver of his legislative privilege for the reasons argued in that case. However, to be clear, the Respondents further do not concede that any waiver in a different case should be construed as a waiver in other cases. Nonetheless, as explained below, the subpoena directed toward Representative Jones does not seek any relevant or needed information and would result in an undue burden. Therefore, the motion to enforce the subpoena against Representative Jones should be denied for those reasons as well.

B. Specification of Error No. 2 – The Magistrate Judge erred by failing to find the subpoenas issued to Respondents were unduly burdensome.

The Magistrate Judge's ruling on undue burden is also inconsistent with the precedent of the Supreme Court and our sister circuits. Specifically, the Magistrate Judge failed to consider the factors relevant in an undue burden analysis. District courts in the Eighth Circuit have applied the following 6-factor test imported from the Fifth Circuit for determining whether a subpoena presents an undue burden:

> "In determining whether a subpoena presents an undue burden, courts consider the following factors: '(1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document 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.'"

Glenford Yellow Robe v. Allender, 2010 WL 1780266 at *5 (D.S.D. Apr. 30, 2010) (quoting Jade Trading, LLC v. United States, 65 Fed. Cl. 188, 190 (Fed. Cl. 2005) (quoting Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004)).

"Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party." Wiwa, 392 F.3d at 818. Given the obvious parallels between the first and second factors, they will be analyzed together as will the third, fourth, fifth, and sixth factors. The Magistrate Judge only addressed the first and sixth factor and failed to acknowledge the others.

1. The Magistrate Judge made an erroneous finding on relevance and failed to address the "need" for the requested information.

In the Eighth Circuit, "discovery may not be had on matters irrelevant to the subject matter involved in the pending action, and even if relevant, discovery is not permitted where no need is shown…" Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) (citations omitted).

The Magistrate Judge notes the Respondents argued "the subpoenaed information is not

needed to prove the elements of [Turtle Mountain's] claims under the Voting Rights Act and the requested information lacks probative value in assessing the validity of a legislative act." Doc. 63 at p. 17 (alteration in original). The Order then notes Turtle Mountain argued "communications demonstrating 'illicit motive' by one or more legislators would certainly be relevant and probative evidence of an ongoing history of voting-related discrimination, the extent to which voting is racially polarized, and the use of racial appeals in the political process." Doc. 63 at p. 17. The Magistrate Judge concluded that "[t]hough legislative intent is not central to Turtle Mountain's claims, such evidence may nonetheless be relevant…Accordingly, the court finds Turtle Mountain's subpoenas seek relevant information." Id. The Magistrate Judge's conclusion that the requested information – communications demonstrating 'illicit motive' by one or more legislators – seeks relevant information under Rule 26 ignores the myriad of Supreme Court and circuit court cases cited by the Respondents. Further, the Magistrate Judge made no finding as to whether Turtle Mountain needs the subpoenaed information for the prosecution of its claim. Doc. 63 at *passim*. The Magistrate Judge's failure to address this important issue is a clear error of law that must be reversed.

i. Communications "demonstrating 'illicit motive' by one or more legislators" are not relevant in this case.

The Magistrate Judge did not address the numerous Supreme Court decisions cited and argued by the Respondents with respect to relevance of the motives of "one or more legislators." On appeal, the Respondents reiterate the following:

> As the rule is general, with reference to enactments of all legislative bodies, that 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 inquires as impracticable and futile.

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

The Supreme Court has reiterated this view multiple times in the past 138 years. See e.g. U.S. v. O'Brien, 391 U.S. 367, 384 (1968) ("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."); see also Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) ("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 others to enact it.")

The error in the Magistrate Judge's relevancy ruling here is further highlighted by Phelps-Roper v. Heineman, 2014 WL 562843 (D. Neb. Feb. 11, 2014). In that constitutional case, the plaintiff sought discovery from Nebraska State Senator Krist "about statements attributed to him in a newspaper article, as well as his public statements about the legislation." Id. at * 1. In Phelps-Roper, the court did not reach the issue of privilege or burden because it held "Krist's testimony would not be relevant to this suit. To the extent that legislative intent is at issue in this case, the examination of such intent should be limited to the official legislative history, which does not include post-enactment opinions from legislators." Id. at * 2. The court further quashed a subpoena requiring the Clerk of the Nebraska Legislature to produce "materials, including non-testimonial letters and exhibits" because the Court reasoned "that other than the official legislative history, the discovery sought is irrelevant to the issues involved in this litigation. As stated above, the analysis of legislative intent must be limited to the official legislative history…." Id. at * 2.

Despite the Supreme Court's clear directive that inquiries into the motives of individual legislators are "impractical and futile," the Magistrate Judge found these inquiries were "relevant" in this lawsuit. Based on this precedent alone, the Plaintiff's motion should have been denied because it failed to seek relevant information. See Soon Hing, 113 U.S. at 710-11; O'Brien, 391 U.S. at 384; Dobbs, 142 S.Ct. at 2255; Phelps-Roper, 2014 WL at *1-2; see also McDowell v. Watson, 59 Cal.App.4th 1155, 1161 n.3 (1997) ("Generally the motive or understanding of an individual legislator is not properly received as evidence of that collective intent, even if that legislator was the author of the bill in question. Unless an individual legislator's opinions regarding the purpose or meaning of the legislation were expressed in testimony or argument to either house of the Legislature or one of its committees, there is no assurance that the rest of the Legislature even knew of, much less shared, those views.") It is unclear why or how the Magistrate Judge determined that subpoenas issued to 6 of the 141 members of the Legislative Assembly, which indisputably sought to demonstrate an "'illicit motive' by one or more legislators," (Doc. 63 at p. 17) could provide relevant information in this lawsuit. This alone is a clear error of law justifying reversal.

ii. Even if the subpoenas sought "relevant" information, the information is not needed.

Even if the Magistrate Judge's opinion on "relevancy" is upheld, the Order did not address the need for the subpoenaed information. Doc. 63 at *passim.* Again, "even if relevant, discovery is not permitted where no need is shown...." Miscellaneous Docket Matter No. 1, 197 F.3d at 925. There are no grounds – and the Magistrate Judge has not explained any – showing a need for the subpoenaed documents. As explained above, there is controlling precedent that such statements are irrelevant; however, the complete lack of need for this type of information is also well-established by our sister circuits.

For example, American Trucking explained that even if "relevant," evidence of an individual lawmakers' motives is not needed:

> 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.
>
> 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 (internal citations and quotations omitted) (alteration in original).

In reaching the same ultimate conclusion, the Eleventh Circuit in Hubbard, provided a slightly different analysis as it involved a First Amendment retaliation claim. Hubbard, 803 F.3d at 1310. Hubbard recognized "the factual heart of the retaliation claim and the scope of the legislative privilege were one and the same: the subjective motivations of those acting in a legislative capacity. Any material, documents, or information that did not go legislative motive was irrelevant to the retaliation claim, while any that did go to legislative motive was covered by the legislative privilege." Id. at 1311. In this context, Hubbard noted the "subpoenas' only purpose was to support the lawsuit's inquiry into the motivation behind Act 761, an inquiry that strikes at the heart of legislative privilege." Id. at 1310 (emphasis added). This follows the longstanding principle that "[i]nto the motives which induced members of Congress to enact the [statute], this

court may not inquire." State of Arizona v. State of California, 283 U.S. 423, 455 (1931).

Lee also noted that claims of racial discrimination put "the government's intent directly at issue," but under Supreme Court precedent "such a claim was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege." Lee, 904 F.3d at 1188 (citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977)). Lee based this analysis on the premise that "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" and even at the local level "the exercise of legislative discretion should not be inhibited by judicial interference...." Lee, 908 F.3d at 1187 (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975); Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998)). Applying this precedent, Lee held the "district court properly denied discovery on the ground of legislative privilege."

Put simply, the Magistrate Judge's determination that the Plaintiff's request for information to determine an "illicit motive" was "relevant" to this litigation does not provide a valid ground for enforcing the subpoenas. Reasoned decisions of our sister circuits have clearly established a simple showing of relevance is insufficient to enforce a subpoena against members of the Legislative Assembly or their staff. See American Trucking, 14 4th 76 (1st Cir. 2021); Hubbard, 803 F.3d 1298 (11th Cir. 2015); Lee, 908 F.3d 1175 (9th Cir. 2018).

In addition to the numerous cases holding the motives of a legislator are either irrelevant or devoid of need, the elements of the Plaintiff's only claim – a Section 2 Vote Dilution Claim – do not require any showing of legislative motive. The Respondents set forth the *Gingles* elements in their opposition brief and explained "[a]t bottom, the totality of the 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." Alabama State Conf. of Nat'l Assoc. for Advancement of Colored People v. Alabama, 2020 WL 583803 at * 11 (M.D. Ala. Feb. 5, 2020) (summarizing the factors in the Senate Report also set forth on page 16 of Doc. 59). There is nothing in the three *Gingles* preconditions or within the "totality of the circumstances inquiry" which contemplates the motives of individual lawmakers.

This is no different than other challenges to legislative acts in that "the proof is very likely in the eating, and not in the cook's intentions." American Trucking, 14 F.4th at 90. As in American Trucking, "the need for the discovery requested here is simply too little" and the Magistrate Judge never addressed this indispensable element of "need" under Eighth Circuit precedent. Id.; see also Miscellaneous Docket Matter No. 1, 197 F.3d at 925 (8th Cir. 1999) ("discovery is not permitted where no need is shown…."). The need for the information sought was never evaluated or established. This is a clear error of law and should be reversed.

iii. The breadth, scope, and lack of particularity of the document requests – among other factors – results in a substantial burden imposed upon Respondents.

a. The Magistrate Judge's Order did not evaluate the actual document requests in the subpoenas.

It does not appear the Magistrate Judge gave any consideration to the expansive scope of the subpoenas issued to the Respondents. This is obvious in two ways, 1) there is no analysis of the actual requests in the Magistrate Judge's Order and 2) the Magistrate Judge's comment that a "close reading of each of the three cases shows that none involved the 'exact type of discovery' Turtle Mountain now requests." See Doc. 63 at p. 6.

The subpoenas request the following information from each Respondent:

1. All Documents and Communications regarding Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.

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.

3. All Documents and Communications regarding redistricting criteria for the 2021 Redistricting Process or Maps.

4. All Documents and Communications regarding District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.

5. All Documents and Communications regarding trainings provided to legislators in preparation for or as a part of the 2021 Redistricting Process.

6. All Documents and Communications reflecting the identity of map drawers in the 2021 Redistricting Process.

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.

Doc. 47-8 at pp. 7-8; 14-15; 21-22; 28-29; 35-36; 42-43; 49-50[3].

The subpoenas request the Respondents produce essentially every document or communication related to the 2021 Redistricting Process. Further, contrary to the Magistrate Judge's assertion, this request is strikingly similar to the requests for documents in both American Trucking and Hubbard. The subpoenas in American Trucking sought essentially all information in

[3] The Subpoenas defined "Document" as "all documents, electronically stored information, and tangible things within the broadest possible interpretation of writing, as contained within Rule 1001 of the Federal Rules of Evidence, and/or within the broadest possible interpretation of 'document,' 'electronically stored information,' or 'tangible thing,' as contained in Rule 34 of the Federal Rules of Civil Procedure." Doc. 47-8 at p. 5; 12; 19; 26; 33; 40; 47. Further, "Communication" is defined in the subpoena as "any exchange or transfer of information between two or more persons or entities, including, but not limited to documents, audio recordings, photographs, data, or in any other form including electronic forms such as e-mails or text messages." Id.

the former state officials' possession as it related to the passage of "RhodeWorks." American Trucking, 14 F. 4th at 83[4]. Similarly, the subpoenas in Hubbard sought essentially all information in the state officials' possession as it related to the passage of Act 761. Hubbard, 803 F.3d at 1303 n.4.

The Plaintiffs here may respond that the Magistrate Judge limited what is to be provided immediately to only communications between Respondents and third parties. As to the remainder of the documents, only a burdensome and detailed privilege log is required. This limitation does not save the Magistrate Judge's Order. The subpoenas in both American Trucking and Hubbard requested state officials produce third-party communications. See American Trucking, 14 F. 4th at 83; Hubbard, 803 F.3d at 1303 n.4. Yet, unlike here, both American Trucking and Hubbard held the government officials need not respond to the subpoenas and no privilege logs were required, so the undue burden analysis was not performed. These cases show federal law does not require state officials to respond to this type of discovery. It was improper for the Magistrate Judge, in this case, involving a legislative body, to either produce a broad category of documents (third party communications), or a burdensome privilege log as to all the rest. It is not keeping with the holdings of our sister circuits, and is unlikely to be upheld by our own.

b. The burden imposed on the Respondents is substantial.

Instead of following the binding and persuasive precedent above, the Magistrate Judge evaluated the Respondent's undue burden claim and performed a superficial analysis of the Respondent's information to erroneously conclude "[r]espondents have not provided sufficient information to establish an undue burden." Doc. 63 at p. 18. In reaching this conclusion, the

[4] The quote from American Trucking identifying the requests for information in the subpoenas is found on page 3 of this Appeal.

Magistrate Judge misconstrued the Respondent's information, and concluded a non-party subject to a subpoena can simply hire outside counsel to respond to a subpoena to alleviate the burden. Id. at pp. 18-19.

Pursuant to Rule 45, a "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). In the Eighth Circuit "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 927 (8th Cir. 1999) (quoting Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998)). Put another way, the "Federal Rules of Civil Procedure explicitly provide for limitations on discovery…The Federal Rules also afford nonparties special protection against the time and expense of complying with subpoenas." Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 799 (9th Cir. 1994). Further, "a court may use Rule 26(b) to limit discovery of agency documents or testimony of agency officials if the desired discovery is relatively unimportant when compared to the government interests in conserving scarce government resources." Id. at 799-80. The Supreme Court explained "all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action'…and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance….or undue burden or expense….' Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." Herbert v. Lando, 441 U.S. 153, 1549 (1979) (internal italics and alterations in original). Further, "when reviewing subpoenas directed to nonparties, a court should also examine issues related to the expected compliance costs in light

of Rule 45's provision that nonparties be protected against significant expense." Wilmas v. Renshaw, 2021 WL 1546142 at *2 (E.D. Mo., Apr. 20, 2021) (slip copy).

The Magistrate Judge's Order lacks any legal analysis with respect to the burden imposed on a third-party. For example, the Magistrate Judge makes the unfounded conclusion that "some of the results of the initial keyword search appear unreliable. One subpoenaed state senator, for example, had thirty-two keyword 'hits' for the phrase 'Voting Rights Act.' Yet apparently the phrase did not occur in any communication between the senator and another legislator, the senator and Legislative Council staff, or the senator and a third party." Id. at p. 19. This is based on a complete misunderstanding of the process utilized by Respondents. First, "[a]ll eight attorneys in the Legislative Council's Legal Division cooperatively performed a 'key word' search." Doc. 52 at p. 2. Next, the "total number of search results, generated by the key word search, were recorded." Doc. 47-4 at p. 3. This is what is contained in the first column of the "privilege log" the Respondents prepared to establish undue burden. Next, "the communications identified in the key word search were not reviewed in any detail other than to identify the sender and recipients and eliminate any correspondence, that at a glance, clearly could be identified as nonresponsive, such as daily or weekly publication list serve items." Doc. 52 at p. 2. Based on an extremely cursory review, any items identified as clearly non-responsive (such as list serve items) were excluded from the final three columns of the "privilege log." Id.

Further, the Magistrate Judge's Order found "the assertion that compliance with Turtle Mountain's subpoenas would require 640 hours of Legislative Council staff attorney time is not adequately explained." Doc. 63 at p. 19. Emily Thompson, Legal Division Director, explained this estimate in her affidavit as follows:

> If the Legislative Council's Legal Division is mandated to review the documents identified in the "key word" search to determine whether each document actually

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

Doc. 52 at pp. 2-3.

Thompson further stated the initial cursory process to determine the number of possible documents and establish undue burden required 64 hours of the Legislative Council's Legal Division's time. Id. Thompson was involved and had first-hand knowledge of the process. Based on this first-hand knowledge of what was required to compile the initial table, she estimated a more comprehensive review to find each and every document that is responsive to the Plaintiff's subpoena would take ten times as long. Doc. 52 at pp. 2-3. In light of the definitions within the subpoena and the limited review already performed, Thompson's estimate is entirely reasonable. Doc. 52 at p. 2.

The Respondents are at a loss as to what they could possibly do to explain the burden of responding to these subpoenas without actually performing all of the work, recording their time and effort, and then claiming undue burden after the fact. The Magistrate Judge would have the Respondents undertake an undue burden to establish the subpoenas would subject them to an undue burden. As explained above, this is exactly what Rules 26, 45, and the cases interpreting them are designed to prevent.

It was a clear error for the Magistrate Judge to completely dismiss the statements in Thompson's affidavit. Clearly, the Federal Rules are designed to protect against excessive expense and undue burden; nonetheless, the detailed explanation of the burden imposed by the

Plaintiff's subpoenas was essentially ignored by the Magistrate Judge.

Surprisingly, the Magistrate Judge acknowledged the ongoing legislative session imposes a demand on Legislative Council staff, but found this irrelevant because "Respondents have not explained that Legislative Council staff attorneys, rather than Respondents' counsel and their staff, would need to review the documents at issue. Accordingly, the court finds the Respondents have not shown compliance with Turtle Mountain's subpoenas would result in an undue burden under Rule 45(d)(3)(A)(iv)." Doc. 36 at p. 19.

The Magistrate Judge's determination that a subpoena might be an undue burden on Respondents, but not on their retained outside counsel, disregards every aspect of the robust consensus of law set forth above. Under the Magistrate Judge's logic, a nonparty cannot establish an undue burden because that burden can be alleviated by simply hiring a law firm to perform all of the work required for subpoena compliance. The Federal Rules do require such an absurd result. As explained above, nonparties are afforded "special protection against the time and expense of complying with subpoenas." Exxon Shipping Co., 34 F.3d at 799. Further, the Magistrate Judge's Order failed to compare the importance of the discovery sought "to the government interests in conserving scarce government resources." Id. at 799-80. Nonparties are especially "protected against significant expense" in complying with a subpoena. Wilmas, 2021 WL at *2 (E.D. Mo., Apr. 20, 2021). The Magistrate Judge's Order is silent as to the immense expense that would be required to comply with the subpoenas.

In fact, the Magistrate Judge went even further to impose an additional burden on the Respondents that was not even contemplated in Thompson's affidavit. The Magistrate Judge requires Respondents to prepare a privilege log for each withheld document that includes "the general nature of the document, the identity of the author, the identities of all recipients, and the

date on which the document was written." Doc. 63 at p. 20. Based on the Magistrate Judge's calculations – which only account for the initial cursory review by Legislative Council's Legal Division – this detailed privilege log would need to be made for at least 2,074 separate documents. Doc. No. 63. This is work in addition to the estimated 640 hours of time required to simply perform a more comprehensive review of the key-word search, and "perform an additional search and review of correspondence that was not flagged in a key word search, but may be responsive to the Plaintiffs' requests." Doc. 52 at p. 2.

The Eleventh Circuit held that requiring members of a legislative body to prepare a privilege log is contrary to the entire purpose of legislative privilege and is not necessary. Hubbard, 803 F.3d at 1308-09 (holding "that the privileged documents be specifically designated and described, and that precise and certain reasons for preserving the confidentiality be given—was also an error of law…Given the purpose of the legislative privilege…there was more than enough under Rule 45 to assess the claim of privilege and to compel the granting of the motions to quash."). For all of the above reasons, the Magistrate Judge's Order failed to evaluate the burden imposed on the Respondents under any legal standard – and certainly not the binding ones. This is a clear error of law that should be reversed.

IV. CONCLUSION

For the aforementioned reasons, the Magistrate Judge's February 10, 2023, Order should be reversed as it is clearly erroneous and contrary to law.

Dated this 24th day of February, 2023.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

Scott K. Porsborg (ND Bar ID #04904)
sporsborg@smithporsborg.com
Brian D. Schmidt (ND Bar ID #07498)
bschmidt@smithporsborg.com
Austin T. Lafferty (ND Bar ID #07833)
alafferty@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for North Dakota Legislative Assembly; Ray Holmberg, Nicole Poolman, Rich Wardner, Bill Devlin, Mike Nathe, and Terry B. Jones

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2023, a true and correct copy of the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY; SENATORS RAY HOLMBERG, RICHARD WARDNER, AND NICOLE POOLMAN; REPRESENTATIVES MICHAEL NATHE, WILLIAM R. DEVLIN, AND TERRY JONES; AND SENIOR COUNSEL AT THE NORTH DAKOTA LEGILSATIVE COUNCIL – CLAIRE NESS NOTICE OF APPEAL FROM MAGISTRATE JUDGE'S FEBRUARY 10, 2023, ORDER GRANTING MOTION TO ENFORCE PLAINTIFFS' SUBPOENA** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

ATTORNEYS FOR PLAINTIFFS

Michael S. Carter
Matthew Campbell
Attorneys At Law
1506 Broadway
Boulder, CO 80301

carter@narf.org
mcampbell@narf.org

ATTORNEYS FOR PLAINTIFFS

Mark P. Garber
Molley E. Danahy
Attorneys At Law
1101 14th St. NW, Ste. 400
Washington, DC 20005

mgaber@campaignlegal.org
mdanahy@campaignlegal.org

ATTORNEY FOR PLAINTIFFS

Timothy Q Purdon
Attorney at Law
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501

tpurdon@robinskaplan.com

ATTORNEY FOR PLAINTIFFS

Samantha B. Kelty
Attorney at Law
1514 P St. NW, Suite D
Washington, D.C. 20005

kelty@narf.org

ATTORNEY FOR PLAINTIFF

Bryan Sells
Attorney at Law
P.O. Box 5493
Atlanta, GA 31107-0493

bryan@bryansellslaw.com

ATTORNEYS FOR DEFENDANT MICHAEL HOWE

Matthew A Sagsveen
Assistant Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

masagsve@nd.gov

David R. Phillips
Bradley N. Wiederholt
Special Assistant Attorney General
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247

dphillips@bgwattorneys.com
bwiederholt@bgwattorneys.com

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