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

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO RESPONDENTS' APPEAL OF THE MAGISTRATE JUDGE ORDER GRANTING MOTION TO ENFORCE SUBPOENAS

The Magistrate Judge's Order granting Plaintiffs' motion to enforce subpoenas served on six third-party individuals ("Respondents") should be affirmed. Respondents' attempt to assert privilege over documents shared with individuals outside the scope of the privilege has no basis in law. Respondents have not identified any court that has extended a privilege in such a manner, and Plaintiffs are aware of none. The non-privileged documents ought to have been produced months ago, and certainly when the Magistrate Judge correctly rejected Respondents' assertion of privilege. Respondents' continued refusal to produce these documents, including through this meritless appeal, should be seen for what it is: an attempt to run out the clock on Respondents' discovery obligations. The Court should not countenance such gamesmanship, but rather should order Respondents to promptly produce the relevant documents and privilege log.

STANDARD OF REVIEW

The Court's review of a Magistrate Judge's finding on nondispositive matters is "extremely deferential." *Kraft v. Essentia Health*, No. 3:20-cv-121, 2022 WL 2619848, at *3 (D.N.D. July 8, 2022); *see also Jordan v. Comm'r, Mississippi Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020) (holding that a decision on a motion to quash subpoenas should be reviewed under the "clearly erroneous" or "contrary to law" standard). The party bringing the appeal bears the burden of proving the Magistrate Judge's decision was clearly erroneous or contrary to law. *Id.* Any objection to the Magistrate Judge's order not "specifically designate[d]" in the timely filed notice of appeal is waived and unreviewable on appeal. D.N.D. Civ. L.R. 72.1(D)(2); Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

BACKGROUND

In September and October 2022, Plaintiffs served third-party subpoenas on six members of the North Dakota State Legislature and one former Legislative Council staff attorney

(collectively "Respondents"). After extensive conferences between the relevant parties and an incomplete and nonresponsive production from the Respondents, on December 22, 2022, Plaintiffs moved to enforce the subpoenas. ECF No. 47. On February 10, 2023, the Magistrate Judge granted Plaintiffs' motion to enforce. ECF No. 63. Respondents subsequently appealed. ECF No. 64. Plaintiffs respectfully request that the Magistrate Judge's order be affirmed.

ARGUMENT

I. The Magistrate Judge correctly rejected Respondents' claim of privilege.

As Plaintiffs have repeatedly explained, they seek to enforce the subpoenas only with respect to a small number of communications that have already been identified by Respondents, over which legislative privilege does not exist or has been waived, *i.e.*, communications between Respondents and third parties, and communications over which Representative Jones has waived privilege by testifying publicly about the challenged plan, the legislature's intent in adopting it, and his conversations with other legislators, legislative counsel, outside lawyers, and third parties. Although Respondents have expended a great deal of time, effort, and ink explaining the history and protections afforded by the legislative privilege, they continue to make no effort to explain why they are entitled to withhold documents over which no such privilege applies. The Magistrate Judge correctly rejected Respondents' arguments and should be affirmed.

A. Respondents' Communications with Third Parties

As explained in Plaintiffs' motion to enforce, no reasonable claim of privilege exists with respect to communications that involve or were shared with third parties. *See* Mot. at 8-9, ECF No. 47. Respondents do not seriously dispute this. Instead, they continue to erroneously assert that the legislative privilege serves as an absolute bar to discovery against legislators. *See, e.g.*, Appeal at 2, ECF No. 64. But despite Respondents' lengthy canvass of the history and scope of the

legislative privilege, they fail to identify a single case supporting extending the privilege to communications with third parties or to privileged material shared with third parties. In fact, courts that have considered this issue routinely find such documents and communications to be outside the scope of the privilege. *See, e.g.*, *Perez v. Perry*, No. SA-11-CV-360-OLG, 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 . . . but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.").

As they have in previous filings, Respondents rely solely on cases where the parties agreed that the subpoenaed information was privileged, and the task for the court was to determine whether the interests asserted were sufficient to overcome the privilege. *See, e.g.*, *Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) ("Thus, the only question is whether the district court committed an error of law or exceeded the scope of its discretion in determining that American Trucking's interest in obtaining evidence of the State Officials' subjective motives

outweighed the comity considerations implicated by the subpoenas."); *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015) (noting "none of the information sought could have been outside the privilege"); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018) (considering only whether all state and local officials can assert legislative privilege and whether the legislative privilege asserted should be overcome). Notably, the Magistrate Judge has already considered whether Plaintiffs' interest here outweighs the legislative interest in maintaining the privilege with respect to this case and found in favor of Plaintiffs. *See* Order Denying Mot. to Quash, ECF No. 48. But that analysis is irrelevant here, where Plaintiffs do not seek to overcome an assertion of legislative privilege, but rather to obtain documents to which it does not apply. Respondents' extensive quotations from *American Trucking*, *In re Hubbard*, and *Lee* do not address this point.

Permitting Respondents to withhold responsive documents that have been shared with third parties would significantly expand the legislative privilege well beyond reason, particularly in light of their failure to identify any authority in support of such a position. *Cf., e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) (noting that "a number of courts have rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege.") (internal citation omitted). Likewise, it would fly in the face of the general principle that sharing information with third parties breaks privilege. *See id.* at *10 ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."). The Magistrate Judge was correct to decline Respondents' invitation to expand the privilege in so unprecedented a manner. *See, e.g*, *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (finding that the legislative privilege "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or

excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."); *id.* (noting that "the legislative privilege for state lawmakers is, at best, one which is qualified"); *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022) ("Both this court and the Supreme Court have confirmed that the state legislative privilege is not absolute.").

For these reasons, the Magistrate Judge's Order was not contrary to law.

B. Communications Sought from Representative Jones

The Magistrate Judge correctly found that Representative Jones waived his own assertion of legislative privilege by testifying publicly about the subject matter of this litigation and his related communications. Order at 11-12, ECF No. 63. In their appeal of this Order, Respondents simply assert in a footnote that they do not concede that Representative Jones waived his own assertion of legislative privilege by publicly testifying, but provide no argument or authority on this point. Appeal at 6 n.2, ECF No. 64. Their argument that Representative Jones has not waived his own legislative privilege was similarly perfunctory in previous filings, and thus it is waived. *See United States v. Howard*, 532 F.3d 755, 760 (8th Cir. 2008) (holding that an argument was waived where the party raised the issue but "failed to support [the] conclusion with any argument, facts, reasoning, or citation to authority"); *see also Anderson v. Durham D & M, L.L.C.*, 606 F.3d 513, 515 n.2 (8th Cir. 2010) (holding that an argument had been waived where the opening brief "made only passing reference" to the claim); *see also*, *e.g.*, *Fields v. Henry*, No. 17-cv-2662 (WMW/KMM), 2019 WL 6037425, at *1 n.2 (D. Minn. Nov. 14, 2019) (declining to consider "new arguments that were not presented to the magistrate judge") (citing *Britton v. Astrue*, 622 F. Supp. 2d 771, 776 (D. Minn. 2008)). Because Respondents waived the argument previously and do not seriously contest the point now, this Court should affirm the finding of waiver by the order

Respondent Jones to promptly produce the documents identified through the keyword search, along with a log as to any communications or documents withheld based on the express assertion of privilege by another privilege holder. *See* Order at 13, ECF No. 63.

II. The Magistrate Judge correctly rejected Respondents' unsupported assertion that compliance would impose an undue burden.

"In analyzing whether a subpoena constitutes an 'undue burden,' the Court may consider '(1) relevance of the information requested; (2) the need of the party for production; (3) the breadth of the request for production; (4) the time period covered by the subpoena; (5) the particularity with which the subpoena describes the requested production; and (6) the burden imposed.'" *In re Whatley v. Canadian Pac. Ry. Ltd.*, No. 1:16-cv-74, 2021 WL 1951003, at *5 (D.N.D. May 14, 2021) (quoting *In re Levaquin Prods. Liab. Litig.*, 2010 WL 4867407, at *2 (D. Minn. Nov. 9, 2010)). Respondents "bear[] the burden to demonstrate that compliance would be unreasonable or oppressive." *Cody v. City of St. Louis*, No. 4:17-CV-2707-AGF, 2018 WL 5634010, at *3 (E.D. Mo. Oct. 31, 2018). "This burden cannot be satisfied with conclusory statements." *Whatley*, 2021 WL 1951003 at *5 (quotation marks omitted).

The subpoenaed information is relevant, narrowly tailored, and cannot be obtained through other means. As such, Plaintiffs have adequately demonstrated their need for the same. Further, Respondents have failed to substantiate the alleged burden, and any harms arising out of compliance are largely of their own making. The Court should affirm the Magistrate Judge's order.

A. The Subpoenaed Information Is Relevant

Proof of legislative intent is relevant and important evidence in redistricting cases, including the motives of individual legislators. *See Bethune-Hill v. Va. State Bd. Of Elections*, 114 F. Supp. 3d 323, 339-40 (E.D. Va. 2015); *see also*, *e.g.*, Order Denying Mot. to Quash at 17, ECF 48. This is particularly so where freedom to exercise the fundamental right to vote free of racial

discrimination is at issue. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 339. As such, courts regularly permit plaintiffs to put forth evidence tending to show legislators' intent. *See, e.g.*, *id*; *League of United Latin Am. Citizens*, 2022 WL 2713263, at *1; *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 166 (D.S.C. 2022). Respondents contend that legislative intent is irrelevant because even an "illicit legislative motive" would not be sufficient reason to strike down an otherwise valid legislative enactment. Appeal at 8-10, ECF No. 64 (quoting *e.g.*, *U.S. v. O'Brien*, 391 U.S. 367, 384 (1968)). But Plaintiffs do not allege that the 2021 Redistricting Plan would be valid but for an improper legislative motive. Rather Plaintiffs seek to prove that the Redistricting Plan violates federal law because it denies Native voters an equal opportunity to participate in the political process. Under the totality of the circumstances test, 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 responsiveness of the legislature to Native voters, the tenuousness of the enacted plan's justifications, and the use of racial appeals in the political process. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021-22 (8th Cir. 2006) (listing factors for courts to consider in evaluating a Section 2 claim). As such, the Magistrate Judge's Order finding that the subpoenaed information is relevant is not clearly erroneous.

Furthermore, Representative Jones's documents and communications are relevant for reasons other than legislative intent as well. He represented the district containing the MHA Nation, and served on the Tribal-State Relations Committee, but was not the candidate of choice of Native voters in his district. His documents and communications may bear on electoral conditions, campaign materials, and the Legislature's responsiveness to the Native American community in North Dakota. Thus, even if not dispositive as to the legislature's intent as a whole,

the information is relevant to Plaintiffs' claim. The scope of discovery allowed under the Federal Rules is "extremely broad," *Whatley*, 2021 WL 1951003 at *4, and certainly encompasses the information Plaintiffs seek here. Furthermore, because the requested information is solely in the hands of Respondents and unnamed third parties, Plaintiffs have no other reasonable way to obtain the same. As such, Plaintiffs have demonstrated sufficient need to justify the burdens imposed.

B. The Information Sought Is Narrowly Tailored

As discussed above, Plaintiffs seek only a narrow subset of the documents and communications that have *already* been identified by Respondents—non-privileged communications with third parties and communications over which privilege has been waived. As Respondents concede, Appeal at 15, ECF No. 64, *American Trucking* and *Hubbard* were decided on other grounds and did not reach the undue burden analysis, so Respondents' reliance on those cases in this part of the inquiry is misplaced. Furthermore, Plaintiffs have not challenged the search terms used by Respondents, nor the scope of the search conducted, nor demanded additional searches be conducted. *Cf.* Suppl. Objections at 2, ECF No. 47-4 (Describing Respondents' search process and noting "[w]e believe the search terms used have captured all relevant communications."); Thompson Decl. at 2, ECF 52 (subsequently estimating that additional time would be required to conduct additional searches and review additional documents); Appeal at 18 (complaining of the burden of conducting "a more comprehensive review to find each and every document that is responsive to Plaintiff's subpoena"). Instead, Plaintiffs merely seek to obtain

documents Respondents have already identified.[1] As such, Respondents' claim that the breadth of the search imposes an undue burden fails.[2]

C. The Burden Asserted Is Unsubstantiated.

Respondents' complaints about the burden imposed by producing their communications with third parties are similarly unavailing. Notably, Respondents do not raise any objection to the burden of actually producing the narrow universe of documents Plaintiffs seek here, rather their objections revolve solely around the necessity of conducting a privilege review. But Respondents requested and obtained additional time to respond to the subpoena specifically to conduct this review. *See* Mot. at 3, ECF No. 47. They have already conducted a search for responsive documents and excluded any deemed nonresponsive. Appeal at 17, ECF 64. And Plaintiffs do not challenge either the scope of search or any exclusions based on nonresponsiveness. Further, Respondents have now had months to complete the review required by Rule 45, the necessity of which became evident as soon as a partial analysis of the search results revealed the existence of the limited universe of nonprivileged documents Plaintiffs now seek. *See* Mot. at 4, ECF No. 47. Respondents' failure to conduct this review in a timely manner such that they now face competing demands on their time is a burden of their own making.

Finally, Respondents have failed to provide either Plaintiffs or the Court with the basic information necessary to evaluate their claim of burden: the number of documents at issue. *See* Mot. at 4, ECF No. 47 (explaining that the search results provided by Respondents identify the

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[1] Respondents' contention that these documents were only subject to a "cursory" review before being withheld on the basis of privilege demonstrates why a privilege log is necessary.

[2] Respondents did not object to the scope of the subpoenas in their initial objections. *See* ECF No. 47-2 (asserting only that the subpoenas were unduly burdensome because they sought publicly available material and that 30 days was not sufficient time to conduct a privilege review). Thus they have waived any objections to the scope of the requests.

number of documents in which certain keywords appear, but not the total number of documents at issue). Respondents continue to obfuscate the actual number of documents at issue here—a number which is indisputably in their possession—and instead rely on the "Magistrate Judge's calculations" to claim that 2,074 separate documents would need to be reviewed. Appeal at 20, ECF 64. As the Magistrate Judge explained, however, this calculation likely significantly overestimates this actual number of documents at issue. Order at 18-19, ECF No. 63. Respondents do not dispute that this is the case, despite claiming to "be at a loss" as to what additional information they could provide to substantiate their claims. Appeal at 18, ECF 64. The Court should reject Respondents' claims of undue burden based solely on their inexplicable lack of candor regarding the actual number of documents to be reviewed.[3]

Respondents next claim that the Magistrate Judge failed to properly evaluate the burden on Respondents of producing the privilege logs. But this is incorrect in two ways: first, the Magistrate Judge *did* analyze the burden and simply found that it was not undue. Order at 15, ECF No. 63. Second, as the Magistrate Judge's Order explained, an item-by-item privilege log may not be necessary where all subpoenaed documents are covered by legislative privilege. But where only some are, such an accounting is essential to properly evaluate the claims of legislative privilege. Respondents have failed to show that the subpoenas constitute an undue burden, and the Magistrate Judge's finding in this regard is not clearly erroneous.

CONCLUSION

For the foregoing reasons, the Magistrate Judge's Order was not clearly erroneous and should be affirmed. Respondents' appeal of this order should be denied.

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[3] As such, the burden alleged is largely conclusory. *Cf. Whatley*, 2021 WL 1951003 at *5 (noting that requirement to demonstrate undue burden "cannot be satisfied with conclusory statements.").

March 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

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