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' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO RESPONDENTS' NOTICE OF APPEAL FROM MAGISTRATE JUDGE'S FEBRUARY 10, 2023, ORDER GRANTING MOTION TO ENFORCE PLAINTIFFS' SUBPOENA**

RETRIEVED FROM DEMOCRACYDOCKET.COM

*** *** ***

I. INTRODUCTION

Five summary judgment memoranda's have been filed in this case and Walen v. Burgum, Civil No. 1:22-cv-00031. See Doc. Nos. 59, 65; see also Walen Doc Nos. 98, 102, 108. In Walen, the intervenors – who are represented by the same attorneys as the plaintiffs here - analyzed the *Gingles* preconditions and the totality of the circumstances test under Section 2 of the VRA without a single reference to the "illicit motive" or "intent" of an individual legislator. See Walen, Doc. No. 108 at pp. 25-32. In fact, the Walen intervenors argued legislative intent is wholly irrelevant to the VRA analysis. Id. at p. 45.[1] Likewise, the Plaintiffs here did not reference the motives or intent of an individual legislator in opposition to summary judgment. Doc. No. 65.

[1] In Walen, the intervenors argued "regardless of the Legislature's intent in creating Subdistrict 4A, Plaintiffs are not entitled to a remedy that itself violates federal law by diluting Native votes and denies them the opportunity to elect candidates of their choice."

Additionally, the Governor's memorandum in Walen (Walen, Doc. 102) and the Secretary of State's memorandum here (Doc. 59) are completely silent as to the motive or intent of individual legislators. Further, the Walen plaintiff's supporting memorandum focused only on the public legislative record in support of its argument. Walen, Doc. No. 99 at pp. 2, 6, 10, 26-28, 31-32, 34. This is because the motives of individual lawmakers are neither relevant nor needed to establish any of the elements of a Section 2 vote dilution claim.

The lack of relevance or need is for the subpoenaed information is established by binding case law and perfectly in line with the purpose of legislative privilege. The Magistrate Judge's Order to the contrary is a clear error of law and must be reversed.

II. ARGUMENT

1. The Supreme Court Held Inquiries into the Intent of Individual Officials "Asks the Wrong Question" Under Section 2 of the VRA's "Totality of the Circumstances" Test.

The Plaintiffs assert the Magistrate Judge's Order should be upheld because communications "demonstrating an 'illicit motive' by one or more legislators would certainly be relevant and probative evidence" under Section 2 of the VRA's totality of the circumstances test. Doc. 66 at p. 7. Supreme Court precedent establishes the Plaintiffs' argument and the Magistrate Judge's Order are wrong.

The totality of the circumstances test under Section 2 of the VRA is derived from the "Senate Committee report that accompanied the 1982 amendment to the Voting Rights Act...." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1021 (8th Cir. 2006). The Supreme Court explained the intent of an individual official is irrelevant to the totality of the circumstances test as follows:

> The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof

RETRIEVED FROM DEMOCRACYDOCKET.COM

> that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. See, *e.g.*, S.Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.*, at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, at 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also *id.*, at 2, 27, 29, n. 118, 36.

Thonburg v. Gingles, 478 U.S. 30, 43-44 (1986) (emphasis added) (footnotes omitted).

An inquiry into the intent or motive of individual officials "asks the wrong question" because inquiries into an individual lawmaker's motives are not only barred by legislative privilege (See In re Hubbard, 803 F.3d 1298, 1310 (11th Cir. 2015)), but are also an "impracticable," "futile," and "hazardous matter." See Soon Hing v. Crowley, 113 U.S. 703, 710-711 (1885); Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022). Clearly, Gingles forecloses consideration of individual intent in a Section 2 "totality of the circumstances" analysis.

Nonetheless, Plaintiffs cite Bone Shirt to argue proof of an "'illicit motive by one or more legislators would certainly be relevant and probative evidence" under the "totality of the circumstances test." Doc. 66 at p. 7. However, Bone Shirt cites Gingles, and makes no reference of "illicit motive" or "intent" of one or more lawmakers under its "totality of the circumstances" analysis. Bone Shirt, 431 F.3d at 1021-22. Rather, Bone Shirt provides: "Two factors predominate the totality-of-circumstances analysis: the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." Id. at 1022 (internal quotation omitted). This is consistent with Gingles and explains why nobody argued the intent or motives of an individual lawmaker were necessary in their summary judgment submissions. See Doc. Nos. 59, 65; see also Walen Doc Nos. 98, 102, 108. It also explains why the same law firm

RETRIEVED FROM DEMOCRACYDOCKET.COM

that represents the Plaintiffs here argued legislative intent was completely irrelevant in a vote dilution claim. See Walen Doc. No. 108 at p. 45.

Clearly, an inquiry into the intent of an individual lawmaker is irrelevant because "it asks the wrong question." Gingles, 478 U.S. at 43-44. This further bolsters the applicability of American Trucking which held the "need" - for type of information sought by the Plaintiff's here - "is simply too little to justify such a breach of comity…the proof is likely in the eating, and not in the cook's intentions." American Trucking, 14 4th at 90.

The Magistrate Judge's Order ignored well-settled Eighth Circuit precedent establishing "discovery is not permitted where no need is shown." Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999). Clearly, the Plaintiff's attempted fishing expedition hoping to find communications demonstrating an "illicit motive" by one or more legislators is not needed or relevant to this lawsuit as it focuses on "the wrong question." Gingles, 478 U.S. at 43-44; See also Soon Hing, 113 U.S. at 710-711 (1885); Dobbs, 142 S.Ct. at 2255 (2022); American Trucking, 14 4th at 90 (1st Cir. 2021). The Magistrate Judge's failure in its Order to consider the need for the information sought by the Plaintiffs' is a clear error of law under binding precedent. The Magistrate Judge's Order must be set aside for this reason alone.

RETRIEVED FROM DEMOCRACYDOCKET.COM

2. The Magistrate Judge's Order and the Plaintiffs' Arguments Ignore Decisions of Our Sister Circuits on Legislative Privilege.

The Court need not reach the question of legislative privilege because the information sought in the subpoenas is irrelevant and not needed for the reasons discussed above. This is how another Eighth Circuit district court addressed this situation. See Phelps-Roper v. Heineman, 2014 WL 562843 at *1-2 (D. Neb. Feb. 11, 2014) (noting the "court need not reach the issue of privilege or burden" when a subpoena fails to seek relevant information.) Heineman quashed the deposition of a state senator and a subpoena directed to the legislative clerk because "other than the official

legislative history, the discovery sought is irrelevant...." Id. This is consistent with the Walen plaintiffs' summary judgment argument. See Walen Doc. No. 99 at pp. 2, 6, 10, 26-28, 31-32, 34.

Nonetheless, legislative privilege bars the Plaintiffs' subpoenas. Plaintiffs erroneously argue Respondents "fail to identify a single case supporting extending the privilege to communications with third parties or to privileged materials shared with third parties." Doc. 66 at p. 4. The Plaintiffs ignore the actual text of American Trucking and Hubbard. In American Trucking the subpoenas sought "documents and deposition testimony from several non-party drafters and sponsors of [the law]...to bolster its discriminatory-intent claims." Id. at 83. This included "communications between the former Governor and legislators regarding RhodeWorks or other methods of raising funds" and "the public statements made by the movants and others." Id. Likewise, in Hubbard, the subpoena requested the following categories of documents from the state lawmakers:

> (1) All documents explaining the requirements of Act 761, including any cover letters showing who sent such documents;
> ...
> (3) All communications (including emails) sent or received that related to or concerned the bill that became Act 761 in the December 2010 special session;
> (4) All documents and communications (including emails) from either 2009 or 2010 that "related to or concerned" AEA, A–VOTE, the Alabama State Employees Association, SEA–PAC, Dr. Paul Hubbert, Dr. Joe Reed, or Edwin "Mac" McArthur...

Id. at 1303 n.4.

Clearly, the subpoenas in both American Trucking and Hubbard were not limited to communications between legislators. Nonetheless, the First Circuit 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." American Trucking, 14 4th at 88. This is because legislative "privilege applies with full force against requests for information about the

RETRIEVED FROM DEMOCRACYDOCKET.COM

motives for legislative votes and legislative enactments." Hubbard, 803 F.3d at 1310. Further, "judicial inquiries into legislative…motivation represents a substantial intrusion" and creating a categorical exception whenever a "claim directly implicates the government's intent…would render the privilege of little value." Lee v. City of Los Angeles, 908 F.3d 1175, 1187-88 (9th Cir. 2018) (quotations omitted). This is why legislative privilege bars obtaining discovery from "local legislators, even in extraordinary circumstances." Id. Further, it is well-established legislative "privilege extends to discovery requests, even when the lawmaker is not a named party in the suit [because] complying with such requests detracts from the performance of official duties." Hubbard, 803 F.3d at 1310. The Magistrate Judge's Order and the Plaintiffs' arguments fail to give the reasoned decisions of our sister circuits "great weight and precedential value" as required in this Circuit. Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). These reasoned decisions establish the Plaintiffs' requested discovery is barred by legislative privilege. See American Trucking, 14 4th at 88, 90; Hubbard, 803 F.3d at 1310-1311; Lee, 908 F.3d at 1187-88.

RETRIEVED FROM DEMOCRACYDOCKET.COM

3. The Plaintiffs' Provide No Valid Argument to Support the Magistrate Judge's Erroneous Conclusions Regarding the Burden Placed Upon Respondents.

The Magistrate Judge's Order imposes an undue burden on a third-party - who is entitled to legislative privilege – to sift though thousands of communications and prepare a detailed privilege log for each document withheld. The sole purpose of this burdensome exercise is to appease the Plaintiffs' hopes that they will demonstrate an "illicit motive" of one or more lawmakers. See Doc. No. 63 at p. 17; Doc. No. 66 at p. 7. This inquiry not only "asks the wrong question" under the totality of the circumstances test (Gingles, 478 U.S. at 43-44), but is also an "impracticable," "futile," and "hazardous matter." Soon Hing, 113 U.S. at 710-711; Dobbs, 142 S.Ct. at 2255. As non-parties, the Respondents' burden is "entitled to special weight in evaluating the balance of competing needs." Misc. Docket Matter No. 1, 197 F.3d at 927 (8th Cir. 1999).

The Magistrate Judge's Order failed to account for the need of the requested information even though the Supreme Court clearly said there is none. Gingles, 478 U.S. at 43-44; Soon Hing, 113 U.S. at 710-711; Dobbs, 142 S.Ct. at 2255. Then, the Magistrate Judge erroneously discredited Thompson's Declaration which contained a detailed explanation of the Respondents' burden. Lastly, neither the Magistrate Judge nor the Plaintiffs cite any authority for the proposition a third-party cannot establish an undue burden because it retained outside counsel. Doc. No. 63 at p. 19. This unprecedented determination must be set aside as it is in direct conflict with federal law. See Misc. Docket Matter No. 1., 197 F.3d at 927 (8th Cir. 1999).

III. CONCLUSION

The Magistrate Judge's Order must be set aside and reversed. The Plaintiffs' Motion to Enforce the subpoenas should be denied as seeks irrelevant and/or unneeded information, impermissibly circumvents legislative privilege, and imposes a substantial undue burden on the Respondents.

Dated this 10th day of March, 2023.

RETRIEVED FROM DEMOCRACYDOCKET.COM

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, Terry B. Jones, and Claire Ness

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 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' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO RESPONDENTS' 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 — carter@narf.org
Matthew Campbell — mcampbell@narf.org
Attorneys At Law
1506 Broadway
Boulder, CO 80301

ATTORNEYS FOR PLAINTIFFS

Mark P. Garber — mgaber@campaignlegal.org
Molley E. Danahy — mdanahy@campaignlegal.org
Attorneys At Law
1101 14th St. NW, Ste. 400
Washington, DC 20005

ATTORNEY FOR PLAINTIFFS

Timothy Q Purdon — tpurdon@robinskaplan.com
Attorney at Law
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501

ATTORNEY FOR PLAINTIFFS

Samantha B. Kelty — kelty@narf.org
Attorney at Law
1514 P St. NW, Suite D
Washington, D.C. 20005

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

RETRIEVED FROM DEMOCRACYDOCKET.COM

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