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

Case No: 1:22-cv-00031

Charles Walen, individual; and Paul Henderson, an individual,

Plaintiffs,

v.

Doug Burgum, in his official capacity as Governor of the State of North Dakota; Alvin Jaeger in his official capacity as Secretary of State of the State of North Dakota.

Defendants,

and

The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville,

Defendant-Intervenors.

NORTH DAKOTA LEGISLATIVE ASSEMBLY AND REPRESENTATIVE TERRY B. JONES' NOTICE OF APPEAL FROM MAGISTRATE'S DECEMBER 22, 2022 NON-DESPOSITIVE ORDER

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 72(a) and D.N.D. Civ. L.R. 72.1(D)(2), the North Dakota Legislative Assembly and Representative Terry Jones (collectively "Respondents") appeal the Magistrate's December 22, 2022, Order denying their motion to quash a subpoena commanding Representative Terry Jones to appear for a deposition on November 17, 2022, in the above-captioned case[1]. The Magistrate'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. Civ. L.R. 72.1(D)(2).

[1] In accordance with D.N.D. Civ. L.R. 72.1(D)(2), the Magistrate's Order subject to this appeal is dated December 22, 2022. The Order is filed as Document No. 72 in Case No. 3:22-cv-00031. There was no hearing before the magistrate judge on this motion; therefore, no transcript exists.

II. SPECIFICATION OF ISSUES FOR APPEAL

Respondents specify the following issues for appeal:

1) The Magistrate erred by denying the Respondents' motion to quash.

2) The Magistrate erred by applying the five-factor test imported from the lesser deliberative process privilege to a legislative privilege analysis.

3) The Magistrate erred by failing to put constraints on Representative Jones' testimony.

4) The Magistrate erred by failing to modify the subpoenas to preclude any inquiry into communications between state lawmakers and Legislative Council.

III. BASIS FOR OBJECTIONS TO MAGISTRATE'S ORDER

A. Specification of Error No. 1 – The Magistrate Erred by Denying the Respondents' Motion to Quash

As an initial matter, the Magistrate's Order erred by finding Representative Jones' deposition was not barred by legislative privilege. The history of legislative privilege as explained by the Supreme Court and recently applied by the First, Ninth, and Eleventh Circuits is provided at length in Representative William Devlin and the North Dakota Legislative Assembly's Notice of Appeal from the Magistrate's December 22, 2022, Order Denying Motions to Quash ("Devlin Appeal") and incorporated herein.

As explained in the Devlin Appeal, "[l]ike 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 v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975)) (alteration in original). The Ninth Circuit applied Supreme Court precedent and "concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances.'" Lee, 908 F.3d at 1187-88. Notably, Lee involved a racial gerrymandering case and noted that Village of Arlington Heights v. Metropolitan Housing

Development Corp., 429 U.S. 252, (1977) also involved "a claim of alleged 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." Lee, 908 F.3d at 1188.

The Eleventh Circuit in Hubbard, the Ninth Circuit in Lee, and the First Circuit in American Trucking Assoc. Inv. v. Alviti, 14 F. 4th 76 (1st Cir. 2021) all held legislative privilege barred state lawmakers from complying with discovery requests. Alviti, 14 F. 4th at 88 (holding legislative privilege was grounds to overturn the district court's order denying the lawmakers motion to quash and noted "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 privilege.") The Eighth Circuit clear directive is to give the sister circuits' reasoned decisions "great weight and precedential value." Aldens, Inv. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). The magistrate erred by not following the decisions of the sister circuits and quashing the subpoena on the grounds of legislative privilege.

The Magistrate's Order also erred by not applying the appropriate legal standard to the need for information sought by the subpoena. Specifically, the Magistrate erred by concluding the "representatives' testimony meets the standard of Rule 26 relevancy" without providing further applicable analysis. Doc. 72 at p. 17 n. 8. The Eighth Circuit requires more than just relevancy under Rule 26 because "[e]ven if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome...." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) (quotation omitted). The Magistrate correctly noted the Supreme Court "has repeatedly stressed that 'judicial inquiries into legislative or executive motivation represent a substantial intrusion.'" Doc. 72 at p. 13

(quoting Lee, 908 F.3d at 1187). However, the Magistrate ignored over a century of Supreme Court case law prohibiting the judiciary from inquiring into the motives of individual legislators. See Soon Hing v. Crowley, 113 U.S. 703, 701-11 (1885) ("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…"); U.S. v. O'Brien, 391 U.S. 367, 384 (1968) ("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."); Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (noting same). Specifically, the following Supreme Court opinion is directly on point:

> The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. 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.

Soon Hing, 113 U.S. 710-11 (emphasis added).

Under Supreme Court precedent, inquiries into the motives of individual legislators are a futile endeavor. Id. The First Circuit noted as much in Alviti, where in addition to holding legislative privilege applied, it held that conducting discovery on the motives of individual lawmakers "is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose." Alviti, 14 4th at 90. The First Circuit found that even if legislative privilege did not apply, "the need for the discovery [into motives of individual legislators] is simply too little to justify such a breach of comity. At base…the proof is very likely in the eating, and not in the cook's intentions." Id. The Magistrate's Order failed to follow decisions of the Supreme Court and sister circuits when it concluded the Tribes' need for

evidence of an individual legislator's motives outweighs the Assembly's interest of non-disclosure. Doc No. 72 at p. 19. This decision ignores the Supreme Court's prior admonitions that this type of evidence is a "hazardous matter," "futile," and should be avoided to "eschew guesswork." See Soon Hing, 113 U.S. 710-11; O'Brien, 391 U.S. at 384; Dobbs, 142 S.Ct. at 2255. The lack of need for Representative Jones' testimony is even more important when the subpoenaed individual is a non-party as here. Misc. Docket Matter No. 1, 197 F.3d at 927 ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.")

Further, the Tribes are not a plaintiff in this action and carry no burden of proof. Rather, they are an Intervenor/Defendant in the Plaintiffs' Equal Protection claim. The Magistrate made no finding of need for the Intervenor/Defendants in this lawsuit. Doc. No. 72 at p. 16. Rather the Magistrate only noted the "Tribes contend 'information related to the purpose and circumstances of the plan's adoption are…relevant to the totality of circumstance factors courts consider in Section 2 litigation." Id. The Magistrate erred in relying on this contention because 1) this case does not involve Section 2 litigation; and 2) the "totality of circumstances" factors courts consider in Section 2 litigation do not involve the motives of individual legislators.

Rather, in a Section 2 Voting Rights Act case, the Plaintiff (not defendant) 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 Natl. Assn. for Advancement of Colored People v. Alabama, 2020 WL 583803, at *9 (M.D. Ala. Feb. 5, 2020) (quoting Thornburg v. Gingles, 478 U.S. 30, 50 (1986)).

"[A]fter a plaintiff has satisfied the three *Gingles* preconditions, the court must determine, as § 2(b) dictates, whether the plaintiff has proven that, "based on the totality of

circumstances, … the political processes leading to ... election in the State ... are not equally open to participation by members" of the protected class. § 10301(b)." Id. at * 10. The "totality of the circumstances" test applies 10 factors, none of which contemplates the motives of a single legislator. Id. "At bottom, 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). This perfectly comports with the Supreme Court's directive that "motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." Soon Hing, 113 U.S. 701-11. Or as the First Circuit correctly noted "the proof is very likely in the eating, and not in the cook's intentions." Alviti, 14 4th at 90.

Put simply, there is no need for the deposition testimony of an individual legislator in this case. The Defendants/Intervenors bear no burden of proof, the Magistrate erroneously analyzed the need of testimony under a claim that does not exist in this lawsuit, and the higher courts who have considered this issue have found the testimony of an individual legislator to be a "futile" and "hazardous matter."

Under Supreme Court, First Circuit, and Eighth Circuit precedent, the Magistrate's Order denying Representative Jones' Motion to Quash should be reversed as there is no need for the testimony of a single lawmaker. See Soon Hing, 113 U.S. 710-11; O'Brien, 391 U.S. at 384; Dobbs, 142 S.Ct. at 2255; Alviti, 14 4th at 90; Misc. Docket Matter No. 1, 197 F.3d at 925, 927.

B. The Specification of Error No. 2 – The Magistrate Erred by Applying the Five-Factor Test Imported from the Lesser Deliberative Process Privilege.

The Magistrate's Order applied a "five-factor test imported from the deliberative process privilege context to determine when the state legislative privilege must yield to a need for

evidence." Doc. 72 at pp. 14-19. The Magistrate's Order relies on district court opinions for this contention; however, sister circuits have not applied this test. See Hubbard, 803 F.3d at 1303-1315; Lee, 908 F.3d at 1186-1188; Alviti, 14 F.3d at 85-88. Specifically, in Lee, the Ninth Circuit declined to apply this test even though it was argued in that case[2]. This is significant as the Ninth Circuit previously applied the five-factor test to deliberative process privilege. See F.T.C. v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984). However, "the *common law* deliberative process privilege [is] weaker than, and thus more readily outweighed than, the constitutionally-rooted legislative process privilege." Kay v. City of Rancho Palos Verdes, 2003 WL 25294710 at *18 (C.D. Cal. Oct. 10, 2003). Therefore, it stands to reason why the five-factor test was not applied to a claim of legislative privilege by the sister circuits.

Further, this case involves an equal protection claim arising under the Fourteenth Amendment. (Doc. 1). The Ninth Circuit explained that Village of Arlington Heights "also involved an equal protection claim alleging racial discrimination…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." Lee, 908 F.3d at 1188 (citing Village of Arlington Heights, 429 U.S. at 268). Put simply, Lee analyzed this exact issue in the scope of deposition testimony of local lawmakers in an equal protection claim and refused to apply the five-factor test under Supreme Court precedent. Under the Eighth Circuit precedent, the Magistrate erred by failing to follow the decisions of the sister circuits when it applied the deliberative process's five-factor test to a claim of legislative privilege. See Miller, 610 F.2d at 539.

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[2] The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege" but noted – like the Intervenors here – "some courts have done so." Lee, Case 15-55478, DktEntry: 29-1 (Appellees Brief), P. 53 of 60 (per PACER).

C. Specification of Error No. 3 – The Magistrate Erred by Failing to Put Constraints on Representative Jones' Testimony.

To the extent the subpoena seeks deposition testimony as to Representative Jones' motives behind the legislative act, it is certainly not needed for the disposition of this case. See Alviti, 14 F. 4th at 90; Soon Hing, 113 U.S. at 701-11; O'Brien, 391 U.S. at 384; Dobbs, 142 S.Ct. at 2255. Therefore, it was an error to deny the motion to quash the subpoena because no need for his testimony was shown. See Miscellaneous Docket Matter No. 1, 197 F.3d 922, 925 (8th Cir. 1999) ("discovery is not permitted where no need is shown.") As explained above, the Magistrate's Order ignored this analysis and rather erroneously denied the Respondent's motion to quash because Representative Jones waived his legislative privilege "by his testimony at the preliminary injunction hearing." Doc. No. 72 at p. 20.

Assuming arguendo Representative Jones waived his privilege, the alleged waiver was not all-encompassing. The topics upon which he testified were essentially limited to the following: 1) He was an elected representative of District 4 (Doc. 58-1 at pp. 8-9); 2) He attended Redistricting Committee meetings even though he was not a committee member (Id. at p. 9); 3) He testified before the Redistricting Committee (Id. at p. 11); 4) His observations of the committee meetings (Id. at p. 14); 5) Proposed redistricting maps were presented to the House floor (Id. at pp. 14-15); 6) He spoke during the floor debate related to the proposed maps (Id. at p. 15); 6) The Assembly passed a redistricting bill (Id.); and 7) He resides within subdistrict 4A (Id. at p. 16). The Court noted the video shown during Representative Jones' testimony and "other videos of the Redistricting Committee hearings are a matter of public record." Id. at p. 25.

In Cano v. Davis, 193 F.Supp.2d 1177 (C.D. Cal. 2002), a lawmaker elected to waive his privilege and provide testimony. Id. at 1179. Cano held the lawmaker "may not give unfettered testimony regarding the legislative acts of other members" and "may not testify to the legislative

acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege." Id (emphasis added).

When the appropriate constraints are placed on Representative Jones' testimony, he can disclose only information that is either publicly available or completely unnecessary for the disposition of this case. This alone is sufficient grounds for quashing a subpoena. See Jordan v. Commissioner, Mississippi Dept. of Corrections, 947 F.3d 1322, 1328, n. 3 (11th Cir. 2020) (explaining the district court did not err in quashing a subpoena seeking information that was either protected, not needed for disposition of the case, or "readily available to the public.") The Magistrate erred by failing to quash the subpoena directed to Representative Jones and alternatively erred by failing to set limits on testimony about other individuals who are protected by privilege. See Misc. Docket Matter No. 1, 197 F.3d at 925; Cano, 193 F.Supp.2d at 1179.

D. Specification of Error No. 4 – The Magistrate Erred by Failing to Modify the Subpoenas to Preclude Testimony about Interactions with Legislative Council.

The Magistrate erred by failing to limit the subpoenas to prohibit questioning about interactions with members of Legislative Council. The Magistrate correctly noted that Legislative Council "performs a wide variety of duties for the Assembly, including research, bill drafting, and providing legal advice, and its staff consists of attorneys and non-attorneys." Doc. 72 at n. 9. Legislative Council effectively acts as an aide to the legislative assembly. It is well-established that "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); see also Florida v. U.S., 886 F.Supp.2d 1301, 1304 (holding that in a Voting Rights Act case the legislative privilege "extends to staff members at least to the extent that the proposed testimony would intrude on the legislators' own deliberative process and their ability to communicate with staff members on the

merits of proposed legislation.") Therefore, the Magistrate erred by failing to extend legislative privilege to Legislative Council and preclude any testimony about acts of "staffers or consultants who are protected by the privilege." See Cano, 193 F.Supp.2d at 1179.

Further, the Magistrate erred by failing to modify the subpoena to preclude questioning as to legal advice received from Legislative Council attorneys. The Magistrate correctly found attorney-client privilege applies to government clients (Doc. 72 at p. 21); however, the Order failed to limit any questioning in light of the privilege. The Magistrate's Order should be modified accordingly as the issue was properly raised in the Motion to Quash.

IV. CONCLUSION

For the aforementioned reasons the Magistrate's Order was a clear error of law and should be reversed. The Respondents Motion to Quash should be granted.

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 **NORTH DAKOTA LEGISLATIVE ASSEMBLY AND REPRESENTATIVE TERRY B. JONES' NOTICE OF APPEAL FROM MAGISTRATE'S DECEMBER 22, 2022 NON-DESPOSITIVE ORDER** 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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