Docket No. 23-1600

In the

United States Court of Appeals

For the

Eighth Circuit

In re North Dakota Legislative Assembly, Senator Ray Holmberg, Senator Richard Wardner, Senator Nicole Poolman, Representative Michael Nathe, Representative William R. Devlin, Representative Terry Jones, Senior Counsel at the North Dakota Legislative Council Claire Ness,

Petitioners.

On Petition for a Writ of Mandamus
To The United States District Court for the District of North Dakota
In Case No. 3:22-cv-00022

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE REQUESTED RELIEF

This petition seeks review of the district court's orders enforcing subpoenas against current and former members of the North Dakota Legislative Assembly and its legal counsel. (App113-118; App210-214.) The Plaintiffs' stated purpose for issuing the subpoenas is to uncover an "illicit motive" of one or more state lawmakers in the 141-member Assembly with respect to its approval of a 2021 redistricting plan. (App184.)

In their quest to discover an "illicit motive," Plaintiffs issued a deposition subpoena to Representative William R. Devlin (App004-006) and seven subpoenas seeking seven identical categories of documents to Senator Ray Holmberg (App007-013), Senator Richard Wardner (App014-020), Senator Nicole Poolman (App021-027), Representative Michael Nathe (App028-034), Representative William R. Devlin (App035-041), Representative Terry Jones (App042-048), and Senior Counsel at the North Dakota Legislative Council Claire Ness (App049-055) (collectively "State Officials"). The subpoenas demand the select State Officials produce virtually all documents and communications related to the 2021 redistricting plan in their personal files.

Petitioners timely objected to all subpoenas on grounds of legislative privilege, attorney-client privilege, and also asserted compliance would impose an undue burden. After numerous motions and briefing, the district court held the State

Officials must comply with all eight subpoenas. The district court ignored three recent circuit court opinions which held legislative privilege bars this discovery. Further, the district court held the Petitioners undue burden argument failed. However, the record shows a cursory key-word search of the State Official's email accounts uncovered over 64,000 emails that contained one or more of the searched key words. A cursory review of the results consumed approximately 64 hours of Legislative Council staff attorney's time to briefly scan for responsiveness and sort into one of the three categories of senders and recipients. The district court also disregarded the Legal Division Director for the North Dakota Legislative Council's explanation that full compliance with the document subpoenas will require approximately 640 hours of staff attorney time. In dismissing these claims, the district court determined any burden could be alleviated by utilizing outside counsel.

The First Circuit recently held a similar situation presented an "extraordinary case" as it raises unsettled legal questions about legislative privilege as applied to state lawmakers and lower courts have developed divergent approaches to answering them. American Trucking Associations, Inc. v. Alviti, 14 4th 76, 84 (1st Cir. 2021). In light of the district court's refusal to follow American Trucking and the two circuit court cases preceding it on this issue, this remains an "extraordinary case" in need of immediate review.

The Assembly is currently in session. The district court's order requires the legislative branch of a sovereign government to detract from its official duties and respond to discovery in a private civil law suit to which it is not a party. The North Dakota Constitution, common-law doctrines, and numerous recent circuit court decisions prohibit this type of judicial interference upon the legislative branch of a sovereign state government.

Nonetheless, the district court misapplied directives of the Supreme Court and our sister circuits on legislative privilege. Further, it erroneously determined a fishing expedition to seek evidence of an "illicit motive" by one or more lawmakers through these subpoenas was relevant and needed to prove a Section 2 vote dilution claim under the Voting Rights Act. The district court's decision misapplied the law and imposes a substantial burden upon the Petitioners. Further, the district court's order ignores well-recognized doctrines of federalism and comity and opens the door to force state lawmakers to comply with discovery of their personal files whenever a member of the public is unhappy with a legislative decision.

This Court should issue a writ of mandamus directing the district court to quash the subpoenas in this private civil action. The Petitioners have no other adequate means to attain the desired relief and the district court's rulings are clearly erroneous. In accordance with the holdings of our sister circuits, appellate review is appropriate to protect a properly asserted privilege and prohibit a private party from

engaging in a fishing expedition in hopes of finding evidence indicating one or more lawmakers had an "illicit motive" in a challenge to a legislative act approved by the Legislative Assembly.

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STATEMENT OF THE ISSUES PRESENTED

(1) Whether the district court abused its discretion when it failed to properly apply legislative privilege and quash the deposition subpoena directed to Representative Devlin?

(2) Whether the district court abused its discretion when it failed to properly apply legislative privilege and this Court's precedent when it issued an order enforcing the document subpoenas directed to all Petitioners?

STATEMENT OF THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

With the exception of Claire Ness, all State Officials are current and former Assembly members[1]. The Petitioners' involvement in this case stems from the above-described subpoenas served upon them by the named Plaintiffs - Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. The Plaintiffs' Complaint in the underlying action asserts the 2021 redistricting plan violates Section 2 of the Voting Rights Act.

1. Background of Underlying Litigation.

Before 2021, all senators and representatives in North Dakota's 47 legislative districts were elected at-large. In light of the requirement in the Constitution of North Dakota to redistrict after each census, the Legislative Assembly passed legislation establishing a Redistricting Committee to develop and submit a redistricting plan to Legislative Management. In addition, to the statutory Tribal and State Relations Committee also held public meetings related to redistricting. These Committees held numerous public meetings during the summer and fall of 2021 where both oral and written testimony were received from various tribal members, tribal leaders, and others. On November 1, 2021, the Redistricting Committee

[1] Ness was senior counsel at the North Dakota Legislative Council during the 2021 Special Session. Effective May 9, 2022, the North Dakota Attorney General appointed Ness as Deputy Attorney General for the State of North Dakota.

submitted its final report to the Legislative Management. The final report recommended passage of House Bill 1504 which created subdistricts in District 9 which encompasses the Turtle Mountain reservation.

Through executive order, the Governor convened a special session of the Legislative Assembly on November 8, 2022, to provide for redistricting. Numerous hearings were held on House Bill 1504 and alternatives to the proposed redistricting plan were discussed. Written testimony on behalf of the Spirit Lake and Turtle Mountain tribes also was received by the Joint Redistricting Committee during these hearings.

On November 9, 2022, the House of Representatives debated and ultimately passed House Bill 1504. The Senate debated and passed House Bill 1504 the following day. House Bill 1504 was signed by Governor Burgum on November 11, 2021, and became law the following day when filed with the Secretary of State. The district descriptions are now codified in N.D.C.C. § 54-03-01.14. As a result of the redistricting plan, District 9 is divided into two House subdistricts. One member of the House is elected from Subdistrict 9A and one member of the House is elected from Subdistrict 9B. Subdistrict 9A encompasses the Turtle Mountain reservation.

The Plaintiffs' Complaint alleges the redistricting plan violates Section 2 of the Voting Rights Act and results in vote dilution. During the pendency of this litigation, the Plaintiffs served the above-described subpoenas on the State Officials.

2. Representative Devlin Deposition Subpoena

Representative Devlin moved to quash the subpoena commanding him to appear and provide testimony as it improperly sought the disclosure of information protected by legislative privilege and/or attorney-client privilege. (App056-059; App060-078.) The Magistrate Judge denied the motion to quash in a consolidated December 22, 2022, order[2]. (App079-100.) The Petitioners appealed this decision to the district court. (App101-112.) On March 14, 2023, the district court denied the appeal erroneously finding legislative privilege did not bar his testimony. (App113-118.) Neither order placed any limits or parameters on Devlin's testimony.

3. Document Subpoenas to all State Officials.

Upon receipt of the above-described document subpoenas, the State Officials promptly objected to the subpoenas on grounds of legislative privilege and claimed the subpoenas created an undue burden. (App119-127.) To substantiate the extent of the burden, Legislative Council's Legal Division performed a cursory review of the Petitioners' email accounts searching for specific key words that may generate responsive documents. (App216.) This cursory search required approximately 64 hours of the Legislative Council's staff attorneys' time and generated 64,849 emails containing key-word hits. (App216; App128-129.) The results of this cursory search

[2] The Magistrate Judge's Order also addressed Representative Jones' motion to quash his deposition in a companion case entitled Walen v. Burgum, Case No. 1:22-cv-31.

were provided to the Plaintiffs. The Plaintiffs moved to enforce the subpoenas. (App132-146.) The Petitioners resisted the motion on grounds of legislative privilege, attorney-client privilege, and undue burden. (App147-167.) The Magistrate Judge granted the Plaintiffs' motion. (App168-187.) The Petitioners appealed to the district court and raised the same arguments. (App188-209.) The district court affirmed the Magistrate Judge's order on March 14, 2023. (App210-214.) The Petitioners now seek review to correct the district court's clear errors.

REASONS WHY THE WRIT SHOULD ISSUE

I. Mandamus is Appropriate to Review Discovery Orders That Impede Upon Privilege or Order the Production of Irrelevant Information.

Pursuant to the All-Writs Act, the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This Court has "found mandamus to be an appropriate vehicle to review orders compelling the production of documents or testimony claimed to be privileged or covered by other more general interests in secrecy." Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 953-54 (8th Cir. 1979). More recently, this Court noted "[d]iscovery orders likewise are not ordinarily appealable, but mandamus may issue in extraordinary circumstances to forbid discovery of irrelevant information, whether or not it is privileged, where discovery would be oppressive and interfere with important state interests." In re Lombardi, 741 F.3d

888, 895 (8th Cir. 2014). Where claims of legislative privilege are denied by the district court it creates an "extraordinary case" where mandamus is appropriate. American Trucking v. Alviti, 14 4th 76, 84 (1st Cir. 2021). This is because "the degree to which state officials may be subjected to discovery in civil cases alleging violations of [federal law] raises important questions about the appropriate balance of power between the states and the federal government." Id. at 85.

This Petition presents an extraordinary circumstance where the Petitioners properly claimed legislative privilege as a bar to discovery in a civil case. Absent relief from this Court, the State Officials' privilege will be lost forever if they are required to comply with these subpoenas. The discovery sought is oppressive and will interfere with the biennial Assembly's official duties. If the district court order stands, state lawmakers will be forced to split their time between what the people elected them to do – legislating – and responding to discovery requests from their political adversaries in federal court. Ultimately, candid discussions – which are vitally important to the legislative process – will cease for fear of being discovered in a federal civil action.

II. There is a Circuit Split with Respect to Whether Discovery Orders Involving Claims of Legislative Privilege are Properly Reviewed Pursuant to Supplemental Jurisdiction or Mandamus.

There is a circuit split as to whether the exercise of supplemental jurisdiction or mandamus proceedings are proper for review of discovery orders involving state

lawmakers' claims of legislative privilege. In the Eleventh and Fifth Circuits, "one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit." In re Hubbard, 803 F.3d 1298, 1305-06 (11th Cir. 2015); see also League of United Latin American Citizens Abbott v. United States, 2022 WL 2713263 at *1 n.1 (5th Cir. May 20, 2022) (Not reported in Fed. Rptr.)[3].

The First Circuit reached a different conclusion when considering former lawmakers' appeal from a discovery order rejecting their claims of legislative privilege in American Trucking, 14 F.4th at 83-84. While noting the "ordinary course of perfecting an appeal by incurring a contempt order is sometimes 'less readily available' to state actors than to private parties," the First Circuit determined no exception applied to invoke appellate jurisdiction under its precedent. Id. at 84. Rather, the First Circuit found mandamus appropriate to address the "state lawmakers' claims of legislative privilege" because it had "little doubt that it will become increasingly common to subpoena state lawmakers in connection with such claims if we do not review the district court's order at this juncture." Id. at 85.

[3] Notably, the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981." Hubbard, 803 F.3d at 1305, n. 6. It appears this narrow jurisdictional issue is controlled in both the Fifth and Eleventh Circuits by the same pre-1981 Fifth Circuit precedent. Compare Hubbard, 803 F.3d at 1305; League of United Latin American Citizens Abbott, 2022 WL at *1, n. 1.

While this Court has not yet addressed this narrow issue, it has "occasionally treated a notice of appeal as a petition for a writ of mandamus" where the "propriety of mandamus was raised from the outset…has been fully briefed, and…the interests of the district court have been actively presented…." Iowa Beef Processors, 601 F.2d at 953 n. 3. This Court noted immediate appellate attention is required when the discovery dispute gives "rise to serious policy considerations" and there is a dearth of precedent on the issue. Id. at 954. Moreover, Judge Kelly recently noted mandamus would be the appropriate means of seeking to quash a discovery order requiring disclosure of deliberations of a state judiciary. In re Kemp, 894 F.3d 900, 910 (8th Cir. 2018) (dissent).

With respect to this narrow issue, there is authority for the Court to consider this issue through either its supplemental jurisdiction or by this Petition. Regardless, the "legislative privilege is important. It has deep roots in federal common law" and its deep roots are being attacked here. See Hubbard, 803 F.3d at 1307. This presents extraordinary circumstances and the district court's orders must be reversed to preserve this important and historic privilege.

III. Legislative Privilege Predates the Constitution and Principles of Comity Apply to Prevent the Federal Judiciary from Inquiring into the Motivations of Individual Lawmakers of a Sovereign Legislative Body in a Private Civil Action.

A. The historical significance of legislative privilege.

The district court's orders infringe upon a deeply rooted privilege that "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The Supreme Court explained: "Since the Glorious Revolution in Britain…the privilege has been recognized as an important protection of the independence and integrity of the legislature…In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." U.S. v. Johnson, 383 U.S. 169, 178 (1966). Further, in "Virginia, as well as in the other colonies, the assemblies had built up a strong tradition of legislative privilege long before the Revolution." Tenney, 341 U.S. at 374 n. 3. In fact, "[t]hree State Constitutions adopted before the Federal Constitution specifically protected the privilege." Id. at 373. Consistent with this longstanding principle, both the United States and North Dakota Constitution protect the privilege by their respective Speech or Debate Clauses. See U.S. Const. Art. 1, § 6; N.D. Const. Art. 4, § 15.

B. Legislative privilege applies to state legislators

Assertions of legislative privilege by state lawmakers "are governed by federal common law rather than the Speech or Debate Clause;" however, "the interests in legislative independence served by the Speech or Debate Clause remain relevant in the common-law context." American Trucking, 14 F.4th at 87. As a result, "it is well-established that state lawmakers possess a legislative privilege that

is 'similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.'" Hubbard, 803 F.3d at 1310 n. 11; see also Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) ("We therefore hold that state and local legislators may invoke legislative privilege."); American Trucking, 14 4th at 86-87 (holding same). This is because there are "important comity considerations that undergird the assertion of a legislative privilege by state lawmakers." American Trucking, 14 F.4th at 88. Put another way, the "rationale for the privilege…applies equally to federal, state, local officials" as well as their aides and assistants. Lee, 908 F.3d at 1187.

C. When properly applied, legislative privilege protects lawmakers from responding to discovery in civil actions.

The district court's orders ignore and/or misapply the entire purpose of legislative privilege. "The legislative privilege 'protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts.*" Hubbard, 803 F.3d at 1310 (emphasis in original) (quoting United States v. Brewster, 408 U.S. 501, 525 (1972). Legislative privilege protects lawmakers from "distraction" and prevents them from diverting "their time, energy, and attention from their legislative tasks…." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975). This is especially true when "a civil action is brought by private parties" because "judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." Id. "This is why the privilege extends to

discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Hubbard, 803 F.3d at 1310; see also MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive."). "The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Hubbard, 803 F.3d at 1310 (emphasis added).

Even a "claim of unworthy purpose does not destroy the privilege" because the "privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader...." Tenney, 341 U.S. at 377. This is consistent with the "unquestioned" Supreme Court "holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L. Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators." Tenney, 341 U.S. at 377. See also Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (noting that "inquiries into legislative motives are a hazardous matter...What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of other to enact it." (Quotations omitted)).

The proper application of the above case law has resulted in an unbroken chain of recent appellate courts finding a request for discovery – issued by a party that is

not the United States - to state or local lawmakers in a civil case is barred by common-law legislative privilege. See Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88; American Trucking, 14 4th at 88-91. The district court failed to follow this well-reasoned precedent of our sister circuits.

In Hubbard, the Eleventh Circuit considered a case in which four lawmakers filed a motion to quash subpoenas on the grounds legislative privilege exempted them from responding to the subpoenas. Hubbard, 803 F.3d at 1304. The subpoenas sought production of documents relating to the contents and passage of a legislative act, similar proposals, "as well as any communications regarding [the act] and the other plaintiffs in the lawsuit."[4] Id. at 1303. The district court denied the lawmakers' motions and ordered production of the documents. Id. at 1304. The lawmakers sought review by filing petitions for writs of mandamus and notices of appeal. Id. at 1305. After staying the district court's order, the Eleventh Circuit reversed the district court's order because "the legislative privileges must be honored and the subpoenas quashed." Id. at 1305, 1312.

In Lee, the Ninth Circuit considered "whether the City primarily sought to maximize the voting power of certain racial groups over others when drawing Council Districts and subordinated all other considerations to that priority." Lee, 908

[4] The list of documents requested in the subpoena served upon the lawmakers requests information substantially similar to subpoenas at issue here. See Hubbard, 803 F.3d at 1303 n. 4.

F.3d at 1178. The plaintiffs sought to depose city officials of Los Angeles who were "involved in the redistricting process." Id. at 1186. The district court denied the plaintiffs' deposition requests. Id. After analyzing the Supreme Court's analysis of legislative privilege, the Ninth Circuit explained "plaintiffs are generally barred from deposing local legislators, even in extraordinary circumstances." Id. at 1187-88 (internal quotations omitted). While acknowledging "claims of racial gerrymandering involve serious allegations," Lee explained these were not "within the subset of 'extraordinary instances' that might justify an exception to the privilege…we conclude the district court properly denied discovery on the ground of legislative privilege." Id. at 1188.

In American Trucking, the First Circuit issued a writ of mandamus "reversing the decision to allow the discovery sought from Rhode Island's former governor, from the former speaker of Rhode Island's legislature, and from a former state representative." American Trucking, 14 4th at 80-81. The plaintiff "sought to enforce subpoenas seeking documents and deposition testimony from several non-party drafters and sponsors of [the act]…to bolster its discriminatory intent claims." Id. at 83. The First Circuit held the state officials' petition presented an "extraordinary case" because the "petition raises unsettled legal questions about the scope of the legislative privilege as applied to state lawmakers." Id. at 84. Like this Court, the First Circuit had "never addressed these questions" and noted "the lower courts have

developed divergent approaches to answering them." Id. Importantly, like here, "no representative of the federal government asserts any interest in overbearing the assertion of legislative privilege in this case. We have before us neither a federal criminal case nor a civil case in which the federal government is a party." Id. at 88. The First Circuit acknowledged "[b]oth courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." Id. (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). In reliance on Supreme Court precedent, the First Circuit found evidence of an individual legislators' motives "is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose." Id. at 90. The First Circuit concluded "the need for the discovery requested here is simply too little to justify such a breach of comity" and issued a writ reversing the district court's discovery order allowing discovery from the former state officials. Id. at 90-91.

The Plaintiffs failed to cite any appellate court decision indicating a request for discovery – issued by a party who is not the United States – to an individual lawmaker in a civil case was not barred by legislative privilege. The district court relied on none, and the Petitioners are unaware of any [5]. As such, in light of the

[5] The only appellate decision upon which Plaintiffs cited below in support of their argument was League of United Latin Am. Citizens Abbott v. United States, 2022 WL 2713263 (5th Cir. May 20, 2022). This order denied the appellants' request to stay district court depositions pending appeal. Id. at * 2. The following day, appellants requested an emergency application for a stay to the Supreme Court in a

American Trucking holding, now all three "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." See American Trucking, 14 4th at 88. If the district court's decision is affirmed, it would create a circuit split.

D. The district court did not properly apply legislative privilege.

Not only did the district court stray from the unanimous decisions of the circuit courts, but it imported an inapplicable five-factor test in doing so. The district court simply concluded a "qualified balancing analysis (five-factor test) is a better fit in this type of redistricting case, as opposed to the per se rule and absolute bar the Assembly advocates for." (App116.) The district court relied on non-persuasive authority from other district courts and did not follow the decisions of the sister circuits in reaching this conclusion.

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consolidated case entitled Guillen et al v. League of United Latin American Citizens, Sup. Ct. Case No. 21A756 (Docket Entry May 21, 2022). The United States, as a plaintiff in the underlying consolidated lawsuit responded to the emergency application and explained "the United States' complaint alleges that Texas's 2021 Congressional redistricting plan violates Section 2 of the Voting Rights Act." Sup. Ct. Case No. 21A756 (Docket Entry May 23 "Response to application from respondent United States" at p. 6). The United States served deposition subpoenas on state legislators. Id. at p. 7. The United States differentiated American Trucking, Hubbard, and Lee by explaining those cases "arose in a private suit, not an enforcement action by the United States." Id. at p. 25. Therefore, this case is inapplicable.

Petitioners do not contend that legislative privilege is absolute. The Supreme Court explained the privilege is qualified in U.S. v. Gillock, 445 U.S. 360 (1980) as follows:

> Although *Tenney* reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, *Tenney* was a civil action brought by a private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of **federal criminal liability as a restraining factor on the conduct of state officials**.

Id. at 372 (emphasis added).

The Court further explained "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at **civil actions**." Id. at 373 (emphasis added). In drawing on these cases, Gillock held "that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the **enforcement of federal criminal statutes**, comity yields." Id (emphasis added). This was explicitly acknowledged in Hubbard, Lee, and American Trucking. See Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1187 n. 10-11; American Trucking, 14 F.4th at 87.

The district court's error in determining a "five factor test[ ] is a better fit in this type of redistricting case" is best exhibited in Lee. As the district court readily acknowledges, the "five-factor balancing test" utilized by the Magistrate Judge was "derived from the deliberative process privilege." (App116-117; App093-098.)

Interestingly, the Ninth Circuit adopted a multi-factor test which mirrors the test applied by the district court for the purpose of the deliberative process privilege. Compare F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (listing the factors applicable to the deliberative process privilege) with Doc. 48 at pp. 16-19; Doc. 63 at p. 5. 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). When the Ninth Circuit analyzed legislative privilege in the scope of a discriminatory gerrymandering claim it refused to apply this multi-factor test even though it was raised by the parties[6]. Lee, 908 F.3d 1186-1188. Rather, Lee followed Supreme Court precedent and reasoned categorical exception whenever a claim "directly implicates the government's intent" would render "the privilege of little value." Lee, 908 F.3d at 1188. Importantly, neither the First nor Eleventh Circuits applied the "five-factor test" derived from the weaker deliberative process privilege either. See American Trucking, 14 F.4th at 86-91; Hubbard, 803 F.3d at 1310-1312. Instead, the Circuits recognized there are limitations to legislative privilege as it does not apply to the enforcement of federal criminal statutes or in cases where the federal

[6] The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege." Lee, Case 15-55478, Dkt Entry: 29-1 (Appellees Brief) at P. 53 of 60 (per PACER).

government is a party to a suit seeking to vindicate civil rights. However, the "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments" (Hubbard, 803 F.3d at 1310) and this is especially true when someone other than the United States seeks "discovery in a civil case." American Trucking, 14 4th at 88. The district court's order clearly misapplied legislative privilege and remains unsupported by any appellate court decision.

E. The district court's misapplication of legislative privilege has drastic policy implications.

The policy behind the holdings of the sister circuits is sound, as the First Circuit noted it had "little doubt that it will become increasingly common to subpoena state lawmakers" if it did not reverse the district court's order and put a stop to the practice. See American Trucking, 14 4th at 85. If this Court affirms the district court's decision, it will allow any private individual to harass members of the Assembly with subpoenas to engage in a fishing expedition in hopes of finding an "illicit motive" to undercut legislation with which they disagree. Even the Magistrate Judge acknowledged this is exactly what the Turtle Mountain Plaintiffs attempt to do here. (App184.) (noting Plaintiffs seek "communications demonstrating 'illicit motive' by one or more legislators….").

Further, the district court erroneously held this "case requires at least some judicial inquiry into the legislative intent and motivation of the Assembly."

(App116.) This statement by the district court flies directly in the face of longstanding Supreme Court precedent. Tenney, 341 U.S. at 377 (holding it is "not consonant with our scheme of government for a court to inquire into the motives of legislators."); See also State of Arizona v. State of California, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [Act], this court may not inquire."); Dobbs, 142 S.Ct. at 2255 ("inquiries into legislative motives are a hazardous matter…."). This is because "an isolated statement by an individual legislator is not sufficient basis from which to infer the intent of the entire legislative body." Rosentiel v. Rodriguez, 101 F.3d 1554, 1552 (8th Cir. 1996) The rationale behind this rule is clearly explained as follows:

> When construing a statute, our task is to ascertain the intent of the Legislature as a whole. 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.

McDowell v. Watson, 59 Cal.App.4th 1155, 1161 n. 3 (1997).

Put another way, to "the extent that legislative intent is at issue…the examination of such intent should be limited to the official legislative history, which does not include post-enactment opinions from legislators." Phelps-Roper v. Heineman, 2014 WL 562843 at * 1 (D. Neb. Feb. 11, 2014) (citing Weinberger v.

Rossi, 456 U.S. 25, 35 n. 15 (1982)). Even within the official legislative history, the Supreme Court has "eschewed reliance on the passing comments of one Member and casual statements from floor debates." Garcia v. U.S., 469 U.S. 70, 76 (1984).

Here, the subpoenas seek documents from six of the 141 Assembly members, and deposition testimony from one. If it is improper for the Court to rely upon a comment from a member of the legislator during a floor debate, discovery seeking information from individual legislators - outside of the official legislative record - serves no purpose other than to divert attention from the Assembly's official duties. Allowing such discovery would undoubtedly set a dangerous precedent as it will chill candid communication and open the floodgates for abuse of the federal court system to imperil legislative independence.

IV. The District Court's Discovery Order Imposes an Undue Burden on the Assembly and the Stated Purpose of the Discovery Sought is Irrelevant and not Needed Under Supreme Court precedent.

A. Petitioners are non-parties to this litigation

The Petitioners are not named as parties to this litigation and only became involved when the Plaintiffs served the above-described subpoenas. This district court disregarded the Assembly's evidence explaining the burden imposed upon it. The Magistrate Judge reached the unfounded conclusion that the Petitioners – as

non-parties – could simply hire outside counsel to alleviate the burden. (See App186.)

Upon receipt of the subpoenas, all eight attorneys in the Legislative Council's Legal Division cooperatively performed a keyword search on each of the Petitioners' email accounts to provide a general estimate of the communications sought by the subpoenas. (App216.) The "total number of search results, generated by the key word search, were recorded." (App224.) This resulted in 64,849 emails containing the key word searched. (App129.) The communications identified in the initial 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." (App216.) Based on this extremely cursory review, any items identified as clearly non-responsive (such as list serve items) were excluded from the remaining portions of the initial cursory analysis. (Id.) This cursory review alone "averaged a full 8 hours per attorney" or a total of 64 hours. (Id.)

Legal Division Director, Emily Thompson, explained the following in her affidavit:

> 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.

(App216-217.)

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 cursory search, she estimated a more comprehensive review to find every document responsive to the Plaintiff's subpoena would take ten times as long. (Id.) In light of the definitions within the subpoena and the limited review already performed which identified more than 64,000 communications, Thompson's estimate is entirely reasonable. (App216.) Notably, this did not account for the additional detailed privilege log ordered by the Magistrate Judge which must include "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." (App187.) It is well-settled that privilege logs are not required with respect to a claim of legislative privilege because the burden of producing one is not consistent with the privilege. 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.").

To further complicate matters, the North Dakota biennial legislative session commenced on January 3, 2023. (App217.) The Legislative Council's Legal Division anticipated it would be tasked with drafting over 1,000 bills, along with providing daily research and legal advice -- "akin to an aide to the legislators." (Id.) The Magistrate Judge determined the burden imposed by the discovery order could simply be alleviated by engaging outside counsel. (App186.) While the district court's discovery orders are in direct violation of legislative privilege as explained above, it also runs afoul of Fed. R. Civ. P. 26, 45 and ignored precedent on this issue.

This Court previously held "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, "[t]he 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 "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)." Herbert v. Lando, 441 U.S. 153, 1549 (1979). 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 Respondents are at a loss as to what they possibly could do to explain the burden of responding to these subpoenas without actually performing over 700 hours of work, recording their time and effort, and then claiming undue burden after the fact. The district court would have the Respondents undertake an undue burden to establish the subpoenas would subject them to an undue burden.

The D.C. Circuit considered a similar situation in MINPECO, S.A., where the appellant served subpoenas on the Custodian of Records and the Staff Director for a House Subcommittee seeking identities of a stenographer, payments, and third-party communications relating to the publication of an allegedly altered transcript. MINPECO, 844 F.2d at 857-58 (D.C. Cir. 1988). While finding legislative privilege applied as a bar to the subpoena, the court also acknowledged the subpoena "might arguably contain material unrelated to the subcommittee's protected investigatory

activities" including correspondence with third-parties. Id. at 862. The court held that enforcing the subpoenas "would be to authorize a fishing expedition into congressional files." Id. at 862-63 (emphasis added). "For a court to authorize such open-ended discovery in the face of a claim of privilege" would "appear inconsistent with the comity" that exists between separate branches of government. Id. at 863. The court further noted that if the appellants' requested discovery were allowed, "each time a subpoena is served on a committee, an initial judicial inquiry would be required to calibrate the degree to which its enforcement would burden the committee's work. Such a consequence would be absurd." Id. at 860.

This is exactly what the district court's order invites here. The Petitioners claimed legislative privilege; however, the district court's order permits a "fishing expedition" in hopes to find an "illicit motive" of one or more legislators. If the district court's order is allowed to stand, each time a subpoena is served upon a member of the Assembly, a judicial inquiry would be required to calibrate the degree to which its enforcement would burden the Assembly's work. This consequence "would be absurd." See Id.

The district court's order permits exactly what Rules 26, 45, and the cases interpreting them – especially in light of a claimed privilege - are designed to prevent. The district court disregarded the detailed first-hand sworn statement of Emily Thompson which explained the extensive burden imposed by these

subpoenas. It also ignored fundamental principles of comity and impermissibly determined a non-party cannot establish an undue burden when it can simply shift its burden upon outside counsel. The district court's discovery order must be reversed as it imposes an undue burden.

V. The Plaintiffs' Stated Purpose for the Discovery Sought is not Needed and Irrelevant in a Section 2 Claim Under the VRA.

The Magistrate Judge acknowledged the Plaintiffs' subpoenas seek to find "communications demonstrating 'illicit motive' by one or more legislators" and argued they would "certainly be relevant" under Section 2 of the VRA's "totality of the circumstances test." (App184.) The Magistrate Judge went on to acknowledge "legislative intent is not central to Turtle Mountain's claims," but found "such evidence may nonetheless be relevant." Id. The district court affirmed this order and determined the requested discovery "is relevant in assessing the Assembly's discriminatory intent (or lack thereof) and motivations presented against or in favor of the redistricting plan." (App116.) This is inconsistent with Supreme Court precedent and arguments of the parties below.

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 that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters…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."…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."

Thonburg v. Gingles, 478 U.S. 30, 43-44 (1986) (emphasis added) (footnotes and internal quotations 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 Hubbard, 803 F.3d at 1310), 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.

This Court's holding in Bone Shirt is consistent with 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 neither party in this case argued the intent or motives of an individual lawmaker were necessary in their summary judgment submissions. See ECF Nos. 59, 65, 73. These inquiries are simply not necessary for the analysis.

Even if the district court were correct that motives of an individual legislator were relevant – which they are not – there is no need for this information as it addresses "the wrong question" under the "totality of the circumstances" test. Gingles, 478 U.S. at 43-44 (1986). It has long been the law of this Court that "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). As explained above, the information sought is not relevant, and even if it were, there is no need for it. This is an especially important consideration when a state lawmaker asserts a claim of legislative privilege. American Trucking, 14 F.4th at 90 (holding that even if legislative privilege might yield, "the need for the discovery requested here is simply too little to justify such a breach of comity."). In sum, the district court's order imposes an undue burden upon a sovereign's legislative branch to allow Plaintiffs to

engage in a fishing expedition in hope of finding evidence of an "illicit motive" of one or more legislators which has absolutely no bearing on the disposition of the underlying action. This decision cannot stand and must be reversed.

CONCLUSION

This case implicates an important privilege and presents an extraordinary situation where the district court ignored consistent precedent of our sister circuits. Clearly, under Lee and the cases cited therein, Representative Devlin's deposition is barred by legislative privilege. Further, the document subpoenas clearly create an undue burden, seek information which is not needed, and the State Officials' obligation to respond is barred by legislative privilege. For the aforementioned reasons, the district court's discovery orders should be reversed and all subpoenas issued to the State Officials should be quashed.

Dated this 28th day of March, 2023.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) as it uses the proportionally spaced typeface of Times New Roman in 14-point font.

This brief complies with the type-volume limitation of Fed. R. App. P. 21(d) as it contains 6,923 words, excluding parts of the brief exempted by Fed. R. App. P. 21(a)(2)(c).

The electronic version of the foregoing Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28(A)(d) was scanned for viruses and that the scan showed the electronic version of the foregoing is virus free

Dated this 28th day of March, 2023.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2023, I electronically submitted the foregoing **PETITION FOR WRIT OF MANDAMUS** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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

Docket No. 23-1600

In the

United States Court of Appeals

For the

Eighth Circuit

In re North Dakota Legislative Assembly, Senator Ray Holmberg, Senator Richard Wardner, Senator Nicole Poolman, Representative Michael Nathe, Representative William R. Devlin, Representative Terry Jones, Senior Counsel at the North Dakota Legislative Council Claire Ness,

Petitioners.

On Petition for a Writ of Mandamus
To The United States District Court for the District of North Dakota
In Case No. 3:22-cv-00022

APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS

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Attorneys for Petitioners.

TABLE OF CONTENTS TO THE APPENDIX

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Al Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 1:22-CV-00022-PDW-ARS

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: William R. Devlin

(Name of person to whom this subpoena is directed)

☑ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Place:	Date and Time:
Robins Kaplan LLP 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	11/18/2022, 9 AM CST

The deposition will be recorded by this method: Stenographic and/or videographic means

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/02/2022

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Mark Gaber, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, DC 20005; 202-736-2200; mgaber@campaignlegal.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:22-CV-00022-PDW-ARS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al.
Plaintiff
v.
Alvin Jaeger, in his official capacity as Secretary of State of North Dakota
Defendant

Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Ray Holmberg
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP, Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501 OR Spirit Lake Nation C/O Chairman Doug Yankton, Attn: Tim Purdon PO Box 359, Fort Totten, ND 58335	October 29, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:
Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

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(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

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(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

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(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

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(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

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(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

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(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Ray Holmberg, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Richard Wardner

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 29, 2022

❒ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Richard Wardner, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Nicole Poolman

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 29, 2022

❒ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Nicole Poolman, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Michael Nathe

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 29, 2022

❒ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Michael Nathe, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

William R. Devlin

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP, Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501 OR Spirit Lake Nation C/O Chairman Doug Yankton, Attn: Tim Purdon PO Box 359, Fort Totten, ND 58335	October 29, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to William R. Devlin, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al. *Plaintiff* v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota *Defendant*	)	Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Terry B. Jones

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 29, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Terry B. Jones, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. “Item” is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. “Person” means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. “And” and “or” mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your “control,” meaning documents that You have the “legal right to obtain” within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al.
Plaintiff

v.

Alvin Jaeger, in his official capacity as Secretary of State of North Dakota
Defendant

Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Claire Ness
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 30, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 9/30/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:
Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Claire Ness, whether in your official capacity or as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean 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.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean 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.

9. "Item" is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. "Person" means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. "And" and "or" mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your "control," meaning documents that You have the "legal right to obtain" within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

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.

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	)	**RESPONDENTS MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION**

*** *** ***

The North Dakota Legislative Assembly and North Dakota Representative William R. Devlin hereby move pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure to quash the subpoena served by the Plaintiffs commanding Representative Devlin to appear for a deposition.

As set forth more fully in the Memorandum of Law and Exhibits filed contemporaneously herewith, the *Subpoena* the Plaintiffs served upon Representative Devlin seeks to elicit testimony that is protected by legislative privilege and attorney client privilege.

Accordingly, the North Dakota Legislative Assembly and Representative William R. Devlin respectfully request this Court grant the *Motion to Quash Subpoena to Testify at a Deposition in a Civil Action.*

Dated this 17th day of November, 2022.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

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Attorneys for North Dakota Legislative Assembly and Representative Bill Devlin

CERTIFICTE OF SERVICE

I hereby certify that on the 17th day of November, 2022, a true and correct copy of the foregoing **RESPONDENTS MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION** 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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By /s/ Scott K. Porsborg
SCOTT K. PORSBORG

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	**MEMORANDUM IN SUPPORT OF RESPONDENTS MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION**

*** *** ***

I. INTRODUCTION

The North Dakota Legislative Assembly and North Dakota Representative William R. Devlin make this limited appearance for the sole purpose of quashing Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown's *Subpoena to Testify at a Deposition in a Civil Action* directed toward Representative Devlin.[1] Pursuant to Fed. R. Civ. P. 45, the subpoena must be quashed as it seeks information subject to legislative privilege. Importantly, neither the Legislative Assembly nor Representative Devlin is a party to this action and neither has made any appearance in this action other than to assert legislative privilege in response to the Plaintiffs' *Subpoena*.

The *Complaint* asserts North Dakota's redistricting plan violates Section 2 of the Voting Rights Act, by diluting the strength of Native American voters in Legislative Districts 9 and 15. Defendant Alvin Jaeger, Secretary of State of North Dakota denied this claim.

[1] A copy of this subpoena is attached to this document as Exhibit A.

On November 2, 2022, the Plaintiffs served a *Subpoena to Testify at a Deposition in a Civil Case* upon the undersigned, commanding Representative William R. Devlin of the North Dakota Legislative Assembly to appear and provide testimony.

The North Dakota Legislative Assembly and Representative Devlin now timely move to quash this subpoena, because it improperly seeks the disclosure of information protected by legislative privilege and/or attorney-client privilege. The Plaintiffs have subpoenaed the testimony of only one member of the North Dakota Legislative Assembly – Representative Devlin. It appears he has been selected for deposition solely because he served as the chairman of the Redistricting Committee.

The Plaintiffs cannot be allowed to depose a member of the legislature based on that member's position as a committee chairman. Allowing the deposition would chill the legislative process and hinder free debate among legislators. Nor can the Plaintiffs be allowed to depose a member of the legislature regarding conversations between the member and other legislators, or the member and Legislative Council, regarding a bill. It is clear the Plaintiffs seek to pierce legislative and/or attorney-client privilege with this deposition, and thus, Plaintiffs' *Subpoena* must be quashed.

II. RELEVANT FACTUAL BACKGROUND

On November 10, 2021, the North Dakota Legislative Assembly, in a special session, passed House Bill 1504, which provided for a redistricting of North Dakota's legislative districts. See Doc ID #30, p. 2. North Dakota has 47 legislative districts, with one senator and two representatives elected at large from each district. See Doc ID #1, p. 2.

House Bill 1504 retains the election of one senator and two representatives for the majority of the 47 districts. However, in Districts 4 and 9, senators will continue to be elected at

large, but representatives will be chosen from single-member subdistricts, labelled as House Districts 4A, 4B, 9A, and 9B. Id. House District 4A follows the boundaries of the Fort Berthold Indian Reservation, and House District 9A substantially follows the border of the Turtle Mountain Indian Reservation.

The Plaintiffs are two Native American Tribes located within the state of North Dakota. The Spirit Lake Tribe is located in Legislative District 15, and the Turtle Mountain Band of Chippewa Indians are in Legislative District 9 and House Districts 9A and 9B. The individual plaintiffs are residents and voters of Districts 9A and 15.

III. LAW AND ARGUMENT

A. The Court Must Quash the Subpoena Issued to Representative Devlin Because He is Entitled to Legislative Privilege.

The Federal Rules of Civil Procedure state that the Court shall quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies. See Fed.R.Civ.P. 45(d)(3)(A)(iii). Rule 501 of the Federal Rules of Evidence governs privilege as follows:

> The common law – as interpreted by the United States courts in light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:
> - The United States Constitution;
> - A federal statute; or
> - Rules as prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Ev. 501.

Here - as explained in detail below - Representative Devlin's claim of legislative privilege is rooted in the Federal common law as interpreted by numerous United States district and appellate courts and his motion to quash should be granted.

i. Legislative Privilege is Derived from the Speech or Debate Clause of the United States Constitution.

The genesis of the federal common law legislative privilege is found in Section 6 of Article 1 of the United States Constitution which provides Senators and Representatives "shall in all Cases...be privileged ... for any Speech or Debate in either House, they shall not be questioned in any other Place." This is commonly referred to as the Speech or Debate Clause. See U.S. v. Brewster, 408 U.S. 501, 521 (1972). The "purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process." Id. at 524. "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers...." Id. "The applicability of the Clause to private civil actions is supported by the absoluteness of the terms 'shall not be questioned,' and the sweep of the term 'in any other Place.' In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975). When "a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled...once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." Id. While the Speech or Debate Clause only applies to federal legislators, "it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause." In re Hubbard, 803 F.3d 1298, 1310 n. 11 (11th Cir. 2015). In other words,

"state and local legislators may invoke legislative privilege." Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018).

"The legislative privilege 'protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts.*" In re Hubbard, 803 F.3d at 1310 (emphasis in original) (quoting Brewster, 408 U.S. at 525). "One of the privilege's principal purposes is to ensure that lawmakers are allowed to focus on their public duties." Id. at 1310 (internal quotation omitted). "That is why the privilege extends to discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Id (emphasis added). "The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Id. Put another way, "state legislators, like members of Congress, enjoy protection from…evidentiary process that interferes with their legitimate legislative activity." Puente Arizona v. Arpaio, 314 F.R.D. 664, 699 (D. Ariz. 2016) (internal quotation omitted).

ii. The North Dakota Constitution contains a Speech or Debate Clause and federal courts recognize the importance of comity in legislative privilege.

In addition to the Federal common law privilege state legislators possess as derived from the U.S. Constitution's Speech or Debate Clause, the State of North Dakota - through the state constitution - explicitly recognize its legislators should enjoy the same privilege. The North Dakota Constitution provides "[m]embers of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings." N.D. Const. Art. 4, § 15. Clearly, legislative privilege is vitally important to North Dakota as it is specifically addressed in the plain text of the state constitution. While state law is not dispositive of the privilege to be applied in federal court, it is persuasive in applying the federal common

law legislative privilege. The United States District Court for the North District of Florida recognized the importance of a state affording its legislators a legislative privilege and noted that "if a state indeed did not recognize a privilege for its own legislators, the case for recognizing a federal privilege would be weaker. This makes no difference here, because Florida *does* recognize a state legislative privilege[2]." Florida v. U.S., 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (emphasis in original). Further, the First Circuit recently recognized "principles of comity command careful consideration. And the interests in legislative independence served by the Speech or Debate Clause remain relevant in the common law context. For these reasons, federal courts will often sustain assertions of the legislative privilege by state legislatures except when important federal interests are at stake, such as in a federal criminal prosecution." American Trucking Associations, Inc. v. Alviti, 14 F.4th 76, 87 (1st Cir. 2021) (internal quotations and citations omitted).

iii. Legislative privilege applies to the claims asserted in this lawsuit.

The *Complaint* in this action asserts an alleged violation of the Voting Rights Act. Doc. No. 1 at pp. 29-31. Representative Devlin also was served a subpoena duces tecum in this case requiring him to produce all documents and communications regarding the applicability of the

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[2] Notably, the legislative privilege afforded to state lawmakers in Florida is a product of the common law and not expressly written into Florida's constitution. See Fla. House of Representatives v. Expedia, Inc., 85 So.3d 517, 521-525 (Fla 1st DCA 2012) (holding the state lawmaker's legislative privilege was a product of the common law as "[t]he Florida Constitution does not include a version of the Speech or Debate Clause" but the "privilege of legislators to be free from…civil process for what they say or do in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and reasoned that legislators are "entitled to refuse to testify about the performance of duties.") Unlike Florida, the North Dakota Constitution expressly provides a Speech or Debate Clause to prohibit state lawmakers from being questioned about their performance of legislative duties.

Voting Rights Act[3]. See Exhibit #B. Put simply, this is not a criminal prosecution, but a private civil action arising under the Voting Rights Act that alleges a dilutive redistricting plan. The common law clearly establishes legislative privilege bars Representative Devlin from appearing for a deposition in his capacity as a state legislator.

a. This is a private civil action and legislative privilege applies.

Importantly, this is a private civil action and the federal government is not a party to this litigation. While principles of comity may yield where "important federal interests are at stake, as in the enforcement of federal criminal statutes" this exception to legislative privilege has no application here. See U.S. v. Gillock, 445 U.S. 360, 373 (1980). The Supreme Court has noted in "some extraordinary instances [legislative] members might be called to the stand at trial to testify the purpose of the official action, although even then such testimony frequently will be barred by privilege." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977). The application of legislative privilege to state lawmakers in a private civil action was recently explained by the First Circuit as follows:

> We have before us neither a federal criminal case nor a civil case in which the federal government is a party. *See Gillock*, 445 U.S. at 373, 100 S.Ct. 1185 (holding that a federal criminal prosecution was important enough to overcome a state lawmaker's assertion of legislative privilege); *In re Hubbard*, 803 F.3d at 1309 n.10 (suggesting that discovery may be more searching in "[a]n official federal investigation into potential abuses of federal civil rights" by state officials than in "a private lawsuit attacking a facially valid state statute by attempting to discover the subjective motivations of some of the legislative leaders and the governor who supported it"). 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. *See In re Hubbard*, 803 F.3d at 1311–12; *Lee*, 908 F.3d at 1186–88.

Alviti, 14 F. 4th at 88.

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[3] Representative Devlin anticipates the subpoena at issue is designed to question him on the documents requested in Exhibit B. The North Dakota Legislative Assembly and Representative Devlin have objected to this subpoena duces tecum.

In other words, a private lawsuit attacking a legislative action does not invoke the incredibly limited exceptions to a state lawmaker's legislative privilege.

b. Lawsuits involving the Voting Rights Act are subject to legislative privilege.

While this is a private civil action – not a federal criminal proceeding – the *Complaint* asserts a claim under the Voting Rights Act, and the available subpoena information indicates the Plaintiffs seek to inquire about the communications between Representative Devlin and other legislators and Legislative Council, amongst other topics. Doc. No. 1; Exhibit B. The federal district court of Florida evaluated the application of a state lawmaker's legislative privilege in light of the Voting Rights Act claims in Florida, 886 F. Supp. 2d 1301 (N.D. Fla. 2012). In Florida, the district court found the state legislators were entitled to legislative privilege and could not be required to testify based on the following rationale:

> But legislative purpose is an issue in many other cases, not just those arising under the Voting Rights Act. Indeed, in many equal-protection cases, legislative purpose is an issue that precisely mirrors the issue in a Voting Rights Act case. In equal-protection cases, as in Voting Rights Act cases, the critical question often is whether the legislature acted with a discriminatory purpose. *See, e.g., Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The relevance of a legislator's testimony on the issue of discriminatory purpose and the legislator's privilege not to testify thus are identical in equal-protection and Voting Rights Act cases.
>
> The Supreme Court has addressed these matters in language squarely applicable here:
>
> > The legislative or administrative history [of the legislative action] may be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then *such testimony frequently will be barred by privilege.*

Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (citing *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)) (emphasis added). The Court added:

> This Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130–31, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided."

Arlington Heights, 429 U.S. at 268 n. 18, 97 S.Ct. 555 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

Arlington Heights accurately sets out the law on this subject. The considerations that support the result include the burden that being compelled to testify would impose on state legislators, the chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due a coordinate branch of government. Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes. Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege.

To be sure, a state legislator's privilege is qualified, not absolute; a state legislator's privilege is not coterminous with the privilege of a member of Congress under the Constitution's Speech and Debate Clause. Thus, for example, in *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court held that a state legislator had no legislative privilege in a federal criminal prosecution for bribery. The court distinguished *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)—one of the cases relied on in *Arlington Heights* for the proposition that a state legislator's testimony on legislative purpose often is privileged—on the ground that it was a civil case. But even if the state legislative privilege is qualified in civil as well as criminal cases, there is no reason not to recognize the privilege here. Voting Rights Act cases are important, but so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.

Florida, 886 F. Supp. 2d at 1303-04 (N.D. Fla. 2012) (emphasis added).

After acknowledging that Florida affords legislative privilege to its state lawmakers, the Florida Court held "the privilege is broad enough to cover all the topics that the intervenors

propose to ask them and to cover their personal notes of the deliberative process." Id. at 1304. Further, in a case involving the federal Voting Rights Act, the Florida court held the "privilege also extends to staff members at least to the extent 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." Id.

The well-reasoned – and directly applicable analysis above – establishes a state lawmaker's legislative privilege acts as a bar to compelling testimony in a civil action with respect to the specific federal question before the Court. While Florida provides the Court with a detailed and well-reasoned roadmap to decide this motion, the Ninth Circuit went a step further and evaluated the application of legislative privilege as applied to an alleged discriminatory redistricting case in Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018).

c. Legislative privilege applies to bar testimony of legislators in alleged racially-motivated redistricting cases.

The Ninth Circuit applied the above-described legal framework in a case directly applicable to Representative Devlin's motion to quash as explained by the Ninth Circuit in Lee, 908 F.3d 1175 (9th Cir. 2018). This recent Ninth Circuit opinion applied legislative privilege to bar the depositions of local officials involved in drawing city council districts for the City of Los Angeles. Id.

In Lee, various plaintiffs filed a complaint in federal district court alleging the City violated the U.S. Constitution when the City Council passed its final redistricting ordinance in 2012. Id. at 1181. The City moved for a protective order prohibiting the plaintiffs from "questioning City officials regarding any legislative acts, motivations, or deliberations pertaining to the 2012 redistricting ordinance. The City also sought to specifically prohibit Plaintiffs from deposing Mayor Eric Garcetti, Council President Wesson, City Councilmember Jose Huizar, and

former City Councilmember Jan Perry." Id. The district court granted the City's motion and the plaintiffs appealed. Id. at 1181-82.

On appeal, the Ninth Circuit affirmed the district court's order based on the following rationale:

> Plaintiffs contend that the district court erred in barring the depositions of Ellison, Wesson, and other officials involved in the redistricting process. First, according to Plaintiffs, the legislative privilege does not apply at all to state and local officials. We disagree.
>
> The legislative privilege has deep historical roots that the Supreme Court has traced back to "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries....
>
> 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." *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). 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 ...." *Bogan v. Scott-Harris*, 523 U.S. 44, 52, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). We therefore hold that state and local legislators may invoke legislative privilege.
>
> Plaintiffs next argue that, even assuming the privilege applies to state and local officials, it is only a qualified right that should be overcome in this case. Plaintiffs have failed to persuade us that the privilege was improperly applied here.
>
> 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.' " *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).
>
> In *Village of Arlington Heights*, the plaintiff brought an Equal Protection challenge against local officials, alleging that their refusal to rezone a parcel of land for redevelopment was motivated by racial discrimination. *Id.* at 254, 97 S.Ct. 555. 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." *Id.* at 268, 97 S.Ct. 555 (citing *Tenney*, 341 U.S. 367, 71 S.Ct. 783). Applying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in "extraordinary circumstances." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (citing *Vill. of Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555).
>
> We recognize that claims of racial gerrymandering involve serious allegations: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial ... class."' *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting)). 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. *See Vill. of Arlington Heights*, 429 U.S. at 268 n.18, 97 S.Ct. 555. 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." *See Tenney*, 341 U.S. at 377, 71 S.Ct. 783. *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. 429 U.S. at 268, 97 S.Ct. 555. Without sufficient grounds to distinguish those circumstances from the case at hand, we conclude that the district court properly denied discovery on the ground of legislative privilege.

Id. at 1186-88 (internal footnotes omitted).

Put simply, Representative Devlin is clearly entitled to legislative privilege and his motion to quash should be granted. The common law - as explained above – clearly establishes legislative privilege applies to preclude state lawmakers from testifying in private civil actions asserting claims under the Voters Rights Act. See Alviti, 14 F.4th at 88 (1st Cir. 2021); Florida, 886 F. Supp. 2d at 1303-04 (N.D. Fla. 2012). Further, legislative privilege under the Federal common law is a bar to deposing local lawmakers in cases asserting a violation of the U.S. Constitution in cases alleging racially-motivated redistricting. Lee, 908 F.3d at 1186-88 (9th

Cir. 2018). For these reasons, Representative Devlin is clearly entitled to legislative privilege, should not be compelled to testify at his deposition, and his motion to quash should be granted.

B. In Addition to Legislative Privilege, Representative Devlin's Motion to Quash Should Be Granted Because Any Testimony He Could Provide Lacks Probative Value.

Representative Devlin is simply one representative out of ninety-four. Although Representative Devlin served as the chair of the Redistricting Committee, that role did not grant him any additional power. The committee chair can be defined as a relatively administrative role – the committee chair's role is to ensure the committee is proceeding in a timely fashion, and that bills move from the Committee to the floor. This is especially true in joint committees like the redistricting committee.

The subpoena appears to target Representative Devlin based on his status as chair of the Committee, but Representative Devlin cannot provide any relevant testimony beyond what is already readily available online.[4] While this information is subject to legislative privilege as explained above, it also is unnecessary to the disposition of this lawsuit. Specifically, the First Circuit cautioned courts from ignoring legislative privilege to allow the type of testimony the Plaintiffs seek to obtain from Representative Devlin. The First Circuit explained the rationale behind applying legislative privilege to state lawmakers in the discrimination context in Alviti.

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[4] The website for the interim redistricting committee includes agendas, minutes, and video documentation for each of the committee's meetings. It also includes the documentation considered by the committee. It can be found at https://www.ndlegis.gov/assembly/67-2021/committees/interim/redistricting-committee.

Likewise, the website for House Bill 1504 details the various versions of the bill, and contains video for the floor debate, including video of Representative Devlin's remarks. It also includes links to testimony provided to the Committee, including testimony by the chairmen of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Nation. It can be found at https://www.ndlegis.gov/assembly/672021/special/billoverview/bo1504.html?bill_year=2021ss&bill_number=1504.

In Alviti, the Plaintiffs asserted the Rhode Island Bridge Replacement, Reconstruction, and Maintenance Fund Act of 2016 ("RhodeWorks") was in violation of the Commerce Clause because it was discriminatory. Alviti, 14 F.4th at 80-81. The underlying lawsuit was based on alleged discrimination, and Alviti evaluated the state lawmakers' motion to quash in light of the probative value of their testimony as follows:

> 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. *See United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (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."); cf. *Va. Uranium, Inc. v. Warren*, — U.S. —, 139 S. Ct. 1894, 1907–08, 204 L.Ed.2d 377 (2019) (plurality opinion) ("Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product[,] ... [and] risk[s] displacing the legislative compromises actually reflected in the statutory text."). Thus, when evaluating whether a state statute was motivated by an intent to discriminate against interstate commerce, 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. *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 13 (1st Cir. 2010) (quoting *Gwadosky, 430 F.3d at 38*). 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.

Alviti, 14 4th at 90 (1st Cir. 2021) (emphasis added).

Representative Devlin's testimony is not necessary to fully develop the facts of this case. See Id. ("evidence that will likely bear on the presence or absence of discriminatory effects in the actual results of [the legislative act] is more probative and more readily discoverable than evidence relating to legislative intent.") Representative Devlin's actions or intentions are not probative of any issue to be decided in this action as he is merely one lawmaker in a large Legislative Assembly. Further, as noted in Alviti, the evidence that will bear on the presence or absence of discriminatory effects of the legislative decision can easily be procured from other sources and Representative Devlin's testimony lacks probative value in determining the action. This is yet another reason to grant Representative Devlin's motion to quash. See Fed. R. Civ. P. 26(b)(2)(C)(i) ("the court must limit the frequency or extent of discovery…if it determines that: (i) the discovery sought…can be obtained from some other source that is more convenient, less burdensome, or less expensive."); See also Fed. R. Ev. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.")

Here, it is clear legislative privilege shields Representative Devlin from testifying at a deposition. It also is clear comity commands careful consideration and it is appropriate to quash subpoenas to state lawmakers where the "subpoenas' only purpose was to support the lawsuit's inquiry into the motivation behind [the legislative act], an inquiry that strikes at the heart of legislative privilege." In re Hubbard, 803 F.3d at 1310 (11th Cir. 2015). The Plaintiffs' *Subpoena* to Representative Devlin appears to serve no other purpose than what was contemplated by the Circuit Courts in Hubbard, Alviti, and Lee. This type of discovery is clearly barred by the Federal Rules of Civil Procedure, Federal Rules of Evidence, and the Federal

common law of legislative privilege. Therefore, Representative Devlin's motion to quash should be granted.

C. The Court Must Quash the Subpoena Issued to Representative Devlin if the Plaintiffs Seek Discussions Between Representative Devlin and Legislative Council

It is possible the Plaintiffs do not seek Representative Devlin's testimony regarding his motivations or legislative actions, but instead, seek testimony regarding conversations he may or may not have had with Legislative Council regarding the legality of the sub-district plan. The Plaintiffs cannot use this subpoena to attempt to discover discussions Representative Devlin had with Legislative Council regarding redistricting. These conversations are communications between counsel and client, regarding the legality of an action, and the potential for suit. They are protected by attorney-client privilege. See Fed. R. Civ. P. 26(b)(3). The Federal Rules require a subpoena be quashed when it "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A)(iii). Plaintiffs request Representative Devlin testify as to privileged communications, and thus, the subpoena must be quashed.

IV. CONCLUSION

The Plaintiffs seek to depose a member of the North Dakota Legislative Assembly, based on the member's position as a committee chairman. The Plaintiffs improperly seek the disclosure of information protected by legislative privilege and attorney-client privilege. It must be quashed, pursuant to Fed.R.Civ.P. 45(d)(3). There is no testimony Representative Devlin could provide that is not protected by either legislative or attorney-client privilege. For all of the aforementioned reasons, the North Dakota Legislative Assembly and Representative William R.

Devlin respectfully request this Court quash Plaintiffs' *Subpoena to Testify at a Deposition in a Civil Action.*

Dated this 17th day of November, 2022.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2022, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF RESPONDENTS MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION** 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al., Defendants.	)	Case No. 3:22-cv-22 **ORDER**

Charles Walen, an individual, et al., Plaintiffs, vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota, et al., Defendants, and Mandan, Hidatsa, & Arikara Nation, et al., Defendant-Intervenors .	)	Case No. 1:22-cv-31 **ORDER**

In the above-captioned cases, the Turtle Mountain Band of Chippewa Indians (Turtle Mountain Band) and Mandan, Hidatsa, & Arikara Nation (MHA Nation) subpoenaed members of North Dakota's Legislative Assembly to appear at depositions and testify about recent redistricting legislation. North Dakota's Legislative Assembly, a

non-party, moved to quash the subpoenas on the basis of the state legislative privilege. For the reasons discussed below, the court denies the motions.

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id. Before the redistricting legislation, voters in North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Walen, Doc. 12-1).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, labeled House District 4A, 4B, 9A, and 9B. Id. Voters in each of these subdivided districts elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the MHA Nation. House District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in House District 9B. The Spirit Lake Nation, which is located near the Turtle Mountain Reservation and a plaintiff in Turtle Mountain, is in the undivided District 15. Id. at Doc. 19-3, pp. 2-4).

In February 2022, complaints in the above-captioned cases were filed. Both sets of plaintiffs argue the redistricting plan is an illegal racial gerrymander. The Turtle Mountain plaintiffs allege a violation of the Voting Rights Act, asserting the redistricting plan simultaneously "packs" some Native American voters in subdivided districts and "cracks" others across divided and undivided districts. (Turtle Mountain, Doc. 1, p. 30).

The Walen plaintiffs allege a violation of the Equal Protection Clause, asserting race was the predominate factor behind the redistricting legislation. (Walen, Doc. 1, p. 9).

The Walen plaintiffs moved for a preliminary injunction. A three-judge panel held a hearing on that motion in May 2022. Id. at Doc. 36. State Representative Terry Jones—who the MHA Nation has now subpoenaed—testified at the hearing. See id. at Doc. 58-1. The three-judge panel denied the motion for a preliminary injunction on May 26, 2022. Id. at Doc. 37. The Turtle Mountain defendants brought a motion to dismiss for failure to state a claim and lack of jurisdiction. (Turtle Mountain, Doc. 17). The presiding district judge denied that motion on July 7, 2022. Id. at Doc. 30.

Both cases proceeded to discovery. In November 2022, the Turtle Mountain Band (plaintiffs in Turtle Mountain) and the MHA Nation (defendant-intervenors in Walen) served subpoenas on two state representatives to testify at depositions.[1] The Turtle Mountain Band subpoenaed Representative William Devlin, who served as chair of the redistricting committee when the challenged legislation was passed. Id. at Doc. 38. The MHA Nation subpoenaed Representative Terry Jones, who represented one of the districts altered by the challenged legislation and who testified at legislative hearings and at the preliminary injunction hearing. (Walen, Doc. 53, p. 1).

North Dakota's Legislative Assembly, Representative Devlin, and Representative Jones (together, "the Assembly") moved to quash the subpoenas in both cases on the

[1] In both cases, subpoenas were also served for production of documents. The Assembly does not challenge those subpoenas in its motion but notes it has conveyed its objections to plaintiffs. (Turtle Mountain, Doc. 38, p. 7 n.3).

basis of the legislative privilege.[2] (Walen, Doc. 52; Turtle Mountain, Doc. 37). The Turtle Mountain Band and MHA Nation (together, "the Tribes") filed a response in their respective cases, and the Assembly filed replies. (Walen, Doc. 58; Doc. 65; Turtle Mountain, Doc. 41; Doc. 45).[3] The Tribes filed a notice of supplemental evidence in Walen, together with transcripts of depositions of the two plaintiffs. (Walen, Doc. 71).

Law and Discussion

Federal Rule of Civil Procedure 45 provides a court must "quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter." The Assembly argues this court should quash the subpoenas because the legislative privilege prohibits state legislators from being compelled to testify about their legislative activities. (Doc. 38). The Tribes do not dispute that, if applicable, the state legislative privilege would cover the representatives' testimony. Rather, the Tribes contend the privilege is overridden by the circumstances of this case. (Doc. 41). Because these cases involve federal claims, privileges are governed by federal common law unless a rule prescribed by the Supreme Court, a federal statute, or the United States Constitution provides otherwise. See Fed. R. Evid. 501.

The primary dispute is under what circumstances—if any—the state legislative privilege yields to countervailing interests. "This is a thorny issue." League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 455 (N.D. Fla. 2021). "[T]he Supreme Court has not set forth the circumstances under which the privilege must yield to the need for

[2] The Assembly also asserts the subpoenas should be quashed on the basis of the attorney-client privilege. (Turtle Mountain, Doc. 38, p. 16). For reasons discussed in this order, quashing the subpoenas on that basis would be premature.

[3] The briefs in both cases are similar. Unless otherwise indicated, the court will hereinafter cite only to the briefs filed in Turtle Mountain.

a decision maker's testimony." Lee v. City of L.A., 908 F.3d 1175, 1187 (9th Cir. 2018). Nor has the Eighth Circuit addressed the question. And other federal courts are split about the strength of the privilege. See e.g., Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 335 (E.D. Va. 2015).

One point of agreement is that the state legislative privilege is different in source and purpose from its federal counterpart. These differences are important and make "determining whether a state legislator is entitled to invoke legislative privilege in federal court . . . not as simple as it would be . . . if the legislator were a member of Congress." Jackson Mun. Airport Auth. v. Bryant, No. 3:16-CV-246, 2017 WL 6520967, at *3 (S.D. Miss. Dec. 19, 2017). To understand this contrast, the court turns to the legislative privilege afforded to federal lawmakers.

1. The Constitutional Federal Legislative Privilege

The legislative privilege for federal lawmakers is explicit in the United States Constitution. The federal Speech and Debate Clause, found in Article I, Section VI of the Constitution, provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place." With roots in the English Bill of Rights of 1689, "the central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975) (internal quotation marks omitted). The Clause also guards against the potential for litigation to "delay and disrupt the legislative function." Id. at 503.

To effectuate these purposes, the Supreme Court has interpreted the Clause as providing federal lawmakers with both immunity from liability and an evidentiary

privilege.[4] See Am. Trucking Ass'ns, Inc. v. Alviti, 14 F.4th 76, 86 (1st Cir. 2021). Legislative immunity shields federal lawmakers from criminal and civil liability for legislative activities "such as the production of committee reports, the passage of resolutions, and the act of voting." Bethune-Hill, 114 F. Supp. 3d at 331. Legislative privilege relieves federal lawmakers from "the burden of defending" themselves and protects against, among other things, "the use of compulsory process to elicit testimony from federal legislators . . . with respect to their legislative activities." Id. at 332. These protections are absolute. If the lawmaker's activity is "within the legitimate legislative sphere," then "balancing plays no part" and the federal lawmakers' protection applies. Eastland, 421 U.S. at 510 n.16.

2. The Common Law State Legislative Privilege

The legislative privilege for state lawmakers "stand[s] on different footing." Am. Trucking, 14 F.4th at 87. The federal Speech and Debate Clause "by its terms" only applies to federal legislators; the state legislative privilege is not derived from the same source as the federal privilege. See United States v. Gillock, 445 U.S. 360, 374 (1980). What is more, the Supreme Court has rejected the argument that "our constitutional structure" compels the existence of a state legislative privilege on par with its federal counterpart. Id. at 366.

Without federal constitutional status, federal courts apply the state legislative privilege as a matter of federal common law. Id. at 374. In addressing a privilege under

[4] Some cases speak of only a legislative "privilege" to refer to both immunity from liability and an evidentiary privilege. See e.g., Tenney v. Brandhove, 341 U.S. 367, 372 (1951). This court separates the two concepts—immunity refers to protections against liability and privilege refers to evidentiary protections. See Am. Trucking, 14 F.4th at 86 (doing the same).

the federal common law, the court begins with Federal Rule of Evidence 501. See id. Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (citation omitted).

Defining a privilege under Rule 501 proceeds in two steps: "[F]irst [determining] whether 'reason and experience' justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case." In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1168 (D.C. Cir. 2006) (Tatel, J., concurring). "By insisting on a two-step process, courts guide their discretion with rules developed from accumulated wisdom about the situations that justify a privilege." In re Grand Jury, 821 F.2d 946, 955 (3d Cir. 1987).

3. Recognition of a State Legislative Privilege

Whether to recognize a privilege depends upon a "broad-based view of how the privilege will work in general." Id. Factors traditionally considered are whether the privilege would serve significant private and public interests, the evidentiary benefit that would result from rejection of the privilege, and the policy decisions of the states. See Jaffee, 518 U.S. at 10-12.

As the Assembly points out, Article 4, Section 15 of the North Dakota Constitution contains a clause that reads, "Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings." A state's recognition of a privilege "indicates that 'reason and experience'" support its recognition in federal court. Id. at 13 (citation omitted).

The only Supreme Court case to address the state legislative privilege, Gillock, declined to recognize the privilege under Rule 501 in a federal criminal proceeding. 445 U.S. at 373. There, a state legislator, Gillock, was charged by federal prosecutors with bribery for accepting money in exchange for supporting certain legislation. Id. at 362. The issue was whether Gillock's legislative acts—his introduction of certain legislation and statements he made on the floor of the state senate, among others—could be introduced at trial as evidence against him. Id. at 365. Gillock argued for a state legislative privilege on par with the privilege granted to federal lawmakers through the Speech and Debate Clause.

In Gillock, the Supreme Court began its analysis by looking to the "language and legislative history of Rule 501." Id. at 367. The court noted the state legislative privilege was not one of the nine privileges enumerated in the Judicial Conference's original draft of Rule 501. Id. Though not dispositive, the state legislative privilege's omission from the draft suggested "that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." Id. at 368.

Next, the Supreme Court contrasted the purposes of the state legislative privilege with those of the federal Speech and Debate Clause. The federal Speech and Debate Clause has two interrelated purposes: to avoid intrusion by the Executive and Judiciary into the affairs of a coequal branch and to avoid disruption of the legislative process. Id. at 369. The first, separation-of-powers rationale, "[gave] no support to the grant of a privilege to state legislators in federal criminal prosecutions." Id. at 370. The court stated, "[U]nder our federal structure, we do not have the struggles for power between the federal and state systems [that] inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators." Id. As to the second

rationale, disruption of the legislative process, the court recognized that "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function" but that impact was offset "when balanced against the need of enforcing federal criminal statutes." Id. at 373.

Ultimately, the court found "although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." Id. The court concluded, "We believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." Id. In sum, Gillock held there was no state legislative privilege in federal criminal proceedings. The Supreme Court did not "recognize" the privilege under Rule 501. See e.g., Jaffee, 518 U.S. at 14 ("In United States v. Gillock . . . our holding that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft.").

Gillock's holding was limited to federal criminal proceedings, but the Assembly and the Tribes here both presume existence of a state legislative privilege in federal civil cases. There is well-developed case law recognizing legislative immunity in civil cases. See Tenney, 341 U.S. at 369; Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391 (1979); Bogan v. Scott-Harris, 523 U.S. 44 (1998). Courts often find that from this civil immunity "springs a limited legislative privilege against supplying evidence, including testimony." Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at *9 (C.D. Cal. Oct. 10, 2003). Though the Supreme Court has never explicitly recognized the state legislative privilege under Rule 501, it has suggested such

a privilege would be available in civil cases. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."). Because the Assembly and the Tribes do not argue otherwise, the court recognizes a state legislative privilege in federal civil cases.

4. Strength of a State Legislative Privilege

Having recognized a state legislative privilege in federal civil cases, the court now considers "whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case." In re Grand Jury Subpoena, Judith Miller, 438 F.3d at 1168. The Assembly and the Tribes agree the state legislative privilege is qualified rather than absolute. (Doc. 41, p. 1; Doc. 45, p. 4). Used here, a qualified privilege simply means one that "may be overcome by an appropriate showing." See In re Grand Jury Subpoena, Judith Miller, 438 F.3d at 1150. The Assembly and the Tribes, however, assert different interpretations of how the state legislative privilege is qualified.

The Tribes argue the state legislative privilege is qualified in a manner similar to the deliberative process privilege, advocating for balance of their need for evidence against the Assembly's interest in non-disclosure. (Doc. 41, p. 2). The Assembly argues no such balancing is warranted, asserting the state legislative privilege includes categorical exceptions and none of those exceptions apply here. (Doc. 45, p. 4). Both the Assembly and the Tribes marshal extensive case law in support of their respective positions.

A. The Assembly's Argument

The Assembly relies on four cases that emphasize Gillock's conclusion that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." 445 U.S. at 373. These cases ask a threshold question of whether there are "important federal interests" at stake and generally contrast the weightier federal interests in criminal prosecutions, like in Gillock, with the lesser-federal interests in private civil cases.

In the most recent of those cases, American Trucking, trucking companies and other private parties brought a Dormant Commerce Clause challenge to a Rhode Island law that authorized tolls on bridges and roads within the state. 14 F.4th at 81. The trucking companies sought to depose members of the state legislature on the theory that law was passed with a purpose of discriminating against out of state businesses. Id. at 82. The First Circuit Court of Appeals quashed the subpoenas on the basis of state legislative privilege. The court began its analysis by citing Gillock for the proposition that "federal courts will often sustain assertions of legislative privilege by state legislatures except when important federal interests are at stake, such as in a federal criminal prosecution." Id. at 87. The court then noted, "We have before us neither a federal criminal case nor a civil case in which the federal government is a party." Id. at 88. In addition, the court stated the private plaintiffs' case did not "implicate important federal interests" by seeking to enforce the Dormant Commerce Clause because were "a mere assertion of a federal claim sufficient[,] . . . the privilege would be pretty much unavailable largely whenever it is needed." Id. Finally, the court noted "the need for the discovery requested here is simply too little to justify such a breach of comity." Id. at 90.

In another case on which the Assembly relies, In Re Hubbard, an Alabama teachers union subpoenaed members of the state legislature for documents related to legislation the union claimed was in retaliation for its members exercise of their First Amendment rights. 803 F.3d 1298 (11th Cir. 2015). The Eleventh Circuit quashed the subpoenas on the basis of the state legislative privilege. As in American Trucking, the court began its analysis by stating "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests such as the enforcement of federal criminal statutes." Id. at 1311 (internal quotation marks omitted). The court then discussed the "fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government." Id. at 1312. In the end, the court held the plaintiffs' claim was not cognizable under the First Amendment and therefore did not implicate an important federal interest.[5] Id. at 1315.

Two cases the Assembly cited address claims brought under the Equal Protection Clause and the Voting Rights Act. In Florida v. United States, the court denied motions to compel depositions of state legislators in proceedings related to federal preclearance of legislation under the Voting Rights Act. 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). At that time, section 5 of the Voting Rights Act required covered jurisdictions to obtain federal preclearance from the federal government by proving that a change in their voting procedures had neither the purpose nor the effect of denying or abridging the

[5] The In Re Hubbard court emphasized the limited nature of its holding: "Our decision should not be read as deciding whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim than the one [plaintiffs] made here." 803 F.3d at 1312 n.13.

right to vote on account of race.[6] The court recognized "a state legislator's privilege is qualified, not absolute," but determined

> there is no reason not to recognize the privilege here. Voting Rights Act cases are important, but so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases.

Id. at 1304.

In Lee, the plaintiffs brought an Equal Protection challenge to Los Angeles's redistricting of city council districts. 908 F.3d at 1179. The Ninth Circuit upheld protective orders prohibiting depositions of city officials on the basis of the state legislative privilege. The court recognized that "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.'" Id. at 1187 (citation omitted). The court then concluded "the factual record falls short of justifying the 'substantial intrusion' into the legislative process." Id. at 1188. The court also rejected the plaintiffs' "call for a categorial exception whenever a constitution claim implicates the government's intent" because "that exception would render the privilege of little value." Id.

Drawing on these cases, the Assembly argues the state legislative privilege is "qualified" only in the sense that it does not apply to federal criminal proceedings but otherwise stands as an "absolute bar to deposition testimony of local lawmakers in a racial gerrymandering case." (Doc. 45, p. 4). According to the Assembly, "[A] private

[6] That section of the Voting Rights Act was later held unconstitutional by the Supreme Court. See Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 537 (2013).

lawsuit attacking a legislative action does not invoke the incredibly limited exceptions to a state lawmaker's legislative privilege." (Doc. 38, p. 8). Even if the state legislative privilege might yield in civil cases where important federal interests are at stake, the Assembly contends this case does not present sufficient federal interests and the Tribes have not shown sufficient need for the evidence they seek. Id. at 15.

B. The Tribes' Argument

The Tribes argue this court should apply 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. 41, p. 3). Those factors are (a) the relevance of the evidence sought to be protected, (b) the availability of other evidence, (c) the seriousness of the litigation and the issues involved, (d) the role of government in the litigation, and (e) the purposes of the privilege. Bethune-Hill, 114 F. Supp. 3d at 338. Several federal district courts, predominantly in redistricting cases, have applied this five-factor balancing test, or a similar test, to assess whether a need for evidence overrides the state legislative privilege. See S.C. State Conf. of NAACP v. McMaster, 584 F. Supp. 3d 152, 163 (D.S.C. 2022); League of Women Voters, 340 F.R.D. at 456; Benisek v. Lamone, 263 F. Supp. 3d 551, 553 (D. Md. 2017), aff'd, 241 F. Supp. 3d 566 (D. Md. 2017); Bethune-Hill, 114 F. Supp. 3d at 332; Doe v. Nebraska, 788 F. Supp. 2d 975, 985 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

In South Carolina State Conference of NAACP, for example, the plaintiffs alleged South Carolina redistricting legislation violated the Fourteenth Amendment and brought a motion to compel discovery and depositions from several state legislators. 584 F. Supp. at 157. The state legislators asserted legislative privilege. The court interpreted

Gillock as rejecting the proposition that a state legislator's evidentiary privilege is "co-extensive" with their immunity from liability. Id. at 161. Rather, the court determined the "privilege is not without limit," rejected a sharp line between criminal and civil cases, and determined that when "constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield." Id. at 162. The court applied the five-factor test to "balance the substantial interests at issue" and concluded the plaintiffs' need for evidence overcame the privilege and permitted discovery, including depositions of state legislators. Id. at 163, 166.

In this court's opinion, it is appropriate to apply the five-factor test the Tribes propose. Nearly all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified. See e.g., Florida, 886 F. Supp. 2d at 1303 ("To be sure, a state legislator's privilege is qualified."). And this court does not read Gillock's rejection of the state legislative privilege in federal criminal proceedings as establishing an absolute privilege in civil cases.[7] Gillock does not address the contours of the state legislative privilege in civil cases. Rather, several courts have looked to the deliberative process privilege, which applies to the executive branch, to inform the contours of the state legislative privilege. See In re Grand Jury, 821 F.2d at 959 n.8 ("[S]ubpoenas directed at executive agencies arouse less direct concerns about

[7] If anything, Gillock cuts against recognition of a strong state legislative privilege. See In re Grand Jury, 821 F.2d at 958 (holding the state legislative privilege is similar to the deliberative process privilege); see also 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) ("Since Gillock, a number of courts have rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege.").

separation of powers than subpoenas directed . . . at Congress . . . and therefore provide a more useful model for a privilege mediating federal/state relations."); see also Doe, 788 F. Supp. 2d at 984 (collecting cases).

This court will balance, as with other qualified privileges, "the interests of the party seeking the evidence against the interests of the individual claiming the privilege." Favors v. Cuomo, 285 F.R.D. 187, 209 (E.D.N.Y. 2012). In applying the five-factor test, the court recognizes only in an "extraordinary instance" will testimony of a state legislator not "be barred by privilege." See Arlington Heights, 429 U.S. at 268.

5. Application of the Five Factor Balancing Test

The five-factors described above provide an "analytical framework to balance the substantial interests at issue." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 163. If the balance of interests weighs in favor of non-disclosure, the state legislative privilege shields Representatives Devlin and Jones from providing testimony about their legislative acts and the subpoenas will be quashed. If, on the other hand, the balance of interests weighs in favor of disclosure, the Tribes' need for evidence outweighs the state legislative privilege and the court will decline to quash the subpoenas.

A. Relevance of the Evidence Sought

The Assembly argues that testimony from a single legislator does not shed light on whether the legislation at issue was passed with a discriminatory purpose. (Doc. 38, p. 13). Further, the Assembly argues, even if such testimony would be relevant, the representatives subpoenaed in these cases have no relevant testimony to provide. Id. 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." (Doc. 41).

"[P]roof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence." See Bethune-Hill, 114 F. Supp. 3d at 339. Of course, "the motivations of individual legislators in supporting a particular law are not necessarily representative of those of the entire Legislature." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 163. But that does not mean individual motivations "cannot constitute an important part of the case presented against, or in favor of, the districting plan." Bethune-Hill, 114 F. Supp. 3d at 340. Other courts to consider this issue in redistricting cases have determined similar evidence to be relevant. See League of Women Voters, 340 F.R.D. at 457. Further, Representative Jones's extensive testimony at the preliminary injunction hearing in Walen cuts against the notion that his testimony would now be irrelevant. This factor weighs in favor of disclosure.[8]

B. Availability of Other Evidence

The Assembly points to publicly available evidence, including the "agendas, minutes, and video documentation" of the redistricting committee's meetings. (Doc. 38, p. 13 n.13). In addition to seeking testimony, the Tribes have subpoenaed Representatives Devlin and Jones for production of documents relating to the redistricting legislation. (Doc. 38-2). The Assembly indicates it has objected to that request but does not challenge it here. (Doc. 38, p. 7 n.3). The Tribes contend that while

[8] The Assembly argues the Tribes have not made a threshold showing of relevance under Rule 26. (Doc. 45, pp. 2-3). "The scope of permissible discovery is broader than the scope of admissibility." Kampfe v. Petsmart, Inc., 304 F.R.D. 554, 557 (N.D. Iowa 2015). "Discovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case." Id. For the same reasons this factor weighs in favor of disclosure, the court finds the representatives' testimony meets the standard of Rule 26 relevancy.

circumstantial evidence may be available, parties in a redistricting litigation "need not confine their proof to circumstantial evidence alone." (Doc. 41, p. 3).

In general, "the availability of alternate evidence will only supplement—not supplant—the evidence sought by the Plaintiffs." Bethune-Hill, 114 F. Supp. 3d at 341. The Assembly might produce the Tribes' requested documents without court involvement. The court is unaware of the extent of the discovery produced to date and thus unable to assess the other evidence available. This factor weighs in favor of neither disclosure nor non-disclosure.

C. Seriousness of the Litigation

"All litigation is serious. But . . . voting-rights litigation is especially serious." League of Women Voters, 340 F.R.D. at 457. "[T]he right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance." Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014). Moreover, "[i]n redistricting cases, . . . the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of legislative self-entrenchment." See Bethune-Hill, 114 F. Supp. 3d at 337 (citation and internal quotation marks omitted). The court recognizes the Assembly cites cases that do not distinguish redistricting claims from other federal claims. See e.g., Florida, 886 F. Supp. 2d at 1304 ("[T]here is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases."). But other courts to consider the matter have found the claims at issue in redistricting "counsel in favor of allowing discovery." Favors, 285 F.R.D. 187, 219; see also S.C. State Conf. of NAACP, 584 F. Supp. 3d at 165. This court agrees and therefore finds this factor weighs in favor of disclosure.

D. The Role of the Legislature

This factor considers whether the legislature as an entity, rather than individual legislators, is the focus of the litigation. See Bethune-Hill, 114 F. Supp. 3d at 341. If so, then an individual legislator's "immunity is not under threat, [and] application of the legislative privilege may be tempered." Id. "This is not a case where individual legislators are targeted by a private plaintiff seeking damages." S.C. State Conf. of NAACP, 584 F. Supp. 3d at 165. Because no individual legislator is threatened with individual liability in this case, this factors weighs in favor of disclosure.

E. Purpose of the Privilege

The purpose of the state legislative privilege is to ensure litigation does not "delay and disrupt the legislative function." Eastland, 421 U.S. at 502. The court recognizes a subpoena for a deposition may be more burdensome than a subpoena for documents, and the threat of disruption to the legislative process is "not one to be taken lightly." See Bethune-Hill, 114 F. Supp. 3d at 342. "[T]he need to encourage frank and honest discussion among lawmakers favors nondisclosure." League of Women Voters, 340 F.R.D. at 458 (internal quotation marks and citation omitted). Accordingly, this factor weighs against disclosure.

F. Balancing of the Factors

Having considered each of the five factors, the court finds the Tribes' need for evidence outweighs the Assembly's interest of non-disclosure. The court will therefore decline to quash the subpoenas on the basis of the state legislative privilege.

6. Waiver of Representative Jones's Legislative Privilege

The Walen plaintiffs argue Representative Jones waived any legislative privilege by testifying about his legislative activities at the preliminary injunction hearing.

(Walen, Doc. 58, p. 4). "[T]he legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10. "[T]he waiver of the privilege need not be . . . explicit and unequivocal, and may occur either in the course of the litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." Favors, 285 F.R.D. 187, 211-12.

During the preliminary injunction hearing, Representative Jones testified at length about the development of the challenged legislation. (Walen, Doc. 58-1). He testified about his motivations, his conversations with other legislators, staff, outside advisors, and attorneys, and the work of the redistricting committee. See id. Thus, even if Representative Jones would have been protected by the state legislative privilege, the privilege was waived by his testimony at the preliminary injunction hearing.

7. Attorney-Client Privilege

The Assembly also asserts the Tribes' subpoena should be quashed because the Tribes' purpose is to inquire about conversations between the Assembly's members and Legislative Council staff attorneys.[9] (Doc. 38, p. 16).

The attorney-client privilege protects "confidential communications between a client and her attorney made for the purpose of facilitating the rendition of legal services to the client." United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011). This includes

[9] North Dakota's 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. See N.D. Legislative Branch, https://www.ndlegis.gov/legislative-council (last visited Dec. 22, 2022). Depending on the nature of the communication, conversations between legislators and Legislative Council staff attorneys who provide legal advice could be protected by the attorney-client privilege.

communications between government officials and government attorneys. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) ("The objectives of the attorney-client privilege apply to governmental clients."). Applying the attorney-client privilege to government officials encourages "governmental attorneys to respond with frank, candid advice." North Dakota v. United States, 64 F. Supp. 3d 1314, 1342 (D.N.D. 2014). That said, to be protected by the privilege, the communications must be for legal, as opposed to policy, advice. See e.g., In re Cnty. of Erie, 473 F.3d 413, 420 (2d Cir. 2007).

The record does not demonstrate that the Tribes will seek information about conversations between legislators and Legislative Council staff attorneys during the deposition. The court will therefore decline to quash the Tribes' subpoenas on this basis.

The Walen plaintiffs also contend Representative Jones waived his attorney-client privilege by testifying about his conversations with outside redistricting counsel and a Legislative Council staff attorney. (See Walen, Doc. 58-1, pp. 31, 33, 36). It appears most of these conversations, which occurred during public redistricting committee meetings, would not be privileged because they were not confidential. See id. at 31, 33. In his testimony, Representative Jones mentioned a private conversation with a Legislative Council staff attorney but did not provide enough to detail to allow the court to evaluate whether the communication would be protected under the attorney-client privilege. See id. at 36. Accordingly, the court cannot determine whether Representative Jones has waived the attorney-client privilege as to that communication.

Conclusion

Representatives Devlin and Jones are, in general, protected from providing compelled testimony about their legislative acts by a state legislative privilege. This

privilege is recognized under Rule 501 and applied as a matter of federal common law. The privilege is qualified, not absolute, meaning it must yield when outweighed by countervailing interests. Applying a five-factor balancing test, the court finds the representatives' state legislative privilege is outweighed by the Tribes' need for evidence. Even if the representatives were protected by the privilege, Representative Jones waived any privilege by providing extensive testimony at the preliminary injunction hearing in Walen. For those reasons, the motions to quash the Tribes' subpoenas are **DENIED**.

IT IS SO ORDERED.

Dated this 22nd day of December, 2022.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	**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**

*** *** ***

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 William Devlin (collectively "Respondents") appeal the Magistrate's December 22, 2022, Order denying their motion to quash subpoena to testify at a deposition in a civil action[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).

II. SPECIFICATION OF ISSUES FOR APPEAL

Respondents specify the following issues for appeal:

1) The Magistrate erred by failing to apply legislative privilege as a complete bar to the depositions of Representative Devlin.

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

[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. 48. There was no hearing before the magistrate judge on this motion; therefore, no transcript exists.

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

III. BASIS FOR OBJECTIONS TO MAGISTRATE'S ORDER

A. Specification of Error No. 1 – The Magistrate Erred by Failing to Apply Legislative Privilege as a Complete Bar to the Deposition Representative Devlin.

Representative Devlin has made no appearance in this case other than to state an objection and quash a "Subpoena to Testify at a Deposition in a Civil Action" commanding him to testify on November 18, 2022. Representative Devlin was the elected member for District 23 of the North Dakota Legislative Assembly. https://ndlegis.gov/biography/bill-devlin (accessed Jan. 3, 2023). Upon being served with a subpoena to testify in this action, he objected and filed a motion to quash claiming his testimony was barred by legislative privilege.

The Magistrate failed to follow the recent rulings of sister circuits and instead relied upon district court decisions to find legislative privilege did not bar Representative Devlin's deposition. The Eleventh, Ninth, and First Circuits all recently held that legislative privilege is a bar to state lawmakers' participation in discovery. In re Hubbard, 803 F.3d 1298 (11th Cir. 2015); Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018); American Trucking Assoc. Inc. v. Alviti, 14 F. 4th 76 (1st Cir. 2021). The Magistrate's Order is contrary to Eighth Circuit's "policy that a sister circuit's reasoned decision deserves great weight and precedential value" in an effort to "maintain uniformity in the law among the circuits" and avoid "needless division and confusion" to prevent "unnecessary burdens on the Supreme Court docket." Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979).

The sister circuits acknowledge "it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause." Hubbard, 803 F.3d at 1310 n. 11 (11th Cir. 2015); see also Lee, 908

F.3d at 1187 (same). Here, the Magistrate's Order was not only contrary to the sister circuits' reasoned decisions, but also contrary to the Supreme Court's directives on legislative privilege.

1. The Magistrate's Order Ignores the Supreme Court's Directives on Legislative Privilege.

The Speech or Debate Clause is found in Section 6 of Article 1 of the United States Constitution which provides Senators and Representatives "shall in all Cases…be privileged … for any Speech or Debate in either House, they shall not be questioned in any other Place." In Tenney v. Brandhove, 341 U.S. 367, (1951) the Court explained extension of legislative privilege to state lawmakers was necessary because the Speech or Debate Clause "was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege[2]." Tenney, 341 U.S. at 786. Tenney noted that legislative privilege is secured for the intention of enabling state representatives "to execute the functions of their office" and should be liberally applied "without inquiring whether the exercise [of the functions of their office] was regular according to the rules of the house, or irregular and against their rules." Id. at 373-74 (quoting Coffin v. Coffin, 4 Mass. 1, 19 (Mass. 1808)). Tenney further explained that even a "claim of unworthy purpose does not destroy the privilege." Id. at 377. Twenty-four years after Tenney, the Supreme Court reiterated "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the [Speech or Debate] Clause, then the Clause simply would not provide the protection historically undergirding it…The wisdom of congressional approach or methodology is not open to judicial veto." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508-09 (1975). The Court explained the Clause's purpose "is to protect the individual legislator, not simply for his

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

own sake, but to preserve the independence and thereby the integrity of the legislative process." U.S. v. Brewster, 408 U.S. 501, 524 (1972). "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers...." Id. "In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Eastland, 421 U.S. at 503 (1975) (internal quotation omitted).

To be sure, legislative privilege is not absolute as the Supreme Court has "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." U.S. v. Gillock, 445 U.S. 360, 372 (1980). However, "in protecting the independence of state legislatures, *Tenney* and subsequent cases...have drawn the line at civil actions." Id. at 373. More recently, the Court acknowledged "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace." Bogan v. Scott-Harris, 523 U.S. 44, 44-45 (1998). Although in "some extraordinary instances [legislative] members might be called to the stand at trial to testify the purpose of the official action, although even then such testimony frequently will be barred by privilege." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977). Clearly, the Magistrate's Order is inconsistent with the Supreme Court's directives.

2. The Magistrate's Order is Inconsistent with the Sister Circuit's Application of Legislative Privilege Under Supreme Court Directives.

Under Supreme Court precedent, the Circuit Courts acknowledge the Speech or Debate Clause shields "legislators from private civil actions that create [ ] a distraction and force [ ]

Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (alterations in original) (internal quotation omitted) (emphasis added). Further, sister circuits applied legislative privilege to state lawmakers and concluded:

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

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

The "rationale for the privilege—to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box—applies equally to federal, state, and local officials." Id. One of the legislative "privilege's principal purposes is to ensure that lawmakers are allowed to focus on their public duties." Hubbard, 803 F.3d at 1310 (internal quotation omitted). "That is why the privilege extends to discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Id (emphasis added).

The sister circuits recognize claims of discrimination are important and involve the government's intent; however, even where - as here – the "Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render the privilege 'of little value.'" Lee, 908 F.3d at 1188 (citing Tenney, 341 U.S. at 377); see also Alviti, 14 F. 4th at 88; Hubbard, 803 F.3d at 1312. This is especially true when the lawmakers are not named as a party to the pending litigation because complying with discovery requests

detracts from the performance of official duties. Hubbard, 803 F.3d at 1310; see also MINPECO, S.A., 844 F.2d at 859 (D.C. Cir. 1988).

In 2015, the Eleventh Circuit exercised appellate jurisdiction under the collateral order doctrine to quash subpoenas directed to state lawmakers to produce documents relating to the contents and passage of the subject legislation, similar proposals, and any communications regarding the subject legislation and the other plaintiffs in the lawsuit. Hubbard, 803 F.3d at 1303-1315. In light of a thorough analysis of the Supreme Court's decisions in Brewester, Tenney, and Eastland, as well as the D.C. Circuit's decision in MINPECO, the Eleventh Circuit concluded that legislative "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Id. at 1310. As a result, the Eleventh Circuit reversed "the district court's denial of the four lawmakers' motions to quash." Id. at 1315.

In 2018, the Ninth Circuit affirmed the district court's decision to bar depositions of local lawmakers involved in a redistricting process. Lee, 908 F.3d at 1186. The Ninth Circuit relied on the Supreme Court's opinions in Tenney, Eastland, Bogan, and Vill. of Arlington Heights, and determined that in "[a]pplying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances.'" Id. at 1187-88. Specifically, the Ninth Circuit held that "[a]lthough Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render of the privilege 'of little value.'" Id. at 1188 (citing Tenney, 341 U.S. at 377). The Ninth Circuit further noted that Village of Arlington Heights also involved a "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 properly denied discovery on the ground of legislative privilege." Id. (internal citation omitted).

The First Circuit granted a writ of advisory mandamus to "assist other jurists, parties, or lawyers" in addressing claims of legislative privilege. Alviti, 14 F.3d at 85 (1st Cir. 2021). The First Circuit explained the district court failed to apply legislative privilege as a bar to subpoenas issued to state lawmakers seeking document production. Id.at 83. Alviti noted the "legal questions about the scope of the legislative privilege as applied to state lawmakers" were "unsettled" and "the lower courts have developed divergent approaches to answering them." Id. at 85. In its analysis, Alviti overturned the district court's denial of the state lawmakers' motion to quash subpoenas and correctly noted that **"[b]oth courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege**." Id. at 88 (emphasis added) (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). Like the Ninth Circuit, Alviti noted:

> [Plaintiff's] argument suggests a broad exception overriding the important comity considerations that undergird the assertion of a legislative privilege by state lawmakers. Many cases in federal courts assert violations of federal law by state legislators who are not joined as parties to the litigation. Were we to find the mere assertion of a federal claim sufficient, even one that addresses a central concern of the Framers, the privilege would be pretty much unavailable largely whenever it is needed.

Id. at 88.

Alviti, applied legislative privilege as one of the bases for its decision to quash subpoenas served upon state lawmakers[3]. Three sister circuits recently held a private party's request for discovery from a state lawmaker was "barred by common-law legislative privilege." Id. at 88;

[3] Alviti also explained the need for information sought from state legislators "is simply too little to justify such a breach of comity." Alviti, 14 F.3d at 90.

Lee, 908 F.3d 1186-1189; Hubbard, 1303-1315. The Eighth Circuit's policy of affording "great weight and precedential value" to "sister circuit's reasoned decision[s]" was also stated in light of "three decisions of our sister circuits." Miller, 610 F.2d at 539 (8th Cir. 1979). Therefore, the Magistrate's Order finding legislative privilege did not act as a bar to Representative Devlin's deposition subpoena is contrary to Eighth Circuit precedent and should be reversed.

B. 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. 48 at pp. 14-19. The Magistrate's Order relies on district court opinions for this contention; however, none of the sister circuits 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 by the parties[4]. 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, 1161 (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). This is best exhibited by the Ninth Circuit's refusal to apply the test to legislative privilege when it previously applied the test to the deliberative process privilege. Compare Lee, 908 F.3d at 1186-1188 with Warner Comm. Inc., 742 F.2d at 1161. Under Eighth Circuit precedent, the Magistrate's Order erred by failing to follow the

[4] 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, Dkt Entry: 29-1 (Appellees Brief), P. 53 of 60 (per PACER).

decisions of the sister circuits when it applied the five-factor test. See Miller, 610 F.2d at 539.

C. Specified Issue No. 3 – The Magistrate Erred by Denying the Respondents' Motion to Quash.

The Magistrate erred by denying the Respondents' motion to quash Representative Devlin's subpoena by finding "the Tribes' need for evidence outweighs the state legislative privilege and the court will decline to quash the subpoenas." Doc. No. 48 at p. 16. In the Eighth Circuit, "discovery is not permitted where no need is shown." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999).

The Supreme Court's prohibition on legislator's testimony in court proceedings has been clear. 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).

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

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

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

If the Plaintiff meets their initial burden, they must then satisfy a multi-factor "totality of the circumstances" test[5]. Id. Notably, none of these factors contemplate the motives of individual legislators. Id. Representative Devlin's testimony cannot help the Plaintiffs meet their burden in this case. They cannot go on a fishing expedition through the use of a subpoena to depose a state lawmaker. See United States v. One Assortment of 93 NFA Regulated Weapons, 897 F.3d 961, 967 (8th Cir. 2018) (noting the Federal Rules do not allow fishing expeditions in discovery.) The Magistrate's Order erred by finding the deposition testimony of Devlin was needed in this action.

IV. CONCLUSION

For the aforementioned reasons, the Magistrate's December 22, 2022, Order should be reversed and the Respondents' motion should be granted.

Dated this 5th day of January, 2023.

SMITH PORSBORG SCHWEIGERT
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[5] In a Section 2 claim under the VRA, "the totality-of-circumstances inquiry asks whether a neutral electoral standard, practice, or procedure, when interacting with social and historical conditions, works to deny a protected class the ability to elect their candidate of choice on an equal basis with other voters." Id. at * 11 (quotations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2023, a true and correct copy of the foregoing **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** 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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al., Defendants.	**ORDER** Case No. 3:22-cv-22

Representative William Devlin (a member of the North Dakota Legislative Assembly) and the North Dakota Legislative Assembly appeal an order of United States Magistrate Judge Alice R. Senechal denying a motion to quash subpoena. Doc. No. 49. Representative Devlin was subpoenaed to testify at a deposition but moved to quash (along with the Legislative Assembly), asserting that state legislative privilege barred his testimony. Judge Senechal denied the motion. For the reasons below, the order denying the motion to quash is affirmed, and the appeal is denied.

I. BACKGROUND

This case arises from the redrawing of certain North Dakota legislative districts pursuant to the legislative redistricting plan in House Bill 1504. At issue here are legislative districts 9, which was subdivided into single-representative districts 9A and 9B, and 15. District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in district 9B. District 15 encompasses the Spirit Lake Nation. The Turtle Mountain plaintiffs assert a Section 2 violation of the Voting Rights Act. Doc. No. 1; Doc. No. 44.

In November of 2022, the Turtle Mountain plaintiffs subpoenaed Representative Devlin to testify at a deposition. They subpoenaed Representative Devlin because he served as chair of the

redistricting committee when House Bill 1504 was passed. Doc. No. 38. Representative Devlin and the North Dakota Legislative Assembly (together, the "Assembly") moved to quash the subpoena. Doc. No. 37. As grounds to quash, the Assembly argued that the state legislative privilege is "an absolute bar to deposition testimony of local lawmakers" and is "qualified" only in that it does not apply to federal criminal proceedings, which does not apply here. For their part, the Turtle Mountain plaintiffs argued the state legislative privilege is not absolute and is more akin to the deliberative process privilege, which uses a five-factor test to balance the need for evidence against the legislative body's interest in non-disclosure.

After considering the parties' arguments, Judge Senechal denied the motion to quash. Doc. No. 48. She analyzed the relevant cases forming the basis of the state law legislative privilege and addressed (and distinguished) the many cases raised by the parties. Id. Judge Senechal concluded it was appropriate to apply the five-factor test. In weighing the factors, she determined the Turtle Mountain plaintiffs' need for the testimony outweighed the Assembly's interest of non-disclosure and declined to quash the subpoena based on the state law legislative privilege. Id.

II. LAW AND DISCUSSION

Under Federal Rule of Civil Procedure 72(a) and District of North Dakota Civil Local Rule 72.1(B), a magistrate judge is permitted to hear and determine non-dispositive matters in a civil case. Any party may appeal the determination to the district court judge assigned to the case who "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); see also D.N.D. Civ. L. R. 72.1(D)(2). "A district court conducts an 'extremely deferential' review of a magistrate judge's ruling on a nondispositive issue." Carlson v. BNSF Ry. Co., No. 19-CV-1232, 2021 WL 3030644, at *1 (D.

Minn. July 19, 2021). As such, a magistrate judge's decision will not be disturbed unless it is "clearly erroneous" or "contrary to law." See Fed. R. Civ. P. 72(a).

On appeal, the Assembly primarily challenges the choice and application of the five-factor test imported from the deliberative process privilege, and the relevancy of the testimony under Federal Rule of Civil Procedure 26. Doc. No. 49.

A. The Choice and Application of the Five-Factor Test to State Legislative Privilege

After careful review of the case law and the parties' arguments, Judge Senechal's order is not clearly erroneous or contrary to law. First, as to the choice and application of the five-factor test to the state legislative privilege, neither the United States Supreme Court nor the Eighth Circuit Court of Appeals has directly addressed the contours and qualifications of the state legislative privilege. Having reviewed the decisions of the federal courts that have addressed the issue, the majority conclude, as Judge Senechal did here, that "the privilege is a qualified one in redistricting cases." See Bethune-Hill v. Va. State Bd. Of Elections, 114 F. Supp. 3d 323, 336-37 (collecting cases). That is because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." Id. at 337. From there, the question is the strength of the qualified privilege, and most courts that have reviewed qualified privilege challenges in redistricting cases have used the five-factor balancing test derived from the deliberative process privilege. Id. at 337-38 (collecting cases). In those cases, courts have explained that "whether the privilege should cover the factual bases of a legislative decision, protect the process of fact-finding, or extend in varying concentric degrees to third parties are questions to be addressed within the qualified balancing analysis rather than with any kind of 'per se' rule." Id. at 339.

The qualified balancing analysis (five-factor test) is a better fit in this type of redistricting case, as opposed to the per se rule and absolute bar the Assembly advocates for. This case requires at least some judicial inquiry into the legislative intent and motivation of the Assembly. An absolute bar on the testimony of members of the Assembly makes little sense and could preclude resolution on the merits of the legal claim. Given the particular facts of this redistricting case, and the available case law, the Court cannot conclude that Judge Senechal's decision to use the five-factor test in assessing the Assembly's assertion of state law privilege is clearly erroneous or contrary to law.

The Court disagrees with the Assembly's argument that this result ignores the directives from the United States Supreme Court in Tenny v. Brandhove, 341 U.S. 367 (1951), Eastland v. U.S. Serviceman's Fund, 421 U.S. 491 (1975), and United States v. Gillock, 445 U.S. 360 (1980). Tenny and Eastland are factually distinguishable. In Tenny, the Supreme Court addressed the issue of whether certain defendants were acting in the sphere of legislative activity for the purposes of assessing civil liability (341 U.S. at 378-79), and Eastland involved the federal legislative privilege under the Speech and Debate Clause of the United States Constitution, which is not at issue here. Eastland, 421 U.S. at 501. Eastland also involved Congress issuing, not receiving, the subpoena. Id. Gillock is also distinguishable. In that case, the Supreme Court limited the privilege granted to state legislators in federal criminal prosecutions. Gillock, 445 U.S. at 373.

Turning to the application of the five-factor test itself, the Court does not find Judge Senechal's application of the five-factor test to the facts of this case clearly erroneous or contrary to law. First, the testimony is relevant in assessing the Assembly's discriminatory intent (or lack thereof) and motivations presented against or in favor of the redistricting plan. Representative Devlin served as the chair of the redistricting committee. The second factor, availability of other

evidence, is neutral, given the state of discovery and the record at this time. Third, because these cases concern voting rights litigation, the litigation is "especially serious" and weighs in favor of disclosure. League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 457 (N.D. Fla. 2021). Fourth, since this is not a case where individual legislators are threatened with individual liability, the role of the legislature factor weighs in favor of disclosure. Finally, the purpose of the privilege does weigh against disclosure. On balance, the five factors weigh in favor of allowing the Turtle Mountain plaintiffs to depose Representative Devlin, and Judge Senechal's conclusion that the Turtle Mountain plaintiffs need for evidence outweighs the Assembly's interest of non-disclosure is not clearly erroneous or contrary to law.

B. Motion to Quash and Federal Rule of Civil Procedure 26

The Assembly next argues that Judge Senechal erred generally in denying the motion to quash and concluding that the testimony of Representative Devlin is relevant under Federal Rule of Civil Procedure 26. And even if relevant, the Assembly asserts Judge Senechal erred by not weighing the exceptions to relevance in Rule 26. Rule 26 states that "[e]ven if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999).

Judge Senechal addressed the relevancy issue as a part of assessing the relevance factor under the five-factor test. Moreover, the Court agrees the testimony is relevant because "proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence" in redistricting cases. See Bethune-Hill, 114 F. Supp. 3d at 339. And, as noted above, the testimony of Representative Devlin, as chair of the redistricting committee, is relevant to the claim

here. None of the exceptions in Rule 26 apply either. The Turtle Mountain plaintiffs have shown a need, compliance would not be unduly burdensome, and the harm to Representative Devlin and the Assembly does not outweigh the need of the plaintiffs in obtaining the testimony. Judge Senechal's conclusion as to relevancy under Rule 26 is not clearly erroneous or contrary to law.

III. CONCLUSION

The Court has carefully reviewed the order denying the motion to quash, the parties' filings, the applicable law, and the entire record. Judge Senechal's order denying to the motion to quash the subpoena as to Representative Devlin is not clearly erroneous or contrary to law. The order (Doc. No. 48) is **AFFIRMED**, and the appeal (Doc. No. 49) is **DENIED**.

IT IS SO ORDERED.

Dated this 14th day of March, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

EXHIBIT 2

Initial Objections

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	)	**OBJECTION TO SUBPOENAS TO PRODUCE DOCUMENTS**

*** *** ***

I. INTRODUCTION

Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown issued *Subpoenas to Produce Documents* upon North Dakota State Senators Ray Holmberg, Nicole Poolman, and Rich Wardner, and North Dakota State Representatives Bill Devlin, Mike Nathe, and Terry B. Jones, commanding them to produce protected documents by October 29, 2022.

Plaintiffs also issued a *Subpoena to Produce Documents* upon North Dakota Deputy Attorney General Claire Ness, formerly a member of the Legislative Council staff, commanding her to produce protected documents by October 30, 2022.

Because there are important privilege and public policy concerns affected by the subpoenas, the North Dakota Legislative Assembly and the respondents hereby submit this written objection to Plaintiff's *Subpoenas to Produce Documents*, pursuant to Federal Rule of Civil Procedure 45(d)(2)(b) and 45(e)(2).

II. FACTS

On September 29, 2022, Plaintiffs issued six *Subpoenas* upon the North Dakota Legislators.[1] These *Subpoenas* all commanded production of the following documents:

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.

On September 30, 2022, Plaintiffs served a *Subpoena* upon Deputy Ness, making an identical command for production of documents relating to the seven topics listed above.

III. LAW AND ARGUMENT

The North Dakota Legislators and Deputy Ness object to these *Subpoenas to Produce Documents*, because they are unduly burdensome, and because they request documents and communications that are protected by privilege.

A. Plaintiffs' *Subpoenas* are Unduly Burdensome

First, the *Subpoenas'* command is unduly burdensome. It requests the respondents to provide documentation that is readily available to the Plaintiffs online. Both

https://ndlegis.gov/assembly/67-2021/committees/interim/tribal-and-state-relations-committee and https://ndlegis.gov/assembly/67-2021/committees/interim/redistricting-committee contain the documents and communications responsive to Plaintiffs' *Subpoenas*. These sites are readily available to the public, and contain not only all of the documentation presented to the committees, but also video recordings of the Redistricting Committee meetings and Tribal and State Relations Committee meetings at issue in the case.

Specifically, the website for the Redistricting Committee is directly responsive to Plaintiffs' requests. It contains links to proposed maps, including those proposed by Senator Holmberg, Senator Poolman, Representative Devlin, and Representative Nathe (see request No. 6). It includes video recording of meetings which include training (see request No. 3 & 5), and information regarding demographics (see request No. 7). Further, the videos and meeting minutes reflect not only public deliberations by legislators, but also testimony and communications from interested parties (see request No. 1, 2 and 4). These publicly available documents and communications are readily available for Plaintiffs to access at any time.

In addition, Plaintiffs' request is unduly burdensome because they do not allow the respondents a reasonable time to comply. See Fed.R.Civ.P. 45 (d)(1) and (3)(A)(i) and (iv). To the extent there are non-website-accessible documents available, they may consist of communications between legislators, staff and interested parties and constituents. The vast majority, if not all, of these documents are privileged. To the extent there are documents that are not privileged, less than 30 days response time is inadequate to sift through documents and communications and determine what is responsive and (1) not already available to plaintiffs via

[1] The North Dakota Legislators were served on different dates: Sens. Holmberg and Wardner on Sept. 30, Rep. Nathe on Oct. 1, Sen. Poolman on October 6, Rep. Devlin on Oct. 7, and Rep. Jones on Oct. 6 or 7.

the legislature's website, and (2) not protected by privilege. See Pointer v. DART, 417 F.3d 819, 821 (8th Cir. 2005).

B. Plaintiffs' *Subpoenas* Request Documents and Communications Protected by Privilege

The respondents further object because the *Subpoenas* request documents and communications that are protected by legislative privilege, deliberative process privilege, and attorney-client privilege, as well as communications that are work product. See Fed.R.Civ.P. 45(d)(3)(iii).

The documents and communications are protected by legislative privilege. Compare U.S.C.A. Const. Art. 1, § 6, cl. 1 ("The Senators and Representatives…and for any Speech or Debate in either house, they shall not be questioned in any other Place.") with N.D. Const. Art. IV, § 15 ("Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings."). Legislative privilege protects state legislators from producing documents in certain cases. Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). Legislative privilege "protects documents 'created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides.'" Id. at *9. Further, the North Dakota Century Code protects legislative work product and communications. See N.D.C.C. § 44-04-18.6. The documents and communications sought by Plaintiffs are either readily available online, or are believed to fall into this category – documents and communications that involve opinions, recommendations, or advice about legislative decisions between legislators and other legislators or their aides. They are protected by legislative privilege, and by the protections of N.D.C.C. § 44-04-18.6.

The documents and communications are also protected by the deliberative process privilege, which protects "the legislative decision-making process," and "the confidentiality of communications with the office-holder involving the discharge of his or her office." See Doe v. Nebraska, 788 F.Supp.2d 975, 984 (D. Neb. 2011). See also, Brandt v. Rutledge, No. 4:21CV00450 JM, 2022 WL 3108795, at *1 (E.D. Ark. Aug. 4, 2022), Shirt v. Hazeltine, No. CV. 01-3032-KES, 2003 WL 27384631, at *2 (D.S.D. Dec. 30, 2003). The materials requested by Plaintiffs are pre-decisional and deliberative, invoking the deliberative process privilege.

Finally, any communications between Legislative Council staff and members of the legislature are protected by attorney-client privilege (Fed. R. Civ. P. 26(b)(3)) and/or constitute work product. See City of Greensboro v. Guilford Cnty. Bd. of Elections, No. 1:15CV559, 2016 WL 11660626, at *5-6 (M.D.N.C. Dec. 20, 2016).

IV. CONCLUSION

The short timeframe between service of the subpoenas and the response date prevents the respondents from having adequate time to review all non-publicly available information and prepare a privilege log. Moreover, it is believed the vast majority of non-publicly available documents are subject to the privileges addressed above. If Plaintiffs request documents beyond what is available on the Legislature's website, the respondents will require additional time to review the documents and communications in their possession to prepare a privilege log and / or to provide additional documents. For these reasons, the respondents object to the subpoenas.

Dated this 14th day of October, 2022.

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Attorney for the North Dakota Legislative Assembly, Senators Ray Holmberg, Nicole Poolman, and Rich Wardner; Representatives Bill Devlin, Mike Nathe, and Terry B. Jones, and Deputy Attorney General Claire Ness.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2022, a true and correct copy of the foregoing **OBJECTION TO SUBPOENAS TO PRODUCE DOCUMENTS** was served upon the following:

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

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.	)	**SECOND AFFIDAVIT OF EMILY THOMPSON**

*** *** ***

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

Being duly sworn, Emily Thompson, testifies:

1. I am the Legal Division Director for the North Dakota Legislative Council.

2. This will supplement the Affidavit submitted on January 4, 2023, in support of the Memorandum in Opposition to Plaintiffs' Motion to Enforce Subpoenas Served on Members of the North Dakota Legislative Assembly and Legislative Council Staff.

3. In the District Court's Order denying appeal of the Magistrate Judge's decision (Doc. 72, p. 4) the District Court stated: "And while not necessarily dispositive of the issue, what is also missing from the record is a simple estimate from the Assembly as to the number of documents at issue."

4. In the log of documents produced by the Assembly, the first column shows the number of documents containing the searched keyword. (Doc. 47-4). This number is 64,849. This is the total number of emails that generated keyword hits, and the total number of emails that Legislative Council staff would have to review to determine what is to be provided pursuant to the subpoenas, and to prepare a privilege log as ordered.

Dated this 27th day of March, 2023.

By _____
Emily Thompson

On this 27th day of March, 2023, before me personally appeared Emily Thompson known to me to be the person described in the within and foregoing instrument and acknowledged to me that she executed the same.

AUSTIN GUNDERSON
Notary Public
State of North Dakota
My Commission Expires Jun 7, 2023

_____
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2023, a true and correct copy of the foregoing **SECOND AFFIDAVIT OF EMILY THOMPSON** 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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By /s/ Scott K. Porsborg
SCOTT K. PORSBORG

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

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

PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS SERVED ON MEMBERS OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL STAFF

Plaintiffs respectfully move to enforce the subpoenas duces tecum served on North Dakota State Senators Ray Holmberg, Nicole Poolman, and Richard Wardner, State House Representatives William Devlin, Terry Jones, and Michael Nathe, and Clare Ness (collectively "Respondents") for documents and communications relevant to this matter.[1] Respondents erroneously assert that the legislative privilege provides an absolute bar against any obligation to respond to discovery in this matter, including with respect to documents and communications they admit were shared with non-legislators and non-legislative staff. But the legislative privilege is at best a qualified privilege, which federal courts routinely pierce in redistricting litigation, and which does not extend to documents and communications shared with third parties. Further, at least one of the Respondents has waived his legislative privilege with respect to the 2021 Redistricting Plan by voluntarily appearing and testifying about the Plan in a separate matter. Finally, the

[1] The subpoenas are compiled and attached as Exhibit 8, hereto.

Respondents' claim that they withhold responsive documents or communications on the grounds that identifying non-privileged documents and communications imposes an undue burden on a non-party fails in light of the number of communications at issue—at most 1,407 total across seven Respondents, and likely far fewer—and would render Rule 45 a nullity.

Respondents played integral roles in enacting the 2021 Redistricting Plan, including the challenged subdistrict. Representative Devlin and Senator Holmberg served as Chair and Vice Chair of the Redistricting Committee, respectively, with Senators Poolman and Representative Nathe serving as Committee members. Senator Wardner is the Chair of the Tribal State Relations Committee, on which Representative Jones also served, and both heard testimony in that Committee from Tribal Leaders and Tribal Members on the redistricting process. Representative Jones also testified before the Redistricting Committee and has funded a separate lawsuit challenging the subdistrict at issue here. Finally, Ms. Ness served as Senior Counsel at the North Dakota Legislative Council during the 2021 Redistricting Process. Defendant identified all of these individuals as having information relevant to this matter in their initial disclosures, *see* Ex. 1 at 3 ¶ 11, 8 ¶ 43, 9 ¶ 53 (Defendant's Rule 26(a)(1) Disclosures), and indeed Respondents' responses to the subpoenas demonstrate they have non-privileged documents and communications relevant to this case. Respondents are not entitled to withhold this information simply because they are non-party legislators. The court should grant Plaintiffs' motion to enforce.

BACKGROUND

I. Respondents' Refusal to Comply with Rule 45 Subpoenas

Between September 30 and October 11, 2022, Plaintiffs served subpoenas for production of documents on North Dakota State Senators Ray Holmberg, Nicole Poolman, and Richard Wardner, State House Representatives William Devlin, Terry Jones, and Michael Nathe, and

former legislative counsel Clare Ness. Collectively through counsel, Respondents provided their objections to the subpoenas on October 14, 2022. *See* Ex. 2 (Initial Objections). Respondents objected (1) that the subpoenas imposed an undue burden to the extent they sought information about the redistricting process that was available on the Redistricting Website, (2) that the October 31 deadline to respond was unduly burdensome because it did not provide sufficient time to identify which responsive documents and communications in the Respondents' possession were non-privileged and not already publicly available, and (3) that the subpoenas requested documents that were subject to the legislative, deliberative process, and attorney-client privileges. *See* Ex. 2 at 2-5.

On November 9, 2022 Plaintiffs' counsel met and conferred with Respondents' counsel, confirmed that Plaintiffs were not seeking publicly available material from the Redistricting Website, and asked Respondents to provide a reasonable timeline for reviewing the responsive documents and communications, identifying and producing non-privileged documents and communications, and providing a privilege log for any items withheld. After conferring with his clients, Respondents' counsel indicated that two weeks would be a sufficient time to collect the documents and provide a privilege log. Ex. 3 (Nov. 9 Email from S. Porsborg).

On December 1, 2022, Respondents provided a supplemental objection to the subpoenas, labeled "Privilege Log." *See* Ex. 4 (Supplemental Objection). The Supplemental Objection includes a boilerplate assertion of attorney-client and deliberative process privilege but does not identify any category of documents or communications, nor any specific documents or communications, that are protected by attorney-client or deliberative process privilege. *See* Ex. 4 at 1. Instead, the privilege analysis rests entirely on the assertion that the subpoenaed documents and communications are protected by legislative privilege. Ex. 4 at 1-2. The Supplemental

Objection further asserts that because any non-privileged documents are public, a privilege log is not required by Rule 45. Ex. 4 at 2.

Next, the Supplemental Objection describes a series of keyword searches undertaken by Respondents to identify potentially responsive communications in their emails, Teams messaging software, and text messages, and provides the number of total keyword hits for each Respondent, as well as the number of communications containing those keywords for each of three categories: (1) communications between Respondents and other legislators; (2) communications between Respondents and legislative council staff; and (3) communications between Respondents and individuals who are not legislators nor part of the legislative council staff. Ex. 4 at 4. While the Supplemental Objection does not provide the total number potentially responsive documents or communications, a hand calculation shows that for all seven Respondents, there are approximately 51,679 total keyword hits across at most 1,407 communications, with at most 543 communications between Respondents and other legislators, 438 communications between Respondents and legislative council staff, and 426 communications between Respondents and non-legislators and non-legislative council staff. Ex. 4 at 4-14.[2] The Supplemental Objection does not identify dates, the specific recipients, the subject matter, or the specific privilege asserted for the relevant documents and communications—information which is necessary for Plaintiffs to evaluate Respondents' claim of privilege. Ex. 4 at 4-14.

[2] Because the Supplemental Objection lists total communications per keyword hit, rather than providing the actual number of total communications identified, the calculation of 1,407 communications does not account for communications that contained more than one keyword. For example, a communication that stated "the 2021 Redistricting Plan subdivides Senate District 9 into House Subdistrict 9A and 9B" would be counted three times, since it contains three keywords. It likewise does not account for communications between two or more Respondents. For example, if Rep. Devlin sent an email with responsive keywords to Rep. Holmberg, this communication would be counted twice in the total. As such, it is likely that there are significantly fewer than 1,407 total documents or communications that have been identified as potentially responsive.

The Supplemental Objection further notes that with respect to Ms. Ness, the search of her emails was ongoing and the results would be produced once the search was complete. Ex. 4 at 3. It went on to note that Respondents had been provided instructions by counsel to search their phones and text messages, that search results had not yet been produced by Representative Jones, but that the results would be provided to Plaintiffs once received. *See* Ex. 4 at 3. Counsel for Respondents has represented that these limited search results will be provided early in the week of December 26, 2022.

On December 6, Plaintiffs' counsel met and conferred again with Respondents' counsel, and noted that the purported privilege log was inadequate, and that Respondents appeared to be asserting privilege over documents and communications they admitted were shared with non-legislators and non-legislative staff. Respondents' counsel stated that pursuant to caselaw cited in Representative Devlin's motion to quash the deposition subpoena served upon him, Respondents were asserting an absolute legislative privilege against responding to discovery and would neither supplement the purported privilege log nor produce any responsive documents or communications.

II. Representative Jones' Waiver of Privilege Regarding Communications Related to the 2021 Redistricting Process.

During the legislative debate on the North Dakota legislative redistricting plan, Rep. Jones—who was directly affected by the creation of subdistricts within legislative district 4—testified in opposition to the creation of subdistricts, saying "[i]f we leave subdistricts in this bill as is proposed, we will be guilty of racial gerrymandering, according to [a redistricting attorney] that I was talking to. . . . I was told today by this attorney, that is racial gerrymandering."[3] Although he revealed the content of the legal advice he was provided, he did not identify the attorney.

[3] Nov. 9 House Floor Session, 67th Leg., 1st Spec. Sess. 1:44:49 (N.D. Nov. 9, 2021), https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211109/-1/22663.

On May 5, 2022, the three-judge panel in *Walen* held a hearing on *Walen* Plaintiffs' motion for a preliminary injunction. *Walen* Plaintiffs' first witness was Rep. Jones, who voluntarily appeared and testified on behalf of *Walen* Plaintiffs. *See* Ex. 5 (May 5, 2022 PI Hrg. Tr. Excerpt). On direct examination, Rep. Jones testified that "[t]here was information coming to me from members on the Redistricting Committee that they were considering subdistricts in Districts 4 and District 9" and that eventually "the members on the committee were telling me that it was getting very serious." *Id.* at 9:19-24. He testified in Court that he had testified to the Redistricting Committee in opposition because "the information I was getting as I was studying was that what was happening was not appropriate, was unconstitutional." *Id.* at 10:7-10. When asked on direct whether "[i]n addition to attending meetings, did you discuss with members of the Redistricting Committee your concerns about the redistricting process and subdistricts in Districts 4 and 9," Rep. Jones testified, "[y]es, I did." *Id*. at 10:15-19. Testifying about these private conversations, Rep. Jones stated that "[s]omehow in my discussions with them and in the stuff that I was watching them discuss they missed the point that you had to meet all three of [the *Gingles* preconditions], and so I was desperately trying to explain to them that there's more than just one criteria that had to have been met." *Id.* at 11:14-19.

Rep. Jones was asked on direct examination whether race predominated in the drawing of subdistricts, and the Court overruled Defendant's objection that the question called for a legal conclusion. *Id.* at 12:2-16. "It does call for a legal conclusion in part. However, I think his understanding of what the process was as a member of the legislature is relevant, and I'll hear it for what it's worth." *Id.* at 12:9-12.

Plaintiffs' counsel also asked Rep. Jones to testify about conversations Rep. Jones had regarding the Legislative Council's work. Rep. Jones testified that he asked Redistricting

Committee members "whether voting data had been compiled" to analyze the requirements of the Voting Rights Act, and affirmed that his questions to members were about "whether Legislative Council had performed those analyses for the Redistricting Committee" and he was told they had not. *Id.* at 33:23-34:15. On recross, Rep. Jones testified that he also asked Legislative Council attorney Clair Ness specifically about this:

> Q: Have you ever talked to Clair Ness about analyses that she may have run?
> A: Yes.
> Q: You have spoken with her?
> A: Yes.
> Q: When did you speak with her?
> A: I can't say exactly the time but it was during this time when we were working on this stuff to find out what had been done.
> . . . .
> Q: You'd indicated earlier that someone told you that Legislative Council did not perform a data analysis; is that correct?
> A: Yes.
> Q: Who told you that?
> A: I was talking to [Rep.] Austen Scahuer and I was talking to the chairman of the committee.

Id. at 36:3-22.

Walen Plaintiffs also revealed in their depositions that Rep. Jones voluntarily spoke with them about the redistricting process, and specifically discussed the constitutionality of the subdistricts and their lawsuit. Ex. 6 at 25:12-27:23 (Henderson Deposition Tr.); Ex. 7 at 19:2-14, 21:10-22:14 (Walen Deposition Tr). During his testimony, Mr. Walen revealed that he speaks with Rep. Jones "almost four or five times a week," and has discussed the subdistrict boundaries and his lawsuit, which challenges the subdistrict at issue here. *Id*. at 30:17-20. Mr. Walen likewise testified that Rep. Jones has contributed funds to attorney fees for the *Walen* lawsuit. *Id.* at 21:10-15. Likewise, in response to questioning about how he became a plaintiff in *Walen*, Mr. Henderson revealed that Rep.

Jones had contacted him after the Legislature adopted the 2021 Redistricting Plan to discuss the constitutionality of the subdistricts. Ex. 6 at 25:12-27:23.

ARGUMENT

I. Respondents Must Produce Documents and Communications Shared with Third Parties.

At the outset, Respondents assert privileges against production of documents over which no reasonable claim of privilege exists. The Supplemental Objection identifies up to 426 communications between Respondents and individuals who are not legislators nor legislative council staff. Courts routinely require legislators to produce such communications because there is no reasonable claim that communications with third parties are covered by the legislative privilege. *See, e.g.*, *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 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, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative

process or the basis on which to invoke privilege."). As such, this Court should compel Respondents to produce all responsive documents that fall into this category.

Nonetheless, during the meet and confer counsel for Respondents erroneously claimed that the legislative privilege shields them from producing *any* discovery in this matter, including communications with third parties. Plaintiffs are not aware of any case that holds such, and none of the cases relied on by Respondent Devlin in moving to quash the deposition subpoena involved an invocation of privilege over the production of communications with third parties. *See, e.g.*, *In re Hubbard*, 803 F.3d 1298, 1308, 1312 (11th Cir. 2015) (overturning district court ruling that legislators failed to properly assert legislative privilege, finding that plaintiffs had no interest in obtaining the subpoenaed material because they failed to state a claim, and remanding with a suggestion that the district court *sua sponte* revisit its denial of the defendants' motion to dismiss). The Court should reject Respondents' expansive assertion of legislative privilege and order Respondents to produce responsive communications that involved non-legislative parties. *See supra* (collecting cases holding that such communications are not privileged).

II. Representative Jones Has Waived Privilege with Respect to the 2021 Redistricting Plan.

Representative Jones has waived any legislative privilege with respect to his documents and communications related to the 2021 redistricting. Waiver of legislative privilege "need not be 'explicit and unequivocal,' and may occur either in the course of litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (quoting *Almonte v. City of Long Beach*, No. CV 04-4192 (JS) (JO), 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005)). This is a settled proposition. *See, e.g.*, *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (holding that legislative privilege was "clearly waived" where legislators

"testified extensively as to their motives in depositions with their attorney present, without objection"); *Trombetta v. Bd. of Educ., Proviso Township High Sch. Dist. 209*, No. 02 C 5895, 2004 WL 868265, at *5 (N.D. Ill. April 22, 2004) (explaining that legislative privilege "is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters"); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."); *see also Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3rd Cir. 1985); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). The reason for this rule is straightforward: the legislative privilege may not be used as both shield and sword whereby a legislator "strategically waive[s] it to the prejudice of other parties." *Favors*, 285 F.R.D. at 212.

Rep. Jones waived any legislative privilege when he voluntarily inserted himself into litigation challenging the Plan. Specifically, Rep. Jones testified in *Walen* in support of Plaintiffs' preliminary injunction motion about his motivations, his private conversations with other legislators, legislative staff, and outside advisors and attorneys, and his understanding of what analyses the Redistricting Committee or Legislative Council did or did not conduct. "[B]y voluntarily testifying, the legislator waives any legislative privilege on the subjects that will be addressed in the testimony." *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). Rep. Jones likewise waived privilege over matters related to drawing of subdistricts when he voluntarily contacted potential plaintiffs and discussed the constitutionality of subdistricts in Legislative Districts 4 and 9, the latter of which is at issue here. *See* Ex. 6 at 25:12-27:23; Ex. 7 at 19:2-14, 21:10-22:14, 29:11-30:20. Rep. Jones may not strategically waive the privilege by

revealing only that information he deems beneficial to his cause and then refuse to produce documents and communications and preclude the parties from probing his public, non-legislative statements on those matters.

III. Respondents' Boilerplate Assertion of the Attorney-Client and Deliberative Process Privileges Is Insufficient.

Respondents also seek to withhold responsive documents and communications on the basis of attorney client privilege. *See* Ex. 2 at 5; Ex. 4 at 1. However, Respondents have not identified with any specificity the documents and communications to which they claim this privilege applies. As courts have observed in other litigation involving state legislators, it is "highly unlikely . . . that all of the disputed requests involve documents that fall under the attorney-client and work product protection." *Doe v. Nebraska*, 788 F. Supp. 2d 975, 986 (D. Neb. 2011). As such, "[a]sserting a blanket privilege for these documents simply is not sufficient." *Id.* To the extent Respondents allege that any document or communication is withheld on the basis of attorney-client or deliberative process privilege, they must produce a privilege log that identifies those documents with specificity and provides sufficient information—including dates, recipients, and an explanation of the privilege asserted and the basis therefor privilege—to allow Plaintiffs and this court to evaluate the claim.

IV. Production of the Responsive Documents Is Not Unduly Burdensome.

Respondents argue that production of responsive documents is unduly burdensome because the subpoenas request information that is available online and because Plaintiffs do not provide sufficient time for a response. *See* Ex. 2 at 2-4; Ex. 4 at 1-2. However, Plaintiffs made clear in the initial meet and confer that they were not seeking information that is already publicly available online, and Respondents represented that two weeks would be sufficient time to review the materials and produce a privilege log. *See* Ex. 3 (Nov. 9 Email from S. Porsborg). Further,

Plaintiffs provided Respondents *more* than the requested two weeks to complete their review of the responsive materials and produce a privilege log. *See* Ex. 4 (Supplemental Objection produced December 1). Respondents newly broadened assertion that conducting a privilege review in response to a subpoena is unduly burdensome because they are non-parties would nullify Rule 45. And it is particularly unreasonable here where Respondents have already reviewed and categorized the majority of the potentially responsive documents and communications,[4] such that the additional burden of producing them is minimal. The Court should order Respondents to produce a privilege log containing sufficient detail to allow Plaintiffs to evaluate the claimed privilege with respect to any specific communications ultimately withheld.

V. Respondents Clare Ness and Terry Jones Must Complete their Searches and Produce Responsive Documents.

In the Supplemental Objection, Respondents indicated that Ms. Ness had yet to complete her search for responsive emails, and that Representative Jones had yet to complete a search of his text messages, but that these results would be forthcoming. Counsel for Respondents has represented that these additional limited search results will be provided early the week of December 26, 2022. Plaintiffs respectfully request the Court order that Ms. Ness produce any non-privileged responsive documents and communications identified in her search, including documents or communications shared with third parties, and produce a privilege log with respect to any documents withheld; and that Representative Jones produce all responsive documents and communications identified in his search as he has waived privilege over the same.

[4] This is particularly so given that so far the seven Respondents have identified at most 1,407 total potentially responsive documents. The small number of potentially responsive documents identified by the seven Respondents so far demonstrates that the subpoenas were narrowly targeted and not unduly burdensome.

CONCLUSION

For the foregoing reasons, this Court should order Respondents to comply with the subpoenas and produce all responsive non-privileged documents and communications, as well as responsive documents and communications over which privilege has been waived, and produce a privilege log containing individualized descriptions of each responsive document Respondents are withholding on the basis of privilege.

December 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2022, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber

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

Case No: 3:22-cv-00022

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

*** *** ***

I. INTRODUCTION

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

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

II. BACKGROUND

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

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

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

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

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

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

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

> and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.
>
> 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.

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

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

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

Id. at p. 3.

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

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

III. LAW AND ARGUMENT

A. Legislative Privilege bars the Plaintiffs' motion.

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

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

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

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

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

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

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

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

answering them." Id. at 85. In its analysis, Alviti overturned the district court's denial of the state lawmakers' motion to quash subpoenas and correctly noted "[b]oth courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." Id. at 88 (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). The First Circuit's observation certainly is accurate upon a review of the Ninth Circuit's decision in Lee and the Eleventh Circuit's decision in Hubbard.

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

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

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

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

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

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

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

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

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

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

Under Supreme Court precedent, the Circuit Courts acknowledge the Speech or Debate Clause shields "legislators from private civil actions that create [ ] a distraction and force [ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. A litigant does not have to name members or their staffs as parties to a suit in order to

distract them from their legislative work. Discovery procedures can prove just as intrusive." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (alterations in original) (internal quotation omitted) (emphasis added). The Circuits also recognized "it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause." Hubbard, 803 F.3d at 1310 n. 11 (11th Cir. 2015); see also Lee, 908 F.3d at 1187 ("We therefore hold that state and local legislators may invoke legislative privilege.")

The Ninth Circuit explained:

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

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

Circuit Courts explain the "rationale for the privilege—to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box—applies equally to federal, state, and local officials." Id. One of legislative "privilege's principal purposes is to ensure that lawmakers are allowed to focus on their public duties." Hubbard, 803 F.3d at 1310 (internal quotation omitted). "That is why the privilege extends to discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Id (emphasis added).

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

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

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

B. The Subpoenas are Unduly Burdensome

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

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

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

In the Eighth Circuit, "discovery is not permitted where no need is shown." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999). The Plaintiffs have not shown why the information they seek from the Respondents is needed in this litigation. Their Complaint states a claim for relief under Section 2 of the Voting Rights Act and asserts the Legislative Assembly's decision continues "to dilute the votes" of the Plaintiffs' "in violation of Section 2 of the VRA." Doc. No. 1 at pp. 30-31 at ¶¶ 124-131.

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

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

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

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

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

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

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

This longstanding principle remains the Supreme Court's directive nearly 140 years later. See Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (noting that "inquiries into legislative motives are a hazardous matter... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of other to enact it." (Quotations omitted)).

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

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

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

Alviti, 14 F.4th at 83.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

Dated this 5th day of January, 2023.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By */s/ Scott K. Porsborg*

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CERTIFICATE OF SERVICE

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

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

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

Turtle Mountain Band of Chippewa Indians, et al.,	)	
Plaintiffs,	)	Case No. 3:22-cv-22
vs.	)	**ORDER**
Michael Howe, in his Official Capacity as Secretary of State of North Dakota, et al.,	)	
Defendants.	)	

The Turtle Mountain Band of Chippewa Indians and other plaintiffs (hereafter Turtle Mountain) subpoenaed six current and former members of North Dakota's Legislative Assembly and a former Legislative Council staff attorney to produce documents about recent redistricting legislation.[1] The subpoenaed legislators, each of whom was identified by defendants as possessing relevant information, objected on several grounds. Turtle Mountain now moves to enforce the subpoenas. (Doc. 47). The six legislators (hereafter Respondents) filed a brief opposing the motion. (Doc. 50). The subpoenaed attorney has not responded to the motion, though Respondents' brief includes argument on her behalf. Id. at 17-19.

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id.

[1] The subpoenaed attorney no longer works with the Legislative Council but is now Deputy Attorney General. Five of the six subpoenaed legislators are no longer serving in the legislature.

Before the redistricting legislation, voters in North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Doc. 1, p. 2).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, denominated House Districts 4A, 4B, 9A, and 9B. Voters in each of these subdivided districts now elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the Mandan, Hidatsa, and Arikara Nation. House District 9A encompasses most of the Turtle Mountain Indian Reservation, with the remainder of that reservation in House District 9B. The Spirit Lake Nation, which is located near the Turtle Mountain Reservation, is in undivided District 15. Id.

In February 2022, Turtle Mountain filed a complaint alleging violation of the Voting Rights Act. Turtle Mountain asserts the redistricting plan simultaneously "packs" some Native American voters in subdivided districts and "cracks" others across divided and undivided districts. Id. at 30.

In September 2022, Turtle Mountain served third-party document subpoenas on three state senators and three state representatives who had served in the Legislative Assembly when the redistricting plan was adopted and on a former Legislative Council staff attorney. (Doc. 47-8). Initially, Respondents objected on the basis the discovery sought was publicly available, unduly burdensome, and was protected by the deliberative process privilege, state legislative privilege, and the attorney-client privilege. (Doc. 47-2).

In a December 1, 2022 supplemental objection, Respondents produced results of an initial search of their official email accounts, Microsoft Teams accounts, and personal phones for certain keywords like "redistricting," "race," and "Voting Rights Act."[2] The results of the searches are shown on a table indicating the total number of keyword "hits" for each Respondent's communications.[3] Each communication containing a keyword was then classified into one of three categories: (1) communications between the Respondent and another legislator, (2) communications between the Respondent and Legislative Council staff, and (3) communications between the Respondent and an individual who was neither a legislator nor a Legislative Council staff member. The court will refer to an individual who is neither a legislator nor a Legislative Council staff member as a "third party."

There may be multiple keyword "hits" in a single communication. To take one example, the search of a subpoenaed state senator's email found 181 "hits" for the keyword "redistricting" across ten communications between the senator and another legislator, seven communications between the senator and Legislative Council staff, and eight communications between the senator and a third party. (Doc. 47-4, p. 10). The

[2] Microsoft Teams is an instant messaging application for organizations. Microsoft, What is Microsoft Teams? https://support.microsoft.com/en-us/topic/what-is-microsoft-teams-3de4d369-0167-8def-b93b-0eb5286d7a29 (last visited Feb. 8, 2023).

[3] Respondents' counsel sent a list of keywords to the Respondents so they could conduct an initial search of their personal phones. Respondents' counsel selected the search terms without input from Turtle Mountain, but Turtle Mountain does not challenge the selection of those terms. In their supplemental objection, Respondents produced the results as to four of the seven individuals and stated that "the search results for the other remaining subpoenaed individuals' personal phones will be relayed as they are received." (Doc. 47-4, p. 4).

court calculated, across all subpoenaed individuals, 64,562 total keyword hits across at most 2,655 communications, with at most 857 communications between a Respondent and a legislator, 1,217 communications between a Respondent and Legislative Council staff, and 558 communications between a Respondent and a third party. (Doc. 47-4; Doc. 50-1).[4]

On December 6, 2022, after Respondents relayed their objections to Turtle Mountain, the parties conferred.[5] Unable to resolve the dispute in conferral, Turtle Mountain moved to enforce its subpoenas on December 22, 2022. (Doc. 47). Respondents filed a response, (Doc. 50), and Turtle Mountain filed a reply, (Doc. 53).[6]

Law and Discussion

This is the second subpoena compliance dispute raised in this litigation. In November 2022, Turtle Mountain subpoenaed former Representative William Devlin—one of the current respondents—to testify at a deposition. Representative Devlin and the Legislative Assembly moved to quash the subpoena on the basis of the state legislative

[4] The court's calculation differs from Turtle Mountain's, (see Doc. 47, p. 4), because the court's calculation includes additional results included in an exhibit to Respondents' responsive brief, while Turtle Mountain's calculations included only Respondents' initial search results, (see Doc. 50-1, p. 2).

[5] Civil Local Rule 37.1 did not require an informal conference with the court before Turtle Mountain moved to enforce its subpoenas because the subpoenas were directed to third parties. Federal Rule of Civil Procedure 45(d)(2)(B)(ii) requires only that the moving party provide notice to the subpoenaed party.

[6] Respondents' brief refers to the court as "magistrate." The correct title is magistrate judge. More than thirty years ago, Congress changed the title "United States Magistrate" to "United States Magistrate Judge." Judicial Improvements Act of 1990, 104 Stat. 5089, Pub. L. No. 101-650, §321 (1990) ("After the enactment of this Act, each United States Magistrate . . . shall be known as a United States Magistrate Judge.").

privilege.[7] In a December 22, 2022 order, the court recognized a qualified state legislative privilege. But, applying a five-factor balancing test, the court determined Turtle Mountain's need for evidence outweighed Representative Devlin's state legislative privilege and therefore declined to quash the subpoena. (Doc. 48). Representative Devlin and the Legislative Assembly appealed the December 22 order; that appeal is pending before the presiding judge. (Doc. 49).

The primary dispute addressed in the December 22 order was whether the legislative privilege could be overcome by Turtle Mountain's need for evidence. (Doc. 48, p. 4). Both parties had agreed Representative Devlin's testimony was subject to the state legislative privilege; the issue was the extent to which the privilege was qualified rather than absolute. Id.

This dispute is different in an important respect; it concerns the scope—not the strength—of the state legislative privilege. Turtle Mountain emphasizes it "do[es] not seek to overcome Respondents' assertion of legislative privilege." (Doc. 53, p. 3). Rather, Turtle Mountain requests Respondents produce only documents where "legislative privilege does not exist or has been waived." Id. at 3. Turtle Mountain contends the state legislative privilege does not protect communications between a subpoenaed individual and a third party. Turtle Mountain also argues former Representative Terry Jones—one of the current respondents—waived his state legislative privilege by testifying at a preliminary injunction hearing in another case concerning the redistricting legislation and thus his communications cannot be withheld on the basis of privilege. Id. at 3-6. As

[7] Respondents' brief was filed by the same law firm that represented the Legislative Assembly in the earlier dispute, but the brief is not identified as filed on behalf of the Legislative Assembly.

to communications where privilege may exist and has not been waived, Turtle Mountain requests Respondents produce a privilege log describing withheld documents. Id. at 10-11.

Respondents argue three circuit courts—the First, Ninth, and Eleventh—have held "legislative privilege bars the exact type of discovery the Plaintiffs seek." (Doc. 50, p. 4). Respondents further argue the December 22 order conflicts with the Eighth Circuit policy of giving great weight and precedential value to reasoned decisions of other circuits. Id. This court of course recognizes the importance of giving weight and precedential value to decisions of other circuits. But, as discussed in the December 22 order, none of the three circuit court decisions Respondents cite supports their assertion that the legislative privilege bars any discovery from state legislators in civil cases. And close reading of each of the three cases shows that none involved the "exact type of discovery" Turtle Mountain now requests.

In American Trucking Association, Inc. v. Alviti, the First Circuit recognized a qualified state legislative privilege, subject to an exception when "important federal interests are at stake." 14 F. 4th 76, 87 (1st Cir. 2021). The discovery sought in American Trucking was depositions of state legislators on the theory that a state law was passed with a purpose of discriminating against out-of-state businesses. The First Circuit concluded no important federal interest was at issue. Id. at 88. Here, an important federal interest—the right to vote without racial discrimination—is at issue, and the discovery Turtle Mountain seeks is limited to documents not covered by legislative privilege or as to which any legislative privilege has been waived.

The Ninth Circuit case which Respondents cite challenged a redistricting plan alleging racial considerations predominated in the redistricting process. Lee v. City of

L.A., 908 F.3d 1175 (9th Cir. 2018). Though recognizing there are circumstances in which a legislative privilege must yield to a decision-maker's testimony, the plaintiffs' 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.

In re Hubbard, like American Trucking, recognized a qualified state legislative privilege but concluded no important federal interest was at stake in the litigation. 803 F.3d 1298, 1313 (11th Cir. 2015). And, unlike the issue presented in this case, the Hubbard court found it was apparent from the face of the document subpoenas that none of the requested information could have been outside the legislative privilege.

Because Respondents are non-parties, Turtle Mountain moves to compel subpoena compliance under Federal Rule of Civil Procedure 45(d)(2)(B)(i). That rule provides "the serving party may move the court for the district where compliance is required for an order compelling production." But, under Rule 45(d)(3)(A), a court "must quash or modify a subpoena" that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." "A person withholding subpoenaed information under a claim that it is privileged" must "expressly make the claim" and "describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A).

1. Communications with Third Parties

The court first considers whether Respondents must produce communications between themselves and third parties. In their objection, Respondents asserted the subpoenaed communications were protected by the state legislative privilege,

deliberative process privilege, and attorney-client privilege.[8] (Doc. 47-4, p. 2). Turtle Mountain argues communications between a Respondent and a third party must be produced "because no reasonable claim of privilege exists with respect to communications that involve or were shared with third parties." (Doc. 53, p. 2).

A. State Legislative Privilege

The state legislative privilege protects against disclosure of "confidential documents concerning intimate legislative activities." Comm. for a Fair & Balanced Map, v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011). "[T]he privilege applies to any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." 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 privilege therefore also applies to any information that would reveal such opinions and motives." Hall v. Louisiana, No. CIV.A. 12-657-BAJ, 2014 WL 1652791, at *10 (M.D. La. Apr. 23, 2014).

[8] Respondents asserted the deliberative process privilege in their initial and supplemental objections, but that privilege is unavailable to legislators. See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). ("[T]he deliberative process privilege applies to the executive branch, not the legislature."). Some courts, including one cited by Respondents in their objection, characterize the state legislative privilege as a type of "deliberative process privilege." See Doe v. Neb., 788 F. Supp. 2d 975, 984 (D. Neb. 2011) ("[T]he only evidentiary legislative privilege regarding the production of documents available to state legislators . . . is a very narrow and qualified one, sometimes referred to as a 'deliberative process privilege.'"). These courts use "deliberative process privilege" rather than "legislative privilege." See id. But regardless of label, there is only one such privilege potentially available—not two.

"As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *9. Even if the subject matter of a communication between a legislator and a third party would otherwise fall within the scope of the state legislative privilege, the legislator's communication with the third party results in waiver of the privilege. See Mich. State A. Philip Randolph Inst. v. Johnson, No. 16-CV-11844, 2018 WL 1465767, at *7 (E.D. Mich. Jan. 4, 2018). Thus, communications between legislators and third parties are generally not protected by the state legislative privilege. Id.

Respondents argue the state legislative privilege is an absolute "bar to conducting discovery on state lawmakers" in civil cases. (Doc. 50, p. 4). In support, they cites cases where circuit courts quashed subpoenas that sought information from state lawmakers. See Am. Trucking, 14 F.4th at 86; Lee, 908 F.3d at 1187; In Re Hubbard, 803 F.3d at 1311. But none of those cases addressed the scope of the state legislative privilege because the parties agreed the subpoenas at issue sought only privileged information, and none addressed communications with third parties. In In re Hubbard, the court acknowledged "[n]one of the relevant information sought in this case could have been outside of the legislative privilege." 803 F.3d at 1311. And in American Trucking, "no party dispute[d] that the subpoenas issued . . . sought evidence of the [s]tate [o]fficials' legislative acts and underlying motives." 14 F.4th at 87. Here, Turtle Mountain contends Respondents are refusing to produce documents that are not within the scope of the legislative privilege.

In sum, the state legislative privilege protects certain communications—not all state legislators' communications concerning work of the Legislative Assembly.

Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 344 (E.D. Va. 2015) ("[T]he proponent of a privilege must demonstrate specific facts showing that the communications were privileged."). And the state legislative privilege does not protect information a legislator discloses to a third party. Thus, Respondents cannot withhold information on the basis of the state legislative privilege where a communication has been disclosed to a third party.

B. Attorney-Client Privilege

Respondents also assert Turtle Mountain's subpoenas seek documents protected by the attorney-client privilege. (Doc. 50, p. 18). The attorney-client privilege protects "confidential communications between a client and her attorney made for the purpose of facilitating the rendition of legal services to the client." United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011). This includes communications between government officials and government attorneys. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) ("The objectives of the attorney-client privilege apply to governmental clients.").

To be protected by the attorney-client privilege a communication must be (1) between an attorney and client, (2) confidential, and (3) for the purposes of obtaining legal services or advice. See e.g., In re Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007). When the client is an organization, the communications may be distributed to multiple individuals within the organization. But in order to maintain confidentiality, distribution of a communication must be limited to those employees who "need to know its contents" and the subject matter of the communication must be "within the scope of the employee's . . . duties." See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977),

Communications between a Legislative Council staff attorney and a third party (an individual who is neither a legislator nor the Legislative Council staff member) would likely not be privileged for lack confidentiality. Respondents offer no argument that communications between a Legislative Council staff attorney and a third party are protected by the attorney-client privilege.

C. Respondents' Obligations Regarding Third Party Communications

Respondents' tables show approximately 581 communications between them and a third party. They are directed to review their communications with third parties in light of the principals articulated above and produce all communications between Respondents and third parties.

2. Representative Jones' Waiver of the State Legislative Privilege

Turtle Mountain argues Representative Jones waived any legislative privilege by testifying about his legislative work during the preliminary injunction hearing in Walen v. Burgum, 1:22-cv-31 (D.N.D. Feb. 16, 2022). Turtle Mountain argues Representative Jones cannot "waive the privilege by revealing only that information he deems beneficial to his cause and then refuse to produce documents and communications and preclude the parties from probing his public, non-legislative statements on those matters." (Doc. 47, pp. 10-11). Respondents "do not concede that Representative Jones waived his legislative privilege." (Doc. 50, p. 17 n.6).

"[T]he legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10. "[T]he waiver of the privilege need not be . . . explicit and unequivocal, and may occur either in the course of the litigation when a party testifies as

to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." Favors v. Cuomo, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012).

During the preliminary injunction hearing, Representative Jones testified at length about the development of the challenged legislation. (Doc. 47-5). He testified about his motivations, his conversations with other legislators, staff, outside advisors, and attorneys, and the work of the redistricting committee. Id. During depositions, the Walen plaintiffs testified they spoke to Representative Jones about the redistricting process. (Doc. 47-6, p. 9; Doc. 47-7, p. 10). For these reasons, this court reiterates the conclusion made in the December 22 order that Representative Jones waived his state legislative privilege by testifying at the Walen preliminary injunction hearing. (Doc. 48, p. 20).

Respondents cite Cano v. Davis, 193 F. Supp.2d 1177 (C.D. Cal. 2002), to argue Representative Jones cannot be compelled to produce communications as to "the legislative acts of legislators who have invoked the privilege or to those staffers or consultants who are protected by the privilege." (Doc. 50, p. 17). A three-judge panel in Cano held a legislator who waives their state legislative privilege

> may testify only to his own motivations, his opinion regarding the motivation of the body as a whole, the information on which the body acted, the body's knowledge of alternatives, and deviations from procedural or substantive rules typically employed. He may also testify to his own legislative acts and statements, but 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.

193 F. Supp. 2d at 1179. Turtle Mountain argues it seeks "precisely the type of information" permitted by the Cano court—information concerning Representative Jones' motivation, the information on which the legislature acted, Representative Jones'

knowledge of alternatives, and deviations from procedural or substantive rules typically employed. (Doc. 53, p. 5).

Accordingly, Representative Jones may not withhold documents on the basis of his own state legislative privilege. At the time Turtle Mountain filed its reply brief, Respondents had not provided data on a keyword search of Representative Jones' personal phone. See id. at 6. That search must be conducted immediately if it has not yet been completed. To the extent Representative Jones withholds documents on the basis of another legislator's state legislative privilege, he must produce a privilege log describing the documents in a manner that allows plaintiffs to assess his claims of privilege as required by Rule 45(e)(2)(A).

3. Production of Privilege Logs

The court next addresses communications, like those between a respondent and another legislator or a Legislative Council staff member, where privilege may justify non-disclosure. Turtle Mountain states it "do[es] not seek to overcome Respondents' assertion of legislative privilege." Id. at 3. Rather, Turtle Mountain requests that Respondents "produce a privilege log containing individualized descriptions of each responsive document Respondents are withholding on the basis of privilege."[9] Id. at 11.

Rule 45(e)(2)(A) requires a non-party withholding documents on the basis of privilege to "expressly make the claim" and "describe the nature of the documents" that are withheld. In general, "the privilege must be proved for each document withheld as privileged." Bethune-Hill, 114 F. Supp. 3d at 344. Thus, to comply with Rule 45(e)(2), a

[9] Elsewhere in its brief, Turtle Mountain argues Respondents should produce a privilege log for documents withheld only on the basis of the attorney-client privilege and deliberative process privilege. (Doc. 47, p. 11). It appears that reference to deliberative process privilege is intended to refer to the state legislative privilege.

non-party will often produce a privilege log describing each document withheld and the justification for the assertion of privilege. See Tx. Brine Co., LLC & Occidental Chem. Corp., 879 F.3d 1224, 1229 (10th Cir. 2018).

That said, Rule 45(e)(2)(A) does not always require a document-by-document invocation of privilege. See In re Imperial Corp. of Am., 174 F.R.D. 475, 477 (S.D. Cal. 1997) ("[A] privilege log is one of a number of ways in which a party may sufficiently establish the privilege."). In some instances, document-by-document invocation of privilege may be unduly burdensome or inappropriate given the nature of the withheld documents. Id.

Respondents argue Turtle Mountain's request for a privilege log is inappropriate given the nature of the withheld documents. (Doc. 50 p. 16). In support of their argument, Respondents cite two Eleventh Circuit cases—In Re Hubbard and Jordan v. Commissioner—where the court determined a subpoenaed party was not required to produce a document-by-document privilege log.

In the case of In re Hubbard, an Alabama teachers' union subpoenaed members of the state legislature for documents related to legislation the union claimed was in retaliation for its members' exercise of their First Amendment rights. 803 F.3d at 1298. The Eleventh Circuit quashed the subpoenas on the basis of the state legislative privilege. In doing so, the Eleventh Circuit reversed a district judge who held the state lawmakers had waived their privilege by not, among other things, providing "a specific designation and description of the documents claimed to be privileged" and "precise and

certain reasons for preserving" the confidentiality of the documents.[10] Id. at 1308 (citing United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980)).

The Eleventh Circuit reversed the district judge, in part, because those requirements were "inappropriate given the circumstances." In re Hubbard, 803 F.3d at 1308. The Eleventh Circuit stated a "document-by-document invocation of the legislative privilege" was inappropriate because "[n]one of the relevant information sought in this case could have been outside of the legislative privilege." Id. at 1311. Thus, it was unnecessary for the state lawmakers to "specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents." Id.

In Jordan v. Commissioner, the Eleventh Circuit upheld a district court's quashal of a subpoena served on the Georgia Department of Corrections by two Mississippi inmates. 947 F.3d 1322 (11th Cir. 2020). The subpoena had sought information regarding Georgia's lethal injection protocol. On appeal, the inmates argued the district court should have required the Georgia Department of Corrections to submit a privilege log before granting the motion to quash. The Eleventh Circuit stated a document-by-document privilege log was unnecessary because it was "apparent from the face of the subpoena" that the information sought was protected by the relevant statute. Id. at 1328 n.3. Further, the court stated that "the remainder of the information sought [was] either readily available to the public . . . or of limited relevance." Id.

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[10] The district judge also held the state lawmakers were required to personally review the documents and raise privilege claims by affidavit. See In re Hubbard, 803 F.3d 1308 (citing United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980)). The Eleventh Circuit held those requirements were contrary to circuit precedent. Id. at 1309. Turtle Mountain does not request the subpoenaed individuals fulfill these requirements and thus this portion of Hubbard is not relevant to the current dispute.

Drawing on these cases, Respondents argue a privilege log is unnecessary because "the requested information falls within the scope of [the state legislative privilege] and the non-privileged information requested by a subpoena is readily available to the public or of limited relevance to [Turtle Mountain's] burden." (Doc. 50, p. 16). Thus, Respondents contend "[m]erely asserting legislative privilege through counsel by written response was the only requirement." Id.

Unlike in Hubbard and Jordan, Respondents' communications with third parties and Representative Jones' waiver of the state legislative privilege suggest Turtle Mountains' subpoenas seek information outside of the state legislative privilege and attorney-client privilege. Thus, Respondents' broad invocation of privilege has not sufficiently enabled Turtle Mountain to assess the privilege claim as required by Rule 45(e)(2)(A)(ii). The court will therefore direct Respondents to produce a privilege log sufficient to distinguish privileged from non-privileged documents.

4. Undue Burden Under Rule 45

Under Rule 45(d)(3)(A)(iv), a court "must quash or modify a subpoena" that "subjects a person to undue burden." The scope of discovery permitted under Rule 45 is the same as that permitted under Federal Rule of Civil Procedure 26. Beinin v. Ctr. For Study of Popular Culture, No. C06-2298JW(RS), 2007 WL 832962, at *2 (N.D. Cal. Mar. 16, 2007). The court determines whether a subpoena causes an undue burden by considering, among other things, the "relevance of the information requested" and "the burden imposed." See Am. Broad. Cos., Inc. v. Aereo, Inc., No. 13-MC-0059, 2013 WL 5276124, at *7 (N.D. Iowa Sept. 17, 2013). "Discovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case." Id.

Respondents argue "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. 50, p. 12). Turtle Mountain responds, "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 extent to which voting is racially polarized, and the use of racial appeals in the political process." (Doc. 53, pp. 7-8).

In its December 22 order, this court found testimony of Representatives Jones and Devlin about the redistricting legislation met the Rule 26 standard for relevancy. (Doc. 48, p. 17 n.8). In doing so, this court joined other courts in finding such information relevant for discovery purposes. See League of United Latin Am. Citizens v. Abbott, No. 21CV00259, 2022 WL 1570858, at *2 (W.D. Tex. May 18, 2022); League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 457 (N.D. Fla. 2021); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 102 (S.D.N.Y.), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003). Though legislative intent is not central to Turtle Mountain's claims, such evidence may nonetheless be relevant. See Rodriguez, 280 F. Supp. 2d at 102 ("While evidence of discriminatory animus may not be an essential element of all of the plaintiffs' claims, it certainly is something that can be considered."). Accordingly, the court finds Turtle Mountain's subpoenas seek relevant information.

The court now turns to the potential burden imposed by Turtle Mountain's subpoenas. Turtle Mountain seeks documents from seven individuals. (See Doc. 47-8). As described above, Respondents' supplemental objection to Turtle Mountain's subpoenas includes the results of searches of individuals' official email accounts, instant

messaging application, and personal phones for certain keywords like "redistricting," "race," and "Voting Rights Act." The table shows the total number of keyword "hits" for each individual's communications. The court calculated, across all subpoenaed individuals, 64,562 total keyword hits across at most 2,655 communications, with at most 857 communication between a subpoenaed individual and a legislator, 1,217 communications between a subpoenaed individual and Legislative Council staff, and 558 communications between a subpoenaed individual and a third party.

Respondents submitted an affidavit of a Legislative Council staff attorney that explained the burden of the initial search and the burden that full compliance with Turtle Mountain's subpoenas would impose on Legislative Council staff. (Doc. 52). The affiant states eight attorneys assisted in the initial keyword search and "[t]he combined time required to conduct the cursory keyword review averaged a full 8 hours per attorney." Id. at 2. If the Legislative Council is mandated to fully comply with Turtle Mountain's subpoenas, the affiant estimates it would take approximately "ten 8-hour days for eight attorneys" or "640 hours of Legislative Council's time." Id. The affiant also notes the Legislative Assembly is in session and Legislative Council staff, the primary drafters of bills and resolutions, had received, as of January 4, 2023, 748 drafting requests for the 2023 session. Id. at 3.

Respondents have not provided sufficient information to establish an undue burden. As Turtle Mountain notes, Respondents' initial keyword search does not appear to account for communications that contained more than one keyword. (Doc. 47, p. 4). For example, the court understands the sentence "the 2021 Redistricting Plan subdivides Senate District 9 into House Subdistrict 9A and 9B" would result in three keyword "hits" for the words "redistrict," "district," and "subdistrict," and thus be

counted as three separate communications on Respondents' table.[11] See id. at 4 n.2. Moreover, 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. (See Doc. 47-4, p. 12). Additionally, the assertion that compliance with Turtle Mountain's subpoenas would require 640 hours of Legislative Council staff attorney time is not adequately explained. In the court's experience with electronic discovery disputes, it is likely IT staff could identify duplicate documents, and it appears many documents identified on the initial search are duplicative of each other. The court recognizes the demand the ongoing legislative session imposes on Legislative Council staff. But 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).

Conclusion

Trial of this case is scheduled to begin June 12, 2023, most discovery deadlines have passed, and thus discovery cannot be delayed any further. (Doc. 34; Doc. 40). Respondents are directed to produce their communications with third parties. Further, Representative Jones has waived his state legislative privilege and therefore any documents withheld on that basis must be produced. Any other documents withheld on

[11] Respondents do not address possible duplication in their supplemental objection or briefing.

the basis of privilege, including documents Representative Jones may have withheld based on another legislator's state legislative privilege, must be adequately described on a privilege log.

Privilege log descriptions should include 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. Accordingly, Turtle Mountain's motion to enforce its subpoenas, (Doc. 47), is **GRANTED**.

IT IS SO ORDERED.

Dated this 9th day of February, 2023.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

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**

*** *** ***

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
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By /s/ Scott K. Porsborg

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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:

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

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al., Defendants.	**ORDER** Case No. 3:22-cv-22

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 to the North Dakota Legislative Council Claire Ness (collectively, the "Assembly") appeal an order of United States Magistrate Judge Alice R. Senechal granting a motion to enforce third-party subpoenas. Doc. No. 64. The Turtle Mountain plaintiffs subpoenaed the six current and former members of the Assembly, along with a former attorney for Legislative Council, to produce documents about the redistricting legislation at issue in this case. The Assembly objected, and the Turtle Mountain plaintiffs moved to enforce the subpoenas. Judge Senechal granted the motion. For the reasons below, the order granting the motion to enforce is affirmed, and the appeal is denied.

I. BACKGROUND

This is the second appeal of a discovery order in this case, and the Court will not repeat its summary of the issue and claims here. See Doc. No. 71 (summarizing the redistricting legislation and Voting Rights Act claim in this case). As relevant to this appeal, in September 2022, the Turtle Mountain plaintiffs served third-party document subpoenas on Senators Holmberg, Wardner, and Poolman, Representatives Nathe, Devlin, and Jones, and former Legislative Council attorney Ness. Doc. No. 47-8. These individuals were served because they served in the Assembly and on Legislative

Council when the redistricting bill at issue was vetted and adopted. The Assembly raised several objections, including initially that the discovery was publicly available, the requests were unduly burdensome, and that discovery was protected by the deliberative process privilege, state legislative privilege, and the attorney-client privilege. For their part, the Turtle Mountain plaintiffs argued the document requests are limited to a small number of communications where state legislative privilege does not exist or was waived.

After considering the parties' arguments and filings, Judge Senechal granted the motion to enforce the subpoenas. Doc. No. 63. She analyzed the relevant cases and addressed (and distinguished) the cases raised by the parties. Id. She ordered the production of communications with third parties, determined Representative Jones waived his state legislative privilege and ordered the production of documents withheld on that basis, and ordered the Assembly to produce a privilege log as to any documents withheld based on privilege. Id.

II. LAW AND DISCUSSION

Under Federal Rule of Civil Procedure 72(a) and District of North Dakota Civil Local Rule 72.1(B), a magistrate judge is permitted to hear and determine non-dispositive matters in a civil case. Any party may appeal the determination to the district court judge assigned to the case who "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); see also D.N.D. Civ. L. R. 72.1(D)(2). "A district court conducts an 'extremely deferential' review of a magistrate judge's ruling on a nondispositive issue." Carlson v. BNSF Ry. Co., No. 19-CV-1232, 2021 WL 3030644, at *1 (D. Minn. July 19, 2021). A magistrate judge's decision will not be disturbed unless it is "clearly erroneous" or "contrary to law." See Fed. R. Civ. P. 72(a).

On appeal, the Assembly raises two issues: (1) state legislative privilege bars the Assembly's compliance with the subpoena, and (2) the Assembly's compliance is unduly burdensome under Federal Rule of Civil Procedure 45. Doc. No. 64.

A. State Legislative Privilege and Third Parties

After careful review of the case law and the parties' arguments, Judge Senechal's order is not clearly erroneous or contrary to law as it relates to the state legislative privilege and how the privilege applies to communications with third parties. The state legislative privilege is designed to protect against disclosure of "confidential documents concerning intimate legislative activities." Comm. for a Fair & Balanced Map v. Ill. State Bd. of Election, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011). "The privilege applies to any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." Jackson Mun. Airport Auth. v. Bryant, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017). In a prior order in this case, the Court explained the contours and qualifications of the state legislative privilege in a redistricting case in the context of subpoenaing members of the Assembly for depositions. See Doc. No. 71. That order also rejects the notion that the state legislative privilege is an absolute bar to seeking discovery from legislators. Id. So, to the extent the Assembly persists in its argument that the state law privilege is an absolute bar to seeking discovery from legislators, the prior order resolves that issue.

This appeal also presents a slight twist on the state legislative privilege issue because the subject matter is a document subpoena seeking communications. But recall that the communications the Turtle Mountain plaintiffs are seeking are communications by the individual legislator(s) with third parties. These communications, if they exist, are not protected by the state legislative privilege because the communications are with third parties, not between members of the Assembly or between members of the Assembly and their staff. See Jackson, No. 3:16-CV-246-CWR-FKB, 2017 WL 6520967, at *7. Given that, Judge Senechal's conclusion that the Assembly cannot withhold information based on state

legislative privilege where the communication was disclosed to a third party is not clearly erroneous or contrary to law.

B. Undue Burden and Federal Rule of Civil Procedure 45

The Assembly next argues that Judge Senechal erred in concluding that the subpoenas did not subject the Assembly to an undue burden. Doc. No. 64. Federal Rule of Civil Procedure 45(d)(3)(A)(iv) states a court "must quash or modify a subpoena that . . . subjects a person to undue burden." Several factors must be considered in assessing undue burden, including the "relevance of the information requested" and "the burden imposed." Am. Broad. Cos., Inc. v. Aereo, Inc., No. 13-MC-0059, 2013 WL 5276124, at *7 (N.D. Iowa Sept. 17, 2013). When (as here) non-parties are subpoenaed, the Court is "particularly mindful of Rule 45's undue burden and expense cautions." Id.

Consistent with this Court's order on the other discovery appeal in this case, the information sought by the Turtle Mountain plaintiffs is relevant. See Doc. No. 71. As to the burden imposed on the Assembly, the Court recognizes (as Judge Senechal did as well) that the subpoenas come with poor timing for the Assembly, as the North Dakota Legislative Assembly is currently in session. That said, the subpoenas were served in September of 2022, and the Assembly has identified at least some documents already, which cuts against there being an undue burden. And while not necessarily dispositive of the issue, what is also missing from the record is a simple estimate from the Assembly as to the number of documents at issue. For its part, the Assembly did provide an estimate of the total number of hours of time it would take to comply, but that number is contradicted by certain facts in the record, including that some documents have already been identified and that many documents are likely duplicative.

On these facts, the Court cannot say that Judge Senechal's conclusion that the Assembly's compliance with the subpoenas would not result in an undue burden under Federal Rule of Civil Procedure 45(d)(3)(A)(iv) is clearly erroneous or contrary to law. It is worth noting and keeping in mind that Judge Senechal's order required three actions: (1) disclosure of communications to third

parties (because privilege cannot apply); (2) production of documents from Representative Jones (who waived state legislative privilege[1]); and (3) production of a privilege log for any documents withheld based on privilege. None of those directives are extraordinary or unusual, nor do they require disclosure of any privileged documents. Again, given the facts here, Judge Senechal's conclusion on the undue burden of the subpoenas is not clearly erroneous or contrary to law.

III. CONCLUSION

The Court has carefully reviewed the order granting the motion to enforce subpoenas, the parties' filings, the applicable law, and the entire record. Judge Senechal's order is not clearly erroneous or contrary to law. The order (Doc. No. 63) is **AFFIRMED**, and the appeal (Doc. No. 64) is **DENIED**. Given this order, the Court **FINDS AS MOOT** the related motion to expedite discovery appeals (Doc. No. 67).

IT IS SO ORDERED.

Dated this 14th day of March, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

[1] The Assembly did not raise this issue in this appeal. Nonetheless, Representative Jones's waiver of state legislative privilege was squarely addressed by the three-judge panel in Walen, et al. v. Burgum, et al., Case No. 1:22-cv-31. Doc. No. 110, Case No. 1:22-cv-31.

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,	)	**AFFIDAVIT OF EMILY THOMPSON**
v.	)	
Alvin Jaeger, in his official capacity as Secretary of State of North Dakota.	)	
Defendant	)	

*** *** ***

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

Being duly sworn, Emily Thompson, testifies:

1. I am the Legal Division Director for the North Dakota Legislative Council.

2. After receipt of the subpoenas directed to Senator Ray Holmberg, Senator Nicole Poolman, Senator Rich Wardner, Representative Bill Devlin, Representative Mike Nathe, Representative Terry Jones, and former Senior Counsel for the North Dakota Legislative Council Claire Ness, a "key-word" search was performed on each individual's Outlook.

3. In an effort to determine the extent of information sought by the subpoenas, the following "key-words" were used:

   a. 1504
   b. Redistricting
   c. Map
   d. Subdistrict
   e. District
   f. Race
   g. Tribal

h. Native American
i. Indian
j. Reservation
k. Voting Rights Act
l. VRA
m. Demographic
n. Criteria
o. Training

These terms were used to provide a general estimate of the communications sought by the Plaintiffs' subpoena. It was understood these "key words" may be useful in identifying at least some of the documents requested in the subpoena.

4. All eight attorneys in the Legislative Council's Legal Division cooperatively performed a "key word" search. The combined time required to conduct the cursory key word review averaged a full 8 hours per attorney. 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.

5. The results of this cursory review were sent to counsel.

6. 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.

7. The 2023 legislative session commenced on January 3, 2023.

8. The seven drafting attorneys in the Legislative Council's Legal Division serve as the primary drafters of bills and resolutions introduced by the Legislative Assembly's 141 legislators during the legislative session. As of January 4, 2023, the Legislative Council had received 748 drafting requests for the 2023 legislative session. The final count of bill drafts requested by legislators, not including additional requests for amendments to those bills, has exceeded 1,000 requests for the past four legislative sessions. I anticipate upwards of 300 additional bill drafts being requested for preparation by the Legal Division in the upcoming weeks to meet the tight 80-day timeline allotted for the legislative session.

9. In addition to drafting bills and resolutions, the Legislative Council's Legal Division performs various other services, such as testifying at legislative bill hearings and providing research and legal advice to legislators.

10. This role often involves activities akin to an aide to the legislators.

11. In addition to the obvious burden placed on the legislators, compliance with the Plaintiffs' subpoena also would be a substantial burden on the Legislative Council which would severely limit the Legal Division's ability to timely complete its duty to serve the Legislative Branch during the legislative session.

Dated this 4th Day of January, 2023.

By Emily Thompson
Emily Thompson

On this 4th day of January, 2023, before me personally appeared Emily Thompson known to me to be the person described in the within and foregoing instrument and acknowledged to me that she executed the same.

Jill L. Schwab
Notary Public

JILL L. SCHWAB
Notary Public
State of North Dakota
My Commission Expires May 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that on the11th day of January, 2023, a true and correct copy of the foregoing **AFFIDAVIT OF EMILY THOMPSON** 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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By /s/ Scott K. Porsborg
SCOTT K. PORSBORG

EXHIBIT 4
Supplemental Objection

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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown.

Plaintiffs,

v.

Alvin Jaeger, in his official capacity as Secretary of State of North Dakota.

Defendant

PRIVILEGE LOG

*** *** ***

As stated in the Objection to Subpoenas to Produce Documents, the subpoenaed individuals asserted the subpoenaed documents are subject to privilege. Further, the subpoenaed individuals assert that responding to the subpoena is unduly burdensome. Specifically, the subpoenaed individuals assert the requested documents are protected by legislative privilege, deliberative process privilege, and attorney-client privilege.

As a threshold matter, the doctrine of legislative privilege "extends to discovery requests, even when the lawmaker is not named a party to the suit: complying with such requests detracts from the performance of official duties." In re Hubbard, 803 F.3d 1298, 1310 (11th Cir. 2015). Further, this privilege "protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts*." Id (emphasis in original).

Further, it is well-established that "courts have consistently held that 'non-party status' is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue. Non-parties are afforded this special consideration because they have a different set of

expectations than parties." Rossman v. EN Engineering, LLC, 467 F.Supp.3d 586, 590 (N.D. Ill. 2020).

Additionally, when the requested information clearly falls within the scope of a privilege and the non-privileged information requested by a subpoena is readily available to the public or of limited relevance to the Plaintiffs' burden, it has been held a privilege log under Fed. R. Civ. P. 45 is not required. Jordan v. Commissioner, Mississippi Dept. of Corrections, 947 F.3d 1322, 1328 n. 3 (11th Cir. 2020). As stated in the Objection, all of these factors apply here and the subpoenaed individuals do not concede a privilege log is necessary under the circumstances.

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

I. Privilege Log - Process Used and Search Results

A. A search was conducted on the emails within each subpoenaed individual's Outlook for the key words listed on the charts below. The search was applied to emails dated January 1, 2020 through November 16, 2022. The search for Ms. Ness' emails is ongoing and the results using the same methodology explained below will be provided once complete.

1. Please note:

i. In regard to communications sent through Teams, a search also was conducted on the Teams messages to which the Legislative Council's IT Department had access; specifically, the Teams messages for Representative William Devlin, Representative Mike Nathe, Senator Nicole Poolman, and Senator Rich Wardner. These results have been included on a separate table for each of the listed individuals.

ii. In regard to communications sent through text message, the IT Department does not have access to the subpoenaed individual's personal phones. A request was sent to the subpoenaed individuals for text messages responsive to the subpoena, along with directions on the manner in which individuals could search their devices for text messages using the standard list of key words used when searching for communications in Teams and Outlook.

iii. Senators Holmberg and Poolman as well as Representatives Devlin and Nathe indicated no search results from their personal phones. Ms. Ness performed a search on her phone which revealed the results shown in the applicable table. The search results from the remaining subpoenaed individuals' personal phones will be relayed as they are received.

B. The total number of search results, generated by the key word search, were recorded.

C. When a key word strike was found, the IT Department tallied and further divided it into categories including:

1. Communications between the subpoenaed individual and legislators,
2. Communications between the subpoenaed individual and the Legislative Council staff, and
3. Communications between the subpoenaed individual and individuals other than legislators or the Legislative Council staff.

Representative William Devlin				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	41	3	6	3
Redistricting	895	8	25	17
Map	257	9	19	10
Subdistrict	114	5	12	8
District	2,848	7	15	10
Race	204	4	15	9
Tribal	362	13	20	14
Native American	167	10	20	13
Indian	132	9	9	7
Reservation	211	12	25	10
Voting Rights Act or VRA	116	14	12	5
Demographic	39	8	2	-
Criteria	117	9	6	2
Training	518	11	20	7

Representative William Devlin				
TEAMS SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	0	-	-	-
Redistricting	0	-	-	-
Map	0	-	-	-
Subdistrict	0	-	-	-
District	0	-	-	-
Race	0	-	-	-
Tribal	0	-	-	-
Native American	0	-	-	-
Indian	0	-	-	-
Reservation	0	-	-	-
Voting Rights Act or VRA	0	-	-	-
Demographic	0	-	-	-
Criteria	0	-	-	-
Training	0	-	-	-

Representative Ray Holmberg				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	74	2	-	2
Redistricting	920	32	31	27
Map	990	10	12	14
Subdistrict	53	16	7	9
District	1,862	23	12	24
Race	1,665	7	4	10
Tribal	629	21	10	16
Native American	193	9	5	11
Indian	362	8	6	9
Reservation	495	8	4	7
Voting Rights Act or VRA	95	12	7	11
Demographic	146	2	1	2
Criteria	374	10	2	4
Training	1,107	5	14	1

Representative Michael Nathe				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	63	1	1	-
Redistricting	49	8	-	2
Map	467	-	7	4
Subdistrict	14	4	1	5
District	2,606	8	2	3
Race	230	1	-	3
Tribal	427	2	-	3
Native American	120	-	-	1
Indian	229	2	-	1
Reservation	178	-	-	-
Voting Rights Act or VRA	3	1	-	-
Demographic	101	-	-	-
Criteria	220	-	-	1
Training	906	-	1	-

Representative Michael Nathe				
TEAMS SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	Total Number of Hits for the Key Word Searched	Communications Between the Subpoenaed Individual and Legislators	Communications Between the Subpoenaed Individual and Legislative Council Staff	Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals
1504	0	-	-	-
Redistricting	0	-	-	-
Map	0	-	-	-
Subdistrict	0	-	-	-
District	0	-	-	-
Race	0	-	-	-
Tribal	0	-	-	-
Native American	0	-	-	-
Indian	0	-	-	-
Reservation	0	-	-	-
Voting Rights Act or VRA	0	-	-	-
Demographic	0	-	-	-
Criteria	0	-	-	-
Training	0	-	-	-

Senator Richard Wardner				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	41	1	-	1
Redistricting	181	10	7	8
Map	344	4	3	5
Subdistrict	28	6	6	4
District	1,107	11	8	8
Race	214	2	2	2
Tribal	425	2	2	3
Native American	90	3	2	1
Indian	243	1	1	-
Reservation	190	5	3	-
Voting Rights Act or VRA	17	2	1	1
Demographic	57	2	-	-
Criteria	244	3	-	-
Training	473	-	-	2

Senator Richard Wardner				
TEAMS SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	Total Number of Hits for the Key Word Searched	Communications Between the Subpoenaed Individual and Legislators	Communications Between the Subpoenaed Individual and Legislative Council Staff	Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals
1504	0	-	-	-
Redistricting	0	-	-	-
Map	0	-	-	-
Subdistrict	0	-	-	-
District	0	-	-	-
Race	0	-	-	-
Tribal	0	-	-	-
Native American	0	-	-	-
Indian	0	-	-	-
Reservation	0	-	-	-
Voting Rights Act or VRA	0	-	-	-
Demographic	0	-	-	-
Criteria	0	-	-	-
Training	0	-	-	-

Senator Nicole Poolman				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	20	-	1	1
Redistricting	159	4	4	6
Map	447	3	2	7
Subdistrict	8	2	1	-
District	1,521	5	2	5
Race	499	1	-	1
Tribal	322	1	-	-
Native American	109	-	-	-
Indian	410	-	-	-
Reservation	107	-	1	1
Voting Rights Act or VRA	32	-	-	-
Demographic	111	-	-	-
Criteria	162	-	-	-
Training	1,069	-	1	-

Senator Nicole Poolman				
TEAMS SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	Total Number of Hits for the Key Word Searched	Communications Between the Subpoenaed Individual and Legislators	Communications Between the Subpoenaed Individual and Legislative Council Staff	Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals
1504	0	-	-	-
Redistricting	0	-	-	-
Map	0	-	-	-
Subdistrict	0	-	-	-
District	0	-	-	-
Race	0	-	-	-
Tribal	0	-	-	-
Native American	0	-	-	-
Indian	0	-	-	-
Reservation	0	-	-	-
Voting Rights Act or VRA	0	-	-	-
Demographic	0	-	-	-
Criteria	0	-	-	-
Training	0	-	-	-

Representative Terry Jones				
OUTLOOK SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	83	5	3	4
Redistricting	794	32	14	16
Map	2,529	21	6	6
Subdistrict	59	21	4	7
District	6,006	29	8	22
Race	2,351	4	1	6
Tribal	1,553	10	1	4
Native American	1,109	8	1	4
Indian	2,426	3	2	3
Reservation	609	11	2	4
Voting Rights Act or VRA	161	10	-	4
Demographic	372	2	-	1
Criteria	514	3	1	1
Training	3,671	1	3	2

Claire Ness				
TEST MESSAGE SEARCH RESULTS				
January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	0	0	0	0
Redistricting	1	1	0	0
Map	5	0	5	0
Subdistrict	2	0	2	0
District	3	0	3	0
Race	1	0	1	0
Tribal	1	0	1	0
Native American	0	0	0	0
Indian	0	0	0	0
Reservation	0	0	0	0
Voting Rights Act or VRA	0	0	0	0
Demographic	0	0	0	0
Criteria	0	0	0	0
Training	0	0	0	1

Additionally, any draft redistricting maps that were not part of the public record have been withheld pursuant to legislative, deliberative process, and/or attorney-client privilege.

Dated this 1st day of December, 2022.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2022, a true and correct copy of the foregoing **PRIVILEGE LOG** was served upon the following:

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

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,	)	**SUPPLEMENTAL PRIVILEGE LOG**
v.	)	
Alvin Jaeger, in his official capacity as Secretary of State of North Dakota.	)	
Defendant	)	

*** *** ***

Please find this as a supplement to the December 1, 2022, Privilege Log. The supplemental response below reflects the key word search results performed on Claire Ness' Outlook account. All statements, positions, explanation and arguments from the December 1, 2022, Privilege Log and October 14, 2022, Objection to Subpoenas to Produce Documents are incorporated herein by reference. This supplement utilized the same methodology as explained in the December 1, 2022, Privilege Log. The results are shown in the table below:

Claire Ness OUTLOOK SEARCH RESULTS January 1, 2020 - November 16, 2022				
Searched Key Word	**Total Number of Hits for the Key Word Searched**	**Communications Between the Subpoenaed Individual and Legislators**	**Communications Between the Subpoenaed Individual and Legislative Council Staff**	**Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals**
1504	294	6	30	16
Redistricting	1885	54	105	36
Map	1936	51	167	17
Subdistrict	298	30	57	11
District	4889	67	154	27
Race	472	17	38	3
Tribal	530	16	35	12
Native American	244	12	31	4
Indian	404	7	38	8
Reservation	621	20	63	10
Voting Rights Act or VRA	353	27	45	7
Demographic	46	0	2	3
Criteria	572	6	13	1
Training	839	1	1	0

Dated this 30th day of December, 2022.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2022, a true and correct copy of the foregoing **SUPPLEMENTAL PRIVILEGE LOG** was served upon the following:

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Clerk of Court

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March 28, 2023

Mr. Scott K. Porsborg
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RE: 23-1600 In Re: North Dakota Legislative Assembly, et al

Dear Counsel:

A petition for a writ has been filed under the above referenced number. Your case will be referred to a panel of judges, and you will be advised of the Court's ruling.

Please note that service by pro se parties is governed by Eighth Circuit Rule 25B. A copy of the rule and additional information is attached to the pro se party's copy of this notice.

On June 1, 2007, the Eighth Circuit implemented the appellate version of CM/ECF. Electronic filing is now mandatory for attorneys and voluntary for pro se litigants proceeding without an attorney. Information about electronic filing can be found at the court's web site www.ca8.uscourts.gov. In order to become an authorized Eighth Circuit filer, you must register with the PACER Service Center at https://www.pacer.gov/psco/cgi-bin/cmecf/ea-regform.pl. Questions about CM/ECF may be addressed to the Clerk's office.

Michael E. Gans
Clerk of Court

CBO

Enclosure(s)

cc: Mr. Matthew Lee Campbell
Mr. Michael S. Carter
Mr. Clerk, U.S. District Court, North Dakota
Ms. Molly Danahy
Mr. Mark P. Gaber
Ms. Nicole Hansen
Ms. Samantha Blencke Kelty
Mr. Austin T. Lafferty
Mr. Timothy Q Purdon

Mr. Brian D. Schmidt
Mr. Bryan L. Sells

District Court/Agency Case Number(s): 3:22-cv-00022-PDW

Caption for Case Number: 23-1600

In Re: North Dakota Legislative Assembly; William R. Devlin; Senator Ray Holmberg; Senator Richard Wardner; Senator Nicole Poolman; Michael Nathe, Representative; Terry Jones, Representative; Claire Ness, Senior Counsel at the North Dakota Legislative Council

Petitioners

Addresses for Case Participants: 23-1600

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