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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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IN RE NORTH DAKOTA LEGISLATIVE ASSEMBLY  
et al.,

*Petitioners.*

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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-PDW-ARS

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**BRIEF OF RESPONDENTS TURTLE MOUNTAIN BAND OF CHIPPEWA  
INDIANS, et al. IN OPPOSITION TO PETITION FOR A WRIT OF  
MANDAMUS**

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## STATEMENT OF ISSUES

(1) Did the district court clearly and indisputably abuse its discretion when it affirmed the magistrate judge's order directing the North Dakota Legislature to produce communications with third parties and documents as to which Representative Jones waived his legislative privilege??

(2) Did the district court clearly and indisputably abuse its discretion when it affirmed the magistrate judge's order directing the North Dakota Legislature to produce a privilege log?

(3) Did the district court clearly and indisputably abuse its discretion when it affirmed the magistrate judge's order denying Representative Devlin's motion to quash his deposition subpoena?

## INTRODUCTION

Upon reading the Petition, one might think that the district court ordered the Petitioners (“Legislative Petitioners”) to allow Respondents (“Plaintiffs”) to rummage through 64,000 of their private files and disregard the legislative privilege entirely. But this not at all what happened. The Petition is long on hyperbole, but it obscures the exceedingly limited scope of the discovery ordered by the district court.

The district court ordered the production of two categories of documents: (1) documents responsive to the subpoenas that were shared with third parties and that Legislative Petitioners concede are not privileged and (2) documents in former Representative Jones’s possession over which he waived legislative privilege by voluntarily testifying about otherwise privileged matters in court. That is it. The quantity? Fewer than 1,000 documents. Although the Petition opens by reciting the alarming figure of “over 64,000 emails,” Legislative Petitioners never reveal to this Court that they have already determined that over 62,000 of those emails are “clearly non-responsive.” App.221-242; Supp.App.225 (Stay Mot. at 3, ECF 78). Plaintiffs do not seek—nor has the district court ordered—the production of “clearly non-responsive” documents. Legislative Petitioners likewise object to being ordered to

log the remaining privileged, *responsive* documents—an ordinary task that subpoena recipients do every day.

The district court also ordered the deposition of a single former state legislator who led the redistricting effort and represented one of the Native American Tribes whose members' voting rights are at issue in this case. It did so based upon the analysis followed by the majority of federal courts to consider the application of legislative privilege to depositions in redistricting cases. This was not clear and indisputable error.

This case is a far cry from the circumstances in which mandamus is appropriate. The district court's discovery order will not grind the Legislature to a halt. Legislative Petitioners misstate, embellish, and obscure the facts and paint a picture of a runaway district court that bears no resemblance to the restrained and reasoned decision below.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Plaintiffs' Rule 45 subpoenas to Legislative Petitioners**

Plaintiffs, among whom include the Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation, allege that the 2021 redistricting plan enacted by the North Dakota Legislature violates Section 2 of the Voting Rights Act by cracking and packing Native American voters in northeastern North Dakota, resulting in a reduction from three to one the number of state legislators they have an equal

opportunity to elect. Supp.App.016-047 (Compl., ECF 1); Supp.App.071-077 (Supp. Compl., ECF 44).

In support of their claims, Plaintiffs sought to obtain limited third-party discovery from certain individuals involved in enacting and adopting the challenged plan. Plaintiffs served subpoenas duces tecum 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 “Legislative Petitioners”).<sup>1</sup> App.007-055. The subpoenas sought documents regarding the legislative redistricting process and its relation to North Dakota’s Native American voters and Tribes. *See, e.g.*, App.012-013. The subpoenas sought only documents created between January 1, 2020 and the present. *See, e.g.*, App.012.

Legislative Petitioners all played integral roles in enacting the 2021 Redistricting Plan and therefore are likely to have discoverable information relevant to Plaintiffs’ claims. Representative Devlin and Senator Holmberg served as Chair

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<sup>1</sup> Of these individuals, only Representative Nathe remains in the North Dakota Legislature. *See* 68th Legislative Assembly Members, North Dakota Legislative Assembly, <https://www.ndlegis.gov/assembly/68-2023/regular/members>. Representative Devlin and Senator Wardner have since retired from the Legislature and Representative Jones was defeated in his 2022 reelection campaign. Senator Holmberg resigned in April 2022 and Senator Poolman did not run for re-election in 2022. Ms. Ness left the Legislative Council in May 2022 and now serves in the Attorney General’s office. Pet. at 2 n.1.



and Vice Chair of the Redistricting Committee, respectively, with Senator Poolman and Representative Nathe serving as Committee members. Supp.App.214 (Redistricting Committee Meeting Minutes, ECF No. 60-2). Moreover, Representative Devlin, from whom Plaintiffs seek deposition testimony as well as documents, represented the state legislative district containing the Spirit Lake Reservation during the previous redistricting cycle, Supp.App.210 (Opp'n to Mot. to Quash at 7, ECF 56), and thus likely has nonprivileged information regarding the electoral conditions and campaigns in the region, as well as his own responsiveness to Native American voters in his district. Senator Wardner was the Chair of the Tribal State Relations Committee, on which former Representative Jones also served, and both heard testimony in that Committee from Tribal Leaders and Tribal Members on the redistricting process. Supp.App.215-217, 218-220, 221-222 (Minutes of Tribal State Relations Committee Meetings, ECF 60-3, 60-13, 60-14).

Representative Jones also testified before the Redistricting Committee and has funded a separate lawsuit challenging the 2021 plan, in which he voluntarily appeared and testified about the Legislature's intent in enacting the map and his conversations with other legislators and legislative council staff regarding the same. *See* Supp.App.101 (Defs. Rule 26(a)(1) Disclosures, ECF 47-1 ¶ 43); Supp.App.111-149 (Walen PI Hrg. Tr., ECF 47-5); Supp.App.179-202 (Walen Depo. Tr., ECF 47-7); *see also* Supp.App.082-085 (Mot. to Enforce at 5-8, ECF 47).

Finally, Ms. Ness served as Senior Counsel at the North Dakota Legislative Council during the 2021 Redistricting Process. Supp.App.096 (Defs. Rule 26(a)(1) Disclosures, ECF 47-1 ¶ 11). The North Dakota Secretary of State, who is the defendant in the underlying suit, identified Legislative Petitioners as having information relevant to this matter in their initial disclosures. Supp.App.094, 101, 102 (Defs. Rule 26(a)(1) Disclosures ECF 47-1 ¶¶ 3, 43, 53).

## **II. Legislative Petitioners’ refusal to comply with the subpoenas duces tecum**

On October 14, 2022, Legislative Petitioners, through counsel, provided limited objections to the subpoenas. *See* App.120-124. Specifically, Legislative Petitioners objected (1) that the subpoenas imposed an undue burden to the extent that they sought information about the redistricting process that was already available to Plaintiffs via 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 Legislative Petitioners’ possession were non-privileged and not already publicly available, and (3) that the requested documents were subject to the legislative, deliberative process, and attorney-client privileges. *See id.*

Plaintiffs subsequently confirmed they were not seeking publicly available material from the Redistricting Website, and after conferring with his clients, Legislative Petitioners’ counsel indicated that two weeks would be a sufficient time

to collect the documents and provide a privilege log. Supp.App.107-110 (Nov. 9 Email from S. Porsborg, ECF 47-3). Under this agreement, the privilege log should have been produced to Plaintiffs before the Thanksgiving holiday, on November 23, 2022. *See id.*

Legislative Petitioners then developed a list of fourteen “keywords” and conducted searches of Legislative Petitioners’ emails and text messages. App.221-242. The “keywords” utilized in this search were: “1504” (the bill number), “Redistricting Map,” “Subdistrict,” “District,” “Race,” “Tribal,” “Native American,” “Indian,” “Reservation,” “Voting Rights Act,” “VRA,” “Demographic,” “Criteria,” and “Training.” Supp.App.245 (Stay Reply at 2, ECF 86). Legislative Petitioners have since admitted that these keyword searches were not intended to actually identify documents and communications responsive to the subpoenas, but rather were intended to “substantiate the [Legislative Petitioners’] undue burden objection.” Supp.App.246 (Stay Reply at 3, ECF 86). Legislative Petitioners’ keyword search resulted in 64,849 keyword hits across all eight searches. App.221-242.

After a cursory review of the keyword search results, Legislative Petitioners determined that approximately 62,200 of the keyword hits involved documents and communications that were “clearly non-responsive.” App.221-242; Supp.App.225 (Stay Mot. at 3, ECF 78). Of the remaining 2,600 potentially responsive documents

and communications, Legislative Petitioners determined that approximately 580 involved third parties and 2,060 involved other legislators or legislative council staff. App.221-242; Supp.App.239 (Opp. to Stay at 4, ECF 84). Legislative Petitioners produced the tallies of their search results to Plaintiffs in a document titled “Privilege Log” on December 1, 2022 and a document titled “Supplemental Privilege Log” on December 30, 2022 (collectively “Supplemental Objections”). App.221-242.

### **III. Plaintiffs’ motion to enforce the subpoenas duces tecum**

In light of Legislative Petitioners’ refusal to take any additional steps to comply with their obligations under the subpoenas, Plaintiffs moved to enforce the subpoenas. Supp.App.078-092 (Mot. to Enforce, ECF 47). In their motion, Plaintiffs made clear that they sought *only two categories of documents*, as well as a privilege log for the remaining responsive documents containing sufficient detail to evaluate Legislative Petitioners’ claims of privilege. First, Plaintiffs sought to obtain the approximately 580 documents and communications that Legislative Petitioners had identified as involving non-legislators and non-legislative council staff—*i.e.*, documents that had been shared with third parties and thus were not protected by legislative privilege. Supp.App.085-086 (Mot. to Enforce at 8-9, ECF 47); Supp.App.238-239 (Opp. to Stay at 3-4, ECF 84). Second, Plaintiffs sought to obtain approximately 200 documents and communications identified as in the possession of Representative Jones, on the grounds that Representative Jones waived privilege

over these communications by voluntarily appearing and testifying publicly about the topics on which Plaintiffs sought discovery. Supp.App.082-085 (Mot. to Enforce at 5-8, ECF 47) (detailing Representative Jones’s public statements on the relevant topics); Supp.App.238-239 (Opp. to Stay at 3-4, ECF 84). Finally, Plaintiffs sought a privilege log with respect to the remaining approximately 1,860 responsive documents Legislative Petitioners sought to withhold on the basis of legislative privilege. Supp.App.090 (Mot. to Enforce at 13, ECF 47); Supp.App.238-239 (Opp. to Stay at 3-4, ECF 84).

On February 10, 2023, the magistrate judge granted Plaintiffs’ motion to enforce their subpoenas against Legislative Petitioners. The magistrate judge rejected the assertion that the legislative privilege affords Legislative Petitioners absolute immunity from civil discovery and reached the unremarkable conclusion that “the state legislative privilege does not protect information a legislator discloses to a third party.” App.177. The magistrate judge ordered Legislative Petitioners to produce the “approximately 581 communications between them and a third party.” App.178. The magistrate judge further found that during the preliminary injunction hearing in the *Walen* case, Representative Jones “testified at length about the development of the challenged legislation” including “about his motivations, his conversations with other legislators, staff, outside advisors, and attorneys, and the work of the redistricting committee.” App.179. The magistrate judge found that

Representative Jones had waived his own legislative privilege with respect to the documents sought. App.180. The magistrate judge found that Representative Jones could nonetheless withhold documents on the basis of another legislator's assertion of legislative privilege but must provide a privilege log with respect to any documents withheld on that basis. App.180. Finally, the magistrate judge ordered Legislative Petitioners to produce a privilege log for any remaining documents withheld on the basis of privilege. In finding for Plaintiffs, the magistrate judge expressly determined that the documents sought were relevant to Plaintiffs' claims and that compliance would not impose an undue burden on Legislative Petitioners, because there were "at most 2,655 documents at issue," and Legislative Petitioners had failed to provide sufficient information to substantiate their claim that it would take 640 hours to review such a small number of documents. App.185-186.

Legislative Petitioners appealed and the district court affirmed the decision of the magistrate judge, finding that the order was not clearly erroneous or contrary to law. App.212. With respect to undue burden, the district court made factual findings as to Legislative Petitioners' alleged burden in complying with the subpoena, finding that the 640-hour estimate provided by Legislative Petitioners "is contradicted by certain facts in the record, including that some documents have already been identified and that many documents are likely duplicative." App.213. Finally, the district court further noted that Legislative Petitioners did not raise the issue of

Representative Jones’ waiver on appeal but affirmed that he had waived his privilege. App.214.

Subsequently, Legislative Petitioners sought a stay of the courts’ orders pending resolution of this writ proceeding. Supp.App.223-235 (Mot. for Stay, ECF 78). In the process of briefing the stay, Legislative Petitioners admitted that the numbers they had provided to Plaintiffs and the Court were generated solely to “substantiate” the alleged burden of complying with the subpoenas. Supp.App.246 (Stay Reply at 3, ECF 86). Legislative Petitioners further asserted in their claim that it would take 640 hours to review the documents at issue and produce a privilege log, which included the time it would take to review and log the 62,000 documents Legislative Petitioners had already determined to be “clearly non-responsive”—a category of documents that Plaintiffs have not sought and that the district court has not ordered Legislative Petitioners to produce or log. Supp.App.238-239 (Opp. to Stay at 3-4, ECF 84). Finally, Legislative Petitioners admitted that they did not save any of the results of their initial search or initial review, and thus that their claim of “undue burden” also rested on an estimate of hours necessary to do these tasks again. Supp.App.246 (Stay Reply at 3, ECF 86).

#### **IV. Representative Devlin’s motion to quash**

After serving the subpoenas duces tecum, Plaintiffs served a deposition subpoena on then-Representative Devlin. App.004-006. The North Dakota

Legislative Assembly and Representative Devlin moved to quash the subpoena on the grounds that it sought “information protected by legislative privilege and/or attorney privilege,” App.061, that the legislative privilege provides Representative Devlin with absolute immunity from civil discovery, App.062, and that any testimony would be irrelevant to Plaintiffs’ claims, App.072. The magistrate judge carefully parsed the history of the legislative privilege and its application in the redistricting context and rejected these arguments. App.079-100. The court considered and distinguished each of the cases relied on by Legislative Petitioners. App.089-092. Ultimately, the magistrate judge concluded that “[n]early all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified.” App.93. The magistrate judge applied a five-factor test routinely used by federal courts evaluating assertions of legislative privilege in the redistricting context and found that Plaintiffs’ need for Representative Devlin’s testimony outweighed Legislative Petitioners’ interest in non-disclosure. App.094-097.

Representative Devlin and the Legislative Assembly appealed the order and the district court affirmed. App.113. The district court found that the order was “not clearly erroneous or contrary to law,” and that the “majority” of courts to consider the issue conclude “as Judge Senechal did here, that ‘the privilege is a qualified one in redistricting cases.’” App.115 (quoting *Bethune-Hill v. Va. State Bd. of Elections*,



114 F. Supp. 3d 323, 336-37 (E.D. Va. 2015)). The court further concluded that “[t]he 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” because “[t]his case requires at least some judicial inquiry into the legislative intent and motivation of the Assembly.” App.116. As such, “[a]n absolute bar on the testimony of members of the Assembly makes little sense and could preclude resolution on the merits of the legal claim.” App.116. In so doing, the court expressly distinguished the caselaw relied on by Legislative Petitioners. App. 116.

On April 13, 2023, the district court denied Legislative Petitioners’ motion for a stay pending resolution of this mandamus proceeding and ordered Legislative Petitioners to produce the documents within 10 days, the privilege log within 14 days, and to make arrangements for Representative Devlin’s deposition by April 28, 2023. Supp.App.253-256 (ECF 90). In doing so, the district court highlighted the importance of prompt resolution of this issue in light of the rapidly approaching June 12 trial in this matter. *Id.*

### **LEGAL STANDARD**

Mandamus is an “extraordinary remedy,” the invocation of which is only justified in “exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.” *Cheney v. U.S. District Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal citations and quotation marks omitted). “Before

the ‘drastic and extraordinary’ remedy of a writ may issue, the petitioner must show that he has no other adequate means to obtain relief, that his right to issuance of the writ is clear and indisputable, and that the writ is appropriate under the circumstances.” *In re Grand Jury Process, Doe*, 814 F.3d 906, 907 (8th Cir. 2015) (quoting *Cheney*, 542 U.S. at 380-81).

## ARGUMENT

### **I. The district court did not clearly and indisputably err in enforcing Plaintiffs’ document subpoenas.**

The district court did not err in enforcing Plaintiffs’ document subpoenas, much less commit clear and indisputable error. “[T]he legislative privilege for state lawmakers is, at best, one which is qualified.” *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov’t*, 849 F.3d 615, 624 (5th Cir. 2017); *see also League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at \*1 (5th Cir. May 20, 2022) (“*LULAC*”) (“Both [the Fifth Circuit] and the Supreme Court have confirmed that the state legislative privilege is not absolute.”).

Although one would not know it from reading the Petition, the district court’s order granting Plaintiffs’ motion to enforce their documents subpoenas was exceedingly narrow: (1) Legislative Petitioners were ordered to produce a small universe of documents and communications shared with third parties and thus by definition not privileged, (2) Representative Jones was ordered to produce all responsive communications because he voluntarily waived legislative privilege by

disclosing otherwise privileged information during his preliminary injunction testimony in a related case pending in the district court, and (3) Legislative Petitioners were ordered to produce a privilege log regarding the remaining responsive documents over which they assert legislative or attorney-client privilege. The district court's order was unremarkable in each respect and certainly not indisputably and clearly wrong, as would be required for a writ of mandamus to issue.

**A. No privilege protects Legislative Petitioners' documents and communications shared with third parties.**

No privilege—legislative or otherwise—protects the documents and communications that Legislative Petitioners shared with third parties. This concept is so foundational that it is often not even litigated in redistricting cases. *See, e.g., Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 339 n.4 (4th Cir. 2016) (noting that legislators in redistricting case refused to produce internal legislative documents but agreed to produce “external communications between legislators and third parties”). Legislative Petitioners do not dispute that the documents they share with third parties are nonprivileged. Instead, they contend that “[w]hen properly applied, legislative privilege protects lawmakers from responding to discovery in civil actions.” Pet. at 10. But this sweeping assertion of immunity from discovery that seeks only nonprivileged documents and communications has no basis in law. Put simply, no privilege extends to nonprivileged material.

It is therefore unsurprising that federal courts have routinely held that the legislative privilege does not shield from production documents shared with third parties. *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.”). Legislative

Petitioners ignore this unbroken line of precedent and offer no explanation for why this basic principle does not control here.

Moreover, the cases Legislative Petitioners cite do not support their contention that the legislative privilege somehow protects from disclosure concededly nonprivileged documents. *See* Pet. at 10-15. In *In re Hubbard*, for example, the Eleventh Circuit distinguished the facts before it from another case in which discovery was permitted because “[s]ome of the relevant information sought by the subpoenas in the [other] case could have been outside of any asserted privilege.” 803 F.3d 1298, 1311 (11th Cir. 2015). With respect to the subpoenas issued in *Hubbard*, “[n]one of the relevant information sought . . . could have been outside of the legislative privilege.” *Id.* Likewise, in *American Trucking Associations, Inc. v. Alviti*, the First Circuit explained at the outset of its decision granting a mandamus petition that “no party disputes that, if the legislative privilege applies, the discovery requested by those subpoenas falls within its scope.” 14 F.4th 76, 87 (1st Cir. 2021). And in *Lee v. City of Los Angeles*, there was no document subpoena and no request for nonprivileged documents. 908 F.3d 1175, 1178 (9th Cir. 2018). Legislative Petitioners are thus wrong to contend that this Court would create a circuit split by denying their Petition.

Here, Legislative Petitioners have been ordered to produce a small subset of responsive documents (approximately 580), which *they do not dispute* are

nonprivileged because they were shared with third parties. The district court did not err—let alone clearly and indisputably err—by ordering the production of these documents. No precedent supports the sweeping immunity from producing *nonprivileged* documents that Legislative Petitioners assert.

**B. Representative Jones waived his legislative privilege by voluntarily testifying about otherwise privileged information.**

Representative Jones, who no longer serves in the Legislature, waived his legislative privilege by voluntarily testifying in a related case about his and other legislators’ motives and purposes in enacting the redistricting legislation. 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*, 2005 WL 1796118, at \*3-4). 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 Twp. High Sch. Dist. 209*, No. 02 C 5895, 2004 WL 868265, at \*5 (N.D. Ill. Apr. 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 Government of Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3d Cir. 1985); *Marylanders for Fair Representation, Inc. 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.

Representative Jones waived any legislative privilege when he voluntarily inserted himself into litigation challenging the Plan. Specifically, Representative Jones testified at the preliminary injunction hearing in the related *Walen* litigation pending in the district court 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). Representative Jones likewise waived privilege over matters related to drawing of subdistricts when he voluntarily contacted potential plaintiffs and discussed the legality of subdistricts in Legislative Districts 4 and 9, the latter of which is at issue in this case. *See*

Supp.App.158, 185-186, 188 (Henderson Depo. Tr. at 25:12-27:23, ECF 47-6; Walen Depo. Tr. at 19:2-14, 21:10-22:14, 29:11-30:20, ECF 47-7). Representative 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.

Legislative Petitioners do not dispute that Representative Jones waived legislative privilege by voluntarily testifying in *Walen*, nor did they dispute that waiver argument before the district court. Instead, they appear to rely exclusively upon the same sweeping immunity argument they advance with respect to the third-party documents—that Representative Jones is somehow simply immune to civil discovery. The case law is to the contrary, and the district court did not clearly or indisputably err by so concluding.

**C. The documents ordered to be produced are relevant.**

The documents the district court ordered Legislative Petitioners to produce—limited in number and scope—are relevant to Plaintiffs’ claims. Although much of the evidence in a VRA Section 2 case focuses on voting patterns and mapping, Plaintiffs must also prove that under the totality of circumstances, the electoral process does not provide Native American voters an equal opportunity to participate. 52 U.S.C. § 10301. Among the totality of circumstances factors courts consider



probative are (1) whether there is a lack of responsiveness of legislators to Native American voters and (2) whether “the policy underlying the jurisdiction’s use of the current boundaries [is] tenuous.” *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006). The documents Legislative Petitioners have been ordered to produce bear on both these considerations. Indeed, both Representative Devlin and Representative Jones represented districts containing large Native American populations, making documents that bear on their responsiveness (or lack thereof) particularly relevant. And the documents may also bear on the tenuousness of the Legislature’s justification for the district lines.

Legislative Petitioners contend that the—again, nonprivileged—documents that they have been ordered to produce are not relevant or needed because proof of an “illicit motive” is not required to establish a violation of Section 2 of the VRA. *See, e.g.*, Pet. at 26-27.<sup>2</sup> Although a Section 2 violation may be proven based upon discriminatory results alone, *see Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986), a redistricting plan that was the product of intentional discrimination *also* independently violates Section 2, *see, e.g., United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) (explaining that a Section 2 violation occurs upon a showing that action was taken “with an intent to discriminate *or* [that it] produce[s] discriminatory

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<sup>2</sup> The phrase “illicit motive” appears ten times in the Petition. Notably, it was Legislative Petitioners—not Plaintiffs, the district court, or the magistrate judge—who introduced this phrase into this matter.

results”); *Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) (holding that proof of discriminatory intent establishes Section 2 violation and loosens evidentiary requirements that otherwise apply for only discriminatory results showing).

Legislative Petitioners also contend that the discovery is irrelevant because the statements of a single legislator cannot be imputed to the Legislature as a whole. Pet. at 19-20. But the Supreme Court, recognizing the technical nature of redistricting in which there is usually a primary mapdrawer and a process led by certain legislative leaders, has accorded substantial weight to the actions and motives of the central players in assessing the purpose motivating a redistricting plan. *See, e.g., Cooper v. Harris*, 581 U.S. 285, 313-15 (2017) (focusing racial gerrymandering analysis on actions and motives of mapdrawing consultant and the two legislative leaders in charge of redistricting committees). Moreover, the fact that Plaintiffs limited the *custodians* from whom they sought documents does not mean the subpoenaed documents will not shed light on other legislators’ actions or statements. In any event, the responsiveness and tenuousness totality-of-circumstances considerations do not require proof related to the Legislature as a whole.

The district court did not err—let alone clearly and indisputably—in concluding that the documents and communications were relevant to Plaintiffs’ claims.

**D. The document production will not impose an undue burden on Legislative Petitioners.**

The district court's order requiring production of the two categories of nonprivileged documents (which, by Legislative Petitioners' own count, number around 780) and a log of responsive documents over which they assert legislative or attorney-client privilege (approximately 1800 additional documents) will not impose an undue burden on Legislative Petitioners, and the district court was not clearly and indisputably wrong in so concluding.

Although Legislative Petitioners repeatedly mention that their keyword search yielded 64,849 emails, *see, e.g.*, Pet. at 21, they neglect to inform this Court that they were able to quickly determine that approximately 62,200 of those documents and communications were “clearly non-responsive.” App.221-242; Supp.App.225 (Stay Mot. at 3, ECF 78). This is not surprising, because Legislative Petitioners appear to have devised their search terms in order to maximize the number of hits so that they could claim the burden was great.<sup>3</sup> Supp.App.246 (Stay Reply at 3, ECF 86) (stating that the purpose of the keyword search was to substantiate their forthcoming claim of an undue burden, not to actually find and isolate responsive documents). To the

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<sup>3</sup> As one example, Legislative Petitioners searched for the word “training”—without any connecting words or limiting rules—because Plaintiffs had sought documents related to VRA trainings. Supp.App.245 (Stay Reply at 2, ECF 86). Obviously such an open-ended search will yield a large number of irrelevant and non-responsive returns.

extent Legislative Petitioners need to re-run their searches because they failed to preserve the initial results, *see* Supp.App.246 (Stay Reply at 3, ECF 86), modern litigation technology will ease their task, with document review platforms capable of narrowing search results, eliminating non-responsive hits, and de-duplicating results. And were it not already clear, Plaintiffs do not expect—and the district court did not order—Legislative Petitioners to produce or log documents that they deem “clearly non-responsive.”

In any event, given the fact that Legislative Petitioners’ initial review allowed them to quickly conclude that only 2,600 documents were responsive, it is difficult to understand Legislative Petitioners’ exclamations that the task they face in producing the two categories of nonprivileged documents and logging the remaining responsive documents will somehow take 640 hours.<sup>4</sup> The district court did not clearly and indisputably err in rejecting this unsupported and nonsensical contention.

## **II. The district court did not clearly and indisputably err in ordering the production of a privilege log.**

The district court did not clearly and indisputably err in ordering the production of a privilege log for responsive documents withheld on the basis of

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<sup>4</sup> Even to the extent Legislative Petitioners must retrace their earlier steps, the burden imposed by their own failure to preserve the results of their initial review cannot be laid at Plaintiffs’ feet. Moreover, given the speed with which they were able to conduct their initial cursory review and identify 62,000 documents as “clearly non-responsive,” App.221-242; Supp.App.225 (Stay Mot. at 3, ECF 78), Legislative

privilege. Legislative Petitioners, citing the Eleventh Circuit’s decision in *Hubbard*, contend that it is “well-settled” that privilege logs are not required when legislative privilege is claimed. Pet. at 22-23. But in declining to order production of a privilege log, the Eleventh Circuit emphasized that in that case “[n]one of the relevant information sought in this case could have been outside of the legislative privilege.” *Hubbard*, 803 F.3d at 1311. In this way, *Hubbard* distinguished a Third Circuit case that had required production of a privilege log because the subpoenas in that case sought information “outside of any asserted privilege.” *Id.* Such is the case here. Legislative Petitioners have acknowledged that responsive third-party communications over which there is no privilege are among the documents they possess and have conceded that Representative Jones has waived privilege. The district court did not clearly and indisputably err by ordering the production of a log of privileged, responsive documents in this case. Such a log is necessary to ensure that nonprivileged documents are not inadvertently or improperly withheld.

**III. The district court did not clearly and indisputably err in ordering the deposition of Representative Devlin.**

The district court did not clearly and indisputably err in ordering the deposition of Representative Devlin. Representative Devlin—who is no longer serving in the Legislature—chaired the redistricting committee and also served as

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Petitioners have provided no explanation for how redoing this step will somehow take 640 hours.

the elected representative for District 23, which until the 2021 redistricting cycle included the Spirit Lake Nation. The district court carefully considered the case law and adopted the approach that the majority of federal courts have followed in assessing whether legislative privilege protects a legislator from sitting for deposition. “Most courts that have conducted this qualified privilege analysis in the redistricting context have employed a five-factor balancing test imported from deliberative process privilege case law.” App.115; *see, e.g., South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at \*7; *Favors*, 285 F.R.D. at 209-10; *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). These factors are “(1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5) the extent to which discovery would impede legislative action.” *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 161.<sup>5</sup>

Legislative Petitioners contend that the majority of the federal courts are wrong and that the district court clearly and indisputably erred in following them.

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<sup>5</sup> There, the court rejected the argument advanced by Legislative Petitioners here that only criminal cases involve the potential for legislative privilege to give way. “It is not the simple distinction between ‘criminal’ and ‘civil’ cases which

Instead, Legislative Petitioners contend that the same absolute immunity from discovery that they believe shields them from producing *nonprivileged* documents likewise precludes Plaintiffs from deposing Representative Devlin on *any topic*—privileged or not. But that is not the law.

Just last year, the Supreme Court denied an emergency motion for a stay of a district court’s order requiring a host of Texas state legislators to sit for depositions in the pending Texas redistricting litigation. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022). The Fifth Circuit, which had earlier denied the requested stay, emphasized that the legislative privilege is not absolute, and that “there are likely to be relevant areas of inquiry that fall outside of topics covered by state legislative privilege.” *LULAC*, 2022 WL 2713263, at \*1 (internal quotation marks omitted). Moreover, the Fifth Circuit approved the protections put in place by the district court, under which the legislators could state their legislative privilege objection, would be required to

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determines the availability of this evidentiary privilege, but rather, the importance of the federally created public rights at issue. And when cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield.” *South Carolina State Conference of the NAACP*, 584 F. Supp. 3d at 162.

answer, and such answers would be treated as confidential until the district court could rule on the claim of privilege. *Id.* at \*2.<sup>6</sup>

Legislative Petitioners contend that the Fifth Circuit’s decision in *LULAC* is inapposite because the United States is a party to that case. Pet. at 14-15. But if that were a factor in the decision making, neither the Fifth Circuit nor the Supreme Court said as much. Moreover, a host of private parties issued their own deposition subpoenas in that case. In any event, the United States has entered an appearance in this case, filing a Statement of Interest early in the proceeding highlighting the importance of private enforcement of Section 2. Supp.App.052 (ECF 25 at 5). There is no principled reason to prohibit legislator depositions in a Section 2 case brought by sovereign Tribes while allowing them in cases brought by private individuals whose case happens to be consolidated with one brought by the United States.

Legislative Petitioners also overstate the First, Ninth, and Eleventh Circuit’s rulings declining requests for legislator depositions. In *American Trucking*, a case about the dormant commerce clause, the First Circuit explained that it was not creating a categorical rule and that “a state's legislative privilege might yield in a

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<sup>6</sup> Legislative Petitioners object that the district court did not “place[] any limits or parameters on Devlin’s testimony.” Pet. at 4. But Legislative Petitioners *did not request any*. The district court can hardly have erred—let alone clearly and indisputably—by failing to impose limits or parameters that Legislative Petitioners never sought. Plaintiffs would not have objected, for example, to the procedure imposed by the *LULAC* court had Legislative Petitioners requested it.



civil suit brought by a private party in the face of an important federal interest[.]” 14 F.4th at 90. In *Lee*, the Ninth Circuit rested its conclusion on the fact that “the factual record in this case falls short” of demonstrating the intrusion into the legislative process was warranted. 908 F.3d at 1188. Likewise, the Eleventh Circuit in *Hubbard* emphasized that its ruling was based in large part on the fact that the underlying claim was meritless, that its holding was “limited,” and that its “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.” *Hubbard*, 803 F.3d at 1312 n.13.

Moreover, the Eleventh Circuit emphasized that “[o]ne of the 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 marks omitted). “That is why the privilege extends to discovery requests . . . complying with such requests detracts from the performance of official duties.” *Id.* But Representative Devlin has retired from the Legislature; his deposition in this case will not distract from any public duties.

Even if the Court were to conclude that the district court clearly and indisputably erred in deciding to apply the five-factor test that most federal courts

have applied in redistricting cases,<sup>7</sup> that would still not be a basis for precluding Plaintiffs from deposing Representative Devlin. Representative Devlin has run as a candidate for the Legislature numerous times in a district that contained the Spirit Lake Reservation. He has relevant knowledge and information about the electoral conditions and campaign environment that bear on the totality of circumstances factors in this case. That testimony has nothing to do with any topic protected by legislative privilege.

Contrary to Legislative Petitioners' hyperbole, the district court's order requiring them to produce a small subset of concededly nonprivileged documents and requiring Representative Devlin to sit for deposition will not have "drastic policy implications." Pet. at 18. Legislative Petitioners warn that the district court's ruling will open the floodgates of private litigants seeking to harass the Legislature. *Id.* But the district court's ruling was specific to the context of redistricting litigation—a once a decade occurrence (if it occurs at all). More likely, the district court's order will have no effect beyond this case.

Legislative Petitioners also contend that the district court's order will require state lawmakers to split their time between legislating and "responding to discovery requests from their political adversaries in federal court." Pet. at 6. But this claim is

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<sup>7</sup> Legislative Petitioners do not contend that the district court erred in how it weighed the five factors—they merely object to the use of the test at all.

particularly puzzling because only one of the Legislative Petitioners still serves in the North Dakota Legislature. *See supra* n.1. Moreover, the General Assembly’s characterization of two sovereign Tribes and three individual Native American voters as its “political adversaries” is, to say the least, startling. This sentiment only underscores the relevance of the discovery sought in this case and the merits of Plaintiffs’ underlying VRA claim.

The district court did not engage in “a judicial usurpation of power or a clear abuse of discretion” in ordering Representative Devlin to sit for deposition. *Cheney*, 542 U.S. at 380. Rather, the court carefully considered Legislative Petitioners’ arguments, the relevant law, and adopted the approach followed by the majority of federal courts. Doing so cannot possibly have been clear and indisputable error.

### **CONCLUSION**

Legislative Petitioners have been ordered to produce a handful of nonprivileged documents that were either shared with third parties or over which privilege was waived by Representative Jones’s voluntary testimony in court. They have been ordered to produce a privilege log covering approximately 1,800 documents. And former Rep. Devlin has been ordered to sit for deposition, including regarding indisputably nonprivileged topics about which he has relevant information. Contrary to the tenor of the Petition, the district court did not go rogue

in ordering this discovery. The Petition is without merit and the requested writ of mandamus should be denied.

April 17, 2023

Respectfully submitted,

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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 6,975 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 17th day of April, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023, I electronically submitted the foregoing **RESPONSE TO 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.

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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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IN RE NORTH DAKOTA LEGISLATIVE ASSEMBLY  
et al.,

*Petitioners.*

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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-PDW-ARS

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**SUPPLEMENTAL APPENDIX  
VOLUME I**

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**U.S. District Court  
District of North Dakota (Eastern)  
CIVIL DOCKET FOR CASE #: 3:22-cv-00022-PDW-ARS**

Turtle Mountain Band of Chippewa Indians et al v. Jaeger  
Assigned to: Chief Judge Peter D. Welte  
Referred to: Magistrate Judge Alice R. Senechal  
Case in other court: USCA8, 23-01597  
Cause: 28:1331 Fed. Question: Other Civil Rights

Date Filed: 02/07/2022  
Jury Demand: None  
Nature of Suit: 441 Civil Rights: Voting  
Jurisdiction: Federal Question

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represented by  
Supp.App.003

**Mark Gaber**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Michael Stephen Carter**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Bryan L. Sells**  
(See above for address)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Matthew Lee Campbell**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Molly Danahy**  
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*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

**Nicole Hansen**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Samantha Blencke Kelty**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Alvin Jaeger**  
*in his Official Capacity as Secretary of  
State of North Dakota*  
*TERMINATED: 01/24/2023*

represented by **Bradley Neuman Wiederholt**  
Bakke Grinolds Wiederholt  
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*TERMINATED: 01/24/2023*

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*TERMINATED: 01/24/2023*

**Matthew A. Sagsveen**  
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*TERMINATED: 01/24/2023*

**Defendant**

**Michael Howe**  
*in his Official Capacity as Secretary of  
State of North Dakota*

represented by **Bradley Neuman Wiederholt**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**David R. Phillips**  
(See above for address)  
**ATTORNEY TO BE NOTICED**

**Matthew A. Sagsveen**  
(See above for address)  
**ATTORNEY TO BE NOTICED**

**Movant**

**North Dakota Legislative Assembly**

represented by **Scott K. Porsborg**  
SMITH PORSBORG SCHWEIGERT  
ARMSTRONG MOLDENHAUER &  
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**LEAD ATTORNEY**  
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**ATTORNEY TO BE NOTICED**

**Movant**

**William R. Devlin**  
*Representative*  
*also known as*  
Bill Devlin

represented by **Scott K. Porsborg**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Austin T. Lafferty**  
(See above for address)  
**ATTORNEY TO BE NOTICED**

**Brian D. Schmidt**  
(See above for address)  
**ATTORNEY TO BE NOTICED**

**Movant**

**Sentator Ray Holmberg**  
*Representative*

represented by **Scott K. Porsborg**  
(See above for address)  
**LEAD ATTORNEY**

ATTORNEY TO BE NOTICED

**Austin T. Lafferty**  
(See above for address)  
ATTORNEY TO BE NOTICED

**Brian D. Schmidt**  
(See above for address)  
ATTORNEY TO BE NOTICED

**Movant**

**Senator Richard Wardner**  
*Representative*

represented by **Scott K. Porsborg**  
(See above for address)  
**LEAD ATTORNEY**  
ATTORNEY TO BE NOTICED

**Austin T. Lafferty**  
(See above for address)  
ATTORNEY TO BE NOTICED

**Brian D. Schmidt**  
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**Movant**

**Senator Nicole Poolman**  
*Representative*

represented by **Scott K. Porsborg**  
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**LEAD ATTORNEY**  
ATTORNEY TO BE NOTICED

**Austin T. Lafferty**  
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ATTORNEY TO BE NOTICED

**Brian D. Schmidt**  
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ATTORNEY TO BE NOTICED

**Movant**

**Michael Nathe**  
*Representative*

represented by **Scott K. Porsborg**  
(See above for address)  
**LEAD ATTORNEY**  
ATTORNEY TO BE NOTICED

**Austin T. Lafferty**  
(See above for address)  
ATTORNEY TO BE NOTICED

**Brian D. Schmidt**  
(See above for address)  
ATTORNEY TO BE NOTICED

**Movant**

**Terry Jones**  
*Representative*

represented by **Scott K. Porsborg**  
(See above for address)  
**LEAD ATTORNEY**  
ATTORNEY TO BE NOTICED

**Austin T. Lafferty**  
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ATTORNEY TO BE NOTICED



**Brian D. Schmidt**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Movant**

**Claire Ness**  
*Senior Counsel at the North Dakota  
Legislative Council*

represented by **Scott K. Porsborg**  
(See above for address)  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Austin T. Lafferty**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Brian D. Schmidt**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Amicus**

**United States of America**

represented by **Victor J. Williamson**  
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*ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
02/07/2022	<u>1</u>	COMPLAINT against Alvin Jaeger (Filing fee \$402, receipt number 322000147) filed by Wesley Davis, Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Zachery S. King and Collette Brown. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibit 1 – November 1, 2021 Letter)(sj) Modified on 2/7/2022 to add filer, Collette Brown. NEF Regenerated. (sj). (Entered: 02/07/2022)
02/07/2022	<u>2</u>	Summons Issued as to Alvin Jaeger. (sj) (Entered: 02/07/2022)
02/09/2022	<u>3</u>	MOTION to Appear Pro Hac Vice Molly Danahy (Filing fee \$150, receipt number ANDDC-2358138) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Danahy, Molly) Modified on 2/10/2022 to add receipt number (mf) (Entered: 02/09/2022)
02/10/2022	4	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting <u>3</u> Motion to Appear Pro Hac Vice for Attorney Molly E. Danahy. (mf) (Entered: 02/10/2022)
02/15/2022	<u>5</u>	ACKNOWLEDGMENT OF SERVICE Executed by <i>Matthew A. Sagsveen</i> filed by Wesley Davis, Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Zachery S. King, Collette Brown. Alvin Jaeger served on 2/14/2022, answer due 3/7/2022. (Carter, Michael) (Entered: 02/15/2022)
02/15/2022	<u>6</u>	NOTICE of Appearance by Matthew A. Sagsveen on behalf of Alvin Jaeger (Sagsveen, Matthew) (Entered: 02/15/2022)
02/15/2022	<u>7</u>	NOTICE of Appearance by David R. Phillips on behalf of Alvin Jaeger (Phillips, David) (Entered: 02/15/2022)
02/18/2022	<u>8</u>	STIPULATION re <u>1</u> Complaint, <i>for Extension of Deadline to Answer</i> by Alvin Jaeger. (Phillips, David) (Entered: 02/18/2022)
02/22/2022	9	(Text Only) ORDER by Magistrate Judge Alice R. Senechal Adopting <u>8</u> Stipulation. Defendant's answer to <u>1</u> Complaint due by 4/15/2022. (KT) (Entered: 02/22/2022)
02/22/2022		Set/Reset Deadlines: Alvin Jaeger answer due 4/15/2022. (pb) (Entered: 02/22/2022)

03/14/2022	<u>10</u>	*RESTRICTED – FEE NOT PAID* MOTION to Appear Pro Hac Vice Attorney Bryan L. Sells (Filing Fee: Waived) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Sells, Bryan) Modified on 4/12/2022 to restrict access (lf). (Entered: 03/14/2022)
03/23/2022	11	*RESTRICTED – FILED IN ERROR* (Text Only) ORDER by Magistrate Judge Alice R. Senechal granting <u>10</u> Motion to Appear Pro Hac Vice for Attorney Bryan L. Sells. (sj) Modified on 4/12/2022 to restrict access (lf). (Entered: 03/23/2022)
04/08/2022	12	NOTICE of Hearing: Status Conference set for 4/13/2022 at 03:30 PM in Fargo Courtroom 1 and by video before Chief Judge Peter D. Welte. Parties will appear via video. Video instructions provided to counsel via email. (EA) (Entered: 04/08/2022)
04/12/2022		DOCKET CORRECTION re: <u>10</u> Motion to Appear Pro Hac Vice and 11 Order. Motion was inadvertently filed without payment of the filing fee. The motion and order have been restricted and attorney Sells will refile the motion. (lf) (Entered: 04/12/2022)
04/12/2022	<u>13</u>	*RESTRICTED – FILER WILL RE-FILE AND PAY FILING FEE VIA PAY.GOV* MOTION to Appear Pro Hac Vice Attorney Bryan L. Sells by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Sells, Bryan) Modified on 4/13/2022 to restrict access (lf). (Entered: 04/12/2022)
04/13/2022	<u>14</u>	MOTION to Appear Pro Hac Vice Attorney Bryan L. Sells (Filing fee \$150, receipt number: CNDDC-2403027) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Sells, Bryan) Modified on 4/13/2022 to add receipt number. (sj). (Entered: 04/13/2022)
04/13/2022	15	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting <u>14</u> Motion to Appear Pro Hac Vice for Attorney Bryan L. Sells. (sj) (Entered: 04/13/2022)
04/13/2022	<u>16</u>	Minute Entry for proceedings held before Chief Judge Peter D. Welte: Status Conference held on 4/13/2022. (Court Reporter kk) (lh) (Entered: 04/13/2022)
04/15/2022	<u>17</u>	MOTION to Dismiss for Lack of Jurisdiction , MOTION to Dismiss for Failure to State a Claim by Alvin Jaeger. (Phillips, David) (Entered: 04/15/2022)
04/15/2022	<u>18</u>	MEMORANDUM in Support re <u>17</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim filed by Alvin Jaeger. (Phillips, David) (Entered: 04/15/2022)
04/15/2022	<u>19</u>	AFFIDAVIT re <u>18</u> MEMORANDUM in Support by Alvin Jaeger. (Attachments: # <u>1</u> Exhibit 1 – House Bill 1504, signed by Governor Burgum on November 11, 2021, # <u>2</u> Exhibit 2 – Order in Arkansas State Conference NAACP, et. al. v. The Arkansas Board of Apportionment, et. al., Case 4:21-cv-01239)(sj) (Entered: 04/15/2022)
04/21/2022	<u>20</u>	NOTICE of Appearance by Timothy Q. Purdon on behalf of Turtle Mountain Band of Chippewa Indians (Purdon, Timothy) (Entered: 04/21/2022)
04/27/2022	<u>21</u>	NOTICE of Appearance by Samantha Blencke Kelty on behalf of All Plaintiffs (Kelty, Samantha) (Entered: 04/27/2022)
05/06/2022	<u>22</u>	STIPULATION re <u>17</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Carter, Michael) (Entered: 05/06/2022)
05/09/2022	23	(Text Only) ORDER adopting the <u>22</u> Stipulation for an Extension of Time re: <u>17</u> MOTION to Dismiss. Plaintiff's response is due by 5/13/2022. (AS) (Entered: 05/09/2022)
05/13/2022	<u>24</u>	RESPONSE to Motion re <u>17</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Carter, Michael) (Entered: 05/13/2022)
05/20/2022	<u>25</u>	BRIEF re <u>17</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim ( <i>Statement of Interest of the United States</i> ) by United States of

		America. (Williamson, Victor) (Entered: 05/20/2022)
05/27/2022	<u>26</u>	REPLY to Response to Motion re <u>17</u> MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim filed by Alvin Jaeger. (Phillips, David) (Entered: 05/27/2022)
06/01/2022	<u>27</u>	ORDER for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference, and ORDER regarding resolution of Discovery Disputes by Magistrate Judge Alice R. Senechal. Scheduling Conference set for 7/1/2022 at 09:00 AM before Magistrate Judge Alice R. Senechal. (AS) (Entered: 06/01/2022)
07/01/2022	<u>28</u>	Minute Entry for proceedings held before Magistrate Judge Alice R. Senechal: Scheduling Conference held on 7/1/2022. (DR #220701-000 (Chambers Recorder)) (td) (Entered: 07/01/2022)
07/01/2022	<u>29</u>	SCHEDULING ORDER by Magistrate Judge Alice R. Senechal. Discovery due by 12/1/2022. Discovery Motions due by 12/8/2022. Plaintiff(s) Expert Witness Disclosures and Reports due by 11/15/2022. Defendant(s) Expert Witness Disclosures and Reports due by 12/15/2022. Any Rebuttal Expert Disclosures due by 1/16/2023. Discovery Depositions of Expert Witnesses due by 2/1/2023. Join Additional Parties due by 8/1/2022. Amended Pleadings due by 8/1/2022. Nondispositive Motions due by 9/1/2022. Dispositive Motions due by 2/1/2023. Mid-Discovery Status Conference set for 9/15/2022 at 10:00 AM by telephone before Magistrate Judge Alice R. Senechal. Plaintiffs shall initiate the call in conjunction with the plaintiffs in Walen v. Burgum, No. 1:22-cv-31. The telephone number for chambers is 701-297-7070. (AS) Modified on 7/1/2022 to correct typographical errors per Chambers. NEF Regenerated. (sj). (Entered: 07/01/2022)
07/05/2022		Set/Reset Deadlines: Discovery Depositions of Expert Witnesses due by 2/1/2023; Set/Reset Hearings: Mid-Discovery Status Conference set for 9/15/2022 at 10:00 AM by telephone before Magistrate Judge Alice R. Senechal. (cjs) (Entered: 07/05/2022)
07/07/2022	<u>30</u>	ORDER by Chief Judge Peter D. Welte denying <u>17</u> Motion to Dismiss for Lack of Jurisdiction; denying <u>17</u> Motion to Dismiss for Failure to State a Claim (JS) (Entered: 07/07/2022)
07/21/2022	<u>31</u>	ANSWER to <u>1</u> Complaint, by Alvin Jaeger.(Phillips, David) (Entered: 07/21/2022)
09/15/2022	<u>32</u>	(Text Only) ORDER by Magistrate Judge Alice R. Senechal. Per discussion at the 9/15/2022 status conference, the Scheduling Order is amended as follows: Plaintiff(s) Expert Witness Disclosures and Reports due by 11/30/2022. Defendant(s) Expert Witness Disclosures and Reports due by 1/17/2023. Any Rebuttal Expert Disclosures due by 2/16/2023. Discovery Depositions of Expert Witnesses due by 3/16/2023. (AS) (Entered: 09/15/2022)
09/15/2022	<u>33</u>	Minute Entry for proceedings held before Magistrate Judge Alice R. Senechal: Mid-Discovery Status Conference held on 9/15/2022. (DR #220915-002 Walen Turtle Mtn) (td) (Entered: 09/15/2022)
09/30/2022	<u>34</u>	Order for Final Pretrial Conference and Trial Preparation Deadlines by Magistrate Judge Alice R. Senechal. Two business days prior to the Final Pretrial Conference, counsel must email the Final Pretrial Statement; Exhibit List and Witness List for each party; and Expert Reports to ndd_J-Senechal@ndd.uscourts.gov. Trial Memorandum due at least 7 days prior to trial. Deposition designations due at least 14 days prior to trial. Additional deposition designations by opposing parties due 7 days prior to trial. Objections to deposition designations due 4 days prior to trial. Jury Instructions due at least 7 days prior to trial. Motions in limine due 30 days prior to trial. Additional deadlines and details contained in the Order. Final Pretrial Conference set for 5/30/2023 at 02:00 PM in Chambers before Magistrate Judge Alice R. Senechal. (AS) (Entered: 09/30/2022)
09/30/2022	<u>35</u>	NOTICE of Hearing: Bench Trial set for 6/12/2023 at 09:00 AM in Fargo Courtroom 1 before Chief Judge Peter D. Welte. (Trial Est. 5 Days). (AS) (Entered: 09/30/2022)
11/10/2022	<u>36</u>	NOTICE of Appearance by Nicole Hansen on behalf of Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians (Hansen, Nicole) (Entered: 11/10/2022)

11/17/2022	<u>37</u>	MOTION to Quash by William R. Devlin, North Dakota Legislative Assembly. (Porsborg, Scott) (Entered: 11/17/2022)
11/17/2022	<u>38</u>	MEMORANDUM in Support re <u>37</u> MOTION to Quash filed by William R. Devlin, North Dakota Legislative Assembly. (Attachments: # <u>1</u> Exhibit A – Subpoena to Testify at a Deposition in a Civil Action, # <u>2</u> Exhibit B – Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action)(Porsborg, Scott) (Entered: 11/17/2022)
11/28/2022	<u>39</u>	MOTION for Extension of Time to Complete Discovery ( <i>Unopposed</i> ) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Order)(Gaber, Mark) (Entered: 11/28/2022)
11/29/2022	40	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting unopposed <u>39</u> Motion for Extension of Time to Complete Discovery. The deadline to file discovery motions related to third-party subpoenas is extended to 12/22/2022. The deadline for plaintiffs to respond to defendant's discovery requests is extended to 12/15/2022. The discovery deadline as to the deposition of Representative Bill Devlin is stayed pending a ruling on the pending motion to quash. The fact discovery deadline is extended until 12/22/2022. (AS) (Entered: 11/29/2022)
11/29/2022		Set/Reset Scheduling Order Deadlines: Discovery due by 12/22/2022. See Order at 40 . (sj) (Entered: 11/29/2022)
12/01/2022	<u>41</u>	RESPONSE to Motion re <u>37</u> MOTION to Quash filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Gaber, Mark) (Entered: 12/01/2022)
12/06/2022	<u>42</u>	MOTION for Leave to File <i>Supplemental Complaint (Unopposed)</i> by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Supplemental Complaint, # <u>2</u> Proposed Order)(Gaber, Mark) Modified to clarify attachment description on 12/7/2022 (sc). (Entered: 12/06/2022)
12/07/2022		DOCKET CORRECTION re: <u>42</u> MOTION for Leave to File Supplemental Complaint (Unopposed). Clerk's office added more complete description to attachment. (sc) (Entered: 12/07/2022)
12/07/2022	43	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting <u>42</u> Unopposed Motion for Leave to File. Counsel is directed to file the supplemental complaint. (KT) (Entered: 12/07/2022)
12/07/2022	<u>44</u>	AMENDED COMPLAINT ( <i>Supplemental Complaint</i> ) against Alvin Jaeger filed by Zachery S. King, Collette Brown, Wesley Davis, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians.(Gaber, Mark) (Entered: 12/07/2022)
12/08/2022	<u>45</u>	REPLY to Response to Motion re <u>37</u> MOTION to Quash filed by William R. Devlin, North Dakota Legislative Assembly. (Porsborg, Scott) (Entered: 12/08/2022)
12/12/2022	<u>46</u>	NOTICE of Appearance by Bradley Neuman Wiederholt on behalf of Alvin Jaeger (Wiederholt, Bradley) (Entered: 12/12/2022)
12/22/2022	<u>47</u>	MOTION Enforce Third-Party Subpoenas by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Exhibit 1: Defendants' Rule 26(a)(1) Disclosures, # <u>2</u> Exhibit 2: Initial Objections, # <u>3</u> Exhibit 3: Nov. 9 Email from S. Porsborg, # <u>4</u> Exhibit 4: Supplemental Objections, # <u>5</u> Exhibit 5: May 5, 2022 PI Hr'g Tr. Excerpt, # <u>6</u> Exhibit 6: Henderson Deposition Transcript, # <u>7</u> Exhibit 7: Walen Deposition Transcript, # <u>8</u> Exhibit 8: Subpoena Compilation, # <u>9</u> Proposed Order)(Gaber, Mark) (Attachment 6 and 7 replaced on 12/23/2022) (sc). Modified to replace attachments 6 and 7 to enlarge headers on 12/23/2022. NEF regenerated (sc). (Entered: 12/22/2022)
12/22/2022	<u>48</u>	ORDER by Magistrate Judge Alice R. Senechal denying <u>37</u> Motion to Quash. (AS) (Entered: 12/22/2022)
01/05/2023	<u>49</u>	APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, North Dakota Legislative Assembly re <u>48</u> Order on Motion to Quash (Porsborg, Scott) (Entered: 01/05/2023)



01/05/2023	<u>50</u>	RESPONSE to Motion re <u>47</u> MOTION Enforce Third-Party Subpoenas filed by William R. Devlin, North Dakota Legislative Assembly. (Attachments: # <u>1</u> Exhibit 1 – Supplemental Privilege Log)(Porsborg, Scott) Modified on 1/6/2023 to add exhibit number. (jb) (Entered: 01/05/2023)
01/06/2023		DOCKET CORRECTION re: <u>50</u> Response. Clerk's office added exhibit number to attachment. (jb) (Entered: 01/06/2023)
01/06/2023	<u>51</u>	ANSWER to <u>44</u> Amended Complaint by Alvin Jaeger.(Phillips, David) (Entered: 01/06/2023)
01/11/2023	<u>52</u>	AFFIDAVIT of <i>Emily Thompson</i> re <u>50</u> Response to Motion, by William R. Devlin, North Dakota Legislative Assembly. (Porsborg, Scott) (Entered: 01/11/2023)
01/12/2023	<u>53</u>	REPLY to Response to Motion re <u>47</u> MOTION Enforce Third-Party Subpoenas filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Exhibit 1 (Jan. 11, 2023 Email to S. Porsborg))(Gaber, Mark) (Entered: 01/12/2023)
01/17/2023	<u>54</u>	MOTION for Extension of Time to File Response/Reply as to <u>49</u> APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, North Dakota Legislative Assembly re <u>48</u> Order on Motion to Quash ( <i>Consented Motion</i> ) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Order)(Gaber, Mark) (Entered: 01/17/2023)
01/18/2023	55	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting unopposed <u>54</u> Motion for Extension of Time to File Response re: <u>49</u> APPEAL OF MAGISTRATE JUDGE DECISION to District Judge. Response due by 1/19/2023. (AS) (Entered: 01/18/2023)
01/19/2023	<u>56</u>	RESPONSE to Motion re <u>49</u> APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, North Dakota Legislative Assembly re <u>48</u> Order on Motion to Quash filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Gaber, Mark) (Entered: 01/19/2023)
01/24/2023	57	(Text Only) ORDER by Magistrate Judge Alice R. Senechal. In accordance with Federal Rule of Civil Procedure 25(d), the Clerk's office is directed to substitute Secretary of State Michael Howe for Alvin Jaeger as defendant. (KT) (Entered: 01/24/2023)
02/01/2023	<u>58</u>	MOTION for Summary Judgment by Michael Howe. (Phillips, David) (Entered: 02/01/2023)
02/01/2023	<u>59</u>	MEMORANDUM in Support re <u>58</u> MOTION for Summary Judgment filed by Michael Howe. (Phillips, David) (Entered: 02/01/2023)
02/01/2023	<u>60</u>	AFFIDAVIT of <i>David R. Phillips</i> re <u>59</u> MEMORANDUM in Support by Michael Howe. (Attachments: # <u>1</u> Exhibit 1 – House Bill 1397, # <u>2</u> Exhibit 2 – Meeting Minutes of July 29, 2021 Redistricting Committee Meeting, # <u>3</u> Exhibit 3– meetings minutes of the August 17, 2021 Tribal and State Relations Committee meeting, # <u>4</u> Exhibit 4–written testimony of Nicole Donaghy, Executive Director of the North Dakota Native Vote, provided at the August 17, 2021 Tribal and State Relations Committee meeting, # <u>5</u> Exhibit 5–meetings minutes of the August 26, 2021 Redistricting Committee meeting, # <u>6</u> Exhibit 6–presentation provided by Ben Williams from the National Conference of State Legislatures., # <u>7</u> Exhibit 7–Legislative Redistricting Background Memorandum presented by Emily Thompson from the North Dakota Legislative Council at the August 26, 2021 Redistricting Committee meeting, # <u>8</u> Exhibit 8–visual illustration of constitutional and statutory mapping requirements presented by Emily Thompson, # <u>9</u> Exhibit 9–written testimony of Collette Brown, Gaming Commission Executive Director at the Spirit Lake Casino and Resort, provided at the August 26, 2021 Redistricting Committee meeting, # <u>10</u> Exhibit 10–written testimony of Karen Ehrens, Secretary of the League of Women Voters of North Dakota, provided at the August 26, 2021 Redistricting Committee meeting, # <u>11</u> Exhibit 11–written testimony of Matt Perdue, on behalf of North Dakota Farmers Union, provided at the August 26, 2021 Redistricting Committee meeting, # <u>12</u> Exhibit 12–written testimony of Rick Gion, Director of North Dakota Voters First,

		<p>provided at the August 26, 2021 Redistricting Committee Meeting, # <u>13</u> Exhibit 13–meeting minutes of the August 31, 2021 Tribal and State Relations Committee meeting, # <u>14</u> Exhibit 14–meeting minutes of the September 1, 2021 Tribal and State Relations Committee meeting, # <u>15</u> Exhibit 15–meeting minutes of the September 8, 2023 Redistricting Committee meeting, # <u>16</u> Exhibit 16–meeting minutes of the September 15–16, 2021 Redistricting Committee meeting, # <u>17</u> Exhibit 17–written testimony provided by Nichole Donaghy, Executive Director of North Dakota Native Vote, provided at the September 15–16, 2021 Redistricting Commission meeting, # <u>18</u> Exhibit 18–written testimony of Collette Brown, Gaming Commission Executive Director at the Spirit Lake Casino and Resort, provided at the September 15–16, 2021 Redistricting Commission meeting, # <u>19</u> Exhibit 19–written testimony of Mike Faith, Chairman for the Standing Rock Sioux Tribe, provided at the September 15–16, 2021 Redistricting Committee meeting, # <u>20</u> Exhibit 20–written testimony of Charles Walker, Councilman for the Standing Rock Sioux Tribe, provided at the September 15–16, 2021 Redistricting Committee, # <u>21</u> Exhibit 21–meeting minutes of the September 22–23, 2021 Redistricting Committee meeting, # <u>22</u> Exhibit 22–presentation on legal considerations for subdistricting provided by attorney Claire Ness from the North Dakota Legislative Council, # <u>23</u> Exhibit 23–written testimony of Mark Fox, Chairman of the Tribal Business Council of the Mandan, Hidatsa and Arikara Nation, provided at the September 22–23, 2021 Redistricting Committee meeting, # <u>24</u> Exhibit 24–meeting minutes of the September 28–29, 2021 Redistricting Committee meeting, # <u>25</u> Exhibit 25–written testimony of Mike Faith provided at the September 28–29, 2021 Redistricting Committee Meeting, # <u>26</u> Exhibit 26–written testimony of Mark Fox provided at the September 28–29, 2021 Redistricting Committee meeting, # <u>27</u> Exhibit 27–written testimony of Douglas Yankton provided at the September 28–29, 2021 Redistricting Committee meeting, # <u>28</u> Exhibit 28–written testimony of Lisa DeVille provided at the September 28–29, 2021 Redistricting Committee meeting, # <u>29</u> Exhibit 29–email correspondence from Claire Ness to the Redistricting Committee members providing summaries of various court cases relating to Section 2 of the Voting Rights Act, # <u>30</u> Exhibit 30–Redistricting Committee final report regarding redistricting submitted to the legislative management, # <u>31</u> Exhibit 31–Governor Doug Burgums Executive Order 2021–17, # <u>32</u> Exhibit 32–meeting minutes of the November 8, 2021 Joint Redistricting Committee meeting, # <u>33</u> Exhibit 33–select maps of the final statewide redistricting recommended by the Redistricting Committee, # <u>34</u> Exhibit 34–Expert Report of Dr. Loren Collingwood, # <u>35</u> Exhibit 35–Expert Report of Dr. Trey Hood, # <u>36</u> Exhibit 36–North Dakota Legislative Council memorandum regarding reservation populations, # <u>37</u> Exhibit 37–North Dakota Legislative Council memorandum regarding the 2020 Census population change)(Phillips, David) (Entered: 02/01/2023)</p>
02/07/2023	<u>61</u>	MOTION for Extension of Time to File Response/Reply as to <u>58</u> MOTION for Summary Judgment ( <i>Consented Motion</i> ) by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Order)(Gaber, Mark) (Entered: 02/07/2023)
02/08/2023	<u>62</u>	(Text Only) ORDER by Magistrate Judge Alice R. Senechal granting <u>61</u> Unopposed Motion for Extension of Time to File Response/Reply as to <u>58</u> MOTION for Summary Judgment. Plaintiffs' Response due by 3/1/2023. Defendants' Reply due by 3/15/2023. (KT) (Entered: 02/08/2023)
02/10/2023	<u>63</u>	ORDER by Magistrate Judge Alice R. Senechal granting <u>47</u> Motion to Enforce Third–Party Subpoenas. (KT) (Entered: 02/10/2023)
02/24/2023	<u>64</u>	APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner, Claire Ness re <u>63</u> Order on Motion for Miscellaneous Relief (Porsborg, Scott) Modified on 2/24/2023 to add filer (Claire Ness). Regenerated NEF. (jb) (Entered: 02/24/2023)
03/01/2023	<u>65</u>	RESPONSE to Motion re <u>58</u> MOTION for Summary Judgment filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Gaber Declaration, # <u>2</u> Exhibit 1: Collingwood Initial Report, # <u>3</u> Exhibit 2: Collingwood Rebuttal Report, # <u>4</u> Exhibit 3: Hood Deposition Transcript, # <u>5</u> Exhibit 4: Azure Declaration, # <u>6</u> Exhibit 5: Yankton Declaration, # <u>7</u> Exhibit 6: Brown Declaration, # <u>8</u> Exhibit 7: Davis Declaration, # <u>9</u> Exhibit 8: King Declaration, # <u>10</u> Exhibit 9: ND Legislative Council Population

		Changes Summary, # <u>11</u> Exhibit 10: N.D. Sec'y of State Election Results District 9, # <u>12</u> Exhibit 11: N.D. Sec'y of State Election Results District 9A, # <u>13</u> Exhibit 12: N.D. Sec'y of State Election Results District 9B, # <u>14</u> Exhibit 13: N.D. Sec'y of State Election Results District 15, # <u>15</u> Exhibit 14: Hood Walen Report, # <u>16</u> Exhibit 15: Hood Notes, # <u>17</u> Exhibit 16 County Precinct Maps, # <u>18</u> Exhibit 17: N.D. Legislative Council District 4A Data, # <u>19</u> Exhibit 18: Texas Legislative Council Plan 1374C, # <u>20</u> Exhibit 19: Nov. 9 2021 Committee Meeting, # <u>21</u> Exhibit 20: W. McCool Report)(Gaber, Mark) (Attachment 16 replaced on 3/2/2023 to shrink document to remove overlapping headers) NEF Regenerated (mf) (Entered: 03/01/2023)
03/03/2023	<u>66</u>	RESPONSE to Motion re <u>64</u> APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner re <u>63</u> Order on Motion for Miscellaneous Relief filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Gaber, Mark) (Entered: 03/03/2023)
03/03/2023	<u>67</u>	MOTION to Expedite <i>Discovery Appeals</i> by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Order)(Gaber, Mark) (Entered: 03/03/2023)
03/10/2023	<u>68</u>	REPLY to Response to Motion re <u>64</u> APPEAL OF MAGISTRATE JUDGE DECISION to District Judge by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner re <u>63</u> Order on Motion for Miscellaneous Relief filed by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Porsborg, Scott) (Entered: 03/10/2023)
03/10/2023	<u>69</u>	RESPONSE to Motion re <u>67</u> MOTION to Expedite <i>Discovery Appeals</i> filed by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Porsborg, Scott) (Entered: 03/10/2023)
03/10/2023	<u>70</u>	AFFIDAVIT of <i>Scott K. Porsborg</i> re <u>69</u> Response to Motion, by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Attachments: # <u>1</u> Exhibit 1 – Ms. Danahy's Email to Counsel, dated 3.2.23)(Porsborg, Scott) Modified on 3/13/2023 to add exhibit number. (jb) (Entered: 03/10/2023)
03/13/2023		DOCKET CORRECTION re: <u>70</u> Affidavit of Scott Porsborg. Clerk's office added exhibit number to attachment. (jb) (Entered: 03/13/2023)
03/14/2023	<u>71</u>	ORDER by Chief Judge Peter D. Welte denying <u>49</u> Appeal of Magistrate Judge Decision to District Judge. (EA) (Entered: 03/14/2023)
03/14/2023	<u>72</u>	ORDER by Chief Judge Peter D. Welte denying <u>64</u> Appeal of Magistrate Judge Decision to District Judge and finding as moot <u>67</u> Motion to Expedite. (EA) (Entered: 03/14/2023)
03/15/2023	<u>73</u>	REPLY to Response to Motion re <u>58</u> MOTION for Summary Judgment filed by Michael Howe. (Phillips, David) (Entered: 03/15/2023)
03/15/2023	<u>74</u>	AFFIDAVIT of <i>David R. Phillips</i> re <u>73</u> Reply to Response to Motion by Michael Howe. (Attachments: # <u>1</u> Exhibit 38 –deposition transcript of Dr. Loren Collingwood taken on March 6, 2023, # <u>2</u> Exhibit 39–transcript of the September 15, 2021 North Dakota Legislative Assembly Redistricting Committee Meeting, # <u>3</u> Exhibit 40–Expert Report of Dr. Loren Collingwood dated January 17, 2023 issued for the case entitled Charles Walen, et. al. v. Doug Burgum, et al., Case No. 1:22–cv–00031)(Phillips, David) (Entered: 03/15/2023)
03/22/2023	<u>75</u>	MOTION Set Deadline for Compliance with Third Party Subpoenas by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Attachments: # <u>1</u> Proposed Order)(Gaber, Mark) (Entered: 03/22/2023)
03/23/2023	76	(Text Only) ORDER by Magistrate Judge Alice R. Senechal re: <u>75</u> MOTION to Set Deadline for Compliance with Third Party Subpoenas. Any response to the motion is due by close of business on 3/27/2023. (AS) (Entered: 03/23/2023)

03/27/2023	<u>77</u>	AFFIDAVIT of <i>Emily Thompson (Second)</i> re <u>50</u> Response to Motion by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Porsborg, Scott) Modified on 3/28/2023 to add link. (jb) (Entered: 03/27/2023)
03/27/2023	<u>78</u>	RESPONSE to Motion re <u>75</u> MOTION Set Deadline for Compliance with Third Party Subpoenas filed by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Porsborg, Scott) (Entered: 03/27/2023)
03/27/2023	<u>80</u>	NOTICE OF INTERLOCUTORY APPEAL as to <u>71</u> Order on Appeal of Magistrate Judge Decision to District Judge, <u>72</u> Order on Appeal of Magistrate Judge Decision to District Judge, Order on Motion to Expedite by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. Filing fee \$ 505. (pb) (Entered: 03/28/2023)
03/27/2023	<u>82</u>	MOTION to Stay, MOTION to Expedite by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. See document <u>78</u> . (jb) (Entered: 03/28/2023)
03/27/2023	<u>83</u>	MEMORANDUM in Support re 82 MOTION to StayMOTION to Expedite filed by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. See document <u>78</u> . (jb) (Entered: 03/28/2023)
03/28/2023		DOCKET CORRECTION re: 79 NOTICE OF APPEAL. Wrong event selected. Clerk's Office restricted access and refiled as NOTICE OF INTERLOCUTORY APPEAL at <u>80</u> . (pb) (Entered: 03/28/2023)
03/28/2023	<u>81</u>	Transmittal of Notice of Appeal Supplement to 8th Circuit Court of Appeals re <u>80</u> Notice of Interlocutory Appeal, (pb) (Entered: 03/28/2023)
03/28/2023		DOCKET CORRECTION re: <u>77</u> Affidavit of Emily Thompson (Second). Clerk's office added link; re: <u>78</u> Response to Motion. Multiple relief document filed as one relief. Clerk's office filed Motion to Stay and Motion to Expedite at 82 and filed Memorandum in Support at 83 . (jb) (Entered: 03/28/2023)
03/28/2023	<u>84</u>	REPLY to Response to Motion re <u>75</u> MOTION Set Deadline for Compliance with Third Party Subpoenas filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. (Gaber, Mark) Modified on 3/29/2023 to remove link (cjs). (Entered: 03/28/2023)
03/28/2023	<u>85</u>	RESPONSE to Motion re 82 MOTION to StayMOTION to Expedite filed by Collette Brown, Wesley Davis, Zachery S. King, Spirit Lake Tribe, Turtle Mountain Band of Chippewa Indians. See document <u>84</u> . (cjs) (Entered: 03/29/2023)
03/29/2023		DOCKET CORRECTION re: <u>84</u> Reply to Response to Motion. Clerk's Office removed link. (cjs) (Entered: 03/29/2023)
03/29/2023		USCA Case Number 23-1597 for <u>80</u> Notice of Interlocutory Appeal. (sj) (Entered: 03/29/2023)
03/30/2023	<u>86</u>	REPLY to Response to Motion re 82 MOTION to StayMOTION to Expedite filed by William R. Devlin, Ray Holmberg, Terry Jones, Michael Nathe, Claire Ness, North Dakota Legislative Assembly, Nicole Poolman, Richard Wardner. (Porsborg, Scott) (Entered: 03/30/2023)
04/03/2023	<u>87</u>	USCA JUDGMENT as to <u>80</u> Notice of Interlocutory Appeal, filed by Nicole Poolman, Richard Wardner, Michael Nathe, Terry Jones, North Dakota Legislative Assembly, Ray Holmberg, William R. Devlin, Claire Ness. The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction. (sc) (Entered: 04/03/2023)
04/05/2023	<u>88</u>	NOTICE of Change of Address by Michael Stephen Carter (Carter, Michael) (Entered: 04/05/2023)
04/10/2023	<u>89</u>	ORDER by Chief Judge Peter D. Welte denying <u>58</u> Motion for Summary Judgment. (EA) (Entered: 04/10/2023)



04/11/2023	<u>90</u>	ORDER by Chief Judge Peter D. Welte granting <u>75</u> Motion to Set Deadlines for Compliance with Third Party Subpoenas and denying 82 Motion to Stay. (EA) (Entered: 04/11/2023)
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
EASTERN DIVISION**

Turtle Mountain Band of Chippewa  
Indians, Spirit Lake Tribe, Wesley Davis,  
Zachery S. King, and Collette Brown.

v.

ALVIN JAEGER, in his official capacity as  
Secretary of State of North Dakota.

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Pursuant to 52 U.S.C. § 10310 and 42 U.S.C. § 1983, Plaintiffs file this action challenging North Dakota’s legislative redistricting as a violation of Section 2 of the Voting Rights Act. The new redistricting law dilutes the voting strength of Native American voters from the reservations of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Tribe by packing and cracking those voters, reducing from two to one the number of state house seats in which Native American voters in this region of the state have an opportunity to elect their candidate of choice.

**INTRODUCTION**

1. On November 11, 2021, Governor Doug Burgum signed into law House Bill No. 1504 (“HB 1504”), redrawing North Dakota’s state legislative districts to account for

population shifts captured by the 2020 Census. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

2. HB 1504 establishes an effective Native American voting majority for two state house seats; however, the Voting Rights Act (“Voting Rights Act” or “VRA”) requires the establishment of an effective Native American voting majority for three state house seats that will allow Native American voters to elect the candidate of their choice.

3. North Dakota has 47 state legislative districts, and traditionally one senator and two state representatives are elected at large from each district. However, North Dakota law permits state house representatives to be elected either at-large *or* from subdistricts within a given senatorial district. N.D.C.C. 54-03-01.5(2).

4. HB 1504 contains two house subdistricts in which Native Americans have a meaningful opportunity to elect candidates of their choice to the North Dakota State House. Those are House District 9A and House District 4A. Residents of each subdistrict elect only a single representative to the state house.

5. House District 4A covers the Fort Berthold Indian Reservation of the Mandan, Hidatsa, and Arikara (MHA) Nation.

6. HB 1504’s redistricting plan places the Turtle Mountain Reservation into District 9 (divided into subdistricts 9A and 9B) and the Spirit Lake Reservation into District 15 (with no subdistricts).

7. By subdividing District 9 and keeping Spirit Lake out of District 9, the plan simultaneously packs Turtle Mountain Band of Chippewa Indians members into one

house district, and cracks Spirit Lake Tribe members out of any majority Native house district.

8. The packing of Native American voters into a single state house subdistrict, and the cracking of nearby Native American voters into two other districts dominated by white voters who bloc vote against Native American's preferred candidates, unlawfully dilutes the voting rights of Turtle Mountain and Spirit Lake Native Americans in violation of Section 2 of the VRA.

9. In order to comply with the VRA, North Dakota must implement a redistricting plan in which Native American voters on the Turtle Mountain and Spirit Lake Reservations comprise an effective, geographically compact majority in a single legislative district. Such a plan can be drawn, is legally required, and would provide those Native American voters the opportunity to elect their preferred candidates to both at-large state house seats and the state senate.

### JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357, 42 U.S.C. § 1983, and 52 U.S.C. § 10301, *et seq.* Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202, as well as Rules 57 and 65 of the Rules of Civil Procedure. Jurisdiction for Plaintiffs' claim for costs and attorneys' fees is based upon Rule 54, 42 U.S.C. § 1988, and 52 U.S.C. § 10310(e).

11. This court also has jurisdiction pursuant to 28 U.S.C. § 1362, which provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the

Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

12. The Court has personal jurisdiction over Defendant, who resides in this district.

13. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e). Defendant resides in the State of North Dakota, and Defendant is a state official performing official duties in Bismarck, North Dakota. Plaintiff Tribes and Individual Plaintiffs are located within the State of North Dakota.

#### **PARTIES**

##### ***Plaintiff - Spirit Lake Tribe (Mni Wakan Oyate)***

14. Plaintiff Spirit Lake Tribe - Mni Wakan Oyate is a federally recognized Tribe with an enrollment of 7,559 members. 86 Fed. Reg. 7557.

15. The Spirit Lake Tribe is located on the Spirit Lake Reservation. The Tribal Headquarters are located at 816 3rd Ave. North, Fort Totten, ND 58335.

16. The Spirit Lake Reservation is in east central North Dakota, and covers approximately 405 square miles, primarily in Benson County and Eddy County, with parts extending into Nelson, Wells, and Ramsey Counties. The Spirit Lake Reservation was established in 1867 through a treaty between the Sisseton Wahpeton Sioux Bands and the United States. The Treaty forced the relocation of the Sisseton Wahpeton Sioux Bands from a more expansive territory in present-day Minnesota and the Northern Plains onto the Reservation with the Sisseton, Wahpeton and the Cuthead Bands of the

Yanktonais, who had already been forced onto the Reservation. These Bands make up the present-day Spirit Lake Tribe.

17. Approximately 3,459 Spirit Lake members live on the Spirit Lake Reservation, with more living in surrounding areas. This includes a sizeable population of eligible voters.

18. HB 1504 places the Spirit Lake Reservation into Legislative District 15, which is comprised of one single-member state senate district and a two-member at-large state house districts.

*Plaintiff - Turtle Mountain Band of Chippewa Indians*

19. Plaintiff Turtle Mountain Band of Chippewa Indians is a federally recognized Tribe with an enrollment of more than 30,000 members. 86 Fed. Reg. 7557.

20. Today, the Turtle Mountain Band of Chippewa Indians is located on the Turtle Mountain Indian Reservation. Many Turtle Mountain citizens live on the Reservation and in the surrounding areas, including on lands held in trust for the Tribe by the federal government outside the boundaries of the reservation. The Tribal Headquarters are located at 4180 Highway 281, Belcourt, ND 58316.

21. The Turtle Mountain Reservation covers 72 square-miles in north central North Dakota, located entirely within Rolette County. It is one of the most densely populated reservations in the United States, with a population of 5,113 according in 2020 according to the United States Census Bureau. This includes a sizeable population of eligible voters. Substantial populations of tribal citizens also live in the areas surrounding the Reservation, including Rolla, St. John, Dunseith, and Rolette.

22. HB 1504 places the Turtle Mountain Indian Reservation into Senate District 9 and House District 9A. Lands held in trust for the Turtle Mountain Band of Chippewa Indians are located in House District 9B.

23. A substantial population of Turtle Mountain citizens live in House Districts 9A and 9B.

*Individual Voter Plaintiffs*

24. Plaintiffs also include individual Native American voters (“Individual Plaintiffs”) who reside in the districts that violate Section 2 of the Voting Rights Act.

25. Individual Plaintiffs’ votes are diluted in violation of Section 2 of the Voting Rights Act because they are either: (a) cracked into districts where Native Americans make up less than a majority of the voting age population and their voting power is overwhelmed by a white bloc voting in opposition to their candidates of choice, as in District 15; or (b) packed into a subdistrict with an excessively high number of Native voters – well above what is necessary to afford them an equal opportunity to elect their preferred candidate – as in House District 9A.

26. Plaintiff Wesley Davis is Native American and a citizen of the Turtle Mountain Band of Chippewa Indians. Mr. Davis resides on the Turtle Mountain Reservation and within State Senate District 9 and House District 9A. Mr. Davis has lived at his residence for 10 years, has lived on the Turtle Mountain Reservation for 30 years, and is a regular voter in North Dakota elections. Mr. Davis intends to vote in 2022 and future elections.

27. Plaintiff Zachary S. King is Native American and a citizen of the Turtle Mountain Band of Chippewa Indians. Mr. King resides on the Turtle Mountain Reservation and within State Senate District 9 and House District 9A. Mr. King has lived at this residence for 35 years and is a regular voter in North Dakota elections. Mr. King intends to vote in 2022 and future elections.

28. Plaintiff Collette Brown is Native American and a citizen of the Spirit Lake Tribe. Ms. Brown resides on the Spirit Lake Reservation and within Legislative District 15. Ms. Brown has lived at this residence for 19 years, has resided on the Spirit Lake Reservation for 43 years and is a regular voter in North Dakota elections. Ms. Brown intends to vote in 2022 and future elections.

*Defendant*

29. Defendant Alvin Jaeger is sued in his official capacity as Secretary of State of North Dakota. The North Dakota Secretary of State is the State's supervisor of elections and is responsible for "supervis[ing] the conduct of elections," and "publish[ing] . . . a map of all legislative districts." N.D.C.C. §§ 16.1-01-01(1) & (2)(a). He is tasked with "maintain[ing] the central voter file," which "must contain . . . the legislative district . . . in which the [voter] resides." N.D.C.C. §§ 16.1-02-01 & -12(6).

**LEGAL BACKGROUND**

30. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a), prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a). A violation of Section 2 is established if it is shown that "the political processes



leading to [a] nomination or election” in the jurisdiction “are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b).

31. The dilution of a racial or ethnic minority group’s voting strength “may be caused by the dispersal of [the minority population] into districts in which they constitute an ineffective minority of voters or from the concentration of [the minority population] into districts where they constitute an excessive majority.” *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

32. In *Gingles*, the Supreme Court identified three necessary preconditions (“the *Gingles* preconditions”) for a claim of vote dilution under Section 2 of the Voting Rights Act: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) the minority group must be “politically cohesive”; and (3) the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” 478 U.S. at 50-51.

33. After the preconditions are established, the statute directs courts to assess whether, under the totality of the circumstances, members of the racial minority group have less opportunity than other members of the electoral to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Court has directed that the Senate Report on the 1982 amendments to the Voting Rights Act be consulted for its non-exhaustive factors that the court should consider in determining if,

in the totality of the circumstances in the jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2.

34. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent of which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which the minority group bears the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

35. Nevertheless, “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” S. Rep. No. 97-417, 97th Cong. 2d Sess. (1982) at 29.

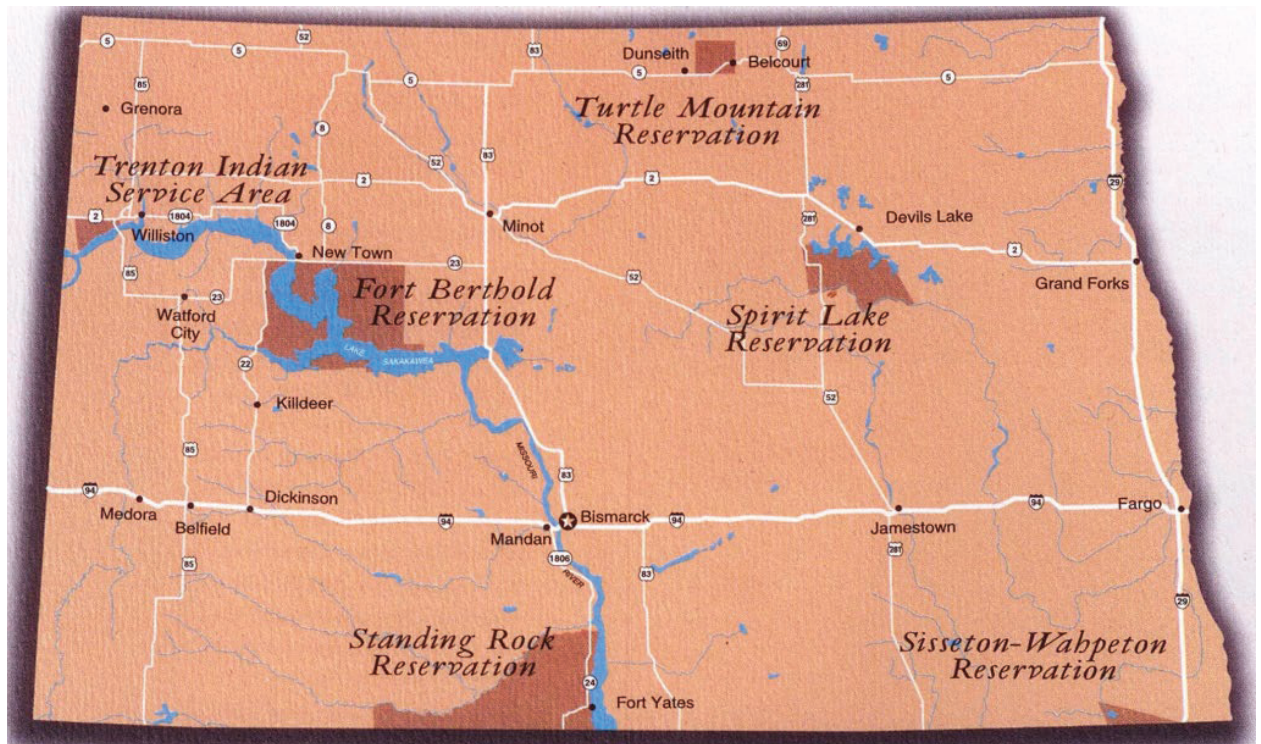
36. Courts have found violations of Section 2 where district maps “pack” minority voters into a district where they constitute a significant supermajority, diluting their ability to elect a candidate of their choice in surrounding districts. *See Boneshirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006).

37. Likewise, courts have found Section 2 violations occur where district maps “crack” compact minority populations between districts, thwarting their ability to elect a

candidate of choice in a district encompassing the entire minority population. *See Gingles*, 478 U.S. at 46 n.11; *See also Johnson v. De Grandy*, 512 U.S. 997,1007 (1994).

### FACTS

38. All or part of five Indian reservations are within the boundaries of the State of North Dakota. This includes the entirety of the Fort Berthold Indian Reservation, where the MHA Nation is located, the Spirit Lake Reservation, where the Spirit Lake Tribe is located, and the Turtle Mountain Reservation, where the Turtle Mountain Band of Chippewa Indians is located, as well as northern portions of the Standing Rock Reservation, where the Standing Rock Sioux Tribe is located, and the Lake Traverse Reservation, where the Sisseton Wahpeton Oyate is located. A map of the North Dakota reservations is below.



<https://www.indianaffairs.nd.gov/tribal-nations>.

39. According to the 2020 Census, North Dakota has a total population of 779,094, of whom 636,160 (81.7%) are non-Hispanic White, 55,727 (7.2%) are Native American (alone or in combination), and 87,207 (11.2%) are members of other racial or ethnic groups.

40. According to the 2020 Census, North Dakota has a voting-age population of 596,093, of whom 503,153 (84.4%) are non-Hispanic White, 35,031 (5.9%) are Native American (alone or in combination), and 57,909 (9.7%) are members of other racial or ethnic groups.

41. The North Dakota legislature commenced its most recent redistricting process following the 2020 U.S. Census in August 2021. Redistricting was driven by the North Dakota Legislative Council Redistricting Committee (the “Redistricting Committee”), a subcommittee of the legislature comprised of eight state house representatives, including the chairman, and eight state senators, including the vice chairman. H.B. 1397, 67th Leg., Reg. Sess. (N.D. 2021).

42. The Redistricting Committee was charged with developing a legislative redistricting plan to submit to the legislative assembly and implemented in time for use in the 2022 primary election. *Id.* Throughout the process, the Redistricting Committee held hearings in which it received testimony from the public and state legislators regarding legislative plans.

43. Many of the requests of tribal leaders and native organizations were ignored in the process, including requests to hold Redistricting Committee meetings on or near reservations to allow tribal members to participate.

44. Chairman Douglas Yankton of the Spirit Lake Tribe and other official representatives of the Spirit Lake Tribe, including Gaming Commission Executive Director Collette Brown (who is also an Individual Plaintiff), provided testimony to the Redistricting Committee on August 26, 2021,<sup>1</sup> September 15, 2021,<sup>2</sup> and September 29, 2021,<sup>3</sup> stating the Spirit Lake Tribe's official position that the Spirit Lake Reservation should be placed into a single state house subdistrict that would improve tribal citizens' representation in the State Legislature.

45. At no point did the Turtle Mountain Band of Chippewa Indians nor its representatives request that the Tribe's reservation be placed into a single-member state house subdistrict.

46. On September 29, 2021, the Redistricting Committee adopted its draft final statewide legislative plan and for the first time indicated the Committee's intent to split

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<sup>1</sup> *Aug. 26 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Aug. 26, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5024-03000-meeting-minutes.pdf> (minutes); *Testimony of Collette Brown at Aug. 26 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Aug. 26, 2021), [https://www.legis.nd.gov/files/committees/67-2021/23\\_5024\\_03000appendixh.pdf](https://www.legis.nd.gov/files/committees/67-2021/23_5024_03000appendixh.pdf).

<sup>2</sup> *Sep. 15 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 15, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5061-03000-meeting-minutes.pdf> (minutes); *Testimony of Collette Brown at the Sep. 15 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 15, 2021), [https://www.legis.nd.gov/files/committees/67-2021/23\\_5061\\_03000appendixd.pdf](https://www.legis.nd.gov/files/committees/67-2021/23_5061_03000appendixd.pdf) (testimony).

<sup>3</sup> *Sep. 28-29 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 28-29, 2021), <https://www.legis.nd.gov/assembly/67-2021/interim/23-5063-03000-meeting-minutes.pdf> (minutes); *Testimony of Douglas Yankton at the Sep. 28-29 Meeting of the Redistricting Committee*, 2021 Leg., 67th Sess. (N.D. Sep. 28-29, 2021), [https://www.legis.nd.gov/files/committees/67-2021/23\\_5063\\_03000appendixc.pdf](https://www.legis.nd.gov/files/committees/67-2021/23_5063_03000appendixc.pdf) (testimony).



District 9 into two state house subdistricts. The final draft plan included 47 state legislative districts, with two divided into single-member state house subdistricts, Districts 4 and 9.

47. District 9, which comprises the boundaries of Senate District 9 (SD 9), is divided into single-member House Districts: 9A (HD 9A) and 9B (HD 9B). The Turtle Mountain Indian Reservation is located entirely in HD 9A, while some of the Tribe's trust land and members are located in HD 9B.

48. The plan did not establish a single-member state house district encompassing the Spirit Lake Reservation. Instead, the Spirit Lake Reservation was located in District 15, which encompasses a single-member state senate district and a two-member at-large state house district.

49. After reviewing the Redistricting Committee's final proposed plan, officials from the Spirit Lake Tribe and Turtle Mountain Band of Chippewa Indians determined that the best way to prevent the votes of citizens of the Tribal Nations from being diluted and to ensure compliance with the Voting Rights Act would be for the Legislature to adopt a joint legislative district that includes both the Spirit Lake Tribe and the Turtle Mountain Band of Chippewa Indians.

50. On November 1, 2021, Spirit Lake Chairman Yankton and Turtle Mountain Chairman Azure issued a joint letter to Governor Doug Burgum, House Speaker Kim Koppelman, House Majority Leader Chet Pollert, House Minority Leader Joshua Boschee, Senate Majority Leader Rich Wardner, and Senate Minority Leader Joan Heckman detailing the Tribal Nations' concerns about the proposed map and indicating

the Tribal Nations' request to be placed into a single legislative district encompassing both Tribes' reservations. *See* Exhibit 1.

51. The letter also put each of these officials on notice that the proposed District 9, which includes HD 9A and HD 9B, as they are currently drawn, would violate the Voting Rights Act and provided an analysis of racially polarized voting in North Dakota.

52. Along with the letter, the Chairmen delivered a proposed draft of a district encompassing their two Tribal Nations as well as a draft map.

53. On November 8, 2021, the Redistricting Committee held a hearing during the special legislative session to finalize its plan.

54. At that meeting on November 8, 2021, Senator Richard Marcellais who represents SD 9 proposed an amendment to the Committee's final legislative map, which would have created a joint legislative district containing the Turtle Mountain Reservation and Spirit Lake Reservation.

55. During the meeting, the committee heard testimony from Chairman Azure, Chairman Yankton, Senator Marcellais, and Representative Marvin Nelson of District 9 regarding the proposed amendment. Both Chairmen again indicated their Tribal Nations' position that the tribes' reservations should be placed into the same district.

56. The Committee failed to adopt the amendment, as did the full Senate. Rather, on November 10, 2021, the North Dakota State Legislature passed HB 1504. Governor Burgum signed the bill into law the following day.

*Native Americans' Voting Strength Is Diluted by the Configuration of Districts 9A, 9B, and 15*

57. HB 1504 packs Native American voters in District 9A, while cracking other Native American voters in Districts 9B and 15.

58. House District 9A has a Native Voting-Age Population of 79.79 percent and is centered in Rolette.

59. House District 9B has a Native American Voting-Age Population of 32.23 percent, cracking apart Native American populations near St. John and Turtle Mountain Trust lands from those in District 9A.

60. Spirit Lake's Native American population is submerged into District 15, which has a Native American Voting-Age Population of 23.08 percent.

***Gingles Prong 1: Native American Voters Form a Geographically Compact Majority in an Alternative District with Two State House Seats***

61. Native Americans living on and around the Spirit Lake Reservation and Turtle Mountain Reservation are sufficiently numerous and geographically compact to constitute a majority in an undivided legislative district.

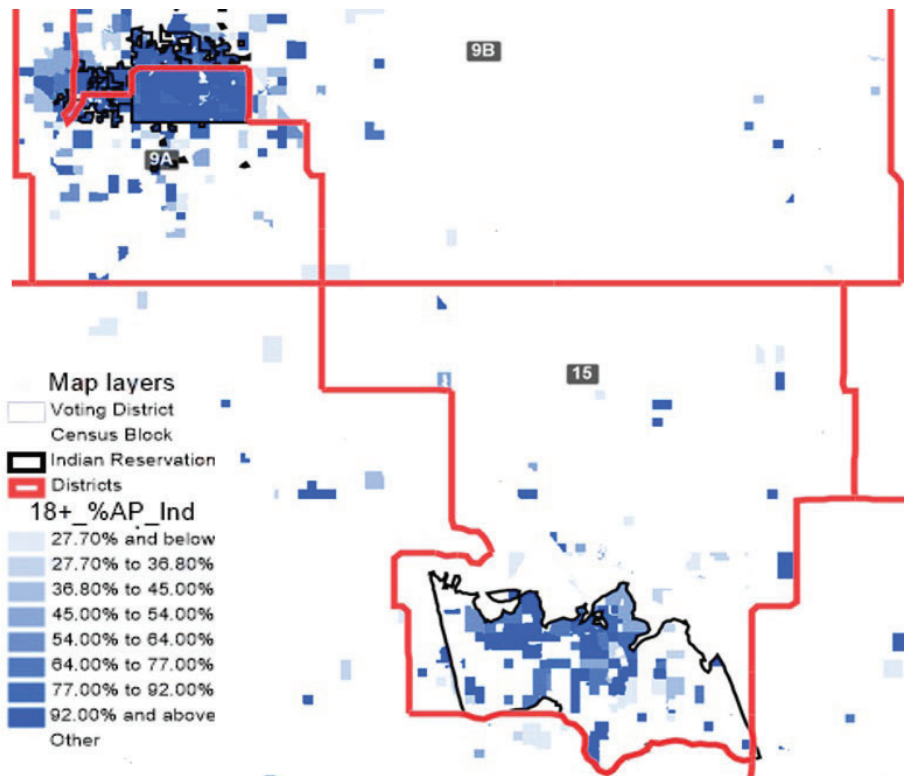
62. In that proposed district, Native American voters from Turtle Mountain and Spirit Lake reservations would be combined in a single district with a Native American Voting-Age Population of 69.1 percent. Under this configuration, Native American voters in the region would have the opportunity to elect their candidates of choice to both at-large state house seats as well as the senate.

63. The Native American population on and around the Turtle Mountain and Spirit Lake reservations is geographically compact.



64. The Spirit Lake and Turtle Mountain reservations are a mere 55 miles apart—a roughly one-hour drive between the reservations.

65. The below map shows the Spirit Lake reservation and Turtle Mountain reservation (including adjacent trust lands) outlined in black lines, with the more densely populated Native American areas shown in blue.



66. The Tribes’ proposed district would be far more compact than the enacted District 14, which stretches over 150 miles—a nearly three hour drive—from Wolford in Pierce County to Alkaline Lake in Kidder County.

***Gingles Prong 2: Voting in the Region is Racially Polarized, with Native American Voters Demonstrating Political Cohesion***

67. Native American voters in North Dakota, including those living on and around the Spirit Lake Reservation and Turtle Mountain Reservation, vote cohesively and overwhelmingly support the same candidates.

68. For example, Rolette County precinct 09-03 has a Native American Voting-Age Population of 93.7 percent, and in the 2020 presidential election candidate Joe Biden carried the precinct by a margin of 87.2 percent to 11.6 percent.

69. Benson County precinct 23-02 has a Native American Voting-Age Population of 91.8 percent, and Biden carried it by a margin of 78.6 percent to 19.6 percent.

***Gingles Prong 3: White Bloc Voting Usually Defeats Native American Preferred Candidates***

70. In the absence of Section 2 compliant districts, white bloc voting in the region usually defeats the candidate of choice of Native American voters.

71. Republican candidates usually defeat the Native American-preferred Democratic candidates in reconstituted elections in Districts 9B and 15.

72. On the other hand, the Native American candidate of choice prevails by high margins in District 9A. In the 2020 presidential election, Native American candidate of choice Biden received 72.7 percent of the vote, compared to 37.0 percent in District 9B and 32.9 percent in District 15. In the 2020 gubernatorial election, Native American candidate of choice Lenz received 64.3 percent of the vote in District 9A, compared to 29.7 percent in District 9B and 25.8 percent in District 15.

*The Totality of Circumstances Demonstrates that Native American Voters Have Less Opportunity than Other Members of the Electorate to Participate in the Electoral Process and Elect Representatives of Their Choice*

73. A review of the totality of the circumstances reveals that Native American voters in North Dakota have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *See* 52 U.S.C. § 10301(b).

*Exclusion of Native Americans from the 2021 Redistricting Process*

74. The North Dakota Legislature, including the Redistricting Committee, failed to actively and effectively engage tribal citizens in the 2021 Redistricting process.

75. The Redistricting Committee failed to hold a single committee hearing on tribal lands, despite repeated requests from the Tribal Nations within North Dakota's borders to do so. Instead, all public hearings were held at substantial distances from tribal lands, making attendance and testimony impossible for most tribal citizens, and especially the many tribal citizens without reliable private transportation.

76. Even when official representatives of the Tribal Nations were able to attend hearings of the Redistricting Committee, they were met with hostility by some legislators.

77. For example, at a final meeting of the Redistricting Committee on November 8, Turtle Mountain Chairman Azure and Spirit Lake Chairman Yankton testified before the Committee. The Chairman requested their respective communities of interest be included together in a single legislative district.

78. Despite the Tribal leaders' requests, legislators repeatedly suggested that they better understood the Tribal Nations' concerns than the Tribes' own Chairmen.

79. With the Chairmen still at the meeting, a Representative and member of the Redistricting Committee stated of the Chairmen's request, "I feel . . . that if we had come up with this plan, it would look we were trying to pack them all into one district and to marginalize them and so it's hard for me to listen to them ask to be marginalized, in my opinion."<sup>4</sup> Other legislators made similar comments.

80. Representative Terry Jones made statements at a Tribal and State Relations Committee meeting with the Spirit Lake Tribe on September 1, 2021 that sought to discourage Tribes from exercising their right to request single-member house districts by his equating the request to "the definition of racism" because, in his view, the request for single-member districts means "that in order for [him] to be able to properly represent them [tribal members] that [his] skin had to be brown."<sup>5</sup>

81. The legislators' comments are illustrative of the atmosphere of hostility toward the concerns of Tribal Nations during the 2021 redistricting process.

*Discrimination in Voting Against Native Americans*

82. As this Court has repeatedly recognized, North Dakota has a long history of both denying Native Americans the right to vote and diluting Native voting strength. *See, e.g., Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at \*3 (D.N.D. 2010); Consent Judgment and Decree, *United States v. Benson Cnty.*, Civ. A. No. A2-00-30

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<sup>4</sup> Nov. 8 Hearing of the Joint Redistricting Committee, 67th Leg., 1st Spec. Sess. 3:40:29 (N.D. Nov. 8, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20211108/-1/22649>.

<sup>5</sup> Sep. 1 Meeting of the Redistricting Committee, 2021 Leg., 67th Sess. 10:38:07 (N.D. Sep. 1, 2021), <https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210901/-1/21581>.

(D.N.D. Mar. 10, 2000); *see also State ex rel. Tompton v. Denoyer*, 72 N.W. 1014, 1019 (N.D. 1897).

83. Until 1922, North Dakota explicitly barred most Native Americans from voting. Until 1897, Native Americans were statutorily denied the right to vote in North Dakota “unless they had entirely abandoned their tribal relations, and were in no manner subject to the authority of any Indian chief or Indian agent.” *Denoyer*, 72 N.W. at 1019. After that law was struck down by the North Dakota Supreme Court as violating the state constitution, the legislature amended the Constitution to allow only “[c]ivilized persons of Indian descent” who “severed their tribal relations two years next preceding” an election to vote. N.D. Const., art. V § 121 (1898). Native Americans were denied the right to vote unless they could show that they “live[d] just the same as white people.” *Swift v. Leach*, 178 N.W. 437, 438 (N.D. 1920).

84. The North Dakota Constitution of 1898 also established a literacy test as a qualification for voting. N.D. Const. art. II, §§ 121, 127 (ratified by vote on Nov. 8, 1898). This practice was commonly used to disenfranchise minority voters and is prohibited by the Voting Rights Act of 1965. 52 U.S.C. § 10303; *see also South Carolina v. Katzenbach*, 383 U.S. 301, 312, 316 (1966) (discussing the discriminatory use of literacy tests and the Voting Rights Act’s ban on such tests).

85. Discrimination against Native American voters continues in North Dakota today. Over the past three decades, the State has continued to enact laws and adopt practices that discriminate against eligible Native voters.

86. In 2000, the Justice Department filed an action against Benson County, North Dakota alleging that the county's at-large elections system for electing county commissioners denied Native American voters the opportunity to participate meaningfully in the political process. *See* Consent Judgment at Preamble, *Benson Cnty.*, Civ. A. No. A1-00-30. The parties entered into a consent decree in which Benson County admitted that its at-large system discriminated against Native American voters. The County agreed to adopt a five-district election system, with two majority Native American districts. *Id.* ¶ 6, 15.

87. In 2010, the Spirit Lake Tribe sued Benson County to prevent the removal of a polling place on the reservation, some 100 years after the Tribe first sued to establish the reservation polling place. In considering the challenge, this Court recognized "[t]he historic pattern of discrimination suffered by members of the Spirit Lake [Tribe]," and found that the removal of the Spirit Lake polling place likely violated Section 2 of the VRA. *Spirit Lake Tribe*, 2010 WL 4226614, at \*3. The polling place was then reestablished on the reservation. *Id.* at \*3.

88. Beginning in 2013, the North Dakota legislature adopted a series of discriminatory voter identification laws targeting Native Americans.

89. In both 2013 and 2014, the North Dakota legislature amended its voter ID law to restrict the acceptable forms of identification and eliminate certain fail-safe mechanisms for voters who lacked a qualifying ID. Specifically, the law required voters to present identification containing the voter's name, date of birth, and residential street address. *See* H.B. 1332, 63rd Leg. Assembly; Reg. Sess. § 5 (2013); Order Granting Motion

for Preliminary Injunction at \*2-3, *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, (D.N.D. Aug. 1, 2016). It also eliminated alternative options that had historically been available for voters without ID. *Id.* The North Dakota Legislature passed these discriminatory voter ID laws even after repeated warnings that the identification and residential address requirements would lead to the disenfranchisement of Native Americans.

90. At the time, many Native American voters living on reservations had not been assigned residential addresses. And though the law purported to include tribal identification cards as qualifying IDs, most tribal IDs included a P.O. Box rather than the tribal citizen's non-existent residential address. As such, the residential address requirement disproportionately affected Native American voters and prevented them from relying on their tribal IDs for voting. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at \*4.

91. In 2016, this Court found that the amended voter ID law discriminated against Native Americans.

92. Specifically, it found that Native Americans "face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under the [2013] law," and that eligible Native voters had been disenfranchised because of it. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at \*9, 16-17.

93. Concluding that the Native American plaintiffs were likely to succeed on a challenge to the law under the Equal Protection Clause of the Fourteenth Amendment, this Court enjoined the Secretary of State from enforcing the law in the November 2016

Election without a fail-safe provision for voters who lack a qualifying ID. *Brakebill*, No. 1:16-cv-008, 2016 WL 7118548, at \*22. The state did not appeal that decision.

94. In 2017, the North Dakota Legislature again amended the State's voter identification law to eliminate the fail-safe provision for voters who lack a qualifying ID listing their residential street address.

95. After the Spirit Lake Tribe, Standing Rock Sioux Tribe, and various individual eligible Native American voters challenged the law again in federal court as discriminating against Native voters, the State agreed to enter into a consent decree. Under the consent decree, the Secretary of State must recognize tribal IDs as valid voter identification and ensure that Native American voters retain an effective fail-safe voting option, including by ensuring that otherwise eligible voters who lack an ID listing their residential address are provided with their address and corresponding documentation sufficient to allow them to vote. Order, Consent Decree, and Judgment, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222-DLH-CRH (D.N.D. Apr. 27, 2020).

***Historic Discrimination Against Native Americans in Other Areas***

96. Native Americans in North Dakota face discrimination in other arenas, which exacerbates the barriers to their effective participation in the political process.

97. Throughout the nineteenth and early twentieth centuries, the United States carried out official federal policy targeted at forcibly assimilating Native Americans into European-American culture. See *Bear Lodge Multiple Use Ass'n v. Babbit*, 175 F.3d 814, 817 (10th Cir. 1999). Forced assimilation included suppression and attempted destruction of Indigenous religions, languages, and culture.



98. Assimilationist policies commonly brought violence in the Northern Plains. “In 1890 for example, the United States Cavalry shot and killed 300 unarmed Sioux [Lakota] men, women and children en route to an Indian religious ceremony called the Ghost Dance[.]” *Bear Lodge Multiple Use Ass’n*, 175 F.3d at 817.

99. Native Americans in North Dakota were a direct target of these discriminatory policies and practices.

100. Christian and government boarding schools were established throughout North Dakota beginning in the late nineteenth century and persisting through the mid-twentieth century. Native American children were removed from their families and tribes and sent to the boarding schools to be “civilized” and indoctrinated into Christianity. *See e.g.* U.S. Dep’t of Interior, *Extracts from the Annual Report of the Secretary of the Interior for the Fiscal Year, 1927-28* (1927); Native American Rights Fund, *Let All That Is Indian Within You Die!*, 38(2) NARF L. Rev. 1 (2013). These children routinely suffered physical and emotional abuse and neglect. At the same time, they were banned from speaking Indigenous languages and practicing their cultures and religions.

101. The boarding school policy was incredibly harmful and its effects, including disparities in education and literacy between Native Americans and non-Native Americans, have persisted in North Dakota long after its official end. *See* Lewis Merriam, Tech. Dir. for Inst. for Gov’t Research, *The Problem of Indian Administration, Report of a Survey made at the request of Hubert Work, Secretary of the Interior and submitted to him Feb. 21, 1928*; Native American Rights Fund, *Let All That Is Indian Within You Die!*, 38(2) NARF L. Rev. 1 (2013).

102. Native children attending state public schools in the mid-twentieth century also faced significant discrimination, including being subjected to humiliating stereotypes and language discrimination. See *Indian Education: A National Tragedy – A National Challenge*, Special Subcomm. on Indian Educ., 91st Cong., S.R. No. 91-501 (1969). Native students often reported feeling powerless, experiencing depression, and generally feeling alienated from their own cultures. Dropout rates among Native children attending public schools were higher than those for non-native children, while reading levels were lower. At the same time, Native people were generally prevented from serving on school boards. *Id.* at 23-31. Higher dropout rates amongst Native students persisted throughout the end of the twentieth century. *Educational Condition*, N.D. Dep’t of Pub. Education, [https://web.archive.org/web/20151225031658/https://www.nd.gov/dpi/SchoolStaff/IME/Programs\\_Initiatives/IndianEd/resources/EducationalCondition/](https://web.archive.org/web/20151225031658/https://www.nd.gov/dpi/SchoolStaff/IME/Programs_Initiatives/IndianEd/resources/EducationalCondition/).

103. Native Americans in North Dakota, including the Plaintiff Tribes, were also subjected to discriminatory land allotment policies. Throughout the early-to mid-1900’s, millions of acres of tribal land were transferred to private ownership, largely by non-Indians. These allotment policies dramatically reduced the land bases for many tribes, including those in North Dakota. These policies also created a confusing “checkerboard” of state, tribal, and federal jurisdiction, leading to reduced and inconsistent enforcement of criminal laws by non-tribal law enforcement agencies. See *Keepseagle v. Vilsack*, 118 F. Supp. 3d. 98 (D.D.C. 2015), *appeal denied* 2015 WL 9310099 (D.C. Cir. 2015).

104. The State of North Dakota has played an active role in discrimination against Native Americans since its inception.

105. Significantly, the State, through the North Dakota Indian Affairs Commission, embraced the discriminatory and harmful forced assimilation and relocation policies of the federal government.

106. Historic discrimination has hindered the ability of the Native American population in North Dakota to participate effectively in the political process.

### *Modern Effects of Discrimination*

107. Native Americans in North Dakota continue bear the effects of the state and federal government's discriminatory policies and practices in income and poverty, education, employment, and health, which hinders their ability to participate effectively in the political process.

108. Native Americans in North Dakota are three times more likely than the general population of North Dakota and nearly four times more likely than are whites in the state to live in poverty. According to the 2015-2019 American Community Survey Estimates, the poverty rate for Native Americans in North Dakota is 32.2 percent (nearly 1 in 3), compared 10.7 percent for the state's total population and only 8.2 percent amongst North Dakotans who are white alone.

109. Approximately half of all Native American children in North Dakota live in poverty – a rate more than five times higher than any other racial group in the state. North Dakota Interagency Council on Homelessness, *Housing the Homeless: North Dakota's*

*10-Year Plan to End Long-Term Homelessness* ii (October 2018), <https://www.ndhfa.org/wp-content/uploads/2020/07/HomelessPlan2018.pdf>.

110. Native Americans in North Dakota face a higher rate of homelessness than any other racial group in the state. In 2017, the North Dakota Interagency Council on Homelessness estimated that Native Americans account for at least 21 percent of North Dakota's homeless population, despite making up only 5 percent of the state's population. *Id.* at 17.

111. This 2017 study likely underestimated the actual number of Native Americans who are effectively homeless because it failed to account for the many individuals who live temporarily with family and other tribal members. *Id.* at 17.

112. Native Americans in North Dakota also fare worse than white North Dakotans in education. Native Americans over the age of 25 are two and a half times as likely as whites to lack a high school diploma. According to the 2019 American Community Survey, approximately 15 percent of Native Americans lack a high school diploma, compared to 6 percent of whites.

113. Native American students in North Dakota are 4.2 times more likely than white students to be suspended from school. At the same time, white students are 4.3 times more likely than Native students to be enrolled in Advanced Placement classes. ProPublica, *Miseducation: North Dakota*, <https://projects.propublica.org/miseducation/state/ND> (last accessed Sep. 16, 2021).

114. Native Americans in North Dakota also suffer worse health outcomes than the State's overall population, on average. For example, Native Americans report being

in poor or fair health at a rate almost double that of North Dakota's total population. North Dakota Dep't of Health, *North Dakota American Indian Health Profile*, Table 21 (Jul. 18, 2014), <http://www.ndhealth.gov/HealthData/CommunityHealthProfiles/American%20Indian%20Community%20Profile.pdf>. Similarly, Native people in North Dakota aged 18-64 are more than twice as likely as the overall population to have a disability. *Id.* at Table 8. The infant death rate and child and adolescent death rate amongst Native Americans in North Dakota is approximately 2.5 times that of the State's total population. *Id.* at Table 13.

115. Native Americans in North Dakota are also overrepresented in the state's prison and jail population. According to the Prison Policy Initiative, Native Americans in North Dakota are incarcerated at a rate 8 times that of the state's white population. Prison Policy Initiative, *North Dakota Profile*, <https://www.prisonpolicy.org/profiles/ND.html> (last accessed Sep. 16, 2021).

116. These and other socioeconomic factors related to the history of discrimination compound the political disempowerment of Native Americans in North Dakota caused by the discriminatory legislative districting scheme.

***Racially Polarized Voting and the Limited Success of Native American Candidates***

117. Voting in North Dakota is racially polarized between white and Native voters.

118. In the 2016 state-wide U.S. House of Representatives contest, Native American voters backed Native American candidate Chase Iron Eyes with 87 percent of

the vote, compared to 13 percent for Kevin Cramer. White voters, however, supported Cramer with 76 percent and Iron Eyes at 24 percent.

119. In the 2016 state-wide Public Service Commissioner race, the Native American vote backed Native American candidate Hunte Beaubrun 78 percent to 15 percent for Julie Fedorchak. However, white voters preferred Fedorchak with 70 percent of the vote, compared to only 21 percent of the vote in support of Hunte Beaubrun.

120. In the 2016 state-wide Insurance Commissioner contests, Native American candidate Ruth Buffalo received 87 percent of the Native American vote, while Jon Godfread received approximately 13 percent of the Native American vote. The white vote favored Godfread with 72 percent of the vote, compared to 28 percent for Buffalo.

121. Native Americans have had little success in being elected to state office in North Dakota outside of the previously Native American-majority District 9.

122. Upon information and belief, there has never been a Native American statewide elected official.

123. HB1504 results in a lack of proportionality for Native American voters; the number of state house and senate districts in which they can election their candidate of choice is lower than their share of the state's voting age population.

## **CLAIM FOR RELIEF**

### **COUNT 1**

#### *Section 2 of the Voting Rights Act, 52 U.S.C. § 10301*

124. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

125. Section 2 of the Voting Rights Act prohibits the enforcement of any qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right of any U.S. citizen to vote on account of race, color in a language minority group. 52 U.S.C. § 10301(a).

126. Native American voters in northeastern North Dakota are “cracked” in District 9B and District 15 where they constitute a minority of the voting age population. The remaining Native American population is packed into District 9A, where Native Americans constitute a supermajority of the voting age population.

127. The packing and cracking of Native American voters in Districts 9 and 15 dilutes the voting strength of Native voters, in violation of Section 2 of the Voting Rights Act.

128. An alternative district can be drawn in which Native American voters constitute a geographically compact majority of eligible voters that will reliably elect Native Americans’ preferred candidates to two at-large state house seats and one state senate seat.

129. Voting in northeastern North Dakota is racially polarized, Native voters are politically cohesive, and white bloc voters usually defeats Native voters’ preferred candidates.

130. Under the totality of the circumstances the current State Legislative plan denies Native voters an equal opportunity to participate in the political process and to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

131. Absent relief from this Court, Defendants will continue to dilute the votes of the individual Plaintiffs and the members of the Plaintiff Tribes in violation of Section 2 of the VRA.

### REQUESTED RELIEF

WHEREFORE, Plaintiffs ask that this Court:

- A. Declare that HB 1504 violates Section 2 of the Voting Rights Act;
- B. Preliminarily and permanently enjoin Defendants from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislature from unlawful districts;
- C. Set a reasonable deadline for the legislature to enact a redistricting plan that does not dilute, cancel out, or minimize the voting strength of Native American voters;
- D. If the legislature fails to enact a valid redistricting plan before the Court's deadline, order a new redistricting plan that does not dilute, cancel out, or minimize the voting strength of Native American voters;
- E. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e); and,
- F. Grant such other relief as the Court deems proper.

Respectfully submitted this 7th day of February, 2022.



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

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TURTLE MOUNTAIN BAND OF  
CHIPPEWA INDIANS, SPIRIT LAKE  
TRIBE, WESLEY DAVIS, ZACHERY S.  
KING, and COLLETTE BROWN,

Plaintiffs,

v.

ALVIN JAEGER, in his official  
capacity as Secretary of State of North Dakota,

Defendant.

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Civil Action No. 3:22-cv-00022-PDW-ARS

**STATEMENT OF INTEREST OF THE UNITED STATES**

The United States files this statement of interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending lawsuit, and pursuant to Civil Rule 7.1(G), Local Rules (D.N.D.).

The pending motion to dismiss presents the important question of whether private plaintiffs can bring suit to enforce Section 2 of the Voting Rights Act (“VRA”), 52 U.S.C. § 10301. Congress has vested the Attorney General with authority to enforce Section 2 on behalf of the United States. *See* 52 U.S.C. § 10308(d). Given the importance of this issue to the effective enforcement of the VRA, the United States has a substantial interest in ensuring the proper interpretation of Section 2, and the proper resolution of the pending motion to dismiss.

The United States submits this statement of interest to explain its view that private parties can enforce Section 2 of the VRA.<sup>1</sup>

## I. BACKGROUND

### A. Procedural Background

Following the 2020 decennial census, the North Dakota Legislative Council Redistricting Committee (the “Redistricting Committee”) developed a legislative redistricting plan that was approved by the North Dakota legislature and signed into law on November 11, 2021. The Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and three individuals filed suit, alleging that the adopted plan has a discriminatory result in violation of Section 2 of the VRA, because it dilutes the voting power of Native American voters. Compl. ¶¶ 1-9, 41-42, 127, ECF 1. Plaintiffs also requested that this Court preliminarily enjoin use of the map. *Id.* at 31 (Requested Relief, ¶ B). In lieu of an Answer, Defendant, Secretary of State Alvin Jaeger, filed a motion to dismiss arguing, among other things, that the VRA does not contain a private right of action for violation of Section 2, and thus Plaintiffs have failed to state a claim and this Court lacks subject matter jurisdiction. Def.’s Br. at 1, 4-7, ECF 18.

### B. Statutory Background

Section 2 of the VRA imposes a “permanent, nationwide ban on racial discrimination in voting.” *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits any state or

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<sup>1</sup> The United States has articulated across decades the view that private parties can enforce the VRA, including in the Supreme Court and most recently in the Eighth Circuit. *See* U.S. Amicus Br. at 25-27 & n.15, *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (No. 94-203); U.S. Amicus Br. at 8 n.7, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (Nos. 3, 25, 26, and 36); U.S. Amicus Br., *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, No. 22-1395 (8th Cir.) (filed April 22, 2022), available at <https://www.justice.gov/crt/case-document/arkansas-state-conference-naacp-v-arkansas-board-apportionment-brief-amicus>.

The United States takes no position on any other issue in this case.

political subdivision from imposing or applying a “voting qualification,” a “prerequisite to voting,” or a voting “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” or membership in a language minority group. 52 U.S.C. § 10301(a); *see also* 52 U.S.C. § 10303(f)(2). Like the Fourteenth and Fifteenth Amendments, Section 2 prohibits voting laws and practices adopted with a discriminatory purpose. *See Chisom v. Roemer*, 501 U.S. 380, 392, 394 n.21 (1991); *see also, e.g., Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330 (2021). But in contrast to those amendments, a violation of Section 2 can also “be established by proof of discriminatory results alone.” *Chisom*, 501 U.S. at 404.

Of particular relevance to this case, the Supreme Court has held that Section 2 prohibits vote dilution through the use of redistricting plans that “minimize or cancel out the voting strength of racial [minorities in] the voting population.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal citations and quotation marks omitted). *See also Jeffers v. Clinton*, 730 F. Supp. 196, 198, 203-04 (E.D. Ark. 1989) (three-judge court) (holding that Arkansas’s 1981 legislative apportionment violated Section 2(b)’s “‘results’ test”), *aff’d*, 498 U.S. 1019 (1991) (per curiam).

## II. ARGUMENT

Defendant’s motion to dismiss here relies upon the recent decision of a federal district court in Arkansas that dismissed the plaintiffs’ challenge to that state’s redistricting plan on the proposition that private plaintiffs cannot enforce Section 2 of the VRA. *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022) (“*Arkansas*”); Def.’s Br. 5-7, ECF 18. The *Arkansas* decision is a legally erroneous outlier. This Court should deny Defendant’s motion to dismiss.

Supreme Court and Eighth Circuit precedent—most notably, *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and

*Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989)—establish the existence of a private right of action to enforce Section 2. Those decisions are binding on this Court and have been ratified by Congress.

The framework set forth in *Alexander v. Sandoval*, 532 U.S. 275 (2001) reinforces the conclusion that Section 2 is enforceable through an implied private right of action. Section 2 indisputably contains rights-creating language, and Congress’s intent to provide a private remedy to enforce the statute can be inferred from the personal nature of the rights that the VRA protects and from several other VRA provisions that evince Congress’s understanding that Section 2 is privately enforceable.

But even if Congress had not contemplated a Section 2-specific implied right of action—and it did—the statute would nevertheless be enforceable through 42 U.S.C. § 1983 to redress violations of the statute committed by persons acting under color of state law. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); Compl. 1, ¶ 10, ECF 1.

**A. Supreme Court And Eighth Circuit Precedents That Congress Has Ratified Establish The Existence Of A Private Right Of Action To Enforce Section 2**

The Supreme Court’s decisions in *Morse* and *Allen*, as well as the Eighth Circuit’s decision in *Roberts*, make clear that a private right of action exists to enforce Section 2. Congress ratified those decisions, and numerous others involving Section 2 claims brought by private plaintiffs, when it repeatedly amended the VRA without disclaiming the already recognized private right of action and when it added provisions that rest on its understanding that one exists.

*1. Supreme Court Precedent*

The Supreme Court recognized more than 25 years ago that, although Section 2 “provides no right to sue on its face, ‘the existence of the private right of action under Section 2 . . . has

been clearly intended by Congress since 1965.” *Morse*, 517 U.S. at 232 (opinion of Stevens, J., joined by Ginsburg, J.) (alteration in original) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982) (“1982 Senate Report”)); *accord id.* at 240 (opinion of Breyer, J., concurring in the judgment, joined by O’Connor & Souter, JJ.). Twice the Court confronted the question whether the VRA contains implied rights of action, and both times the Court answered that question in the affirmative. In *Allen*, the Court found a private right of action to enforce Section 5 of the VRA, 52 U.S.C. § 10304(a), which required jurisdictions covered by Section 4(b) of the Act to obtain preclearance from the Attorney General or the United States District Court for the District of Columbia before subjecting any “person” to a new voting qualification or procedure. *Allen*, 393 U.S. at 556-557. Decades later, in *Morse*, the Court found an implied private right of action to enforce Section 10 of the VRA. *See* 517 U.S. at 232-234. Section 10 prohibits jurisdictions from conditioning the right to vote on payment of a poll tax, because such a tax can deny or abridge “the constitutional right of citizens to vote.” 52 U.S.C. § 10306(a). The Court recognized the rights of action to enforce Sections 5 and 10 because “[t]he achievement of the [VRA’s] laudable goal” to “make the guarantees of the Fifteenth Amendment finally a reality for all citizens \* \* \* could be severely hampered \* \* \* if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.” *Allen*, 393 U.S. at 556; *see also Morse*, 517 U.S. at 231; H.R. Rep. No. 397, 91st Cong., 1st Sess. 4, 8 (1969).

*Morse*’s conclusion that private plaintiffs can enforce Section 10 flows directly from its recognition that Congress intended the same for Section 2. The *Morse* Court held that private plaintiffs must be able to enforce Section 10 because “[i]t would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language.” 517 U.S. at 232; *accord id.* at 240 (Breyer, J., concurring)

(stating that *Allen*'s rationale "applies with similar force not only to § 2 but also to § 10"). The private plaintiffs' ability to enforce Section 2 was the linchpin to *Morse*'s holding.<sup>2</sup>

The *Arkansas* district court erroneously demoted *Morse* by emphasizing that the case "had no majority opinion." *Arkansas*, 2022 WL 496908, at \*15. True, but irrelevant: Five Justices in *Morse* explicitly stated that a private right of action exists to enforce Sections 2 and 5 of the VRA, and that private plaintiffs likewise should be able to enforce Section 10 of the VRA. 517 U.S. at 232 (Stevens, J., joined by Ginsburg, J.); *accord id.* at 240 (Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.). Under *Marks v. United States*, 430 U.S. 188, 193 (1977), that conclusion constitutes a holding of the Court.

The *Arkansas* district court wrongly dismissed *Allen* as "relegated to the dustbin of history" and the conclusion by five Justices in *Morse* that *Allen*'s rationale applies with equal force to Section 2 as "purely dicta." *Arkansas*, 2022 WL 496908, at \*15 & \*16 n.113. Such disregard for Supreme Court case law contradicts the Eighth Circuit's directive that "federal courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings," particularly when, as here, the earlier pronouncements are "not enfeebled by any [later] statement." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc) (citation and internal quotation marks omitted; brackets in original), *cert. denied*, 138 S. Ct. 647 (2018). To be sure, as Defendant here notes, the *Arkansas* district court relied on Justice Gorsuch's recent concurrence in *Brnovich v. Democratic National Committee*,

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<sup>2</sup> Justice Thomas also acknowledged in his dissenting opinion in *Morse*, which Chief Justice Rehnquist and Justices Scalia and O'Connor joined, that a private right of action can be implied to enforce Section 5, "as well as any rights of action [the Court] might recognize in the future." *Morse*, 517 U.S. at 289 (Thomas, J., dissenting). He dissented not because a private right of action cannot as a general matter be inferred from the VRA's text, but because he did not read Section 10 to contain the rights-creating language that Section 2 indisputably possesses. *See* p. 11, *infra*.

141 S. Ct. 2321 (2021), which characterized whether Section 2 is privately enforceable as “an open question.” *Id.* at 2350 (Gorsuch, J., concurring); *see Arkansas*, 2022 WL 496908, at \*18; Def.’s Br. 5, ECF 18. But Justice Gorsuch cited in support of that proposition only a Fourth Circuit opinion that predated *Morse* and “[a]ssum[ed] without deciding” that Section 2 is privately enforceable. *Washington v. Finlay*, 664 F.2d 913, 926 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). Thus, neither the *Brnovich* concurrence nor *Washington*—which are not binding on this Court—actually concluded that private plaintiffs cannot enforce Section 2.

The *Arkansas* district court also characterized *Alexander v. Sandoval*, 532 U.S. 275 (2001), as invalidating *Morse* and *Allen*. *Arkansas*, 2022 WL 496908, at \*16. That characterization is mistaken: *Sandoval* strongly supports the *opposite* conclusion. Although the holding for which *Sandoval* is best known involves the question whether a private right of action existed to enforce a *regulation* under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the case separately held that it “must be taken as given” that a private right of action exists to enforce the *statute*’s prohibition against disparate treatment, despite no express provision of one. *Sandoval*, 532 U.S. at 279. That is because the “reasoning” of an earlier decision finding a cause of action in another statute “embraced the existence of a private right to enforce Title VI as well.” *Id.* at 280 (citing *Cannon v. University of Chi.*, 441 U.S. 667, 694 (1979)). Similarly, the private enforceability of the VRA’s protections, including Section 2, was foundational to *Morse* and *Allen*. *See pp. 4-6, supra*. Moreover, the Supreme Court explained in *Sandoval* that Congress also “ratified” *Cannon*’s reasoning by making changes to Title VI that could not “be read except as validation of *Cannon*’s holding.” *Sandoval*, 532 U.S. at 280 (citation omitted). As discussed below, Congress similarly ratified the reasoning of *Morse* and *Allen*. *See pp. 9-11, infra*. Accordingly, *Morse* and *Allen* remain binding as to whether private plaintiffs can enforce Section 2.



2. *Eighth Circuit And Other Lower-Court Precedent*

The district court in *Arkansas* also brushed aside the Eighth Circuit’s consideration of this issue in *Roberts* as “dicta.” *Arkansas*, 2022 WL 496908, at \*17; Def.’s Br. 7, ECF 18. But *Roberts* expressly held that “a private litigant attempting to protect his right to vote [is] a proper party to effectuate the goals of the Act”; only after doing so did it separately conclude that an unsuccessful *candidate* does not fall within that cause of action. 883 F.2d at 621 (citing *Allen*, 393 U.S. at 557). A holding is “[a] court’s determination of a matter of law pivotal to its decision; a principle drawn from such decision.” *Holding*, Black’s Law Dictionary (11th ed. 2019). The Eighth Circuit could not have concluded that an unsuccessful candidate lacks statutory standing to sue under Section 2, without first resolving whether *some* private plaintiffs can sue under the statute. The resolution of that question in the affirmative was therefore pivotal, making *Roberts*’s recognition of a private right of action binding precedent.<sup>3</sup>

*Roberts*’s holding accords with a vast body of district court and court of appeals decisions that have held that Section 2 can be enforced by private plaintiffs.<sup>4</sup> Indeed, since 1982, private

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<sup>3</sup> The Eighth Circuit also suggested that private litigants, like the organizational plaintiffs here, “suing on behalf of persons who are unable to protect their own rights” fall within Section 2’s private right of action. *Roberts*, 883 F.2d at 621.

<sup>4</sup> See, e.g., *Mixon v. Ohio*, 193 F.3d 389, 406 & n.12 (6th Cir. 1999) (“An individual may bring a private cause of action under Section 2 of the [VRA].”); *Singleton v. Merrill*, No. 2:21-cv-1530-AMM, 2022 WL 265001, at \*79 (N.D. Ala. Jan. 24, 2022) (three-judge court) (stating that to hold otherwise “would badly undermine the rationale offered by the Court in *Morse*” and that “[e]ven if the Supreme Court’s statements in *Morse* about Section Two are technically dicta, they deserve greater respect than Defendants would have us give”), *appeal docketed*, No. 21-1086 (S. Ct. Feb. 7, 2022); *League of Latin Am. Citizens v. Abbott*, No. EP-21-CV-00529-DCG-JES-JVB, 2021 WL 5762035, at \*1 (W.D. Tex. Dec. 3, 2021) (three-judge court) (denying a motion to dismiss arguing that Section 2 lacks a private right of action); *Georgia State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court) (“Section 2 contains an implied private right of action,” citing *Morse*, 517 U.S. at 232); *Veasey v. Perry*, 29 F. Supp. 3d 896, 906 (S.D. Tex. 2014) (holding that “individual voter[s]” and organizations have the “power to enforce” Section 2); *Perry-Bey v. City of Norfolk*,

plaintiffs have brought more than 350 cases alleging violations of Section 2 that have resulted in judicial decisions, without any court (until now) holding that Section 2 lacks a private right of action. See Ellen D. Katz *et al.*, *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, Univ. Mich. L. Sch. Voting Rights Initiative (2022), <https://voting.law.umich.edu> (providing data that are the basis for this estimate).<sup>5</sup> The *Arkansas* district court’s decision stands alone because it is wrong.

### 3. Congressional Ratification

Congress has ratified the consensus view that Section 2 is privately enforceable. As the Supreme Court explained in *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” See also *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 536 (2015) (concluding that Congress had “ratified the unanimous holdings of the Courts of Appeals” that plaintiffs can bring disparate-impact claims under the Fair Housing Act because it was “aware of [the] unanimous precedent” and “made a considered judgment to retain the relevant statutory text”).

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678 F. Supp. 2d 348, 362 (E.D. Va. 2009) (“The [VRA] creates a private cause of action”). At least one court has expressly rejected the *Arkansas* district court’s holding that private plaintiffs cannot enforce Section 2, relying on “the extent and weight of the authority holding otherwise.” *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at \*11 n.10 (N.D. Ga. Feb. 28, 2022).

<sup>5</sup> See also, e.g., *Brnovich*, 141 S. Ct. 2321; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers’ Ass’n v. Attorney Gen.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019); *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), *aff’d*, 498 U.S. 1019 (1991).

In repeatedly amending the VRA, Congress has never questioned the uniform view that Section 2 is privately enforceable. Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 109-246, 120 Stat. 577 (2006). And Congress has consistently cited *Allen* approvingly. *See, e.g.*, S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975) (1975 Senate Report); H.R. Rep. No. 196, 94th Cong., 1st Sess. 9 (1975); H.R. Rep. No. 397, 91st Cong., 1st Sess. 4, 8 (1969). Moreover, in the 1982 Senate Report that the Supreme Court called the “authoritative source for legislative intent” behind Section 2, *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *see also Brnovich*, 141 S. Ct. at 2332-2333 (discussing the “oft-cited” 1982 Senate Report), Congress “reiterates the existence of the private right of action under section 2.” 1982 Senate Report 30; *see also* H.R. Rep. No. 227, 97th Cong., 1st Sess. 32 (1981) (1981 House Report); pp. 13-19, *infra* (discussing changes made to the VRA evincing Congress’s understanding that Section 2 is privately enforceable).

Congress had no reason to codify an express right of action to enforce Section 2. The Supreme Court assumed the existence of a private right of action to enforce Section 2 in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that the original version of the statute reached only conduct prohibited by the Fifteenth Amendment. *Id.* at 60-61. Thus, when Congress amended Section 2 in response to *Bolden* to make clear that proof of discriminatory intent is not necessary to establish a violation of the statute, it had no need to revise the statute to expressly provide a private right of action. Pointing to the continued existence of such a right was sufficient. 1982 Senate Report 30; 1981 House Report 32. The Court’s decision only a few years later in *Gingles*—a case brought by private plaintiffs—also reflects an understanding that Section 2 is privately enforceable. *See* 478 U.S. at 50-52 (describing what “the minority group must be able to demonstrate” or “show” to establish a Section 2 violation—language that is inconsistent with the proposition that only the Attorney General can bring suit). Similarly,

Congress had no need to codify a private right of action to enforce Section 2 when it amended the VRA in 2006 because, in the interim, the Court had explicitly stated that the statute was privately enforceable. *Morse*, 517 U.S. at 232 (opinion of Stevens, J.); *accord id.* at 240 (Breyer, J., concurring).

**B. The VRA’s Text Shows Congress’s Intent To Provide A Private Right Of Action To Enforce Section 2**

Even if the above discussion did not conclusively establish that private plaintiffs can enforce Section 2—and it does—Congress’s intent to create a private right of action flows directly from the *Sandoval* framework.

As the district court in *Arkansas* correctly stated, “*Sandoval* and its progeny don’t entirely foreclose the possibility of implied private rights of action.” *Arkansas*, 2022 WL 496908, at \*17. Far from it. Under *Sandoval*, courts determine whether Congress intended to create a private right of action by: (1) making the “critical” determination whether the statute in question contains “rights-creating language”; and, if so, (2) assessing whether Congress has “manifest[ed] an intent to create a private remedy.” 532 U.S. at 288-289 (citation and internal quotation marks omitted). Section 2 undeniably contains rights-creating language. Moreover, Congress’s intent to create a private remedy to enforce Section 2 is apparent from the very nature of voting rights and from several other VRA provisions that reflect Congress’s understanding that Section 2 is privately enforceable.

*1. Section 2 Contains Rights-Creating Language*

Although the *Arkansas* district court did not reach the “critical” question whether Section 2 contains rights-creating language, it indisputably does. *Sandoval*, 532 U.S. at 288; *Arkansas*, 2022 WL 496908, at \*10 n.76. As the Supreme Court recognized in *Shelby County*, Section 2

imposes a “permanent, nationwide ban on racial discrimination in voting.” 570 U.S. at 557. The statute provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of *the right of any citizen of the United States to vote* on account of race or color, or [membership in a language minority group].

52 U.S.C. § 10301(a) (emphasis added). Thus, the statute “grants” individual citizens “a right to be free from” discriminatory voting practices. *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 23 (1965)). *Allen* relied on similar language to infer Congress’s intent to create a private right of action to enforce Section 5. 393 U.S. at 555; *see* 52 U.S.C. § 10304 (providing that “no person shall be denied the right to vote for failure to comply with [a] qualification, prerequisite, standard, practice, or procedure” covered by, but not approved under, Section 5). And *Cannon* held that another statute (Title IX) contains a private right of action by analogy to Section 5’s “dispositive language.” 441 U.S. at 690. No serious argument can be made that Section 2 lacks rights-creating language.

2. *Congress Intended To Provide A Private Remedy To Enforce Section 2*

Congress’s intent to provide a private remedy to enforce Section 2 is shown by: (1) the statute’s rights-creating language; (2) the private nature of voting rights; and (3) several VRA provisions that evince Congress’s understanding that Section 2 can be privately enforced.

a. *Section 2’s Rights-Creating Language Is Critical Evidence Of Congress’s Intent To Provide A Private Remedy*

Because Section 2 plainly contains rights-creating language, a strong presumption exists that Congress also intended to create a private remedy to enforce those rights. That is because “the right- or duty-creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action.” *Cannon*, 441 U.S. at 690 n.13; *see also*

*Sandoval*, 532 U.S. at 288 (characterizing this component of the private-right-of-action analysis as “critical” because of *Cannon*’s observation that such language is typically dispositive). To be sure, the VRA authorizes civil suits by the United States to enforce the statute’s substantive provisions. See 52 U.S.C. §§ 10308(d) and (e). But interpreting the statute to require “each citizen \* \* \* to depend solely on litigation instituted at the discretion of the Attorney General” would leave many Section 2 violations unremedied and “severely hamper[]” the statute’s enforcement. *Allen*, 393 U.S. at 556.

*b. Voting Rights Typically Are Privately Enforced*

The presumption that Congress intends to provide a private remedy where it includes rights-creating language is even stronger in the context of Section 2 because voting rights typically are considered “private rights.” *United States v. Raines*, 362 U.S. 17, 27 (1960) (holding that Congress did not exceed its constitutional authority by expressly authorizing the Attorney General to sue under Section 131 of the Civil Rights Act of 1957, 52 U.S.C. § 10101, to protect voting rights). If Congress had declined to expressly authorize the Attorney General to enforce Section 2, there would be little doubt that it had intended to authorize suits by private plaintiffs to enforce the statute. Given that voting rights inhere in individual citizens, Congress’s decision to authorize suits by the United States to permit *public* enforcement of Section 2 does not overcome the strong presumption that Congress also intended *private* enforcement of this rights-creating statute. *Allen*, 393 U.S. at 555 n.18 (“[W]e find merit in the argument that the specific references [in the VRA] to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as ‘private’ rights.” (quoting *Raines*, 362 U.S. at 27)).

*c. Several VRA Provisions Reflect Congress’s Understanding That Section 2 Can Be Privately Enforced*

Congress’s intent to provide a private remedy to enforce Section 2 also can be inferred from the text of three other provisions of the VRA: Sections 12(f), 3, and 14(e).

**Section 12(f)** provides:

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to [Section 12 of the VRA] and shall exercise the same without regard to whether *a person asserting rights* under the provisions of [the VRA] shall have exhausted any administrative or other remedies that may be provided by law.

52 U.S.C. § 10308(f) (emphasis added). The statutory term “person” is broad and expressly includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Dictionary Act, 1 U.S.C. § 1. Section 12(f) therefore reflects Congress’s intent that federal courts have subject-matter jurisdiction over suits to enforce the VRA’s substantive provisions—including Section 2—brought by private plaintiffs whose rights have been violated, as well as by the United States (when it has been given litigating authority). *Allen*, 393 U.S. at 555 n.18 (finding “force” to the argument that Section 12(f) “necessarily implies that private parties may bring suit under the [VRA]”). Indeed, because Congress repeatedly stated its intent for a private right of action to exist under Section 2—*see* 1982 Senate Report 30; 1981 House Report 32—it would have understood Section 12(f) as allowing district courts to hear such suits.

The district court in *Arkansas* acknowledged that Section 12(f) might “cut in \* \* \* favor” of implying a private right of action, but then it wrongly interpreted the provision as merely “referencing” the Attorney General’s authority under Section 12(e) of the statute. *Arkansas*, 2022 WL 496908, at \*12. That provision permits the Attorney General to seek a court order requiring an individual’s vote to be counted if, within 48 hours of the polls closing, such



individual alleges to an election observer appointed under the VRA that she was improperly prohibited from voting. 52 U.S.C. § 10308(e). According to the court, subsections 12(e) and (f) “work in combination such that the Attorney General of the United States can quickly bring a § 12(e) suit on behalf of a voter, while the voter can individually bring his or her own suit under state law or other federal law if such law provides a private right of action.” *Arkansas*, 2022 WL 496908, at \*13.

This Court should reject that strained reading because Section 12(f) references “chapters 103 to 107” of the VRA—*i.e.*, the full panoply of the statute’s substantive provisions—and not Section 12(e) alone. And whereas subsection (e) provides a narrow authority to the Attorney General tailored to exigent circumstances surrounding casting of ballots, subsection (f) is an omnibus provision granting federal courts subject-matter jurisdiction over *all* VRA claims. Compare 52 U.S.C. § 10308(e), with 52 U.S.C. § 10308(f). Finally, Section 12(e) *itself* provides federal courts with subject-matter jurisdiction over claims brought by the Attorney General under that provision. 52 U.S.C. § 10308(e) (providing that “the Attorney General may \* \* \* file with *the district court* an application” under Section 12(e) and that “[*t*]he *district court* shall hear and determine such matters immediately after the filing of such application” (emphases added)). The *Arkansas* district court’s interpretation of subsections (e) and (f) would render superfluous the latter’s broad reference to “a person asserting rights under” the VRA.

**Section 3** similarly reflects Congress’s understanding that private plaintiffs can enforce the VRA’s substantive provisions—including Section 2—by providing specific remedies to “the Attorney General *or an aggrieved person*” in lawsuits brought “under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. § 10302 (emphasis added). Congress added the term “aggrieved person” to each of Section 3’s remedies when it amended the VRA in 1975, Pub. L. No. 94-73, § 401, 89 Stat. 404, knowing full well that *Allen*



had construed the VRA as permitting private suits. 393 U.S. at 556-557; *see also* 1975 Senate Report 40 (stating that an “aggrieved person” includes “an individual or an organization representing the interests of injured persons”).

Although the district court in *Arkansas* conceded that an “aggrieved person” encompasses private plaintiffs, it concluded that private plaintiffs can invoke Section 3’s provisions not under the VRA—the very statute in which they appear—but under some other statute that the court failed to identify.<sup>6</sup> *Arkansas*, 2022 WL 496908, at \*13 (citation omitted). And despite Section 3 being part of the VRA, the court concluded that remedies under that provision are not available in lawsuits brought under Section 2 as amended—which prohibits both intentional discrimination and voting practices with a discriminatory result—because the statute’s safeguards now reach conduct that does not necessarily violate the Fourteenth or Fifteenth Amendment. *Id.*

The district court’s interpretation of Section 3 rests on a fundamental misunderstanding of when a statute “enforce[s] the voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. § 10302. It thought that any statute that provides broader protection than what is constitutionally prohibited under the Fourteenth or Fifteenth Amendments does not qualify. But that is incorrect. Both the Fourteenth and Fifteenth Amendments give Congress authority to “enforce” the Amendments’ protections, U.S. Const. Amend. XIV, § 5 and Amend. XV, § 2,

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<sup>6</sup> At the preliminary-injunction hearing, the *Arkansas* district court suggested that Section 3’s remedies can be invoked in private lawsuits brought under 42 U.S.C. § 1983 to enforce the Fifteenth Amendment. Trial Tr., vol. 5, 1165-1166. That would be an exceptionally oblique way of clarifying that relief is available under some other statute but not the one in which the language appears. 52 U.S.C. § 10302. On the flip side, there is nothing odd about Congress’s broad reference to statutes to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments—as opposed to simply referencing the VRA itself—because both the VRA and other statutes enforce those constitutional rights. *See, e.g.*, 42 U.S.C. § 1983; 52 U.S.C. § 10101.

through prophylactic legislation that extends beyond the prohibitions contained in section 1 of those amendments. *See Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727-728 (2003) (holding in the Fourteenth Amendment context that “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct”); *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (rejecting the argument that the Fifteenth Amendment permits Congress to “do no more than to forbid violations of the Fifteenth Amendment in general terms”).

Congress expressly characterized the 1982 amendments to Section 2 as prophylactic legislation to prevent constitutional violations. Pub. L. No. 89-110, 79 Stat. 437 (1965) (describing the original VRA as an act “[t]o enforce to enforce the fifteenth amendment to the Constitution of the United States”); 1982 Senate Report 40 (“[T]o enforce fully the Fourteenth and Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgment of the right to vote.”); 1981 House Report 31 (“Section 2, as amended, is an exercise of the broad remedial power of Congress to enforce the rights conferred by the Fourteenth and Fifteenth Amendments.”). Thus, Section 2 remains a “statute to enforce the voting guarantees of the fourteenth or fifteenth amendment” to which Section 3’s private remedies apply. 52 U.S.C. § 10302.

**Section 14(e)** bears on the question presented in ways similar to Section 3. It provides:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney’s fee.

52 U.S.C. § 10310(e) (emphasis added). Like Section 3, Section 14(e) reflects Congress’s understanding that private plaintiffs can bring claims under the VRA’s substantive provisions—including Section 2. Congress added Section 14(e) to the statute in 1975, well aware of *Allen*’s holding. Pub. L. No. 94-73, § 402, 89 Stat. 404; *see also* 1981 House Report 32 (stating that if

private plaintiffs prevail under Section 2, “they are entitled to attorneys’ fees under [Section 14(e)] and [42 U.S.C. §] 1988”); 1975 Senate Report 40 (finding “appropriate” the award of “attorneys’ fees to a prevailing party in suits to enforce the voting guarantees of the Fourteenth and Fifteenth amendments, *and statutes enacted under those amendments*” because “Congress depends heavily on private citizens to enforce the fundamental rights involved” (emphasis added)).

The *Arkansas* district court dismissed Section 14(e) for the same reasons that it disregarded Section 3: The provision applies only in “proceeding[s] to enforce the voting guarantees of the fourteenth or fifteenth amendment,” which the court did not view as including Section 2 claims. *Arkansas*, 2022 WL 496908, at \*14 (quoting 52 U.S.C. § 10310(e)). That reasoning is just as flawed with respect to Section 14(e) as it is with respect to Section 3. In addition, the court suggested at the preliminary-injunction hearing that the term “prevailing party” in Section 14(e) might refer solely to prevailing defendant States and therefore does not encompass private plaintiffs. Trial Tr., vol. 5, 1161. That suggestion betrays a fundamental misunderstanding of fee-shifting provisions that are commonplace in civil-rights statutes, which are designed to incentivize aggrieved parties to bring suit.

“[P]revailing party” is a “legal term of art” with which Congress was intimately familiar in 1975. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 602-603 (2001) (specifically listing Section 14(e) of the VRA as an example of the term’s technical use). The Supreme Court construed a nearly identical provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), as allowing private plaintiffs to recover attorneys’ fees whenever they secure a legal victory. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-402 (1968) (per curiam). As the Court explained, Title II suits are “private in form only,” and when a private plaintiff sues under that statute, “he does so not for himself alone

but also as a ‘private attorney general.’” *Ibid.* (citations omitted). For that reason, the Court construed the term “prevailing party” broadly “to encourage individuals injured by racial discrimination to seek judicial relief” because “[i]f successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.” *Ibid.*

When Congress inserted the term “prevailing party” into Section 14, it therefore did so with the plain understanding that that term is tailored to statutes—like Section 2—that allow private plaintiffs to sue as private attorneys general. *Shelby Cnty. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015) (“Congress intended for courts to award fees under the VRA, pursuant to the *Piggie Park* standard, when prevailing parties help[] secure compliance with the statute.”), *cert. denied*, 577 U.S. 1119 (2016); *accord Donnell v. United States*, 682 F.2d 240, 245 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

Collectively, Sections 12(f), 3, and 14(e) of the VRA evince Congress’s intent to provide a private remedy to enforce Section 2’s rights-creating language.

**C. In The Alternative, Private Plaintiffs Can Enforce The Rights Conferred By Section 2 Through Section 1983**

Even if the VRA did not evince Congress’s intent to create a private remedy to enforce Section 2—and it does—the statute would be presumptively enforceable against Defendant here through Section 1983, the general remedy that Congress has provided for private plaintiffs to redress violations of federal rights committed by state actors. *See* 42 U.S.C. § 1983; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that “the plain language” of Section 1983 “undoubtedly embraces” suits by private plaintiffs to enforce federal statutory rights).

In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court set forth the test that governs whether private plaintiffs can enforce a federal statute through Section 1983. First,

a court must “determine whether Congress *intended to create a federal right*” in the statute that a plaintiff seeks to enforce. *Id.* at 283. That analysis “is no different from the initial inquiry in an implied right of action case.” *Id.* at 285. But once a court determines a federal right exists, that “right is presumptively enforceable by § 1983,” and a plaintiff “do[es] not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Id.* at 284.

Although defendants can rebut the presumption that a federal right is enforceable through Section 1983, they can do so only by “demonstrat[ing] that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the statute itself” or “[2] impliedly, by creating a *comprehensive enforcement scheme* that is *incompatible with individual enforcement under § 1983.*” *Gonzaga*, 536 U.S. at 284 n.4 (emphases added; citations and internal quotation marks omitted). Specifically, a defendant could rebut the presumption by showing that Congress provided “a more restrictive *private remedy*” for violation of the relevant statute. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (emphasis added). But even an express private remedy does not “conclusively” foreclose the possibility that Congress meant such a remedy “to complement, rather than supplant § 1983.” *Id.* at 122.

Section 2 unquestionably is a rights-creating statute. *See* pp. 11-13, *supra*. Defendants therefore bear the burden to rebut the presumption that Section 2 is enforceable through Section 1983. *Gonzaga*, 536 U.S. at 284. Congress clearly did not “shut the door to private enforcement” of Section 2, *id.* at 284 n.4, because “there is certainly no specific exclusion of private actions” in the VRA, *Allen*, 393 U.S. at 555 n.18. *Cf. Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (holding that a voting provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101, is enforceable by private plaintiffs through Section 1983). Although the VRA plainly also permits the United States to enforce Section 2, the statute provides no explicit “private

judicial remedy,” much less a “more restrictive” one than Section 1983. *Abrams*, 544 U.S. at 121. Section 2’s *public* remedies do not constitute “a comprehensive enforcement scheme” and are “[c]ompatible with individual enforcement under § 1983,” *Gonzaga*, 536 U.S. at 284 n.4. The outsized role of private lawsuits in enforcing Section 2 also demonstrates that private enforcement “complement[s]” public enforcement of the statute. *Abrams*, 544 U.S. at 122; *see also Katz et al., supra*.

Accordingly, Section 2 is enforceable under Section 1983 if this Court concludes—contrary to the weight of authority—that no Section-2 specific implied private right of action exists to enforce the statute.<sup>7</sup>

### III. CONCLUSION

Private plaintiffs have a cause of action under Section 2 of the Voting Rights Act. Defendant relies on an erroneous outlier case inconsistent with decades of jurisprudence and Congressional ratification. This Court should therefore deny Defendant’s motion to dismiss on that basis.

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<sup>7</sup> We note that Plaintiffs here invoke Section 1983 in their Complaint. Compl. 1 & ¶ 10, ECF 1.

Dated: May 20, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 20, 2022, I electronically filed the foregoing Statement of Interest of the United States, using the CM/ECF system, which will send notification of such filing to all counsel of record.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
EASTERN DIVISION**

TURTLE MOUNTAIN BAND OF CHIPPEWA  
INDIANS, *et al.*

Plaintiffs,

v.

ALVIN JAEGER, in his official capacity as Secretary  
of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022-PDW-ARS

**SUPPLEMENTAL COMPLAINT**

Pursuant to Fed. R. Civ. P. 15(d), Plaintiffs file this Supplemental Complaint setting forth events that have occurred after the filing of the initial Complaint in this manner, ECF No. 1. On November 8, 2022, a general election was held under the redistricting plan challenged in this case—the first such election. That election result demonstrates that the configuration of state legislative districts in northeastern North Dakota—particularly District 9, subdistricts 9A and 9B, and District 15—prevent Native American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act.

**SUPPLEMENTAL FACTS**

1. On November 8, 2022, North Dakota held a general election—the first such election to take place under the new legislative redistricting plan enacted by the legislature in 2021.

2. The election included races for the newly drawn state senate District 9 (home to the Turtle Mountain Band of Chippewa Indians (“Turtle Mountain”)), state house subdistrict 9A (which is excessively packed with Native American voters), state house subdistrict 9B (in which

a sizeable Native American population is cracked from those in subdistrict 9A), and state senate and house elections in District 15 (home to the Spirit Lake Tribe (“Spirit Lake”)), whose Native American voters are cracked from those in nearby Turtle Mountain.

3. Native American candidates and candidates of choice of Native American voters lost all elections—as a result of opposition white bloc voting—for state senate and state house except in the packed configuration of subdistrict 9A. Among these losses were an incumbent Native American state senator and an incumbent state representative who had previously been elected as the candidate of choice of Native American voters.

### ***2022 District 9 State Senate Election***

4. District 9 incumbent State Senator Richard Marcellais ran for reelection in the November 2022 election. Senator Marcellais, an enrolled member of Plaintiff Turtle Mountain, first won election as District 9’s state senator in November 2006, and won reelection in 2010, 2014, and 2018. In these elections, District 9 was wholly contained within Rolette County, which is majority Native American by voting age population and home to Turtle Mountain’s reservation.

5. Senator Marcellais is the candidate of choice of Native American voters in District 9 as he receives the overwhelming majority of Native Americans’ votes.

6. The redistricting plan enacted in 2021 extended District 9 into portions of predominantly white Towner and Cavalier Counties, rather than combining Turtle Mountain with the Spirit Lake Tribe in Benson County, as the chairman of both Tribes had requested that the legislature do.

7. On November 8, 2022, Senator Marcellais lost reelection to Kent Weston, a white man. Mr. Weston received 53.8% of the vote to Senator Marcellais’ 46.0%.

8. Senator Marcellais carried Rolette County with 60% of the vote but won only 19.8% in Cavalier County and 34.5% in Towner County.

9. Senator Marcellais was the overwhelming choice of Native American voters in the district, while Mr. Weston was the overwhelming choice of white voters. Mr. Weston's victory was the result of white voters casting their ballots sufficiently as a bloc to defeat the candidate of choice of Native American voters for the state senate seat.

10. Native American voters' candidates of choice in other statewide elections failed to carry District 9 as well. For example, Melanie Moniz is a Native American—a member of the Mandan, Hidatsa and Arikara Nation (“MHA”)—and was a candidate for Public Service Commissioner. She was the overwhelming choice of Native American voters in District 9, while white voters overwhelmingly supported her white opponent, Julie Fedorchak.

11. Ms. Fedorchak carried District 9. Ms. Moniz carried Rolette County with 58% of the vote but won only 20.9% in Cavalier County and 29.2% in Towner County.

12. The same was true with that Native American candidate of choice for Congress, Cara Mund. She was the overwhelming favorite of Native American voters, but lost District 9 because of white bloc voting for her opponent Congressman Kelly Armstrong. While Ms. Mund carried Rolette County with 56.8%, she received only 27.3% in Cavalier County and 34.2% in Towner County.

13. The 2022 elections reveal that voting is racially polarized in the enacted version of District 9 and white voters vote sufficiently as a bloc to usually defeat Native American voters' candidates of choice.

14. By contrast, Ms. Mund and Ms. Moniz would have carried alternative configurations of District 9 that combine Turtle Mountain and Spirit Lake. Unlike the enacted

version of District 9, the alternative configurations would provide Native American voters an equal opportunity to elect their candidates of choice to the state senate.

15. The enacted plan reduced from one to zero the number of state senate districts in northeastern North Dakota in which Native American voters have an equal opportunity to elect candidates of their choice.

16. When the state senate reconvenes in January, it will be the first time since 1991 that no member of a North Dakota Tribe will serve in the state senate.

***2022 Subdistricts 9A and 9B State House Elections***

17. In elections conducted before the 2021 redistricting, Native American candidates of choice were elected to both state house seats in District 9, which was wholly contained within Rolette County. The 2021 redistricting legislation added portions of predominantly white Towner and Cavalier Counties to District 9, rather than the nearby Benson County (home to Spirit Lake). Then, the legislature split District 9 into two subdistricts for state house elections—packing Native American voters into subdistrict 9A and cracking others into subdistrict 9B, which is majority white.

18. In the November 8, 2022 election, only one candidate of choice of Native American voters prevailed—Jayme Davis, in subdistrict 9A. Ms. Davis, an enrolled member of Turtle Mountain and the candidate of choice of Native American voters, carried subdistrict 9A with 68.6% of the vote.

19. By contrast, incumbent Representative Marvin Nelson, the candidate of choice of Native American voters, lost reelection in subdistrict 9B, receiving just 37.6% of the vote. Representative Nelson won Rolette County's portion of subdistrict 9B with 54.7% of the vote, but received 20.4% in Cavalier County and 45.9% in Towner County.

20. The enacted redistricting plan thus resulted in the number of state house seats in northeastern North Dakota in which Native American voters have an equal opportunity to elect their candidates of choice dropping from two to just one.

21. By contrast, an alternatively configured District 9 containing Spirit Lake rather than predominantly white Towner and Cavalier Counties would provide Native American voters an equal opportunity to elect candidates of their choice in two state house seats elected at large from the district.

***2022 District 15 State Senate and State House Elections***

22. The Spirit Lake reservation is contained within District 15, and Plaintiff Collette Brown, an enrolled member of Spirit Lake ran as a candidate for state senate in the November 8, 2022 election. Ms. Brown lost, receiving 33.8% of the vote. Her white opponent, Judy Estenson, prevailed with 77.1% of the vote.

23. Ms. Brown was the overwhelming candidate of choice of Native American voters in District 15, while Ms. Estenson was the overwhelming candidate of choice of white voters.

24. Ms. Brown carried the Benson County portion of the district—home to the bulk of the Spirit Lake reservation—with 63.4%. In the precinct containing Fort Totten, which has a Native voting age population of 91.8%, Ms. Brown received 83.1% of the vote. But she failed to win in any other county in the district. She received 34.9% in Eddy County, 30.2% in Ramsey County, and 22.7% in Towner County—all predominantly white counties.

25. In the District 15 state house election, two white candidates (Kathy Frelich and Dennis Johnson) ran along with a Native American candidate (Heather Lawrence-Skadsem). Ms. Frelich won a seat with 41.6% and Mr. Johnson won a seat with 38.6%. Ms. Lawrence-Skadsem lost, receiving 19.7%.

26. Ms. Lawrence-Skadsem was the overwhelming candidate of choice among Native American voters, while Ms. Frelich and Mr. Johnson were the overwhelming candidates of choice among white voters.

27. Ms. Lawrence-Skadsem was the top vote-getter in the Benson County portion of District 15, where she received 45.7% to Mr. Johnson's 28.7% and Ms. Frelich's 25.1%. In the precinct containing Fort Totten, Ms. Lawrence-Skadsem received 65.9% to Mr. Johnson's 16.9% and Ms. Frelich's 16.5%. But Ms. Lawrence-Skadsem placed last in every other county, receiving 20.0% in Eddy County, 16.7% in Ramsey County, and 13.9% in Towner County.

28. Native American voters in District 15 are thus blocked from electing any candidate of choice to the state senate or state house because of bloc voting in opposition to their preferred candidates by white voters.

29. In an alternatively configured district that combines Turtle Mountain and Spirit Lake, Native American voters would have an equal opportunity to elect candidates of their choice to the state senate and both at-large state house seats.

### **SUPPLEMENTAL REQUESTED RELIEF**

Plaintiffs incorporate the relief requested in paragraphs A-F of their complaint, and request the following supplemental relief:

G. Order a special election for a newly configured state legislative district in November 2024 to ensure that Native American voters in Turtle Mountain and Spirit Lake are not forced to wait until 2026—six years into the decennial redistricting cycle—in order to be afforded an equal opportunity to elect their candidates of choice to the state senate.

December 7, 2022

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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,

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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>2</sup> 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.”<sup>3</sup> Although he revealed the content of the legal advice he was provided, he did not identify the attorney.

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<sup>3</sup> 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,<sup>4</sup> 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.

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<sup>4</sup> 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

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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

# EXHIBIT 1

## Def.'s Rule 26(a)(1) Disclosures

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
EASTERN DIVISION**

<p>Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>Alvin Jaeger, in his official capacity as Secretary of State of North Dakota,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Case No. 3:22-cv-00022</p> <p style="text-align: center;"><b>DEFENDANT ALVIN JAEGER'S INITIAL RULE 26(A)(1) DISCLOSURES</b></p>
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Defendant Alvin Jaeger, in his official capacity as Secretary of State of North Dakota (hereinafter “Defendant”) for his disclosure pursuant to Rule 26(a)(1) hereby provide the following information and documents as described herein:

**(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information:**

1. Wesley Davis

- Wesley Davis is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

2. Zachery S. King

- Zachery S. King is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

3. Collette Brown

- Collette Brown is a named plaintiff in this lawsuit and has information regarding the allegations contained in the Plaintiffs’ Complaint, regarding Defendant’s defenses, and regarding other matters at issue in this subject lawsuit.

4. Alvin Jaeger



600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Alvin Jaeger is a named defendant in this lawsuit and is the Secretary of the State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

5. Irwin James Narum (Jim) Silrum  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Irwin James Narum (Jim) Silrum is the Deputy Secretary of the State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

6. Brian Newby  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Brian Newby is the North Dakota State Election Director in the office of Secretary of State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

7. Lee Ann Oliver  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Lee Ann Oliver is the Election Specialist in the office of Secretary of State of North Dakota. She has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

8. Brian Nybakken  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Brian Nybakken is the Elections Administration System Manager in the office of Secretary of State of North Dakota. He has information regarding the impacts of redistricting on elections in North Dakota, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

9. Brent Sanford  
600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Brent Sanford is the Lieutenant Governor of the State of North Dakota. He has information regarding the allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

10. Reice Hasse

600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Reice Hasse is the former Senior Policy Advisor to Governor Burgum. He has information regarding the allegations contained in the Plaintiffs' Complaint, regarding State outreach to tribal representatives during redistricting, Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

11. Claire Ness

600 East Boulevard Avenue  
Bismarck, ND 58505-0360  
(701) 328-2210

- Claire Ness is currently the Deputy Attorney General of the State of North Dakota. At the time of the subject redistricting process, Claire Ness was Senior Counsel for the North Dakota Legislative Council. She has information regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

12. Emily Thompson

600 East Boulevard Avenue  
Bismarck, ND 58505-0360  
(701) 328-2916

- Emily Thompson is the Legal Division Director of the North Dakota Legislative Council. She has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

13. Samantha Kramer

600 East Boulevard Avenue  
Bismarck, ND 58505-0360  
(701) 328-2916

- Samantha Kramer is Senior Counsel and Assistant Code Revisor for the North Dakota Legislative Council. She has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

14. John Bjornson

600 East Boulevard Avenue  
Bismarck, ND 58505-0360  
(701) 328-2916

- John Bjornson is the Director of the North Dakota Legislative Council. He has information regarding legislative records relating to the subject redistricting, regarding the legislative redistricting process, regarding State outreach to tribal representatives during redistricting, regarding allegations contained in the Plaintiffs' Complaint, regarding Defendant's defenses, and regarding other matters at issue in this subject lawsuit.

15. Nathan Davis

600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Nathan Davis is the Executive Director of the North Dakota Indian Affairs Commission. He has information regarding State outreach to tribal representatives during redistricting and has information regarding the testimony he provided during the redistricting process.

16. Marietta Kemmet

600 East Boulevard Avenue  
Bismarck, ND 58505-0360

- Marietta Kemmet is an Executive Assistant to Nathan Davis, Executive Director of the North Dakota Indian Affairs Commission. She has information regarding State outreach to tribal representatives during redistricting.

17. Alysia LaCounte

General Counsel, Turtle Mountain Band of Chippewa Indians  
4180 Hwy 281  
Belcourt, ND 58316  
(701) 477-2600

- Alysia LaCounte has information regarding the testimony she provided to the Interim Tribal and State Relations Committee.

18. Nicole Donaghy

Executive Director  
North Dakota Native Vote  
919 South 7<sup>th</sup> Street, Ste. 603  
Bismarck, ND 58504  
(888) 425-1483

- Nicole Donaghy has information regarding the testimony she provided to the Interim Tribal and State Relations Committee and testimony she provided to the Redistricting Committee.

19. Jamie Azure

Chairman, Turtle Mountain Band of Chippewa Indians  
4180 Hwy 281  
Belcourt, ND 58316  
(701) 477-2600

- Jamie Azure has information regarding the testimony he provided to the Interim Tribal and State Relations Committee.

20. Karen Ehrens  
Secretary, League of Women Voters of North Dakota  
233 West Ave C  
Bismarck, ND 58501  
- Karen Ehrens has information regarding the testimony she provided to the Redistricting Committee.
21. Rick Gion  
Director, North Dakota Voters First  
- Rick Gion has information regarding the testimony he provided to the Redistricting Committee.
22. Matt Perdue  
Lobbyist, North Dakota Farmers Union  
- Matt Perdue has information regarding the testimony he provided to the Redistricting Committee.
23. Collette Brown  
Executive Director, Gaming Commission, Spirit Lake Casino and Resort  
7889 Hwy 57  
Saint Michael, ND 58370  
(701) 776-4747  
- Collette Brown has information regarding the testimony she provided to the Redistricting Committee and regarding testimony she provided to the Tribal and State Relations Committee.
24. Mark Fox  
Chairman, Three Affiliated Tribes of the Fort Berthold Reservation  
404 Frontage Rd.  
New Town, ND 58763  
(701) 627-4781  
- Mark Fox has information regarding the testimony he provided to the Tribal and State Relations Committee and testimony he provided to the Redistricting Committee,
25. Ted Lone Fight  
- Ted Lone Flight has information regarding the testimony he provided to the Tribal and State Relations Committee.
26. Melanie Moniz  
- Melanie Moniz has information regarding the testimony she provided to the Tribal and State Relations Committee.
27. Joletta Bird Bear

- Joletta Bird Bear has information regarding the testimony she provided to the Tribal and State Relations Committee.

28. Cynthia Monteau

- Cynthia Monteau has information regarding the testimony she provided to the Tribal and State Relations Committee.

29. Ruth Buffalo

- Ruth Buffalo has information regarding the testimony she provided to the Tribal and State Relations Committee.

30. Douglas Yankton

Sr., Chairman, Spirit Lake Tribe  
P.O. Box 359  
Fort Totten, ND 58335  
(701) 381-2006

- Douglas Yankton has information regarding the testimony he provided to the Tribal and State Relations Committee and testimony he provided to the Redistricting Committee.

31. Mike Faith

Chairman, Standing Rock Sioux Tribe  
1 Standing Rock Avenue  
Fort Yates, ND 58538  
(701) 854-8500

- Mike Faith has information regarding the testimony he provided to the Redistricting Committee.

32. Charles Walker

Councilman, Standing Rock Sioux Tribe  
1 Standing Rock Avenue  
Fort Yates, ND 58538  
(701) 854-8500

- Charles Walker has information regarding the testimony he provided to the Redistricting Committee.

33. Matthew Campbell

Staff Attorney, Native American Rights Fund  
1506 Broadway  
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(303) 447-8760

- Matthew Campbell has information regarding the testimony he provided to the Redistricting Committee.

34. Erin Oban

- Erin Oban has information regarding the testimony she provided to the Redistricting Committee.

35. Pete Hanebutt

Director of Public Policy, North Dakota Farm Bureau  
4900 Ottawa Street  
Bismarck, ND 58503  
(701) 224-0330

- Pete Hanebutt has information regarding the testimony he provided to the Redistricting Committee.

36. Kevin Hermann

- Kevin Hermann has information regarding the testimony he provided to the Redistricting Committee.

37. Aaron Birst

Legal Counsel and Assistant Director – Policy, North Dakota Association of Counties  
1661 Capitol Way  
Bismarck, ND 58502  
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- Aaron Birst has information regarding the testimony he provided to the Redistricting Committee.

38. Kathy Skroch

10105 155<sup>th</sup> Avenue SE  
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(701) 538-7396

- Kathy Skroch has information regarding the testimony she provided to the Redistricting Committee.

39. Mike Schatz

400 East Nineth Street  
New England, ND 58647-7528  
(701) 579-4823

- Mike Schatz has information regarding the testimony he provided to the Redistricting Committee.

40. Gerald Wise

Mayor, City of Lincoln

- Gerald Wise has information regarding the testimony he provided to the Redistricting Committee.

41. Jan Jellif

- Jan Jelliff has information regarding the testimony she provided to the Redistricting Committee on September 22-23, 2021.

42. Jennifer Tarlin

- Jennifer Tarlin has information regarding the testimony she provided to the Redistricting Committee on September 22-23, 2021.

43. Terry Jones

P.O. Box 1964  
New Town, ND 58763-1964  
(701) 627-3397

- Terry Jones has information regarding the testimony he provided to the Redistricting Committee. He also has information regarding the matters he testified to at the hearing on the motion for preliminary injunction held May 5, 2022 in case no: 1:22-cv-00031.

44. Jason Heitkamp

921 Dakota Avenue, Suite F  
Wahpeton, ND 58075-4341  
(701) 640-4643

- Jason Heitkamp has information regarding the testimony he provided to the Redistricting Committee.

45. Norma Kjos

- Norma Kjos has information regarding the testimony she provided to the Redistricting Committee.

46. Peter Leedahl

- Peter Leedahl has information regarding the testimony he provided to the Redistricting Committee.

47. Marvin Nelson

P.O. Box 577  
Rolla, ND 58367-0577  
(701) 550-9731

- Marvin Nelson has information regarding the testimony he provided to the Redistricting Committee.

48. Gary Kreidt

3892 County Road 86  
New Salem, ND 58563-9406  
(701) 843-7074

- Gary Kreidt has information regarding the testimony he provided to the Redistricting Committee.

49. Howard Anderson

721 21<sup>st</sup> Avenue NW  
Turtle Lake, ND 58575-9606  
(701) 861-9749

- Howard Anderson has information regarding the testimony he provided to the Redistricting Committee.

50. Craig Headland

4950 92<sup>nd</sup> Avenue SE  
Montpelier, ND 58472-9630  
(701) 489-3184

- Craig Headland has information regarding the testimony he provided to the Redistricting Committee.

51. Sebastian Ertelt

P.O. Box 63  
Gwinner, ND 58040-0063  
(701) 683-2194

- Sebastian Ertelt has information regarding the testimony he provided to the Redistricting Committee.

52. Larry Bellew

812 Bel Air Place  
Minot, ND 58703-1751  
(701) 852-5786

- Larry Bellew has information regarding the testimony he provided to the Redistricting Committee.

53. All individual North Dakota legislators who participated in the subject redistricting process, including in the Interim Redistricting Committee, Interim Tribal and State Relations Committee, Joint Redistricting Committee, North Dakota House of Representatives, and/or North Dakota Senate.

54. All other individuals, whose names and addresses are presently unknown, who have knowledge regarding the allegations in Plaintiffs' Complaint, Defendant's Answer, and other matters at issue in this subject lawsuit.

**(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment:**

1. All documents produced and/or referenced by Plaintiffs and/or Defendants-Intervenors in their Rule 26(a)(1) disclosures, to the extent not objected to.
2. Various documents within the control of Plaintiffs and/or Defendants-Intervenors in this matter which have not yet been provided and/or produced, to the extent not objected to.



3. All documents produced by any of the Plaintiffs and/or Defendants-Intervenors in response to discovery requests.
4. Miscellaneous documents previously provided via counsel.
5. Various other documents which may be located during the discovery process, to the extent not objected to.
6. All documents, exhibits, and evidence submitted in favor of or in opposition to plaintiffs' motion for preliminary injunction (case no: 1-22-cv-00031).
7. 2020 U.S. Census data, legislative redistricting data, and precinct data from the 53 counties in North Dakota. This data is kept in the electronic files of the Secretary of State's office.
8. Communications between the Secretary of State's office and county election officials regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
9. Communications between the Secretary of State's office and state and district political parties regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
10. Communications between the Secretary of State's office and Legislative Council regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
11. Communications between the Secretary of State's office and members of the public regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
12. Communications between the Secretary of State's office and state election vendors regarding the implementation of the redistricting plan contained in House Bill 1504. These communications are kept in the electronic files of the Secretary of State's office.
13. Communications between the Secretary of State's office and the Governor's office regarding redistricting, kept in the electronic files of the office of the Governor.
14. Various communications and documents to and from the Governor's office regarding redistricting, kept in the electronic files of the office of the Governor.

15. Communications and documents relating to House Bill No. 1504, kept in the electronic files of the office of the Governor.

16. All documents, files, and videos that are publicly available on the Redistricting Committee webpage:

<https://www.legis.nd.gov/assembly/67-2021/committees/interim/redistricting-committee>

17. All documents, files, and videos that are publicly available on the Tribal and State Relations Committee webpage:

<https://ndlegis.gov/assembly/67-2021/committees/interim/tribal-and-state-relations-committee>

18. All documents, files, and videos that are publicly available on the following webpage:

<https://www.ndlegis.gov/assembly/67-2021/special-session/bill-video/bv1504.html>

19. All Redistricting Committee memoranda publicly available on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/session-interim/2021-committee-memorandums>

20. All maps that are publicly available on the Redistricting Committee webpage:

<https://www.legis.nd.gov/assembly/67-2021/session-interim/2021-legislative-redistricting-maps>

21. All maps approved by the North Dakota Legislative Assembly during the November 2021 special session, and related files, data, charts, and Interactive Statewide Map publicly available on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/special/approved-legislative-redistricting-maps>

22. All maps of prior legislative districts, publicly available through the links on the following webpage:

<https://www.legis.nd.gov/assembly/67-2021/members/members-by-district>

**(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered:**

Not applicable.

**(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment:**

Not applicable

Defendant reserves the right to supplement or amend these disclosures if new or additional information becomes available.

Dated this 23rd day of June, 2022.

By: /s/ David R. Phillips  
David R. Phillips  
Special Assistant Attorney General  
ND Bar # 06116  
300 West Century Avenue  
P.O. Box 4247  
Bismarck, ND 58502-4247  
(701) 751-8188  
[dphillips@bgwattorneys.com](mailto:dphillips@bgwattorneys.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANT ALVIN JAEGER'S INITIAL RULE 26(A)(1) DISCLOSURES** was on the 23rd day of June, 2022, emailed to the following:

Mark P. Gaber  
DC Bar No. 98807  
Campaign Legal Center  
1101 14th St. NW, Ste. 400  
Washington, DC 20005  
[mgaber@campaignlegal.org](mailto:mgaber@campaignlegal.org)

Molly E. Danahy  
DC Bar No. 1643411  
Campaign Legal Center  
1101 14th St. NW, Ste. 400  
Washington, DC 20005  
[mdanahy@campaignlegal.org](mailto:mdanahy@campaignlegal.org)

Michael S. Carter  
OK No. 31961  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80301  
[carter@narf.org](mailto:carter@narf.org)

Timothy Q. Purdon  
ND No. 05392  
ROBINS KAPLAN LLP  
1207 West Divide Avenue, Suite 200  
Bismarck, ND 58501  
[TPurdon@RobinsKaplan.com](mailto:TPurdon@RobinsKaplan.com)

Bryan L. Sells  
PO BOX 5493  
Atlanta, GA 31107-0493  
[bryan@bryansellslaw.com](mailto:bryan@bryansellslaw.com)

Samantha Blencke Kelty  
Native American Rights Fund  
1514 P Street NW, Suite D  
Washington, DC 20005  
[kelty@narf.org](mailto:kelty@narf.org)

By:           /s/ David R. Phillips            
          DAVID R. PHILLIPS

# EXHIBIT 3

## Nov. 9 Email from S. Porsborg

## Molly Danahy

---

**From:** Scott Porsborg <SPorsborg@smithporsborg.com>  
**Sent:** Wednesday, November 9, 2022 4:39 PM  
**To:** Molly Danahy; Mark Gaber; Anna Heinen; carter@narf.org; mcampbell@narf.org; tpurdon@robinskapal.com; kelty@narf.org; bryan@bryansellslaw.com  
**Cc:** Austin Lafferty; April Heinz; masagsve@nd.gov; David Phillips  
**Subject:** RE: Turtle Mountain Band of Chippewa Indians v. Alvin Jaeger - Case No 3:22-cv-22

Molly, I've been informed that LC believes about two weeks should be sufficient to gather the materials and prepare a log.

Scott K. Porsborg  
Certified Civil Trial Specialist – National Board of Trial Advocacy  
Smith Porsborg Schweigert Armstrong Moldenhauer & Smith  
P.O. Box 460  
122 East Broadway  
Bismarck ND 58502-0460  
Phone: 701-258-0630  
[sporsborg@smithporsborg.com](mailto:sporsborg@smithporsborg.com)

---

**From:** Molly Danahy <mdanahy@campaignlegalcenter.org>  
**Sent:** Thursday, November 3, 2022 2:47 PM  
**To:** Scott Porsborg <SPorsborg@smithporsborg.com>; Mark Gaber <MGaber@campaignlegalcenter.org>; Anna Heinen <AHeinen@smithporsborg.com>; carter@narf.org; mcampbell@narf.org; tpurdon@robinskapal.com; kelty@narf.org; bryan@bryansellslaw.com  
**Cc:** Austin Lafferty <ALafferty@smithporsborg.com>; April Heinz <AHeinz@smithporsborg.com>; masagsve@nd.gov; Daniel Phillips <dphillips@solberglaw.com>  
**Subject:** RE: Turtle Mountain Band of Chippewa Indians v. Alvin Jaeger - Case No 3:22-cv-22

Hi all –

We're available for a meet and confer on Wednesday, November 9 at 11 CT. If that works for everyone. I'll circulate a calendar invite.

Best,

Molly

### Molly E. Danahy

Senior Legal Counsel, Litigation

202.868.4759 | [mdanahy@campaignlegalcenter.org](mailto:mdanahy@campaignlegalcenter.org)

Campaign Legal Center  
1101 14th St. NW, Suite 400  
Washington, DC 20005  
[campaignlegalcenter.org](http://campaignlegalcenter.org)

---

**From:** Scott Porsborg <[SPorsborg@smithporsborg.com](mailto:SPorsborg@smithporsborg.com)>  
**Sent:** Thursday, November 3, 2022 9:20 AM  
**To:** Mark Gaber <[MGaber@campaignlegalcenter.org](mailto:MGaber@campaignlegalcenter.org)>; Anna Heinen <[AHeinen@smithporsborg.com](mailto:AHeinen@smithporsborg.com)>; [carter@narf.org](mailto:carter@narf.org); [mcampbell@narf.org](mailto:mcampbell@narf.org); Molly Danahy <[mdanahy@campaignlegalcenter.org](mailto:mdanahy@campaignlegalcenter.org)>; [tpurdon@robinskapal.com](mailto:tpurdon@robinskapal.com); [kelty@narf.org](mailto:kelty@narf.org); [bryan@bryansellsllaw.com](mailto:bryan@bryansellsllaw.com)  
**Cc:** Austin Lafferty <[ALafferty@smithporsborg.com](mailto:ALafferty@smithporsborg.com)>; April Heinz <[AHeinz@smithporsborg.com](mailto:AHeinz@smithporsborg.com)>; [masagsve@nd.gov](mailto:masagsve@nd.gov); Daniel Phillips <[dphillips@solberglaw.com](mailto:dphillips@solberglaw.com)>  
**Subject:** RE: Turtle Mountain Band of Chippewa Indians v. Alvin Jaeger - Case No 3:22-cv-22

Mark, I'm available all of next week starting Tuesday, with the exception of Wednesday afternoon and Friday. Let me know what works for you.

Scott K. Porsborg  
Certified Civil Trial Specialist – National Board of Trial Advocacy  
Smith Porsborg Schweigert Armstrong Moldenhauer & Smith  
P.O. Box 460  
122 East Broadway  
Bismarck ND 58502-0460  
Phone: 701-258-0630  
[sporsborg@smithporsborg.com](mailto:sporsborg@smithporsborg.com)

---

**From:** Mark Gaber <[MGaber@campaignlegalcenter.org](mailto:MGaber@campaignlegalcenter.org)>  
**Sent:** Wednesday, November 2, 2022 8:46 PM  
**To:** Anna Heinen <[AHeinen@smithporsborg.com](mailto:AHeinen@smithporsborg.com)>; [carter@narf.org](mailto:carter@narf.org); [mcampbell@narf.org](mailto:mcampbell@narf.org); Molly Danahy <[mdanahy@campaignlegalcenter.org](mailto:mdanahy@campaignlegalcenter.org)>; [tpurdon@robinskapal.com](mailto:tpurdon@robinskapal.com); [kelty@narf.org](mailto:kelty@narf.org); [bryan@bryansellsllaw.com](mailto:bryan@bryansellsllaw.com)  
**Cc:** Scott Porsborg <[SPorsborg@smithporsborg.com](mailto:SPorsborg@smithporsborg.com)>; Austin Lafferty <[ALafferty@smithporsborg.com](mailto:ALafferty@smithporsborg.com)>; April Heinz <[AHeinz@smithporsborg.com](mailto:AHeinz@smithporsborg.com)>; [masagsve@nd.gov](mailto:masagsve@nd.gov); Daniel Phillips <[dphillips@solberglaw.com](mailto:dphillips@solberglaw.com)>  
**Subject:** RE: Turtle Mountain Band of Chippewa Indians v. Alvin Jaeger - Case No 3:22-cv-22

Counsel—

Can we schedule a time for a phone call or zoom to meet and confer regarding the objections to the subpoenas referenced below?

Likewise, I have attached a deposition subpoena for Representative Devlin. The date and location are placeholders – we are hoping to conduct the deposition virtually by zoom if the witnesses and counsel are agreeable, and of course we will work with you on scheduling available dates this month. Please let me know if you will accept service of these subpoena, and the Representative's availability.

Sincerely,  
Mark Gaber

---

**From:** Anna Heinen <[AHeinen@smithporsborg.com](mailto:AHeinen@smithporsborg.com)>  
**Sent:** Friday, October 14, 2022 2:38 PM  
**To:** [carter@narf.org](mailto:carter@narf.org); [mcampbell@narf.org](mailto:mcampbell@narf.org); Mark Gaber <[MGaber@campaignlegalcenter.org](mailto:MGaber@campaignlegalcenter.org)>; Molly Danahy <[mdanahy@campaignlegalcenter.org](mailto:mdanahy@campaignlegalcenter.org)>; [tpurdon@robinskapal.com](mailto:tpurdon@robinskapal.com); [kelty@narf.org](mailto:kelty@narf.org); [bryan@bryansellsllaw.com](mailto:bryan@bryansellsllaw.com)  
**Cc:** Scott Porsborg <[SPorsborg@smithporsborg.com](mailto:SPorsborg@smithporsborg.com)>; Austin Lafferty <[ALafferty@smithporsborg.com](mailto:ALafferty@smithporsborg.com)>; April Heinz <[AHeinz@smithporsborg.com](mailto:AHeinz@smithporsborg.com)>; [masagsve@nd.gov](mailto:masagsve@nd.gov); Daniel Phillips <[dphillips@solberglaw.com](mailto:dphillips@solberglaw.com)>  
**Subject:** Turtle Mountain Band of Chippewa Indians v. Alvin Jaeger - Case No 3:22-cv-22

All:

Please find the attached Objection with regard to the above-captioned matter.

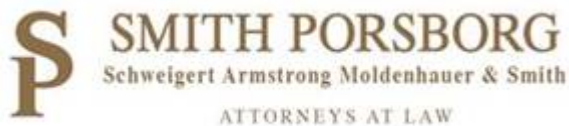
Feel free to contact me if you have any questions.

Thank you,

Anna

*Anna M. Heinen*

Paralegal to Scott Porsborg and Mitch Armstrong



122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
Phone: 701.258.0630 / Fax: 701.258.6498  
Email: [aheinen@smithporsborg.com](mailto:aheinen@smithporsborg.com)

\*\*\*CONFIDENTIALITY NOTE\*\*\*

This email, including attachments is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510 et seq., is confidential, and/or is legally privileged. It is intended for use only by the person to whom it is directed. If you are not the intended recipient and/or received it in error, you should (1) reply by email to the sender; (2) delete this email, including deletion of all associated text files from all storage locations including individual and network storage devices; and (3) refrain from disseminating or copying this communication. Thank you.



**EXHIBIT 5**

**May 5, 2022**

**Pl Hrg. Tr. Excerpt**

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

- - - - -

Charles Walen and Paul )  
Henderson, )

Plaintiffs, )

vs. )

**FILE NO. 1:22-cv-31**

Doug Burgum and Alvin )  
Jaeger, )

Defendants, )

and )

Mandan, Hidatsa & Arikara )  
Nation, Lisa DeVille, )  
and Cesareo Alvarez, Jr., )

Intervenor Defendants. )

- - - - -

**PARTIAL**

**T R A N S C R I P T**

**O F**

**P R O C E E D I N G S**

**(Testimony of Terry B. Jones)**

**MOTION FOR PRELIMINARY INJUNCTION**

**May 5, 2022**

**Pages 1-37**

HELD AT: QUENTIN BURDICK UNITED STATES COURTHOUSE  
655 FIRST AVENUE NORTH  
FARGO, NORTH DAKOTA 58102

BEFORE: THE HONORABLE RALPH R. ERICKSON, PETER D. WELTE  
AND DANIEL L. HOVLAND

COURT REPORTER: KELLY A. KROKE

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**A P P E A R A N C E S**

**MR. PAUL R. SANDERSON** **COUNSEL FOR PLAINTIFFS;**  
**MR. RYAN J. JOYCE**

Attorneys at Law  
1100 College Drive, Ste. 5  
Bismarck, ND 58501

AND

**MR. ROBERT W. HARMS**  
Attorney at Law  
815 North Mandan Street  
Bismarck, ND 58501

**MR. DAVID R. PHILLIPS** **COUNSEL FOR DEFENDANTS;**

Attorney at Law  
300 West Century Avenue  
Bismarck, ND 58502

AND

**MR. MATTHEW A. SAGSVEEN**  
Attorney at Law  
500 North 9th Street  
Bismarck, ND 58501

**MS. SAMANTHA KELTY** **COUNSEL FOR INTERVENOR DEFENDANTS;**

Attorney at Law  
1514 P Street NW, Ste. D  
Washington, DC 20005

AND

**MR. MICHAEL S. CARTER**  
Attorney at Law  
1506 Broadway  
Boulder, CO 80302

AND

**MR. MARK GABER** (Via Video)  
Attorney at Law  
1101 14th Street NW, Ste. 400  
Washington, DC 20005

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I N D E X

W I T N E S S E S

PLAINTIFFS'

PAGE NO.

TERRY B. JONES

Direct Examination by Mr. Sanderson	7
Cross-Examination by Ms. Kelty	16
Redirect Examination by Mr. Sanderson	30
Cross-Examination by Mr. Phillips	35

E X H I B I T S

EXHIBIT NO.

DESCRIPTION

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(See Clerk's Minutes - ECF Doc.#36)

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**P R O C E E D I N G S**

(May 5, 2022: The following proceedings commenced at 9:00 a.m.):

JUDGE ERICKSON: We'll go on the record in a case entitled Charles Walen, et al. Versus Doug Burgum, et al. It's File No. 1:22-cv-31. The record should reflect that -- well, all counsel are here. And why don't we go ahead and do this: Why don't we have counsel for the plaintiffs go ahead and identify themselves for the record.

MR. SANDERSON: Good morning, Your Honor. My name is Paul Sanderson. I represent the plaintiffs, Charles Walen and Paul Henderson. At counsel table with me is Attorney Ryan Joyce and Attorney Robert Harms.

JUDGE ERICKSON: All right. And for the defendants Burgum and Jaeger, Mr. Wrigley, do you wish to speak first?

MR. WRIGLEY: Speak first?

JUDGE ERICKSON: Well, no, I mean, I just want to -- you are the Attorney General. Excuse me, I'm sorry. You are the Attorney General. I thought I'd ask you first.

MR. WRIGLEY: I keep forgetting to -- nice to see you this morning.

JUDGE ERICKSON: All right. And do you want

1 to identify other counsel appearing on behalf of the  
2 State employees, State defendants?

3 MR. PHILLIPS: David Phillips, Your Honor,  
4 Special Assistant Attorney General. The Solicitor  
5 General Matt Sagsveen is also present and the Deputy  
6 Secretary of State Jim Silrum is present today.

7 JUDGE ERICKSON: All right. And then we  
8 have -- who's appearing by video? I'm sorry.

9 MR. GABER: Mark Gaber for the intervenors,  
10 Your Honor.

11 JUDGE ERICKSON: All right. Okay. And who  
12 else -- is anyone else appearing on behalf of the  
13 intervenors? Oh, I'm sorry, there you are. I kept  
14 looking around saying I can't see where everybody is.

15 MR. CARTER: Good morning, Your Honor.  
16 Michael Carter on behalf of the intervenors along with  
17 Samantha Kelty and Emily deLisle assisting.

18 THE COURT: Thank you. All right. I am a  
19 United States Circuit judge and so obviously this whole  
20 presiding over a real proceeding is a little complicated  
21 for me. But now that we've got the hard part done and  
22 that is have all of the attorneys identified for the  
23 record, I think I'll lay out just kind of in general  
24 order the way that I see the proceedings.

25 I believe that the parties do have some

1 additional evidence or cross-examinations that they wish  
2 to present and so we'll take up all evidence from any  
3 party who wishes to present evidence at this hearing  
4 first. Following that we'll likely take a short recess  
5 and then come back and take argument on the legal  
6 matters. I presume that we'll not -- that we will not  
7 be in a position to rule from the bench so we'll  
8 probably take it under advisement and look to get  
9 something out in writing shortly thereafter.

10 The issue before the Court obviously is  
11 we're here on the motion for a preliminary injunction  
12 and the factors that we need to consider both the  
13 substantive law relating to the Voting Rights Act and to  
14 the issuance of preliminary injunctions is well-known  
15 and so I won't summarize the law for you because I'm  
16 pretty confident that you've got that piece of it down  
17 so far.

18 All right. I say "so far" because we all  
19 know that Courts have a tendency to, you know, get to a  
20 place that is somewhat unexpected and so we'll see where  
21 we go from there. All right. So at this point it's the  
22 movants' case to present any additional evidence that  
23 they wish.

24 A couple of general rules. I would like  
25 whoever is going to examine the witness to examine from

1 the podium or the lectern so that they're closer to the  
2 witness and so that the line of sight for the court  
3 reporter is straight and because we have people sitting  
4 over here on the left it just will be a problematic  
5 otherwise, okay?

6 And so I don't know who's going to speak  
7 first for the movants but they may call their first  
8 witness.

9 MR. SANDERSON: Thank you, Your Honor. The  
10 movants would call Representative Terry Jones.

11 JUDGE ERICKSON: Representative Jones, if  
12 you would please come forward, stand before the clerk,  
13 raise your right hand and take the oath.

14 (Witness sworn.)

15 THE COURT: Representative Jones, the  
16 microphone in front of you is directional so it would be  
17 helpful if you talk directly into it. It'll pick you up  
18 a little bit better.

19 Thank you. You may proceed.

20 MR. SANDERSON: Thank you, Judge.

21 **TERRY B. JONES,**

22 **HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE**  
23 **WHOLE TRUTH, AND NOTHING BUT THE TRUTH, RELATIVE TO**  
24 **SAID CAUSE, TESTIFIED AS FOLLOWS:**

24 **DIRECT EXAMINATION**

25 **BY MR. SANDERSON:**



1 Q. Good morning, Representative Jones. Could you  
2 please state your full name and address for the record.

3 A. Terry Burton Jones, 413 Eagle Drive in New Town,  
4 North Dakota, 58763.

5 Q. And, Representative Jones, are you currently one  
6 of the elected North Dakota House of Representatives  
7 from District 4?

8 A. Yes.

9 Q. What year were you first elected to the  
10 Legislative Assembly?

11 A. 2016.

12 Q. And could you just briefly explain the areas --  
13 the geographical areas that District 4 covers.

14 A. It's a huge district. It goes all the way from  
15 Kenmare up against the Canadian border down to Halliday  
16 and Dunn Center. It reached clear over just underneath  
17 Minot. They've changed it here just recently and  
18 shrunked it a little bit but it's a huge district,  
19 covers a lot of country.

20 Q. And does District 4 also include the Fort  
21 Berthold Indian Reservation?

22 A. It does.

23 Q. When was your most recent election in District 4?

24 A. We just were reelected in 2020.

25 Q. How long a term were you elected for in 2020?

1 A. I was elected for a four-year term.

2 Q. And currently are you up for election in 2022?

3 A. Yes. Because of the subdistricts, we had to run  
4 again this year.

5 Q. Now, Representative Jones, I want to ask you a  
6 few questions. You're aware that the Redistricting  
7 Committee of the legislature met in 2021?

8 A. Yes.

9 Q. Were you a member of the Redistricting Committee?

10 A. No, I was not.

11 Q. Did you attend Redistricting Committee meetings?

12 A. I did.

13 Q. How many Redistricting Committee meetings did you  
14 attend?

15 A. I believe I attended either two or three towards  
16 the end of the redistricting work.

17 Q. Why would you as a representative of District 4  
18 attend the Redistricting Committee meetings in 2021?

19 A. There was information coming to me from members  
20 on the Redistricting Committee that they were  
21 considering subdistricts in Districts 4 and District 9.  
22 At first I wasn't too concerned about it but towards the  
23 end the members on the committee were telling me that it  
24 was getting very serious. It looked like it was going  
25 to move forward.

1 Q. Did you testify before the Redistricting  
2 Committee?

3 A. I did.

4 Q. And what was the purpose of your testimony before  
5 the Redistricting Committee?

6 A. I'm a representative from District 4 and I  
7 represent members, the district members. And the  
8 information I was getting as I was studying was that  
9 what was happening was not appropriate, was  
10 unconstitutional. So in order to both uphold my oath to  
11 support the Constitution of North Dakota and my job to  
12 represent and serve the District 4 people, I attended  
13 those meetings to try to make sure that we didn't do  
14 something that was wrong.

15 Q. In addition to attending meetings, did you  
16 discuss with members of the Redistricting Committee your  
17 concerns about the redistricting process and  
18 subdistricts in Districts 4 and 9?

19 A. Yes, I did.

20 Q. Based on your attendance in the meeting and your  
21 testimony at the Redistricting Committee hearings, do  
22 you have an understanding of why the Redistricting  
23 Committee recommended subdistricts in Districts 4 and 9?

24 A. I do.

25 Q. And based on your observations, why did the

1 Redistricting Committee recommend subdistricts in their  
2 maps for Districts 4 and 9?

3 A. Redistricting is a complex thing and there's been  
4 some history with this particular issue here in  
5 District 4. Previous redistricting attempts ended up  
6 causing a lawsuit to occur and that lawsuit when it was  
7 tried it was discovered that the first prong of the  
8 Gingles case criteria had not been met. And so the  
9 judge in that case said because the first prong hasn't  
10 been met he dismissed it.

11 Somehow the members of the committee that  
12 had been involved with that got the interpretation that  
13 if the numbers were ever met that it was inevitable that  
14 you would have to have a subdistrict. Somehow in my  
15 discussions with them and in the stuff that I was  
16 watching them discuss they missed the point that you had  
17 to meet all three of those things, and so I was  
18 desperately trying to explain to them that there's more  
19 than just one criteria that had to have been met. And  
20 so that's what was my main focus for attending the  
21 meetings and visiting them with.

22 Q. And, Representative Jones, you indicated that  
23 there was a prior lawsuit the State of North Dakota was  
24 involved in. Was it your understanding that prior  
25 lawsuit involved the Voting Rights Act claim?

1 A. Yes, it was.

2 Q. And based on your observations and attendance at  
3 the subdistricting committee -- or the districting --  
4 Redistricting Committee meetings, was race a predominant  
5 factor the committee determined in creating the  
6 subdistricts in Districts 4 and 9?

7 MR. PHILLIPS: Objection. Calls for a legal  
8 conclusion.

9 JUDGE ERICKSON: It does call for a legal  
10 conclusion in part. However, I think his understanding  
11 of what the process was as a member of the legislature  
12 is relevant, and I'll hear it for what it's worth. I  
13 mean, this is a bench proceeding. We understand that  
14 ultimately we'll be the people drawing that legal  
15 conclusion.

16 You may answer.

17 THE WITNESS: Thank you, Your Honor.

18 A. It was my understanding that their concern was  
19 based almost entirely on race of the group inside the  
20 boundaries.

21 Q. (Mr. Sanderson continuing) Now one of the things  
22 you testified a moment ago to, Representative Jones, was  
23 the Gingles factor and you're referring to U. S. Supreme  
24 Court case Thornburg v. Gingles; is that correct?

25 A. That is correct.

1 Q. Okay. Based on your observations and attendance  
2 at the Redistricting Committee meetings, did the  
3 Redistricting Committee ever retain or consult an expert  
4 regarding voting patterns in Districts 4 and 9 during  
5 the redistricting process?

6 A. They did not.

7 Q. Based on your observations and attendance at the  
8 redistricting hearings, did the Redistricting Committee  
9 ever review any previous election results in Districts 4  
10 or District 9?

11 A. To my knowledge they did not.

12 Q. Now again based on your observations and  
13 attendance at the Redistricting Committee hearings, did  
14 the Redistricting Committee do any studies analyzing  
15 voting results in Districts 4 and 9?

16 A. They did not.

17 Q. And along those same lines based on your  
18 observation and attendance at those meetings, was there  
19 ever any discussion regarding precinct voting analysis  
20 in District 4 or District 9?

21 A. There was no discussion that I'm aware of.

22 Q. Now you're aware that the Redistricting Committee  
23 passed maps that included subdistricts for Districts 4  
24 or 9 and sent that to the House floor, correct?

25 A. That is correct for recommendation -- or with a

1 recommendation.

2 Q. As a member of the North Dakota Legislative  
3 Assembly and the House of Representatives, were you  
4 present on the House floor on November 9, 2021 when the  
5 Redistricting Committee's proposed maps containing  
6 subdistricts in District 4 and District 9 were debated?

7 A. Yes, I was.

8 Q. During the floor debates was the topic of  
9 subdistricts in Districts 4 and 9 addressed?

10 A. Yes, it was.

11 Q. When the topics of subdistricts in Districts 4  
12 and 9 were addressed that day, did you speak on the  
13 floor?

14 A. Yes, I did.

15 Q. At this point we'd like to show a video to  
16 Representative Jones.

17 JUDGE ERICKSON: You may.

18 (Unidentified video played.)

19 JUDGE WELTE: Counsel, could you pause the  
20 video?

21 Are you able to do anything about the  
22 volume? I believe Lori has it maxed out here.

23 MR. SANDERSON: I don't know why our  
24 computer's not going through the Court's system.

25 JUDGE WELTE: And I would not be a good

1 person to answer that either but thank you.

2 (Unidentified video played.)

3 Q. (Mr. Sanderson continuing) Representative Jones,  
4 following your floor testimony on November 9, 2021, did  
5 the House vote on the Redistricting Committee's proposed  
6 redistricting maps which includes subdistricts in  
7 Districts 4 and 9?

8 A. Yes, they did.

9 Q. And what was the result of the House floor vote?

10 A. We passed the redistricting bill with  
11 subdistricts included.

12 Q. Now following the passage of that bill and it  
13 being signed into law by Governor Burgum in this case,  
14 what district are you currently located in?

15 A. District 4.

16 Q. And what subdistrict are you currently located  
17 in?

18 A. I'm in district -- Subdistrict 4A.

19 Q. And does your Subdistrict 4A, is it -- does it  
20 contain the entire boundary of the Fort Berthold  
21 Reservation?

22 A. Yes, it does. The boundary is the boundary of  
23 Subdistrict 4A.

24 Q. Okay. And when you say that, 4A is comprised  
25 solely of the Fort Berthold Indian Reservation?



1 A. That is correct.

2 Q. Okay. Now, Representative Jones, are you opposed  
3 to the idea of subdistricts in North Dakota?

4 A. Absolutely not.

5 Q. If you felt the Gingles factors had been  
6 demonstrated by the Redistricting Committee and the  
7 evidence required, would you support the creation of  
8 subdistricts in Districts 4 and 9?

9 A. Yes, I would.

10 MR. SANDERSON: I have no further questions  
11 of this witness.

12 JUDGE ERICKSON: Thank you. Cross by the  
13 State defendants?

14 MR. PHILLIPS: No questions, Your Honor.

15 JUDGE ERICKSON: Thank you. Cross by the  
16 intervenors?

17 MS. KELTY: Yes, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MS. KELTY:**

20 Q. Hi, how are you?

21 A. Fine, thank you.

22 Q. Representative Jones, I'm Samantha Kelty. I  
23 represent the Defendant Intervenors MHA Nation, Lisa  
24 DeVille and Cesareo Alvarez.

25 Representative, you did not sit on the

1 Redistricting Committee, did you?

2 A. I did not.

3 Q. And how would the new map of District 4 affect  
4 you in your election?

5 A. It changes the representation for District 4  
6 subdistricts divided into two groups, 4A and 4B, and the  
7 concerning part for me is that it leaves those people  
8 that are in District 4 with only one representative  
9 where previously they had two representatives  
10 representing them.

11 Q. Are you aware of the testimony submitted to the  
12 committees describing past election results and the  
13 presence of racial bloc voting?

14 A. Could you repeat the question?

15 Q. Sure. Are you aware of the testimony that was  
16 submitted to the Redistricting Committee describing past  
17 election results and the presence of racial bloc voting?

18 A. No, I'm not aware of it. I heard the discussion  
19 in the committee meetings that I was in but I was not  
20 aware of the testimony in its entirety.

21 Q. So you did hear some of the discussion, correct?

22 A. Yes.

23 Q. Are you aware of North Dakota's recent voter ID  
24 law that discriminates against Native American voters?

25 A. Could you explain how the new law discriminates

1 against Native American voters?

2 Q. Are you aware of the law that I'm referring to?

3 A. I'm not aware of any law that we've passed that  
4 discriminates against Native American voters so I would  
5 like you to explain how it discriminates so I can  
6 understand which law you're referring to.

7 Q. Sure, Representative Jones. I'm just going to  
8 ask you the questions here, okay?

9 Are you aware of the voter ID law,  
10 Representative?

11 A. Yes.

12 Q. And did you vote for that?

13 A. Yes.

14 Q. Let's talk about the MHA Nation. In the House  
15 you served on the Tribal and State Relations Committee,  
16 didn't you?

17 A. Yes.

18 Q. Since 2021?

19 A. Yes.

20 Q. And part of that committee studies -- an  
21 assignment was to study tribal/state issues, correct?

22 A. Yes.

23 Q. And you're familiar with the MHA Nation?

24 A. Yes.

25 Q. The Three Affiliated Tribes?

1 A. Yes.

2 Q. And the MHA Nation has a unique political status,  
3 doesn't it?

4 A. I don't know what you mean "unique."

5 Q. Is the MHA Nation a sovereign entity?

6 A. MHA Nation is a sovereign entity, yes.

7 Q. And you're familiar with the MHA people?

8 A. Yes.

9 Q. The MHA people have a distinct history, right?

10 A. Yes.

11 Q. And MHA people have unique economic interests as  
12 well, don't they?

13 A. No.

14 Q. Well, some of their economic interests arise from  
15 the Nation's location on the Bakken Oil Formation,  
16 correct?

17 A. Correct.

18 Q. And MHA people have their own languages; is that  
19 right?

20 A. Yes.

21 Q. And they have a distinctive culture, correct?

22 A. Yes.

23 Q. The MHA people are a distinct population, right?

24 A. Yes.

25 Q. And as a representative during the redistricting

1 process, you learned about redistricting?

2 A. I missed the question. What did you say?

3 Q. Did you learn about redistricting during the  
4 redistricting process?

5 A. Yes, I did learn more about it.

6 Q. And one of those trainings was from the National  
7 Conference of State Legislatures, correct?

8 A. I'm not even sure if I attended that. I'm not  
9 sure which training you're referring to. There's a lot  
10 of stuff going on. I assume it's during session and I  
11 can't recall exactly any particular training from that  
12 organization.

13 Q. I understand. I sometimes can't remember last  
14 month.

15 So if we could, Your Honor, I'd like to pull  
16 up a copy of the NCSL PowerPoint.

17 JUDGE ERICKSON: You may.

18 MS. KELTY: Thank you. And let the record  
19 reflect I've previously provided a copy to the other  
20 counsel and we're looking here, this is ECF doc 21-1 and  
21 it's starting at page 50 of the ECF doc 21-1.

22 Q. (Ms. Kelty continuing) Representative, do you  
23 recognize this?

24 A. It looks familiar, yes.

25 Q. Okay. What is this?

1 A. It's a presentation to the North Dakota  
2 legislature on redistricting.

3 Q. By who?

4 A. NCSL.

5 Q. Were you shown this?

6 A. I believe so, yes.

7 Q. Okay. When?

8 A. Beginning of the session in the Brynhild Haugland  
9 Room if I recall correctly.

10 Q. And it says there August 26, 2021; is that  
11 correct?

12 A. Correct.

13 Q. Does that sound about when you were shown this?

14 A. No.

15 Q. So when were you shown it?

16 A. If I recall it was the beginning of the session,  
17 which would have been closer in the December time.

18 Q. Okay, understood. And for what purpose were you  
19 shown this?

20 A. To assist us as legislators in understanding the  
21 redistricting process.

22 Q. Okay. Let's take a look at page 85 of the ECF,  
23 85 of the PDF.

24 JUDGE ERICKSON: Before we do that I wonder  
25 if we should not either stipulate that the exhibits that

1 have been filed and attached can be received and  
2 considered by the Court or have an offer. And I think  
3 we should have done the same thing with the video;  
4 although the video I think we could have let in for  
5 refreshing recollection. But it just seems to me that  
6 if we're going to try and get this record so it's clean,  
7 you know, if an appeal is taken we should know what  
8 we're able to consider.

9 So let's start with the movants. First of  
10 all, have you talked amongst yourselves about what you  
11 would want in or not want in as evidence or should we  
12 handle each exhibit just as being in an exhibit?

13 MS. KELTY: We did not, Your Honor. We  
14 arrived a little late. If we had a few seconds that  
15 would be great.

16 JUDGE ERICKSON: Why don't we take a couple  
17 minutes, five minutes, and let's see if we can't hammer  
18 out how we want to handle the exhibits, all right?  
19 Because at this point what we've got in the record are a  
20 bunch of things that haven't been marked and -- but we  
21 do know where they are in the record so, I mean, it's  
22 not a complete lost cause but I think we ought to arrive  
23 at some consensus. We'll stand in recess for five  
24 minutes.

25 (Recess taken; 9:25 a.m. to 9:40 a.m.)

1 JUDGE ERICKSON: We'll go back on the  
2 record. All counsel of record are present. They've had  
3 a chance to discuss the -- a potential stipulation on  
4 the exhibits.

5 Have the parties reached an agreement?

6 MS. KELTY: We have, Your Honor, and we  
7 appreciate that time to do so. We've stipulated to the  
8 admission of all exhibits that have been submitted into  
9 the record in addition to Intervenors' Exhibit 1 that  
10 we've marked, which is an updated copy Dr. Loren  
11 Collingwood's CV.

12 JUDGE ERICKSON: All right. And so --

13 MS. KELTY: And the video, excuse me.

14 JUDGE ERICKSON: We'll receive Intervenors'  
15 Exhibit No. 1. I should have confirmed that the  
16 stipulation has been accurately stated.

17 On the part of the movants?

18 MR. SANDERSON: Yes, Your Honor, other than  
19 we talked about the video we showed. That's a public  
20 record taken off the North Dakota legislature's website  
21 and we do have a couple others we intend to show but our  
22 understanding is that we have an agreement that those  
23 will be admissible. That's our understanding.

24 JUDGE ERICKSON: All right. Thank you. And  
25 does the State agree with the stipulation as noted?



1 MR. PHILLIPS: Yes, Your Honor.

2 JUDGE ERICKSON: All right. The Court will  
3 receive all of the previously marked exhibits. I have  
4 received Intervenors' 1. We will receive every video  
5 that is shown during the course of this proceeding. The  
6 other videos of the Redistricting Committee hearings are  
7 a matter of public record. And I should note for the  
8 record that I know that I've reviewed them and I suspect  
9 my fellow judges on the panel have reviewed them as  
10 well. And so that's where we're at on this.

11 And Representative Jones remains on the  
12 stand and now we can go back to asking him some  
13 questions.

14 MS. KELTY: Thank you, Judges, and thanks  
15 for that clarification.

16 Q. (Ms. Kelty continuing) Before we took a break we  
17 were taking a look at what is in the record as document  
18 21-1 and I believe we were looking at page 50 of 109 of  
19 that document. As reflected in the record the parties  
20 have stipulated to the admission of the entirety of  
21 document 21-1. Is it not displaying? Okay. For some  
22 reason it's not connecting. Thank you, Lori.

23 And, Representative Jones, I have a hard copy  
24 here. Would you like to take a look at that or -- in  
25 addition to the video?

1 A. This will be fine, thank you.

2 Q. Great. We'll save some paper here. So does this  
3 refresh your recollection as you stated that you did  
4 receive a PowerPoint presentation from NCSL on  
5 redistricting, Representative?

6 A. Yes.

7 Q. And so during this training you learned that  
8 maintaining a community of interest is a traditional  
9 redistricting principle, correct?

10 A. Correct.

11 Q. And let's take a look at page 85 of 109 of this  
12 document. And here, Representative, this is the first  
13 part of the presentation that speaks to the  
14 criteria/principles. What does that say there in the  
15 top left-hand corner of the screen?

16 A. "Criteria/Principles: Compactness."

17 Q. And let's scroll down to page 89 of 109 and what  
18 is the topic -- what is the topic of this slide,  
19 Representative?

20 A. It says, "Other critical (sic) NCSL tracks."

21 Q. "Other criteria NCSL tracks?"

22 A. "Other criteria," sorry.

23 Q. I know. I forgot my glasses so I'm having a hard  
24 time seeing that. And what is the first bullet point  
25 there?

1 A. "Preserving communities of interest."

2 Q. Okay, great. And we can take this down. Thank  
3 you.

4 Representative, let's talk about the Fort  
5 Berthold Reservation. You live here in North Dakota,  
6 correct?

7 A. I live on the reservation in fact.

8 Q. Oh, okay, good to know. So how long have you  
9 lived on the reservation?

10 A. I've been close to or onto it for 11 years.

11 Q. Wow, that's incredible. So you're familiar with  
12 the reservation?

13 A. Yes.

14 Q. And that's the reservation on which the MHA  
15 Nation is located, correct?

16 A. Yes, the Three Affiliated Tribes.

17 Q. And it's a community there, right?

18 A. Yes.

19 Q. An independent community?

20 A. Several communities actually.

21 Q. Right. Several distinct communities within the  
22 reservation, correct?

23 A. Yes.

24 Q. And it's governed by its own government?

25 A. Several governments.

1 Q. And can you please explain your answer there?

2 A. Yes. There seems to be some confusion here about  
3 the reservation. There's several towns in there that  
4 are including my town which is New Town. There's  
5 Parshall. There's several other towns included in the  
6 reservation. The reservation boundary was moved up in  
7 about 1972 six miles to include those towns. So you're  
8 asking me to say that there's one form of government on  
9 the reservation when in fact we have North Dakota  
10 citizens, North Dakota property, taxpayers of North  
11 Dakota, all of that represented within the boundaries of  
12 that reservation as well as the tribal nation, the Three  
13 Affiliated Tribes, and their government.

14 So you're asking a very complicated question  
15 in a very simplistic way.

16 Q. I think you did reply to my question so, yeah, I  
17 appreciate that. I was referring to the tribal  
18 government so thanks for clarifying.

19 That tribal government has a Tribal Business  
20 Council, correct?

21 A. Correct.

22 Q. And a chairman?

23 A. Correct.

24 Q. And MHA Nation is a federally recognized tribe?

25 A. Yes.

1 Q. And the Nation exercises sovereign authority,  
2 right?

3 A. Yes.

4 Q. And you live on the reservation so you're  
5 familiar with the reservation's boundaries?

6 A. I am.

7 Q. Its geographical boundaries?

8 A. Yes.

9 Q. And its boundaries are different from state  
10 boundaries, right?

11 A. They're included in the state boundaries.

12 Q. But they are different. They are distinct from  
13 the state boundaries; is that right?

14 A. Yes.

15 Q. And they are distinct from county boundaries,  
16 right?

17 A. Correct.

18 Q. And they are also different from municipal  
19 boundaries, right?

20 A. Correct.

21 Q. And, Representative, during redistricting the  
22 Redistricting Committee created a policy to not split  
23 reservations; is that right?

24 A. That has been a standing policy for many years.

25 Q. And during this year's redistricting at least the

1 committee chairman repeated this policy?

2 A. Yes.

3 Q. Numerous times?

4 A. Yes.

5 Q. And you're familiar with House Subdistrict 4A as  
6 you testified in your direct, right?

7 A. Yes.

8 Q. And Subdistrict 4A follows the reservation's  
9 boundaries, right?

10 A. Correct.

11 Q. In fact, it precisely follows the reservation's  
12 boundaries, right?

13 A. Yes.

14 Q. The lines of HD 4A do not deviate from the lines  
15 of the reservation, right?

16 A. Correct.

17 Q. And as a representative during the redistricting  
18 process you also learned about other redistricting  
19 principles, correct?

20 A. Yes.

21 Q. And so respecting political boundaries is a  
22 redistricting principle, right?

23 A. Yes.

24 Q. A traditional redistricting principle.

25 A. Yes.

1 MS. KELTY: I have no further questions.

2 JUDGE ERICKSON: Thank you. Redirect from  
3 the movants?

4 MR. SANDERSON: Yes. We're going to need to  
5 show a video here for a second.

6 **REDIRECT EXAMINATION**

7 **BY MR. SANDERSON:**

8 Q. Representative Jones, you were asked about  
9 document 21-1 and that was a presentation on  
10 redistricting to the North Dakota Legislature by Ben  
11 Williams from the National Council of State  
12 Legislatures, correct?

13 A. Yes.

14 Q. And that was on August 26, 2021, correct?

15 A. The document is dated that and I just don't  
16 recall meeting in August to go over that. I thought  
17 maybe it was presented closer in the December time frame  
18 but I could be -- I could be off on that.

19 Q. Representative Jones, I'm going to show you  
20 briefly a video from the presentation Attorney Williams  
21 presented to the Redistricting Committee on August 26,  
22 2021, and then I want to ask you a few questions about  
23 it.

24 (Unidentified video played.)

25 Q. (Mr. Sanderson continuing) Now, Representative

1 Jones, I just played to you a portion of Attorney  
2 Williams' presentation to the Redistricting Committee  
3 regarding the Gingles factors and you heard him discuss  
4 the Gingles factors and the need for regression studies  
5 based on precinct data. You heard that testimony?

6 A. I did.

7 Q. And again, Representative Jones, are you aware of  
8 the Redistricting Committee ever performing any  
9 regression studies based on precinct data to meet the  
10 Gingles criteria?

11 A. No.

12 Q. Are you aware of any outside parties presenting  
13 any regression study analysis to the Redistricting  
14 Committee during their deliberations for creation of  
15 subdistricts in Districts 4 and 9?

16 A. No.

17 MR. SANDERSON: Representative Jones, I have  
18 no further questions. Thank you.

19 JUDGE ERICKSON: Thank you. From the State  
20 defendants?

21 MR. PHILLIPS: Your Honor, I would like to  
22 consult with my client.

23 JUDGE ERICKSON: You may.

24 MR. SANDERSON: Your Honor, before we move  
25 on to the State may I ask another question of



1 Representative Jones? I know I rested and passed but  
2 would ask the Court's permission to briefly address one  
3 other topic that I overlooked.

4 JUDGE ERICKSON: Any objection from the  
5 State defendants?

6 MR. PHILLIPS: No objection.

7 JUDGE ERICKSON: From the intervenors?

8 MS. KELTY: No objection.

9 JUDGE ERICKSON: You may.

10 Q. (Mr. Sanderson continuing) Representative Jones,  
11 you also attended -- during the time you attended the  
12 subdistricting committee meetings, were you also aware  
13 that North Dakota Legislative counsel was present at  
14 those meetings?

15 A. Yes.

16 Q. Okay. And during one of the meetings Legislative  
17 Council Attorney Clair Ness spoke to the committee about  
18 the Gingles factors. Were you present during that?

19 A. Yes.

20 Q. I'd like to play a brief video for you from a  
21 Redistricting Committee hearing in this matter.

22 (Unidentified video played.)

23 MS. KELTY: Just asking for a bit of  
24 foundation to verify who's speaking in this video.

25 JUDGE ERICKSON: Just a second. Okay. I

1 think the objection is it's not clear who was speaking.  
2 I suspect I know but it's not my position to make that  
3 finding so do you want to clarify who was actually  
4 asking the question of Miss Ness?

5 Q. (Mr. Sanderson continuing) And, Representative  
6 Jones, do you recognize the representative that asked  
7 the question of Legislative Council Attorney Clair Ness?

8 A. Yes, I do.

9 Q. And who was that individual?

10 A. Representative Austen Schauer.

11 Q. And was Representative Schauer a member of the  
12 Redistricting Committee in 2021?

13 A. Yes.

14 Q. And the video we're seeing, is that a legislative  
15 Redistricting Committee meeting that occurred in 2021?

16 A. Correct.

17 Q. Okay. And so we'll replay the video from the  
18 start for clarification but the video's going to show  
19 Representative Schauer asking a question regarding the  
20 Gingles factors to Legislative Council Attorney Clair  
21 Ness.

22 (Unidentified video played.)

23 Q. (Mr. Sanderson continuing) And, Representative  
24 Jones, my follow-up question there, are you aware of  
25 Legislative Council ever performing any analytical data

1 on prior voting or precinct voting in Districts 4 and 9  
2 and presenting that to the Redistricting Committee at  
3 any time?

4 A. No. I'm not aware of any of that being  
5 presented. And I asked multiple times if that had been  
6 done and I was assured it had not been done.

7 Q. And when you say you'd asked, who did you request  
8 whether voting data had been compiled for the  
9 Redistricting Committee?

10 A. Members of the Redistricting Committee.

11 Q. Okay. And when you said had that been done, were  
12 you referring to whether Legislative Council had  
13 performed those analyses for the Redistricting  
14 Committee?

15 A. Correct.

16 Q. And your understanding is Legislative Council  
17 never performed any past voting data or precinct data  
18 historical elections in Districts 4 and 9 for the  
19 Redistricting Committee?

20 A. Correct.

21 MR. SANDERSON: I have no further questions.  
22 Thank you.

23 JUDGE ERICKSON: Thank you. From the State  
24 defendants?

25 MR. PHILLIPS: Your Honor, if we could?

1 JUDGE ERICKSON: You may.

2 MR. PHILLIPS: Thank you. Your Honor, I do  
3 have a few questions.

4 JUDGE ERICKSON: You may.

5 MR. PHILLIPS: Just a few questions.

6 **RECROSS-EXAMINATION**

7 **BY MR. PHILLIPS:**

8 Q. Did you attend all three public meetings of the  
9 Interim Tribal and State Relations Committee?

10 A. I assume you're asking about this year 2021-2022?  
11 Yes, I have.

12 Q. You attended all three?

13 A. Yes.

14 Q. Did you attend all six public meetings of the  
15 Interim Redistricting Committee?

16 A. No.

17 Q. Did you attend both meetings of the Joint  
18 Redistricting Committee?

19 A. I believe I did towards the end, the two of them  
20 that I did attend.

21 Q. Do you know which ones?

22 A. I do not other than it was the last two at the  
23 end of the process.

24 Q. There was some discussion in your testimony  
25 earlier and a video where Clair Ness was speaking. Do

1 you remember that?

2 A. Yes.

3 Q. Have you ever talked to Clair Ness about analyses  
4 that she may have run?

5 A. Yes.

6 Q. You have spoken with her?

7 A. Yes.

8 Q. When did you speak with her?

9 A. I can't say exactly the time but it was during  
10 this time when we were working on this stuff to find out  
11 what had been done.

12 Q. You don't remember the time that you spoke with  
13 her?

14 A. I believe I already said no, I do not know  
15 specifically the time.

16 Q. You'd indicated earlier that someone told you  
17 that Legislative Council did not perform a data  
18 analysis; is that correct?

19 A. Yes.

20 Q. Who told you that?

21 A. I was talking to Austen Schauer and I was talking  
22 to the chairman of the committee.

23 Q. Did they tell you whether they had spoken with  
24 Clair Ness or anyone else with Legislative Council?

25 A. I don't recall.

1 MR. PHILLIPS: Thank you. No further  
2 questions.

3 JUDGE ERICKSON: From the intervenors?

4 MS. KELTY: Could I have one moment, Your  
5 Honor?

6 JUDGE ERICKSON: You may.

7 MS. KELTY: Thank you. No further  
8 questions, thank you.

9 JUDGE ERICKSON: Thank you. You may step  
10 down, Representative Jones.

11 MR. JONES: Thank you.

12 \* \* \*

13 (Further proceedings reported but not  
14 transcribed herein.)

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**CERTIFICATE OF REPORTER**

I, Kelly A. Kroke, a duly appointed  
Registered Professional Reporter;

DO HEREBY CERTIFY that I reported in  
shorthand the foregoing proceedings had and made a  
record at the time and place indicated.

I DO HEREBY FURTHER CERTIFY that the  
foregoing and attached (37) typewritten pages contain an  
accurate partial transcript of my shorthand notes then  
and there taken.

Dated this 29th day of November, 2022.

/s/ Kelly A. Kroke  
KELLY A. KROKE - RPR, RMR  
United States District Court Reporter  
District of North Dakota  
Eastern Division

# EXHIBIT 6

## Henderson Depo. Tr.





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# Transcript of Paul Henderson

**Date:** December 7, 2022

**Case:** Walen, et al. -v- Burgum, et al.

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

Transcript of Paul Henderson  
December 7, 2022

<p style="text-align: center;">1</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF NORTH DAKOTA</p> <p>3 EASTERN DIVISION</p> <p>4 ----- x</p> <p>5 CHARLES WALEN, an individual; :</p> <p>6 and PAUL HENDERSON, an : 7 individual, : 8 Plaintiffs, : 9 v. : Case No.</p> <p>10 DOUG BURGUM, in his official : 1:22-CV-00031-CRH 11 capacity as Governor of the : 12 State of North Dakota; and : 13 ALVIN JAEGER, in his official : 14 capacity as Secretary of : 15 State of North Dakota, : 16 Defendants, : 17 ----- x</p> <p>18 (Caption continued on next page)</p> <p>19 Deposition of PAUL HENDERSON 20 Conducted Virtually 21 Wednesday, December 7, 2022 22 9:15 a.m. EST 23 Job No.: 473885 24 Pages 1 - 47 25 Reported by: Debra A. Whitehead</p>	<p style="text-align: center;">3</p> <p>1 APPEARANCES</p> <p>2 ON BEHALF OF PLAINTIFFS:</p> <p>3 PAUL R. SANDERSON, ESQUIRE</p> <p>4 RYAN J. JOYCE, ESQUIRE</p> <p>5 EVENSON SANDERSON</p> <p>6 1100 College Drive, Suite 5</p> <p>7 Bismarck, North Dakota 58501</p> <p>8 (701) 751-1243</p> <p>9</p> <p>10 ON BEHALF OF DEFENDANTS:</p> <p>11 DAVID R. PHILLIPS, ESQUIRE</p> <p>12 BAKKE GRINOLDS WIEDERHOLT</p> <p>13 300 West Century Avenue</p> <p>14 Bismarck, North Dakota 58503</p> <p>15 P.O. Box 4247</p> <p>16 Bismarck, North Dakota 58502-4247</p> <p>17 (701) 751-8188</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: center;">2</p> <p>1 (Caption continued from previous page)</p> <p>2 ----- x</p> <p>3 and : 4 MANDAN, HIDATSA AND ARIKARA : 5 NATION, CESAR ALVAREZ, and : 6 LISA DEVILLE, : 7 Intervenor-Defendants. : 8 ----- X</p> <p>9 Deposition of PAUL HENDERSON, conducted 10 virtually.</p> <p>11</p> <p>12 Pursuant to notice, before Debra Ann Whitehead, 13 E-Notary Public in and for the State of Maryland.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">4</p> <p>1 APPEARANCES CONTINUED</p> <p>2 ON BEHALF OF INTERVENOR-DEFENDANTS:</p> <p>3 MARK P. GABER, ESQUIRE</p> <p>4 MOLLY E. DANAHY, ESQUIRE</p> <p>5 NICOLE HANSEN, ESQUIRE</p> <p>6 CAMPAIGN LEGAL CENTER</p> <p>7 1101 14th Street, NW, Suite 400</p> <p>8 Washington, DC 20005</p> <p>9 (202) 716-2200</p> <p>10 - and -</p> <p>11 ALLISON NESWOOD, ESQUIRE</p> <p>12 MICHAEL S. CARTER, ESQUIRE</p> <p>13 NATIVE AMERICAN RIGHTS FUND</p> <p>14 1506 Broadway</p> <p>15 Boulder, Colorado 80301</p> <p>16 (303) 447-8760</p> <p>17 - and -</p> <p>18 SAMANTHA B. KELTY, ESQUIRE</p> <p>19 NATIVE AMERICAN RIGHTS FUND</p> <p>20 1514 P Street, NW, Suite D</p> <p>21 Washington, DC 20005</p> <p>22 (202) 785-4166</p> <p>23</p> <p>24</p> <p>25</p>

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December 7, 2022

2 (5 to 8)

<p style="text-align: right;">5</p> <p>1 APPEARANCES CONTINUED 2 ALSO PRESENT: 3 LAURIE STIRLING, Paralegal, NARF 4 CHUCK WALEN 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">7</p> <p>1 PROCEEDINGS 2 PAUL HENDERSON, 3 having been duly sworn, testified as follows: 4 EXAMINATION BY COUNSEL FOR 5 INTERVENOR-DEFENDANTS 6 BY MR. GABER: 7 Q Good morning, Mr. Henderson. My name is 8 Mark Gaber. I am one of the attorneys for the 9 defendant-intervenors in this case. 10 And could you just please state your 11 name, for the record. 12 <b>A Yes. It's Paul Henderson.</b> 13 Q And have you been deposed before? 14 <b>A I have not.</b> 15 Q So I'll go over a couple of the ground 16 rules, in that case. 17 The deposition is a little bit different 18 than a normal conversation because we have a court 19 reporter here. She is transcribing everything 20 that we say. So it's important that we both talk 21 slowly so that she can get the words down, but 22 also that we not interrupt each other. And that 23 can sometimes be hard, because in a normal 24 conversation you would anticipate what someone is 25 saying, and maybe interject?</p>
<p style="text-align: right;">6</p> <p>1 CONTENTS 2 EXAMINATION OF PAUL HENDERSON PAGE 3 By Mr. Gaber 7 4 By Mr. Phillips 34 5 6 7 EXHIBITS 8 (none) 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">8</p> <p>1 In this case I just ask, I will do my 2 best not to interrupt you. I will probably 3 violate that rule more than you will. But we both 4 should try to be cognizant of the fact that she is 5 here and taking our words down, and that that's 6 not an easy task if we talk over each other. 7 Is that okay with you? 8 <b>A Yeah, very good.</b> 9 Q Another is that it's important to give 10 verbal responses. Nodding of the head or uh-huh 11 is hard for the court reporter to take down and 12 get a clear transcript. So please do give verbal 13 answers. 14 And those are, you know, I think for our 15 court reporter, those are the two most important 16 things. I'd also say that if at any point you 17 need a break, please let me know. I would just 18 ask that if there is a question pending, that you 19 give the answer to that question and then, you 20 know, we can go ahead and take that break, if 21 necessary. 22 I don't anticipate that we're going to be 23 taking a whole lot of your time this morning. And 24 so hopefully the break issue won't be as much of 25 one as it can be when these things go on for seven</p>

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Transcript of Paul Henderson  
December 7, 2022

3 (9 to 12)

9	<p>1 hours. So just let me know if you need that, 2 though.</p> <p>3 <b>A Very good.</b></p> <p>4 Q I will assume that you understand my 5 question unless you say otherwise. So if you 6 don't understand please say so, and I'll do my 7 best to clarify.</p> <p>8 Does that work for you?</p> <p>9 <b>A Yes.</b></p> <p>10 Q And you have counsel here. There's 11 counsel for the state here. If folks don't like 12 the way I have asked my question, they may object 13 after I ask it. Unless you're instructed by your 14 counsel not to answer for attorney-client 15 privilege reasons, which I don't anticipate 16 needing to get into that issue, you should just 17 wait for the objection and then go ahead and 18 answer my question.</p> <p>19 Does that make sense?</p> <p>20 <b>A Yes.</b></p> <p>21 Q Is there any reason that you can't answer 22 my questions fully and truthfully today?</p> <p>23 <b>A No.</b></p> <p>24 Q Now, obviously we're doing this 25 deposition remotely. And so I'm going to ask you</p>	11
10	<p>1 a couple of questions that I wouldn't if I were in 2 the room with you.</p> <p>3 I gather you are at your counsel's law 4 office.</p> <p>5 Is that right?</p> <p>6 <b>A That's correct.</b></p> <p>7 Q And who is in the room with you?</p> <p>8 <b>A It's Paul Sanderson and Ryan Joyce.</b></p> <p>9 Q Anyone else in the room?</p> <p>10 <b>A No.</b></p> <p>11 Q And Mr. Sanderson and Mr. Joyce, are they 12 seated to the side of you or across from you?</p> <p>13 <b>A Ryan is seated across from me, and Paul 14 is seated to my right.</b></p> <p>15 Q And do you have any notes in front of 16 you?</p> <p>17 <b>A I will be taking notes, yes.</b></p> <p>18 Q But do you have any notes in front of you 19 now?</p> <p>20 <b>A No, I do not.</b></p> <p>21 Q And on the computer screen, are there any 22 windows open, other than this Zoom screen?</p> <p>23 <b>A I don't know.</b></p> <p>24 Q None that you're looking at on the 25 screen?</p>	12
9	<p>1 <b>A I guess not. I don't know how to -- I'm 2 not a tech guy, so I don't know that.</b></p> <p>3 Q I just want to make sure there's not, 4 like, e-mail or some sort of messaging software or 5 anything.</p> <p>6 But it sounds like if it were there, you 7 wouldn't even know what to do with it.</p> <p>8 Am I right?</p> <p>9 <b>A That's correct.</b></p> <p>10 Q What, if anything, did you do to prepare 11 for this deposition?</p> <p>12 <b>A Not really anything. I knew that it was 13 coming, and I'm confident in my ability to answer 14 any questions. I didn't --</b></p> <p>15 Q Did you have any meetings with your 16 counsel, for example?</p> <p>17 <b>A I did, yeah. Just because I've never 18 done this before.</b></p> <p>19 Q And when did that meeting occur?</p> <p>20 <b>A We met yesterday for a small period of 21 time.</b></p> <p>22 Q And that was in person or over the phone?</p> <p>23 <b>A It was in person.</b></p> <p>24 Q Who was present for that meeting?</p> <p>25 <b>A Ryan.</b></p>	11
10	<p>1 Q Anyone else?</p> <p>2 <b>A No.</b></p> <p>3 Q Did you review any documents to assist 4 you in getting ready for today?</p> <p>5 <b>A I did not.</b></p> <p>6 Q Did you talk to Mr. Walen at all in 7 preparing for today?</p> <p>8 <b>A I did not.</b></p> <p>9 Q What was your -- what do you do for work?</p> <p>10 <b>A I own and operate a farm here in North 11 Dakota.</b></p> <p>12 Q And where in North Dakota is that?</p> <p>13 <b>A It's in a small village of Calvin, on the 14 edge of the small village of Calvin.</b></p> <p>15 Q And that's --</p> <p>16 <b>A In North Dakota.</b></p> <p>17 Q Is that in Cavalier County?</p> <p>18 <b>A It is.</b></p> <p>19 Q And how long have you had that farm?</p> <p>20 <b>A My entire life.</b></p> <p>21 Q Was that passed down from family, or did 22 you start that?</p> <p>23 <b>A Not relevant. But, yeah, it was passed 24 down.</b></p> <p>25 Q Do you have any -- what sort of roles in</p>	12

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<p style="text-align: right;">13</p> <p>1 the community do you play? Are you involved in 2 local government at all? 3 <b>A Yeah. I mean, I'm on my township board.</b> 4 <b>I'm on the county zoning board. I'm a volunteer</b> 5 <b>fire department volunteer. I've been an EMT</b> 6 <b>for -- in the past. And I've also been involved</b> 7 <b>in local politics as a -- participated in all the</b> 8 <b>Republican side of the meetings. And I was the</b> 9 <b>chairman in District 10 for about nine years.</b> 10 Q Are the town board and the -- well, the 11 town board position, is that an elected position? 12 <b>A The township board is elected, yes. The</b> 13 <b>zoning board is an appointed position.</b> 14 Q How long have you been on the town board? 15 <b>A Twenty-five years probably.</b> 16 Q And how frequently are those elections? 17 <b>A They're every year. But there's --</b> 18 Q Are they partisan or -- 19 <b>A They're staggered.</b> 20 <b>No, they're not partisan. They're</b> 21 <b>nonpartisan.</b> 22 Q And what is the -- I know you said 23 Calvin, but that's the city that is nearby. Is 24 the township different? 25 <b>A Yeah, the township would be Glen Isle</b></p>	<p style="text-align: right;">15</p> <p>1 <b>A Yeah. I mean, that -- there was some</b> 2 <b>controversy because we weren't allowed to reorg.</b> 3 Q Do you know why that was the case? 4 <b>A Yeah. The leadership of the Republican</b> 5 <b>party in the state interpreted a law that was</b> 6 <b>passed in November saying that you -- if you had</b> 7 <b>more than 25 percent population change in your</b> 8 <b>district, because of redistricting, you were --</b> 9 <b>mandatorily you had to -- you had to reorganize at</b> 10 <b>that point.</b> 11 <b>But there was really nothing -- this was</b> 12 <b>a new law. And historically if you changed the</b> 13 <b>boundaries, you were allowed to reorganize. So</b> 14 <b>there was some controversy there.</b> 15 Q There was a meeting where folks walked 16 out. 17 Is that right? 18 <b>A That was a different meeting. That was a</b> 19 <b>state meeting that was in, I want to say December</b> 20 <b>of last year. So that --</b> 21 Q And was that also related to the 22 boundaries of the district chairs and whatnot? 23 <b>A Yes.</b> 24 Q And what was your -- you were one of the 25 participants that walked out.</p>
<p style="text-align: right;">14</p> <p>1 <b>Township, but the down is, kind of for reference</b> 2 <b>point, we only live a couple blocks away from that</b> 3 <b>town, so that's kind of what we say we're from.</b> 4 Q Right. And who appointed you to the city 5 zoning -- or I'm sorry, to the county zoning 6 board? 7 <b>A One of the commissioners.</b> 8 Q Now, you said you were the chair of the 9 District 10 Republican party. 10 Is that right? 11 <b>A That's correct.</b> 12 Q And that was obviously prior to 13 redistricting. 14 Do you hold a position within your 15 current district for the Republican party? 16 <b>A I do not. I do not.</b> 17 Q Did you run for a position for the -- for 18 your current district party? 19 <b>A No. There was no reorganization after</b> 20 <b>the redistricting, so that was not available.</b> 21 Q Now, I know there was some controversy, a 22 meeting of the Republican party related to 23 redistricting and the positions. 24 Is this along the lines of that issue 25 that happened?</p>	<p style="text-align: right;">16</p> <p>1 Is that right? 2 <b>A I was.</b> 3 Q And what was your view on what was 4 happening there? 5 <b>A It was very unprofessional, and we were</b> 6 <b>not allowed to get our views across to the body</b> 7 <b>that were there. And so at some point we decided</b> 8 <b>that we would, as a block we would remove</b> 9 <b>ourselves.</b> 10 Q And you were attending as a proxy for 11 District 9. 12 Is that right? 13 <b>A I was, yeah.</b> 14 Q Whose proxy did you have? 15 <b>A Tim Litvin's.</b> 16 Q And is he the current chair for the 17 Republicans for District 9? 18 <b>A He's not.</b> 19 Q Who is that? 20 <b>A That's a good question. I'm kind of</b> 21 <b>terrible with names, so ...</b> 22 <b>It may come to me; it may not.</b> 23 Q Okay. When will be the sort of election 24 for those positions? 25 <b>A They will come due in the new year, from</b></p>

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December 7, 2022

5 (17 to 20)

<p style="text-align: right;">17</p> <p><b>1 January to April, I believe, is the time slot for</b></p> <p><b>2 reorganizations in North Dakota.</b></p> <p>3 Q And do you intend to run for a position</p> <p>4 when that happens?</p> <p><b>5 A I haven't decided yet, but it's possible.</b></p> <p>6 Q Other than that position as the chair of</p> <p>7 the District 10 for the Republicans, have you held</p> <p>8 any other positions within the state Republican</p> <p>9 party?</p> <p><b>10 A Yeah. I was on the executive board as a</b></p> <p><b>11 regional chairman for a couple of terms, which</b></p> <p><b>12 gave me the ability to be on the executive</b></p> <p><b>13 committee.</b></p> <p>14 Q And when was that?</p> <p><b>15 A Again, I think it was probably a</b></p> <p><b>16 four-year stint. But it was probably five years</b></p> <p><b>17 ago.</b></p> <p>18 Q What about on the national Republican</p> <p>19 party?</p> <p><b>20 A I was available to the national</b></p> <p><b>21 Republican party for a couple of conventions. I</b></p> <p><b>22 served as the resolution committeeman in 2012 in</b></p> <p><b>23 Tampa.</b></p> <p>24 Q What does the resolution committeeman do?</p> <p><b>25 A He takes the resolutions that are in the</b></p>	<p style="text-align: right;">19</p> <p><b>1 A No.</b></p> <p>2 Q What about an independent candidate?</p> <p><b>3 A No, I haven't.</b></p> <p>4 Q Now, I understand that your wife is Donna</p> <p>5 Henderson.</p> <p>6 Is that right?</p> <p><b>7 A Correct.</b></p> <p>8 Q And she ran for and was elected as the</p> <p>9 new representative for House District 9B, as in</p> <p>10 boy.</p> <p>11 Is that right?</p> <p><b>12 A That's correct.</b></p> <p>13 Q Had she run for office before this</p> <p>14 election?</p> <p><b>15 A Not the State House.</b></p> <p>16 Q What other office had she run for?</p> <p><b>17 A She ran for a position at the state party</b></p> <p><b>18 a couple of years ago.</b></p> <p>19 Q Did she get elected to that position?</p> <p><b>20 A She did not.</b></p> <p>21 Q And I should ask, aside from the elected</p> <p>22 position you have on the county -- or, sorry, the</p> <p>23 town board, have you held any other elected</p> <p>24 office?</p> <p><b>25 A No.</b></p>
<p style="text-align: right;">18</p> <p><b>1 national Republican party and reviews them and</b></p> <p><b>2 brings forth any relevant new resolutions that</b></p> <p><b>3 might be relevant to the party in the new election</b></p> <p><b>4 cycle.</b></p> <p>5 Q Did you work on the party platform as</p> <p>6 part of --</p> <p><b>7 A That's what it is, yes.</b></p> <p>8 Q Aside from your official roles in the</p> <p>9 state and national Republican party, are you a</p> <p>10 part of any other political organizations?</p> <p><b>11 A No.</b></p> <p>12 Q Have you worked on any political</p> <p>13 campaigns?</p> <p><b>14 A Certainly.</b></p> <p>15 Q And how many, would you say?</p> <p><b>16 A Twenty-five.</b></p> <p>17 Q So whenever there's an election, are you</p> <p>18 pretty actively involved --</p> <p><b>19 A Yeah.</b></p> <p>20 Q -- and working on --</p> <p><b>21 A Yes.</b></p> <p>22 Q And has that been exclusively for</p> <p>23 Republican candidates?</p> <p><b>24 A It has.</b></p> <p>25 Q Never worked for a Democratic candidate?</p>	<p style="text-align: right;">20</p> <p>1 Q Just the -- I guess the District 10 for</p> <p>2 the Republican party.</p> <p>3 That's elected. Right?</p> <p><b>4 A That is elected, correct. And so is the</b></p> <p><b>5 regional chairmanship. That's an election as</b></p> <p><b>6 well.</b></p> <p>7 Q But you have never run for the state</p> <p>8 legislature?</p> <p><b>9 A No. I was -- I did in -- I ran in our</b></p> <p><b>10 endorsing convention in 2018, but I was</b></p> <p><b>11 unsuccessful.</b></p> <p>12 Q And can you just explain for me the</p> <p>13 endorsing convention versus -- I know you all have</p> <p>14 primary elections as well.</p> <p>15 What is the role of the endorsing</p> <p>16 convention?</p> <p><b>17 A The endorsing convention is a political</b></p> <p><b>18 party function. And so all the constituents that</b></p> <p><b>19 want to declare that they're Republicans go to an</b></p> <p><b>20 endorsing convention in the district and vote on</b></p> <p><b>21 who they want to run as a candidate.</b></p> <p>22 Q And if you don't get the endorsement, can</p> <p>23 you still run, you know, with the state, on the</p> <p>24 primary?</p> <p><b>25 A Certainly.</b></p>

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Transcript of Paul Henderson  
December 7, 2022

6 (21 to 24)

21	<p>1 Q It's just a matter of who, you know, gets 2 the official endorsement of the local party. 3 Is that the idea? 4 <b>A Yes.</b> 5 Q In the most recent election for your 6 wife, did she have the endorsement at the 7 convention for District 9B? 8 <b>A She did.</b> 9 Q And was that over an incumbent state 10 representative? 11 <b>A Correct.</b> 12 Q What was that person's name? 13 <b>A Charles Damschen.</b> 14 Q And had he been the incumbent for what 15 was formerly District 10? 16 <b>A Correct.</b> 17 Q Do you know how long he was in that 18 position? 19 <b>A I want to say 12 years.</b> 20 Q Okay. 21 <b>A I think he served 12 years.</b> 22 Q What motivated your wife to run this 23 time? 24 <b>A Well, we had talked about running, you</b> 25 <b>know. It's kind of a personal choice. And our</b></p>	23
22	<p>1 <b>time of life was ready for a -- to take a run at</b> 2 <b>the State -- a State House position.</b> 3 Q Did she have any issue with the incumbent 4 that was part of the motivation? 5 <b>A Well, I don't think that was -- that</b> 6 <b>wasn't -- any time you run against an incumbent,</b> 7 <b>there's that. But that wasn't the primary reason,</b> 8 <b>I believe.</b> 9 Q Did the redistricting play a role in her 10 decision? 11 <b>A Well, only reason that that would play a</b> 12 <b>role is that, again with Donna and I, just our</b> 13 <b>personal conversations, when they dissolved</b> 14 <b>District 10 and moved us into District 9, she had</b> 15 <b>worked in the Town of Rolla for 14 years, and so</b> 16 <b>she was better positioned, I think, to run against</b> 17 <b>an incumbent, you know, district-wide than I would</b> 18 <b>have been.</b> 19 Q So you guys were sort of deciding as 20 between the two of you who should run. 21 Is that correct? 22 <b>A Yeah. I think so. I think we would have</b> 23 <b>ran. If all things would have stayed the same,</b> 24 <b>you know, one of us would have ran in District 10.</b> 25 Q And given her work in Rolla, you guys</p>	24
21	<p>1 decided that she probably would have a better 2 chance with the name recognition. 3 Is that the idea? 4 <b>A Correct. And she's better looking as</b> 5 <b>well.</b> 6 Q And from my experience in Wisconsin, the 7 State House races are more on the radio than they 8 are on the televisions. 9 <b>A True. True.</b> 10 Q I see on her website she says that, you 11 know, with the recent redistricting process, our 12 district border has changed, and now I'm very 13 excited about the new District 9B. And she 14 mentions having worked in Rolla. 15 Did you share her sort of view and 16 excitement about the new boundaries for 9B? 17 <b>A We did.</b> 18 Q What in particular did you like about 19 them? 20 <b>A I think the opportunity was that by</b> 21 <b>moving a great portion of District 10, and</b> 22 <b>combining it with Rollette and Towner Counties,</b> 23 <b>that it gave -- it gave a Republican a chance to</b> 24 <b>win.</b> 25 Q And that in your view was an improvement?</p>	23
22	<p>1 <b>A It was the reality. I don't know if it</b> 2 <b>was an improvement, but it was a reality of what</b> 3 <b>we saw as far as the --</b> 4 Q And -- I'm sorry. Continue. 5 <b>A I mean, that's -- we looked at the</b> 6 <b>numbers, and we felt that it was a good</b> 7 <b>possibility that we could pull it off and she</b> 8 <b>could win.</b> 9 Q Your former district, District 10, that 10 was a district that also favored Republicans. 11 Is that right? 12 <b>A Correct. Correct.</b> 13 Q And your view is that 9B does as well? 14 <b>A It's a lot closer to 50/50, but it is --</b> 15 <b>there is a slight advantage I think to the</b> 16 <b>Republicans. It just depends on who comes out to</b> 17 <b>vote. I mean, I can't -- I can't sit here and</b> 18 <b>tell you what the vote percentages are, because</b> 19 <b>we've only had one election cycle.</b> 20 Q Donna won by a large margin. Right? 21 <b>A She ran -- I mean, she won handily, yes.</b> 22 Q I think she -- 56.5 percent against an 23 incumbent. Right? 24 <b>A Correct.</b> 25 Q The incumbent, Marvin Nelson, he had run</p>	24

Transcript of Paul Henderson  
December 7, 2022

7 (25 to 28)

25	<p>1 for governor before. Right?</p> <p>2 <b>A He did.</b></p> <p>3 Q What was your impression in Cavalier</p> <p>4 County of folks' thoughts on him?</p> <p>5 <b>A I don't really know that. I mean, I --</b></p> <p>6 <b>it's not something I had conversations with people</b></p> <p>7 <b>about more then.</b></p> <p>8 Q I gather from the vote totals, they liked</p> <p>9 your wife better?</p> <p>10 <b>A Yeah. Yeah. Well, we worked hard, too,</b></p> <p>11 <b>so there's that.</b></p> <p>12 Q So how did you become a plaintiff in this</p> <p>13 case?</p> <p>14 <b>A Well, I became aware that the split was</b></p> <p>15 <b>going to happen. And I think I had a conversation</b></p> <p>16 <b>with Terry Jones on the phone one day, and we</b></p> <p>17 <b>talked about it. And, you know, this was</b></p> <p>18 <b>something that was brand-new, and that raised red</b></p> <p>19 <b>flags for me right away. And I just latched onto</b></p> <p>20 <b>the constitutional argument that's -- that I will</b></p> <p>21 <b>stick with, that in District 9, during our</b></p> <p>22 <b>election I got to vote for one representative, and</b></p> <p>23 <b>the rest of the 47 -- or 45 districts in the state</b></p> <p>24 <b>got to vote for two representatives. So I felt</b></p> <p>25 <b>like that was probably not equal application of</b></p>	27
26	<p>1 <b>constitutional law.</b></p> <p>2 Q So I just want to -- to clarify for the</p> <p>3 record. When you say "the split," you mean</p> <p>4 District 9 being split into two subdistricts?</p> <p>5 <b>A Correct.</b></p> <p>6 Q And you said you had a conversation with</p> <p>7 Terry Jones. Mr. Jones was an incumbent state</p> <p>8 representative from District 4.</p> <p>9 Is that correct?</p> <p>10 <b>A That's correct.</b></p> <p>11 Q And did he reach out to you?</p> <p>12 <b>A He did.</b></p> <p>13 Q How do you know Representative Jones?</p> <p>14 <b>A I don't really know him.</b></p> <p>15 <b>I mean, I know of him because he was in</b></p> <p>16 <b>the House. But I didn't -- I don't have a</b></p> <p>17 <b>personal relationship with Terry.</b></p> <p>18 Q What was the -- did he call you, did he</p> <p>19 e-mail you? How did he reach out?</p> <p>20 <b>A I believe he called me.</b></p> <p>21 Q And what did you talk about?</p> <p>22 <b>A Just the -- just the split of the</b></p> <p>23 <b>district and how that -- how that was going to</b></p> <p>24 <b>affect us going forward.</b></p> <p>25 Q When was that conversation?</p>	28
25	<p>1 <b>A Oh, I would say November, December of</b></p> <p>2 <b>last year, somewhere in that area.</b></p> <p>3 Q And did he ask you if you would be</p> <p>4 willing to be a plaintiff?</p> <p>5 <b>A No.</b></p> <p>6 Q What did he say?</p> <p>7 <b>A We just generally talked about the split</b></p> <p>8 <b>and how both him and I picked up on the fact that</b></p> <p>9 <b>it was probably unconstitutional. And that was</b></p> <p>10 <b>pretty general. Pretty general conversation.</b></p> <p>11 Q Do you know how he got your name or why</p> <p>12 he reached out to you?</p> <p>13 <b>A I don't.</b></p> <p>14 Q He didn't tell you who had said that he</p> <p>15 should call you?</p> <p>16 <b>A He did not. But you've got to realize</b></p> <p>17 <b>that it's a small state, and I've been in the --</b></p> <p>18 <b>politics for 25 years. So it's not like I'm</b></p> <p>19 <b>unknown.</b></p> <p>20 Q And you were the -- at the time you were</p> <p>21 the Republican chair for what was District 10,</p> <p>22 which covered this part of this territory. Right?</p> <p>23 <b>A Correct.</b></p> <p>24 Q And just I think we -- I think this was</p> <p>25 implied, but you live in the Subdistrict 9B.</p>	27
26	<p>1 Is that right?</p> <p>2 <b>A That's correct.</b></p> <p>3 Q And I think you explained it a little</p> <p>4 bit, but make sure I'm right.</p> <p>5 Your concern is that you're unable to</p> <p>6 vote for two state representatives at large; but,</p> <p>7 rather, you vote for one that's dedicated to your</p> <p>8 subdistrict.</p> <p>9 Is that your concern?</p> <p>10 <b>A That's correct.</b></p> <p>11 Q And in terms of, you know, you mentioned</p> <p>12 that you thought it was unconstitutional. I</p> <p>13 gather that your complaint is that it's unequal</p> <p>14 for you to get one when other voters in the state</p> <p>15 get two representatives that they vote for.</p> <p>16 Is that correct?</p> <p>17 <b>A Yeah. I'm not a lawyer, but I know</b></p> <p>18 <b>enough to know that that's my experience.</b></p> <p>19 Q And when you say you thought it was</p> <p>20 unconstitutional, is that the unequal treatment</p> <p>21 that you were concerned about?</p> <p>22 <b>A Correct.</b></p> <p>23 Q Do you have any other objections or</p> <p>24 complaints about the redistricting plan?</p> <p>25 <b>A I guess I don't. I just -- that's what</b></p>	28

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## Transcript of Paul Henderson

8 (29 to 32)

December 7, 2022

29	<p>1 <b>I'm basing my participation in, is that it's</b></p> <p>2 <b>unconstitutional, in my view.</b></p> <p>3 Q And would you like to see the map</p> <p>4 changed?</p> <p>5 <b>A I would like to have the opportunity to</b></p> <p>6 <b>vote for two representatives, yeah.</b></p> <p>7 Q If that change made it harder for</p> <p>8 Republicans to win the district, would you like to</p> <p>9 see that?</p> <p>10 <b>A It wouldn't matter.</b></p> <p>11 Q And aside from the fact that you cast</p> <p>12 your ballot for just one rather than two</p> <p>13 representatives, is there any other way in which</p> <p>14 you were affected by the way the map lines are</p> <p>15 drawn?</p> <p>16 <b>A No. I guess that would be the height of</b></p> <p>17 <b>my complaint.</b></p> <p>18 Q Did you cast a ballot in the 2022</p> <p>19 election? I assume your wife would have made you.</p> <p>20 <b>A Yes, that is a correct statement.</b></p> <p>21 Q Do you regularly vote?</p> <p>22 <b>A I do.</b></p> <p>23 Q Is there an election you've missed?</p> <p>24 <b>A Not since I was 18. That's a long time</b></p> <p>25 <b>ago.</b></p>	31
30	<p>1 Q Do you recall that you were -- the</p> <p>2 parties in the case were sent some document</p> <p>3 requests?</p> <p>4 <b>A I don't understand that question. Go</b></p> <p>5 <b>ahead.</b></p> <p>6 Q Sorry, that's the way we talk to each</p> <p>7 other.</p> <p>8 Did you look at any sort of document that</p> <p>9 had been sent by me or my colleagues or for the</p> <p>10 state for requests for production of the documents</p> <p>11 that you might have?</p> <p>12 <b>A Yes. Yes, I perused those. Yes.</b></p> <p>13 Q What did you do, what was your process</p> <p>14 for determining whether you had material that</p> <p>15 would respond to those requests?</p> <p>16 <b>A Just my memory.</b></p> <p>17 Q Did you look through any e-mail or look</p> <p>18 through your phone at all to see whether you had</p> <p>19 text messages or other materials that might</p> <p>20 respond?</p> <p>21 <b>A I didn't. I just -- I don't text much</b></p> <p>22 <b>and I don't e-mail much, so I didn't do any of</b></p> <p>23 <b>those things.</b></p> <p>24 Q So you just thought about it, and that</p> <p>25 was basically the extent of it?</p>	32
31	<p>1 <b>A Yeah.</b></p> <p>2 Q During the course of the campaign with</p> <p>3 your wife, did you guys text message each other?</p> <p>4 <b>A I don't think so. We just talked.</b></p> <p>5 Q What kind of phone do you have?</p> <p>6 <b>A Well, I had a Google phone, but I lost</b></p> <p>7 <b>it. And I have an Apple phone now.</b></p> <p>8 Q Is that an iPhone?</p> <p>9 <b>A Yeah. Don't ask me what flavor it is,</b></p> <p>10 <b>though, because I couldn't tell you.</b></p> <p>11 Q Well, they're very expensive. I just had</p> <p>12 to get a new one. Not great.</p> <p>13 In your role as the Republican party</p> <p>14 chair for when it was for District 10, how did</p> <p>15 people, how did your sort of constituents or</p> <p>16 colleagues or party folks, how did they reach out</p> <p>17 to you? How do you all communicate?</p> <p>18 <b>A Normally it was on -- by phone.</b></p> <p>19 Q Do you sometimes share text messages or</p> <p>20 back and forth over written communication with</p> <p>21 those folks?</p> <p>22 <b>A No.</b></p> <p>23 Q Never?</p> <p>24 <b>A I don't believe so.</b></p> <p>25 Q Who is paying for your attorneys in this</p>	32
32	<p>1 matter?</p> <p>2 <b>A That would be me and a few others.</b></p> <p>3 Q Is that like an hourly rate, or is that</p> <p>4 sort of a lump sum, capped amount? What is the</p> <p>5 arrangement there?</p> <p>6 <b>A I believe it's an hourly rate.</b></p> <p>7 Q And who are -- you said you and some</p> <p>8 others. Who are the other people?</p> <p>9 <b>A I don't actually have that in front of</b></p> <p>10 <b>me. I mean, I know that Chuck is -- Chuck Walen</b></p> <p>11 <b>has signed on to this complaint. I haven't really</b></p> <p>12 <b>asked him how much money that he's put into the</b></p> <p>13 <b>kitty.</b></p> <p>14 Q Any other people that you can identify?</p> <p>15 <b>A I'm sorry to say I don't -- I don't know</b></p> <p>16 <b>that.</b></p> <p>17 Q Do you know whether there are other</p> <p>18 people and you just don't know who, you can't</p> <p>19 think of who they are? Is that the case?</p> <p>20 <b>A Yeah. I think there's -- there's some</b></p> <p>21 <b>other donors, but I don't have their names in</b></p> <p>22 <b>front of me.</b></p> <p>23 Q And what do you know about them? Are</p> <p>24 they individuals or are they any sort of entities</p> <p>25 or organizations?</p>	32

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Transcript of Paul Henderson

9 (33 to 36)

December 7, 2022

<p style="text-align: right;">33</p> <p>1 <b>A I think they're all people.</b></p> <p>2 Q Is the Republican party contributing any</p> <p>3 funds to pay for the case?</p> <p>4 <b>A No. No, they're not.</b></p> <p>5 Q Have you discussed this lawsuit with any</p> <p>6 legislators?</p> <p>7 <b>A Besides Terry, I don't believe I have.</b></p> <p>8 Q I suppose -- when is your wife sworn in?</p> <p>9 Is that January?</p> <p>10 <b>A They actually got sworn in yesterday.</b></p> <p>11 Q Oh.</p> <p>12 <b>A And, so, but this is all preliminary</b></p> <p>13 <b>stuff. The actual session starts in January.</b></p> <p>14 MR. GABER: I am going to have us take a</p> <p>15 short break, if you don't mind. I don't think I</p> <p>16 have a ton more questions for you, but I want to</p> <p>17 think a little bit and talk to some folks. So</p> <p>18 maybe just a ten-minute break. Ten- or 15-minute</p> <p>19 break sound good?</p> <p>20 MR. SANDERSON: Yeah, that's fine.</p> <p>21 MR. GABER: Thank you.</p> <p>22 (A recess was taken.)</p> <p>23 MR. GABER: I do not have any further</p> <p>24 questions for you.</p> <p>25 I am going to pass the witness to</p>	<p style="text-align: right;">35</p> <p>1 <b>A 1980.</b></p> <p>2 Q After high school did you attend any</p> <p>3 college?</p> <p>4 <b>A Yeah. I took two years of-- at NDSU,</b></p> <p>5 <b>and then I did one semester at NDSCS in Wahpeton.</b></p> <p>6 Q What did you study at NDSU?</p> <p>7 <b>A Agronomy.</b></p> <p>8 Q And did that result in a degree?</p> <p>9 <b>A It did not.</b></p> <p>10 Q What about in Wahpeton? You took one</p> <p>11 semester. Did you have any degree at the</p> <p>12 conclusion of that?</p> <p>13 <b>A I did not.</b></p> <p>14 Q What did you study in Wahpeton?</p> <p>15 <b>A Well, my wife was going there for dental</b></p> <p>16 <b>hygiene, so I studied her quite a bit. Actually,</b></p> <p>17 <b>it was an agronomy, it was an agronomy semester as</b></p> <p>18 <b>well.</b></p> <p>19 Q Have you had any other education since</p> <p>20 high school in terms of technical training or any</p> <p>21 other formal education?</p> <p>22 <b>A I just, I went through the EMT basic</b></p> <p>23 <b>course. You know, that's probably 20 years ago.</b></p> <p>24 <b>I was an EMT for seven years.</b></p> <p>25 Q Where did you do the EMT course?</p>
<p style="text-align: right;">34</p> <p>1 Mr. Phillips.</p> <p>2 MR. PHILLIPS: Thank you.</p> <p>3 EXAMINATION BY COUNSEL FOR DEFENDANTS</p> <p>4 BY MR. PHILLIPS:</p> <p>5 Q Still good morning, Mr. Henderson. I'm</p> <p>6 doing the questioning second today, so I will do</p> <p>7 my best not to repeat any of the questions you've</p> <p>8 already been asked. But if I do ask something</p> <p>9 you've already answered, please just bear with me.</p> <p>10 I am David Phillips. I'm not sure if we</p> <p>11 have met before specifically, but I represent the</p> <p>12 Governor in this case and the Secretary of State.</p> <p>13 And I will be doing the followup questions today.</p> <p>14 <b>A Hello.</b></p> <p>15 Q I wanted to do just a few followups to</p> <p>16 clean up some of the matters that I heard you</p> <p>17 testify to earlier and to add a little bit more</p> <p>18 detail.</p> <p>19 I want to start with your background.</p> <p>20 Where did you go to high school?</p> <p>21 <b>A I went to a now defunct high school</b></p> <p>22 <b>called Border Central.</b></p> <p>23 Q Border Central. Where is that located?</p> <p>24 <b>A In Calvin. Or it was.</b></p> <p>25 Q What year did you graduate?</p>	<p style="text-align: right;">36</p> <p>1 <b>A In Rolla.</b></p> <p>2 Q What do you do currently for a living?</p> <p>3 <b>A I'm in agriculture.</b></p> <p>4 Q And are you employed or self-employed?</p> <p>5 <b>A As the owner and operator of a farm.</b></p> <p>6 Q What's the name of the operation?</p> <p>7 <b>A There is no technical name. It's all</b></p> <p>8 <b>under my name.</b></p> <p>9 Q How long have you been doing that?</p> <p>10 <b>A Since I was 18.</b></p> <p>11 Q And you just farm the property around</p> <p>12 your residence in Calvin?</p> <p>13 <b>A Yeah. I mean, there's -- it's spread out</b></p> <p>14 <b>a little bit. But, yeah, it's around.</b></p> <p>15 Q I'm at a point where I'm likely to jump</p> <p>16 around between topics just because I've crossed</p> <p>17 things off my list that Mr. Gaber already covered</p> <p>18 with you. So please bear with me on that.</p> <p>19 What do you consider to be your race or</p> <p>20 ethnicity?</p> <p>21 <b>A White, I guess.</b></p> <p>22 Q Do you consider yourself to be Native</p> <p>23 American?</p> <p>24 <b>A No.</b></p> <p>25 Q And what's the race or ethnicity of your</p>

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Transcript of Paul Henderson

10 (37 to 40)

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<p style="text-align: right;">37</p> <p>1 wife?</p> <p>2 <b>A I believe she would be white as well.</b></p> <p>3 Q Is she Native American?</p> <p>4 <b>A She is not.</b></p> <p>5 Q I believe you had said in your testimony</p> <p>6 earlier that you voted in all of the elections</p> <p>7 since you were 18.</p> <p>8 Am I remembering that correctly?</p> <p>9 <b>A That's correct.</b></p> <p>10 Q Would that include all state-wide</p> <p>11 elections in North Dakota?</p> <p>12 <b>A As to the best of my recollection, yes.</b></p> <p>13 Q And all state legislative elections?</p> <p>14 <b>A Correct.</b></p> <p>15 Q What's your current address?</p> <p>16 <b>A 7980 99th Street, Northeast, Calvin with</b></p> <p>17 <b>a C, C-A-L-V-I-N, North Dakota, 58323.</b></p> <p>18 Q And do you live there all year round?</p> <p>19 <b>A I do.</b></p> <p>20 Q Do you own any other homes at all?</p> <p>21 <b>A I don't.</b></p> <p>22 Q Some people spend part of the year down</p> <p>23 south. Are you that type of person, or do you</p> <p>24 live --</p> <p>25 <b>A Haven't got there yet. We will be</b></p>	<p style="text-align: right;">39</p> <p>1 <b>A Yeah.</b></p> <p>2 <b>I mean, we may have taken some vacations</b></p> <p>3 <b>and that type of thing, but our residency has</b></p> <p>4 <b>always been Calvin.</b></p> <p>5 Q In this lawsuit, is it correct to say</p> <p>6 that you're seeking to eliminate the subdistrict</p> <p>7 seat in District 9?</p> <p>8 <b>A That would be the end result, yes.</b></p> <p>9 Q Are you concerned in terms of what that</p> <p>10 would mean for your wife's current seat in the</p> <p>11 legislature?</p> <p>12 <b>A I mean, obviously it's a concern, but I</b></p> <p>13 <b>don't -- it doesn't raise itself to the level of</b></p> <p>14 <b>overcoming my principles for the</b></p> <p>15 <b>unconstitutionality of the process here.</b></p> <p>16 Q Do you know what the effect would be if</p> <p>17 the subdistricts were eliminated on your wife's</p> <p>18 seat?</p> <p>19 <b>A I don't. I mean, it's never been done</b></p> <p>20 <b>before. We don't know what's the court going to</b></p> <p>21 <b>rule. I mean, that's, we don't know. If -- we</b></p> <p>22 <b>could talk about what-ifs, I guess. But, I mean,</b></p> <p>23 <b>I don't know.</b></p> <p>24 <b>I don't know. I just -- I mean, it's</b></p> <p>25 <b>possible that they would require a new election in</b></p>
<p style="text-align: right;">38</p> <p>1 <b>renting a place here in Bismarck for the duration</b></p> <p>2 <b>of the session.</b></p> <p>3 Q Have you already found a place to rent?</p> <p>4 <b>A We have.</b></p> <p>5 Q And have you signed a lease?</p> <p>6 <b>A No.</b></p> <p>7 Q So I take it you have not yet moved to</p> <p>8 Bismarck?</p> <p>9 <b>A We have not.</b></p> <p>10 Q Your current address, is that in what's</p> <p>11 currently districted as Subdistrict 9B?</p> <p>12 <b>A That's correct.</b></p> <p>13 Q Have you ever lived in the area that's</p> <p>14 subdistricted as Subdistrict 9A?</p> <p>15 <b>A No.</b></p> <p>16 Q Has your wife lived with you the entire</p> <p>17 time you've been married?</p> <p>18 <b>A She has.</b></p> <p>19 Q How long have you been married?</p> <p>20 <b>A Changes every year. I think it's 39, but</b></p> <p>21 <b>don't quote me on that, because I could get in</b></p> <p>22 <b>trouble.</b></p> <p>23 Q That's fair.</p> <p>24 And has she lived there continuously that</p> <p>25 whole 39 years?</p>	<p style="text-align: right;">40</p> <p>1 <b>2024 over the whole district. And if that</b></p> <p>2 <b>happens, I guess we will work hard for</b></p> <p>3 <b>re-election.</b></p> <p>4 Q Mr. Gaber had asked you earlier about</p> <p>5 your written discovery responses.</p> <p>6 Do you remember those questions?</p> <p>7 <b>A Yeah. I mean, I looked at them.</b></p> <p>8 Q And did you sign those written discovery</p> <p>9 responses?</p> <p>10 <b>A Yes. Yes.</b></p> <p>11 Q Did you look for documents to produce in</p> <p>12 response to those discovery requests that were</p> <p>13 made in this case?</p> <p>14 <b>A No. I didn't really look a lot because I</b></p> <p>15 <b>don't text and I don't e-mail a lot. I don't do</b></p> <p>16 <b>that. Most of my communication is in person or</b></p> <p>17 <b>over the phone.</b></p> <p>18 Q Did you look for any physical paper</p> <p>19 documents?</p> <p>20 <b>A I don't have those, so I didn't look. I</b></p> <p>21 <b>mean, I just -- I know I didn't write any letters</b></p> <p>22 <b>or correspond with anybody in that vein, so ...</b></p> <p>23 Q Have you looked at the legislative record</p> <p>24 in this case on the legislative assembly website?</p> <p>25 <b>A I--</b></p>

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## Transcript of Paul Henderson

11 (41 to 44)

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41	<p>1 Q I'm sorry, I cut you off. Go ahead.</p> <p>2 <b>A I have not.</b></p> <p>3 Q You haven't looked at any of the</p> <p>4 documents or other materials on the legislative</p> <p>5 website relating to redistricting?</p> <p>6 <b>A I have not.</b></p> <p>7 Q Did you look at those in preparing the</p> <p>8 answers to the written discovery?</p> <p>9 <b>A No.</b></p> <p>10 Q Earlier I believe you had testified about</p> <p>11 a conversation that you had with Terry Jones.</p> <p>12 Do you recall that?</p> <p>13 <b>A Vaguely. I mean, it was a year ago, so I</b></p> <p>14 <b>don't -- I can't get specific what we exactly</b></p> <p>15 <b>talked about. Generally, though, we talked about</b></p> <p>16 <b>this, the unconstitutionality of the split.</b></p> <p>17 Q You had mentioned the discussion of the</p> <p>18 split.</p> <p>19 Do you have any recollection of any</p> <p>20 specific statement that you made during that call?</p> <p>21 <b>A I don't.</b></p> <p>22 Q And do you have any recollection of any</p> <p>23 specific statement that Mr. Jones made during that</p> <p>24 call?</p> <p>25 <b>A Specifically, no.</b></p>	43	<p>1 Q Did you, personally, attend or provide</p> <p>2 any testimony at the redistricting hearings at the</p> <p>3 legislature?</p> <p>4 <b>A I did not.</b></p> <p>5 Q Did you, personally, attend the House or</p> <p>6 Senate floor debate on the redistricting?</p> <p>7 <b>A I did not.</b></p> <p>8 Q Have you ever reviewed the videos of any</p> <p>9 of those hearings or debates of the redistricting</p> <p>10 that took place in 2021?</p> <p>11 <b>A No.</b></p> <p>12 Q Have you ever reviewed transcripts of</p> <p>13 those proceedings?</p> <p>14 <b>A I have not.</b></p> <p>15 Q Have you reviewed any documentation at</p> <p>16 all during the course of this litigation?</p> <p>17 <b>A Just the -- I signed the complaint and</b></p> <p>18 <b>I've read that. And of course we had meetings</b></p> <p>19 <b>with counsel.</b></p> <p>20 Q I don't want you to tell me about</p> <p>21 anything that you talked about with your counsel.</p> <p>22 But anything else that you've reviewed? Documents</p> <p>23 you've reviewed or materials you've reviewed?</p> <p>24 <b>A No.</b></p> <p>25 Q Have you retained an expert to testify at</p>
42	<p>1 Q Do you remember any details at all from</p> <p>2 that call, other than it involved the split of the</p> <p>3 districts?</p> <p>4 <b>A No.</b></p> <p>5 Q Have you ever had any conversation with</p> <p>6 any other North Dakota legislator about the 2021</p> <p>7 redistricting?</p> <p>8 <b>A No. Not to my recollection.</b></p> <p>9 Q Have you ever had a conversation with</p> <p>10 anyone employed with the North Dakota Legislative</p> <p>11 Council about the 2021 redistricting?</p> <p>12 <b>A No.</b></p> <p>13 Q And that would include Claire Ness. If</p> <p>14 you had a conversation with her?</p> <p>15 <b>A I don't know who that is.</b></p> <p>16 Q What about Emily Thompson?</p> <p>17 <b>A No.</b></p> <p>18 Q And also Samantha Kramer; have you had a</p> <p>19 conversation with her?</p> <p>20 <b>A Not that I'm aware of, no.</b></p> <p>21 Q Other than the conversation with Terry</p> <p>22 Jones, have you had any conversation with any</p> <p>23 other employee or agent of the State of North</p> <p>24 Dakota about the 2021 redistricting?</p> <p>25 <b>A No.</b></p>	44	<p>1 trial in this case regarding the Voting Rights</p> <p>2 Act?</p> <p>3 <b>A I would have to defer to counsel on that.</b></p> <p>4 <b>I don't know.</b></p> <p>5 MR. PHILLIPS: Can we take just a</p> <p>6 few-minute break. I want to review a few things.</p> <p>7 I may be done, but I just want to check my notes.</p> <p>8 Let's go off the record briefly.</p> <p>9 (A recess was taken.)</p> <p>10 MR. PHILLIPS: I don't have any further</p> <p>11 questions, Mr. Henderson.</p> <p>12 THE WITNESS: Okay.</p> <p>13 MR. PHILLIPS: Thank you.</p> <p>14 MR. SANDERSON: Any further questions,</p> <p>15 Mark?</p> <p>16 MR. GABER: No, nothing from me.</p> <p>17 Thank you for your time, sir.</p> <p>18 MR. SANDERSON: All right. I have no</p> <p>19 questions.</p> <p>20 Mr. Henderson, you have the right to read</p> <p>21 and sign your deposition, or you can waive that</p> <p>22 right. It's your choice. What would you like to</p> <p>23 do?</p> <p>24 THE WITNESS: I will waive today.</p> <p>25 COURT REPORTER: Mr. Phillips, do you</p>

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<p style="text-align: right;">45</p> <p>1 need a copy of the transcript? 2 MR. PHILLIPS: Yes. 3 COURT REPORTER: Mr. Sanderson, do you 4 need a copy of the transcript? 5 MR. SANDERSON: Yeah. Electronic 6 condensed, please. 7 MR. PHILLIPS: I'll second that, 8 electronic condensed is fine. 9 (Off the record at 10:36 a.m. EST.) 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">47</p> <p>1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC 2 I, Debra A. Whitehead, the officer before whom the 3 foregoing proceedings were taken, do hereby certify 4 that the foregoing transcript is a true and correct 5 record of the proceedings; that said proceedings 6 were taken by me stenographically and thereafter 7 reduced to typewriting under my supervision; that 8 reading and signing was not requested; and that I am 9 neither counsel for, related to, nor employed by any 10 of the parties to this case and have no interest, 11 financial or otherwise, in its outcome. 12 IN WITNESS WHEREOF, I have hereunto set my hand and 13 affixed my notarial seal this 16th day of December, 14 2022. 15 16 My commission expires: 17 April 30, 2023 18 19  20 _____ 21 E-NOTARY PUBLIC IN AND FOR THE 22 STATE OF MARYLAND 23 24 25</p>
<p style="text-align: right;">46</p> <p>1 ACKNOWLEDGMENT OF DEPONENT 2 I, PAUL HENDERSON, do hereby acknowledge 3 that I have read and examined the foregoing 4 testimony, and the same is a true, correct and 5 complete transcription of the testimony given by 6 me, and any corrections appear on the attached 7 Errata sheet signed by me. 8 9 _____ 10 (DATE) (SIGNATURE) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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# EXHIBIT 7

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# Transcript of Charles Leander Walen

**Date:** December 7, 2022

**Case:** Walen, et al. -v- Burgum, et al.

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Supp.App.180

Appellate Case: 23-1600 Page: 183 Date Filed: 04/17/2023 Entry ID: 5265898

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December 7, 2022

<p style="text-align: center;">1</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF NORTH DAKOTA</p> <p>3 EASTERN DIVISION</p> <p>4 ----- x</p> <p>5 CHARLES WALEN, an individual; :</p> <p>6 and PAUL HENDERSON, an : 7 individual, : 8 Plaintiffs, : 9 v. : Case No.</p> <p>10 DOUG BURGUM, in his official : 1:22-CV-00031-CRH 11 capacity as Governor of the : 12 State of North Dakota; and : 13 ALVIN JAEGER, in his official : 14 capacity as Secretary of : 15 State of North Dakota, : 16 Defendants, : 17 ----- x</p> <p>18 (Caption continued on next page)</p> <p>19 Deposition of CHARLES LEANDER WALEN 20 Conducted Virtually 21 Wednesday, December 7, 2022 22 2:02 p.m. EST</p> <p>23 Job No.: 473885 24 Pages 1 - 37 25 Reported by: Debra A. Whitehead</p>	<p style="text-align: center;">3</p> <p>1 APPEARANCES</p> <p>2 ON BEHALF OF PLAINTIFFS:</p> <p>3 PAUL R. SANDERSON, ESQUIRE</p> <p>4 RYAN J. JOYCE, ESQUIRE</p> <p>5 EVENSON SANDERSON</p> <p>6 1100 College Drive, Suite 5</p> <p>7 Bismarck, North Dakota 58501</p> <p>8 (701) 751-1243</p> <p>9</p> <p>10 ON BEHALF OF DEFENDANTS:</p> <p>11 DAVID R. PHILLIPS, ESQUIRE</p> <p>12 BAKKE GRINOLDS WIEDERHOLT</p> <p>13 300 West Century Avenue</p> <p>14 Bismarck, North Dakota 58503</p> <p>15 P.O. Box 4247</p> <p>16 Bismarck, North Dakota 58502-4247</p> <p>17 (701) 751-8188</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: center;">2</p> <p>1 (Caption continued from previous page)</p> <p>2 ----- x</p> <p>3 and : 4 MANDAN, HIDATSA AND ARIKARA : 5 NATION, CESAR ALVAREZ, and : 6 LISA DEVILLE, : 7 Intervenor-Defendants. : 8 ----- X</p> <p>9 Deposition of CHARLES LEANDER WALEN, conducted 10 virtually.</p> <p>11</p> <p>12 Pursuant to notice, before Debra Ann Whitehead, 13 E-Notary Public in and for the State of Maryland.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">4</p> <p>1 APPEARANCES CONTINUED</p> <p>2 ON BEHALF OF INTERVENOR-DEFENDANTS:</p> <p>3 MARK P. GABER, ESQUIRE</p> <p>4 MOLLY E. DANAHY, ESQUIRE</p> <p>5 NICOLE HANSEN, ESQUIRE</p> <p>6 CAMPAIGN LEGAL CENTER</p> <p>7 1101 14th Street, NW, Suite 400</p> <p>8 Washington, DC 20005</p> <p>9 (202) 716-2200</p> <p>10 - and -</p> <p>11 ALLISON NESWOOD, ESQUIRE</p> <p>12 MICHAEL S. CARTER, ESQUIRE</p> <p>13 NATIVE AMERICAN RIGHTS FUND</p> <p>14 1506 Broadway</p> <p>15 Boulder, Colorado 80301</p> <p>16 (303) 447-8760</p> <p>17 - and -</p> <p>18 SAMANTHA B. KELTY, ESQUIRE</p> <p>19 NATIVE AMERICAN RIGHTS FUND</p> <p>20 1514 P Street, NW, Suite D</p> <p>21 Washington, DC 20005</p> <p>22 (202) 785-4166</p> <p>23</p> <p>24</p> <p>25</p>

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2 (5 to 8)

<p style="text-align: right;">5</p> <p>1 APPEARANCES CONTINUED 2 ALSO PRESENT: 3 KRISTIN HOERTER, Paralegal, NARF 4 LAURIE STIRLING, Paralegal, NARF 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">7</p> <p>1 PROCEEDINGS 2 CHARLES LEANDER WALEN, 3 having been duly sworn, testified as follows: 4 EXAMINATION BY COUNSEL FOR 5 INTERVENOR-DEFENDANTS 6 BY MR. GABER: 7 Q Mr. Walen, my name is Mark Gaber. I'm a 8 lawyer for the intervenor-defendants in this case, 9 and I will be asking you some questions. 10 I'll start, can you state your name, for 11 the record. 12 <b>A Charles Walen.</b> 13 Q And have you been deposed before? 14 <b>A Yes.</b> 15 Q How many times? 16 <b>A One time that I can remember, and it was</b> 17 <b>for a work-related reason.</b> 18 Q About how long ago was that? 19 <b>A Fifteen-plus years ago.</b> 20 Q All right. So I'll spend just a couple 21 of minutes here with some ground rules since it's 22 been a while since you've done this. The main one 23 is to be cognizant that we have a court reporter 24 who is taking down all of our words. So that 25 makes it important that we endeavor to talk slowly</p>
<p style="text-align: right;">6</p> <p>1 CONTENTS 2 EXAMINATION OF CHARLES LEANDER WALEN PAGE 3 By Mr. Gaber 7 4 By Mr. Phillips 25 5 6 7 EXHIBITS 8 (none) 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">8</p> <p>1 and that we not talk over each other. That, you 2 know, can be awkward sometimes because that's not 3 how one has a normal conversation. But for her 4 benefit please keep that in mind, and I'll also do 5 my best not to talk over you when you're giving an 6 answer. 7 Does that make sense? 8 <b>A Yes, that does.</b> 9 Q And then another is that you have to give 10 verbal responses to my questions. She can't take 11 down, you know, head nods and the like. And since 12 we're doing this remotely, that's even harder, I 13 imagine, than it might be if we were in the same 14 room with one another. So do try, though again at 15 times it can be awkward to give a verbal response 16 to each question. Okay? 17 <b>A Understand.</b> 18 Q I will assume that you understand my 19 questions unless you say something. So, you know, 20 if I ask you a question and you don't understand 21 it or I do a poor job of asking it, please just 22 let me know, and I will clarify so that we are 23 both on the same page. 24 Okay? 25 <b>A I will do so.</b></p>



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3 (9 to 12)

<p>9</p> <p>1 Q I don't anticipate us taking much of your 2 time today. But if we do need a break or if you 3 need a break, please let me know, and we can go 4 ahead and take one. The only thing that I ask is 5 if that's the case, that you answer any question 6 that is pending, and then we can go ahead and take 7 a break. 8 Does that sound good? 9 <b>A That sounds good. And I am at work, so 10 just bear that in mind.</b> 11 Q Okay. 12 <b>A I'm in a private office.</b> 13 Q All right. Well, I'll try not to keep 14 you too long from your job. 15 Someone, one of the other attorneys might 16 object to a question that I ask. If they do, you 17 know, let them state that objection, but then you 18 can go ahead and answer my question. 19 Does that make sense? 20 <b>A Yes.</b> 21 Q And is there any reason that you can't 22 answer my questions today truthfully and fully? 23 <b>A No.</b> 24 Q Now, you mentioned you're at your office. 25 Is there anyone else in the room there</p>	<p>11</p> <p>1 problem. 2 MR. GABER: Okay. That sounds good. 3 Q And, Mr. Walen, other than the Zoom 4 screen that's open, are there any other screens, 5 e-mail, anything like that, that are open on your 6 computer? 7 <b>A My company e-mail is open because I 8 cannot -- I'm not supposed to close it.</b> 9 Q That's fine with me. I just ask that you 10 not, like, e-mail someone to get answers to 11 questions during the deposition. But I don't want 12 to get you in trouble with your job. 13 What did you do to prepare for today's 14 deposition? 15 <b>A I read through the interrogatories that I 16 had before, and then I watched the deposition this 17 morning.</b> 18 Q Did you meet with your counsel before 19 today's deposition? 20 <b>A By phone only.</b> 21 Q And when was that? 22 <b>A Yesterday and today.</b> 23 Q Did you meet with your counsel after this 24 morning's deposition? 25 <b>A For one question only.</b></p>
<p>10</p> <p>1 with you? 2 <b>A No.</b> 3 Q And did you bring any notes with you 4 today? 5 <b>A Yes.</b> 6 Q What's the nature of those notes? 7 <b>A They were from the deposition this 8 morning with Paul. I just took some notes then so 9 that any questions that might be similar, I'll 10 have the answer.</b> 11 Q Well, I would -- it's probably best if -- 12 I know you were present this morning. You know, I 13 don't know, maybe I'll direct this to your 14 counsel. Typically if someone has notes, you 15 know, we are entitled to see those. I don't know 16 if you would rather he not have those notes or if 17 you're fine producing them. 18 THE WITNESS: The only thing that's on 19 the notes are names and dates. 20 MR. GABER: So then it sounds like you 21 may be fine producing them. 22 I don't know, Paul, if you have a 23 preference. 24 MR. SANDERSON: I don't -- doesn't 25 matter. You can make a request. Shouldn't be a</p>	<p>12</p> <p>1 Q And I don't want to know what the 2 question and answer were. 3 Did you review any documents in 4 preparation for the deposition? 5 <b>A Yes.</b> 6 Q And when were those documents? 7 <b>A I -- as because of this morning's 8 deposition I looked at my e-mail and my text 9 messages so that I could answer that question.</b> 10 Q And can you just be a little bit more 11 specific. What in particular were you looking 12 for? 13 <b>A To see if I had anything in those areas 14 that pertained to this case.</b> 15 Q And what did you do to make that 16 determination? Did you run a search, or what was 17 your process? 18 <b>A I did a -- just I did a search based on 19 lawsuit and I did a search based on redistricting.</b> 20 Q And that was in your personal e-mail? 21 <b>A Correct.</b> 22 Q What's that e-mail address? 23 <b>A ChuckWalen@Gmail.com.</b> 24 Q And did you find documents? 25 <b>A The only documents that are in there are</b></p>

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4 (13 to 16)

13	<p>1 <b>between my attorney and myself.</b></p> <p>2 Q And what about with respect to your text</p> <p>3 messages?</p> <p>4 <b>A There was only one outside of the</b></p> <p>5 <b>attorney.</b></p> <p>6 Q And what was that text message?</p> <p>7 <b>A Paraphrasing, it said, I understand that</b></p> <p>8 <b>you're -- that we redistricted, there may be a</b></p> <p>9 <b>lawsuit, I'm willing to help.</b></p> <p>10 Q Who was that communication with?</p> <p>11 <b>A Jay Sandstrom.</b></p> <p>12 Q Jay Sandstrom?</p> <p>13 <b>A Yes.</b></p> <p>14 Q And who is he?</p> <p>15 <b>A He is a member of our district.</b></p> <p>16 Q Did you say a member of your district?</p> <p>17 <b>A Yes. Or constituent of our district.</b></p> <p>18 Q You reached out to him?</p> <p>19 <b>A No; he reached out to me.</b></p> <p>20 Q When you say a constituent of your</p> <p>21 district, is he like -- is he affiliated with the</p> <p>22 Republican party, or is he -- what's his role?</p> <p>23 <b>A He is a member of the Republican party.</b></p> <p>24 Q Does he hold any official position with</p> <p>25 the party?</p>	15
14	<p>1 Q And what county is that in?</p> <p>2 <b>A Mountrail.</b></p> <p>3 Q How long have you lived there?</p> <p>4 <b>A Eleven years.</b></p> <p>5 Q Did you say seven or 11?</p> <p>6 <b>A Eleven.</b></p> <p>7 Q Where did you live before that?</p> <p>8 <b>A West Fargo, North Dakota.</b></p> <p>9 Q And do you have any other residences</p> <p>10 besides the House in New Town?</p> <p>11 <b>A No.</b></p> <p>12 Q And you're registered to vote at that</p> <p>13 address?</p> <p>14 <b>A We're not required to register in North</b></p> <p>15 <b>Dakota.</b></p> <p>16 Q I'm sorry, I actually knew that. That is</p> <p>17 the address you use to vote?</p> <p>18 <b>A Yes.</b></p> <p>19 Q And that -- am I right that that's in</p> <p>20 Legislative District 4 for the state Senate and in</p> <p>21 District 4A for the State House?</p> <p>22 Is that right?</p> <p>23 <b>A Correct.</b></p> <p>24 Q What do you do for work?</p> <p>25 <b>A I am an accountant.</b></p>	16

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5 (17 to 20)

17	<p>1 Q And how long have you been the Northwest 2 regional chair for the party? 3 <b>A Four years.</b> 4 Q Is that also elected? 5 <b>A Yes.</b> 6 Q Do you have any other positions with the 7 North Dakota Republican party? 8 <b>A No.</b> 9 Q What about the national Republican party; 10 do you have any involvement there? 11 <b>A No, none.</b> 12 Q And any other political organizations? 13 <b>A No.</b> 14 Q Have you worked on political campaigns? 15 <b>A Yes; in my district.</b> 16 Q And which types of campaigns? 17 <b>A The legislative for Senator and for 18 Congress for North Dakota.</b> 19 Q I'm going to circle back to your 20 conversation that you had with Mr. Sandstrom. 21 What did he say on that conversation? 22 <b>A I don't -- he just asked if there's any 23 way he could help.</b> 24 Q Did you speak with him by phone in 25 addition to the text exchange?</p>	19	<p>1 <b>redistricting process, yes.</b> 2 Q I guess did you generate the idea or did 3 someone come to you as a group or, you know -- 4 kind of just give me the sort of your explanation 5 of who talked to who and who was involved and how 6 that came about, please. 7 <b>A Myself, Terry Jones, Donita Bye, and 8 Jordan Kannianen were the executive committee of 9 District 4. We discussed what options would be.</b> 10 Q So I think it would be helpful for the 11 court reporter if you could spell those, the last 12 two names at least. I think Terry Jones, and then 13 I believe there were two other names of the 14 executive committee folks? 15 <b>A Donita Bye is D-O-N-I-T-A, B-Y-E. Jordan 16 Kannianen is J-O-R-D-A-N, K-A-N-N-I-A-N-E-N. He's 17 also my son-in-law.</b> 18 Q Well, it's good that you got his name 19 spelled right. 20 So the four of you -- was this while 21 redistricting was still ongoing in the 22 legislature, or was this after the bill had been 23 passed? 24 <b>A It would be after the bill was passed.</b> 25 Q And aside from Representative Jones and</p>
18	<p>1 <b>A Other than his reaching out to me by his 2 text, I talked to him by phone.</b> 3 Q And what did you discuss in that 4 conversation? 5 <b>A I don't remember. That's over a year 6 ago.</b> 7 Q Have you run for office other than the 8 party positions? 9 <b>A Yes.</b> 10 Q What offices? 11 <b>A West Fargo School Board. I won.</b> 12 Q Anything else? 13 <b>A No.</b> 14 Q How did you become involved in this 15 lawsuit? 16 <b>A I did not like the fact that I lost a 17 representative to represent me, so talking with 18 people within my district, we decided that I 19 should be the one to represent the people of 20 District 4.</b> 21 Q And did someone -- I know you had this 22 text exchange with Mr. Sandstrom. 23 He reached out to you. 24 Is that right? 25 <b>A He reached out to me after seeing the</b></p>	20	<p>1 the other two folks you mentioned, was anyone else 2 involved in conversations about the potential to 3 file a lawsuit? 4 <b>A No.</b> 5 Q And Jordan, is it Kannianen? 6 <b>A Kannianen.</b> 7 Q Jordan K, is he a member of the state 8 legislature? 9 <b>A He is the state Senator.</b> 10 Q Okay. 11 <b>A District 4.</b> 12 Q When did you first get in touch with your 13 attorneys in this case? 14 <b>A I will defer to them on that question. 15 Don't remember the date exactly.</b> 16 Q So if you don't know exactly, sort of 17 roughly when would that have been? Was it during 18 the legislative process or afterwards, this year, 19 last year? 20 <b>A It would be short -- very shortly after 21 the redistricting.</b> 22 Q And did you reach out to them or did they 23 reach out to you? 24 MR. SANDERSON: Object to the form, to 25 the extent it calls for attorney-client</p>

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6 (21 to 24)

21	<p>1 communications.</p> <p>2 And, Charles, I'd instruct you not to</p> <p>3 discuss or testify to any communications you've</p> <p>4 had with counsel in this deposition.</p> <p>5 Q And just to be clear, I only mean -- I</p> <p>6 don't want you to tell me what was said or</p> <p>7 anything like that. I just mean, you know, who</p> <p>8 generated the -- who initiated the contact?</p> <p>9 A <b>I don't remember.</b></p> <p>10 Q Who is paying for your legal counsel?</p> <p>11 A <b>I'm not sure who is all paying. I know a</b></p> <p>12 <b>few that are.</b></p> <p>13 Q Who can you identify?</p> <p>14 A <b>Paul Henderson, Terry Jones, Jay</b></p> <p>15 <b>Sandstrom. Those are the ones I remember.</b></p> <p>16 Q And is there an agreement among that</p> <p>17 group of people to split, it's like an equal</p> <p>18 share, or what's the arrangement?</p> <p>19 A <b>I don't know what the arrangement is.</b></p> <p>20 Q Are you aware of -- whether or not you</p> <p>21 know the name, are you aware that if there are</p> <p>22 other people or groups who are contributing?</p> <p>23 A <b>I don't know if there are or not.</b></p> <p>24 Q What members of the legislature have you</p> <p>25 discussed this litigation with?</p>	23
22	<p>1 <b>A Terry Jones, Jordan Kannianen</b></p> <p>2 <b>and (inaudible.)</b></p> <p>3 Q We missed the third one.</p> <p>4 A <b>Clayton Fegley, who is the 4B</b></p> <p>5 <b>representative currently.</b></p> <p>6 Q And what have you -- I guess roughly when</p> <p>7 have you spoken with those three people?</p> <p>8 A <b>I talk to them regularly, as I'm the</b></p> <p>9 <b>District chair.</b></p> <p>10 Q And what form does that communication</p> <p>11 take? Do you ever text with those folks?</p> <p>12 A <b>All -- it's always verbal. Terry lives</b></p> <p>13 <b>one -- about three houses away from me, and</b></p> <p>14 <b>Jordan, I see him very often.</b></p> <p>15 Q Makes sense. Family.</p> <p>16 A <b>Right.</b></p> <p>17 Q Any other legislators that you have</p> <p>18 spoken with about this lawsuit?</p> <p>19 A <b>No.</b></p> <p>20 Q Why did you decide to become a plaintiff?</p> <p>21 A <b>Decide to become a what?</b></p> <p>22 Q Why did you decide to become a plaintiff?</p> <p>23 A <b>Because I feel that someone needs to</b></p> <p>24 <b>represent District 4.</b></p> <p>25 Q And you're cutting out a little bit. It</p>	24
21	<p>1 looks like you said something after "someone needs</p> <p>2 to represent District 4."</p> <p>3 A <b>No. That was the end.</b></p> <p>4 Q So your objection is that you have -- you</p> <p>5 get to vote for one state representative rather</p> <p>6 than two state representatives.</p> <p>7 Is that correct?</p> <p>8 A <b>Correct. And now I'm not -- I'm not</b></p> <p>9 <b>being represented by two, like I have been in the</b></p> <p>10 <b>past. When the rest of the state gets two, I only</b></p> <p>11 <b>get one.</b></p> <p>12 Q So that's your complaint, that you think</p> <p>13 you should be able to have two representatives,</p> <p>14 not just one?</p> <p>15 A <b>Yes, that is the complaint.</b></p> <p>16 Q Is there anything else about the</p> <p>17 redistricting plan that you object to?</p> <p>18 A <b>No.</b></p> <p>19 Q And the extent of the unequal treatment</p> <p>20 that you think the plan has is that you're</p> <p>21 represented by one person rather than two?</p> <p>22 A <b>Correct.</b></p> <p>23 Q And that's the sole reason why you'd like</p> <p>24 to see the district changed to be one full</p> <p>25 district?</p>	23
22	<p>1 <b>A Correct.</b></p> <p>2 Q Would you also like to see the district</p> <p>3 be represented by two Republicans in the State</p> <p>4 House?</p> <p>5 A <b>I would like that personally, yes.</b></p> <p>6 Q Did you vote in the 2022 election?</p> <p>7 A <b>Yes.</b></p> <p>8 Q And do you regularly vote in elections?</p> <p>9 A <b>Yes; every election since I was 18.</b></p> <p>10 Q Where does -- so you said that -- I think</p> <p>11 you said Terry Jones has a house down the street</p> <p>12 from you.</p> <p>13 Is that right?</p> <p>14 A <b>Yes.</b></p> <p>15 Q How frequently does he stay there?</p> <p>16 A <b>All the time. He lives there.</b></p> <p>17 MR. GABER: I'm going to take a short</p> <p>18 break, if that's okay. Maybe ten minutes.</p> <p>19 THE WITNESS: Okay.</p> <p>20 (A recess was taken.)</p> <p>21 MR. GABER: Well, Mr. Walen, I don't have</p> <p>22 any further questions for you. Thank you for your</p> <p>23 time. Mr. Phillips, representing the Governor and</p> <p>24 the Secretary of State, I think will have some</p> <p>25 questions.</p>	24

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7 (25 to 28)

25	<p>1 THE WITNESS: Okay.</p> <p>2 EXAMINATION BY COUNSEL FOR DEFENDANTS</p> <p>3 BY MR. PHILLIPS:</p> <p>4 Q Thank you, Mr. Walen. I'm -- did we lose</p> <p>5 him? Oh.</p> <p>6 <b>A Yeah.</b></p> <p>7 Q Mr. Walen, I am David Phillips. I'm the</p> <p>8 attorney representing the defendants in this case,</p> <p>9 Governor Burgum and Secretary Jaeger. And I have</p> <p>10 just a few followup questions for you and we'll</p> <p>11 get you out of here.</p> <p>12 Mr. Walen, what is your race or</p> <p>13 ethnicity?</p> <p>14 <b>A American, Caucasian.</b></p> <p>15 Q I think the very beginning of there cut</p> <p>16 off. I'm sorry, could you just repeat your</p> <p>17 answer?</p> <p>18 <b>A I'm American, Caucasian.</b></p> <p>19 Q And white would be another way to</p> <p>20 describe you?</p> <p>21 <b>A Yes.</b></p> <p>22 Q Do you consider yourself to be Native</p> <p>23 American?</p> <p>24 <b>A I am an American native. I was born in</b></p> <p>25 <b>this country.</b></p>	27	<p>1 <b>A Yes.</b></p> <p>2 Q And all other state-wide elections?</p> <p>3 <b>A Yes.</b></p> <p>4 Q The home that you're in in New Town, do</p> <p>5 you own or rent that home?</p> <p>6 <b>A Own.</b></p> <p>7 Q And do you live there all year round, or</p> <p>8 do you leave for part of the year?</p> <p>9 <b>A I live here all year round.</b></p> <p>10 Q The home that you live in now, is that in</p> <p>11 the subdistrict that's known as Subdistrict 4A?</p> <p>12 <b>A Correct.</b></p> <p>13 Q Have you ever lived in the subdistrict</p> <p>14 that's known as Subdistrict 4B?</p> <p>15 <b>A No.</b></p> <p>16 Q In this case the defendants and the</p> <p>17 intervenors have served what's known as written</p> <p>18 discovery. Those are interrogatories and requests</p> <p>19 for production of documents.</p> <p>20 Do you remember participating in</p> <p>21 answering those?</p> <p>22 <b>A Yes.</b></p> <p>23 Q And did you sign at the bottom of those</p> <p>24 answers?</p> <p>25 <b>A Yes.</b></p>
26	<p>1 Q Would it be fair to say you don't</p> <p>2 consider yourself to be an American Indian?</p> <p>3 <b>A Correct.</b></p> <p>4 Q I may jump around here a little bit, my</p> <p>5 apologies in advance. I just wanted to clarify a</p> <p>6 few things that you testified to earlier.</p> <p>7 You had talked earlier about running and</p> <p>8 winning a seat on the West Fargo School Board.</p> <p>9 Is that correct?</p> <p>10 <b>A Yes.</b></p> <p>11 Q I just want to follow up briefly.</p> <p>12 What years were you on the school board?</p> <p>13 <b>A Approximately -- well, it would be in the</b></p> <p>14 <b>1990s.</b></p> <p>15 Q For how many years?</p> <p>16 <b>A Four years.</b></p> <p>17 Q And a few other clarifications.</p> <p>18 If I recall correctly, did you say you</p> <p>19 voted in every election since you were 18?</p> <p>20 <b>A Yes.</b></p> <p>21 Q Were all of those elections in the State</p> <p>22 of North Dakota?</p> <p>23 <b>A Yes.</b></p> <p>24 Q And would that include all state</p> <p>25 legislative elections?</p>	28	<p>1 Q Earlier today you talked about some</p> <p>2 searching that you did today on your phone and</p> <p>3 your e-mail.</p> <p>4 Did you do any searching of electronic</p> <p>5 records before today for purposes of responding to</p> <p>6 discovery requests?</p> <p>7 <b>A No.</b></p> <p>8 Q Have you reviewed the legislative record</p> <p>9 about the 2021 redistricting that's found on the</p> <p>10 website of our state legislature?</p> <p>11 <b>A Only to the extent to know what the</b></p> <p>12 <b>boundaries were.</b></p> <p>13 Q In other words, looking at the boundary</p> <p>14 maps?</p> <p>15 <b>A Correct.</b></p> <p>16 Q Have you watched any of the videos in the</p> <p>17 legislative record dealing with the 2021</p> <p>18 redistricting?</p> <p>19 <b>A No.</b></p> <p>20 Q Other than the maps, have you looked at</p> <p>21 any other documents in the legislative record?</p> <p>22 <b>A Yes. I try to look at them when they're</b></p> <p>23 <b>in session.</b></p> <p>24 Q Which documents would those have been?</p> <p>25 <b>A Daily -- it would be the videos of the</b></p>

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29	<p><b>1 sessions, and then I just watch bits and pieces.</b></p> <p>2 Q Those videos, did you watch those live as</p> <p>3 they were taking place during the redistricting</p> <p>4 process?</p> <p><b>5 A No.</b></p> <p>6 Q Other than the videos, have you reviewed</p> <p>7 any documentation, either before or after the</p> <p>8 commencement of this lawsuit, generated at the</p> <p>9 legislature relating to redistricting?</p> <p><b>10 A No.</b></p> <p>11 Q You had testified earlier about some</p> <p>12 conversations that you had with North Dakota</p> <p>13 legislators. And you had mentioned Terry Jones,</p> <p>14 Clayton Fegley. My handwriting is horrible and</p> <p>15 the spelling was difficult. Who were the other</p> <p>16 names again?</p> <p><b>17 A Jordan Kannianen.</b></p> <p>18 Q And if I --</p> <p><b>19 A (Inaudible.)</b></p> <p>20 Q Say that one more time?</p> <p><b>21 A Senator Jordan Kannianen.</b></p> <p>22 Q And was there one more?</p> <p><b>23 A No; it was just those three.</b></p> <p>24 Q Correct me if I'm wrong. If I remember</p> <p>25 your testimony, I believe you said that those</p>	31	<p><b>1 A How the process was going.</b></p> <p>2 Q Do you remember anything that Clayton</p> <p>3 told you about how the process was going?</p> <p><b>4 A No.</b></p> <p>5 Q Do you remember anything that you told to</p> <p>6 Clayton during those conversations?</p> <p><b>7 A Yes.</b></p> <p>8 Q What did you tell Clayton, that you can</p> <p>9 recall?</p> <p><b>10 A That depending on how the redistricting</b></p> <p><b>11 turned out, that we'd look at what legal action we</b></p> <p><b>12 could take to keep it together, if they decided to</b></p> <p><b>13 split it.</b></p> <p>14 Q When you say "keep it together," do you</p> <p>15 mean not subdistricted?</p> <p><b>16 A Correct.</b></p> <p>17 Q How many conversations during the</p> <p>18 redistricting process did you have with Jordan,</p> <p>19 and I won't attempt the last name.</p> <p><b>20 A Regarding the lawsuit, not that many. He</b></p> <p><b>21 is my son-in-law, so I communicate with him daily.</b></p> <p>22 Q And during the redistricting process you</p> <p>23 had multiple conversations with him?</p> <p><b>24 A Yes.</b></p> <p>25 Q And do you remember anything that he told</p>
30	<p>1 conversations all took place after the</p> <p>2 redistricting was completed at the state in 2021.</p> <p>3 Is that correct?</p> <p><b>4 A I talk with them regularly as the</b></p> <p><b>5 district chair.</b></p> <p>6 Q Did you talk with them --</p> <p><b>7 A Only related to this lawsuit, it would be</b></p> <p><b>8 after.</b></p> <p>9 Q Related to the lawsuit, after.</p> <p>10 What conversations did you have with</p> <p>11 Terry Jones during the redistricting process?</p> <p><b>12 A Just discussed bound -- you know, asking</b></p> <p><b>13 what our boundaries would be.</b></p> <p>14 Q Did you have any discussions about the</p> <p>15 issues you're raising in this lawsuit?</p> <p><b>16 A Yes, we could have.</b></p> <p>17 Q Do you know how many times you talked to</p> <p>18 Terry Jones during the redistricting process?</p> <p><b>19 A I talked to him almost four or five times</b></p> <p><b>20 a week.</b></p> <p>21 Q What about Clayton Fegley; how many times</p> <p>22 did you talk to Clayton during the redistricting</p> <p>23 process?</p> <p><b>24 A Two, three times, maybe four at most.</b></p> <p>25 Q And what did you talk about with Clayton?</p>	32	<p>1 you in those conversations during the</p> <p>2 redistricting process about the redistricting</p> <p>3 process?</p> <p><b>4 A No.</b></p> <p>5 Q Do you remember anything that you told</p> <p>6 him during the redistricting process about the</p> <p>7 redistricting process?</p> <p><b>8 A That if -- that if the district got</b></p> <p><b>9 split, that we'd look at what legal actions we</b></p> <p><b>10 could take to keep it together.</b></p> <p>11 Q Did you have any conversations with any</p> <p>12 of those three individuals during the</p> <p>13 redistricting process about the Voting Rights Act?</p> <p><b>14 A No.</b></p> <p>15 Q Have you ever had a conversation with</p> <p>16 anyone employed with the North Dakota Legislative</p> <p>17 Council about the 2021 redistricting process?</p> <p><b>18 A No.</b></p> <p>19 Q Have you ever had a conversation with</p> <p>20 anyone else who's employed by or is an agent of</p> <p>21 the State of North Dakota about the 2021</p> <p>22 redistricting process?</p> <p><b>23 A No.</b></p> <p>24 Q Did you, personally, attend or provide</p> <p>25 any testimony at any of the committee hearings or</p>

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33	<p>1 debates on redistricting in 2021?</p> <p>2 <b>A No.</b></p> <p>3 Q Have you hired an expert to testify at</p> <p>4 trial about the Voting Rights Act in this case?</p> <p>5 <b>A I have not.</b></p> <p>6 Q Were you aware of whether or not the</p> <p>7 plaintiffs have done so, including you or your</p> <p>8 co-plaintiffs?</p> <p>9 <b>A You'll have to ask the attorneys.</b></p> <p>10 MR. PHILLIPS: Let's take a short break.</p> <p>11 We'll go off the record for just a few minutes.</p> <p>12 (A recess was taken.)</p> <p>13 BY MR. PHILLIPS:</p> <p>14 Q You testified earlier about going through</p> <p>15 and searching your e-mails and texts today.</p> <p>16 Since the commencement of this lawsuit,</p> <p>17 have you deleted any texts that have been deleted</p> <p>18 and wouldn't have shown up in your results?</p> <p>19 <b>A No.</b></p> <p>20 Q Do you keep all of your text messages</p> <p>21 without ever deleting them?</p> <p>22 <b>A They're -- after a period of time they're</b></p> <p>23 <b>automatically deleted. I don't know what that</b></p> <p>24 <b>time frame is.</b></p> <p>25 Q From your Samsung phone?</p>	35
34	<p>1 MR. GABER: Nothing further from me.</p> <p>2 Thank you, Mr. Walen, I appreciate it.</p> <p>3 MR. SANDERSON: And, Chuck, you have the</p> <p>4 right to read and sign your deposition or you can</p> <p>5 waive that right. It's up to you. Paul waived</p> <p>6 his earlier, if that's what you want to do.</p> <p>7 THE WITNESS: I can waive it.</p> <p>8 MR. SANDERSON: All right. Chuck, thank</p> <p>9 you for your time.</p> <p>10 COURT REPORTER: Mr. Phillips, same order</p> <p>11 as earlier?</p> <p>12 MR. PHILLIPS: Yes.</p> <p>13 COURT REPORTER: Mr. Sanderson, same</p> <p>14 order as earlier?</p> <p>15 MR. SANDERSON: Same order, please.</p> <p>16 COURT REPORTER: Thank you.</p> <p>17 (Off the record at 2:57 p.m. EST.)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	36
34	<p>1 <b>A Correct.</b></p> <p>2 Q And what about your e-mails; are they --</p> <p>3 have they been deleted either automatically or by</p> <p>4 you since the commencement of this lawsuit?</p> <p>5 <b>A Not that I'm aware of.</b></p> <p>6 Q So we will likely be making a followup</p> <p>7 request in this case. And so I would ask that you</p> <p>8 preserve and don't make any deletions, to the</p> <p>9 extent it's already happened don't do any further</p> <p>10 deletions of any texts on your phone or any</p> <p>11 e-mails so that we can make that request and that</p> <p>12 they don't get inadvertently deleted.</p> <p>13 And additionally, I would also ask, we'll</p> <p>14 likely make a request for the notes that you</p> <p>15 discussed earlier that you took in the last</p> <p>16 deposition today, the first deposition today, I</p> <p>17 should say. I'd request that you keep those and</p> <p>18 hold on to them, too, because we'll likely be</p> <p>19 making a request for a copy of those.</p> <p>20 <b>A I will send those to the attorney, to our</b></p> <p>21 <b>attorneys.</b></p> <p>22 Q Perfect.</p> <p>23 MR. PHILLIPS: Thank you. I have no</p> <p>24 further questions.</p> <p>25 Mr. Gaber?</p>	36

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<p style="text-align: center;">37</p> <p>1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC 2 I, Debra A. Whitehead, the officer before whom the 3 foregoing proceedings were taken, do hereby certify 4 that the foregoing transcript is a true and correct 5 record of the proceedings; that said proceedings 6 were taken by me stenographically and thereafter 7 reduced to typewriting under my supervision; that 8 reading and signing was not requested; and that I am 9 neither counsel for, related to, nor employed by any 10 of the parties to this case and have no interest, 11 financial or otherwise, in its outcome. 12 IN WITNESS WHEREOF, I have hereunto set my hand and 13 affixed my notarial seal this 16th day of December, 14 2022. 15 16 My commission expires: 17 April 30, 2023 18 19  20 _____ 21 E-NOTARY PUBLIC IN AND FOR THE 22 STATE OF MARYLAND 23 24 25</p>	

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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,*

v.

MICHAEL HOWE, in his official capacity as Secretary  
of State of the State of North Dakota,

*Defendant.*

Civil No. 3:22-cv-00022-PDW-ARS

**RESPONSE IN OPPOSITION TO REPRESENTATIVE WILLIAM DEVLIN'S APPEAL  
OF THE MAGISTRATE'S DECEMBER 22, 2022, ORDER DENYING MOTIONS TO  
QUASH**

The Magistrate Judge’s order denying Representative Devlin’s motion to quash should be affirmed. The Magistrate Judge correctly concluded that the legislative privilege is qualified and, as is the case in most federal redistricting litigation, must give way in light of the important federal interests at stake.

### STANDARD OF REVIEW

The Court’s review of a Magistrate Judge’s finding on nondispositive matters, like the one at issue, is “extremely deferential.” *Kraft v. Essentia Health*, No. 3:20-CV-121, 2022 WL 2619848, at \*3 (D.N.D. July 8, 2022); *see also Jordan v. Comm’r, Mississippi Dep’t of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020) (holding that a decision on a motion to quash subpoenas should be reviewed under the “clearly erroneous” or “contrary to law” standard). The party bringing the appeal bears the burden of proving the Magistrate Judge’s decision was clearly erroneous or contrary to law. *Id.* Any objection to the Magistrate Judge’s order not “specifically designate[d]” in the timely filed notice of appeal is waived and unreviewable on appeal. D.N.D. Civ. L.R. 72.1(D)(2); Fed. R. Civ. P. 72(a) (“A party may not assign as error a defect in the order not timely objected to.”); *see also St. Jude Med. S.C., Inc. v. Tormey*, 779 F.3d 894, 901–02 (8th Cir. 2015) (holding that party could not challenge magistrate’s nondispositive pretrial discovery order on appeal as he did not timely file objections before district court).

### ARGUMENT

**I. Legislative privilege is not a complete bar to the deposition of Representative Devlin and must give way in favor of discovery.**

The Magistrate Judge correctly determined that the deposition of Representative Devlin is proper because “the legislative privilege for state lawmakers is, at best, one which is qualified,” and must give way in favor of discovery in this case. *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov’t*, 849 F.3d 615, 624 (5th Cir. 2017); *League of United Latin Am. Citizens v.*

*Abbott*, No. 22-50407, 2022 WL 2713263, at \*1 (5th Cir. May 20, 2022) (“Both [the Fifth Circuit] and the Supreme Court have confirmed that the state legislative privilege is not absolute.”); Order Denying Mot. to Quash at 15, ECF No. 48 (finding that “[n]early all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified”). The privilege “must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624. Because it is qualified, the legislative privilege “may be overcome by an appropriate showing.” Order Denying Mot. to Quash at 10, Doc. 48 (citing *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006)).

“Redistricting 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.” *Bethune-Hill v. Va. State Bd. of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). As such, federal courts routinely hold that the legislative privilege must give way to discovery in redistricting litigation. *See, e.g., League of United Latin Am. Citizens*, 2022 WL 2713263, at \*1; *Bethune-Hill*, 114 F. Supp. 3d at 337; *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022).

The sister circuit cases Representative Devlin cites are not to the contrary. *See* Devlin Appeal at 2 (citing *Am. Trucking Assoc., Inc. v. Alviti*, 14 F.4th 76 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015)); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); Order Denying Mot. to Quash, ECF No. 48 at 11-13 (distinguishing Respondents’ cases from this case). Indeed, none of the cases

Representative Devlin cites take the radical position he advances that the legislative privilege amounts to an absolute bar to discovery against state legislators outside of federal criminal prosecutions. Instead, these courts engage in a careful and fact-specific analysis to determine whether there is a sufficient federal interest such that the legislative privilege should give way to discovery in the particular instance.

In *Alviti*, for example, the First Circuit recognized “a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest[.]” *Alviti*, 14 F.4th at 90. Ultimately, the court determined that the plaintiffs’ Dormant Commerce Clause challenge turned primarily on the effect of the challenged law, would not be substantially affected by evidence of the subpoenaed individuals’ purpose in passing the law, and as a result held that the need for discovery was not weighty enough to overcome the legislative privilege. *Id.* at 89-90.

But unlike in Commerce Clause cases, courts regularly permit parties to inquire into legislative intent in redistricting litigation. *See, e.g., League of United Latin Am. Citizens*, 2022 WL 2713262, at \*1; *Bethune-Hill v. State Bd. Of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015); *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022). This is because the enforcement of Section 2 of the Voting Rights Act is an important federal interest, even where that interest advanced through litigation by private parties. *See, e.g., Favors*, 285 F.R.D. at 219 (finding that the claims at issue in redistricting litigation “counsel in favor of allowing discovery”); *Singleton v. Merrill*, No. 2:21-cv-1530-AMM, 2022 WL 265001, at \*79 (N.D. Ala. Jan. 24, 2022); *League of Women Voters of Fla. v. Lee*, 340 F.R.D. 446, 457 (N.D. Fla. 2021) (“All litigation is serious. But . . . voting-rights litigation is especially serious.”); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014) (“[T]he right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance.”); Order



Denying Mot. to Dismiss, ECF No. 30 at 11 (noting that “there has been private enforcement of Section 2 since the VRA’s inception) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020); *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999).

Similarly, the legislative privilege recognized in *Hubbard* is a far cry from the blanket protection Representative Devlin asserts. Like the First Circuit, the Eleventh Circuit acknowledged that “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.’” *Hubbard*, 803 F.3d at 1311 (quoting *United States v. Gillock*, 445 U.S. 360, 373 (1980)). The court thus rested its analysis of whether legislative privilege should give way on whether the subpoenas at issue served an important federal interest. *Id.* at 1312-13. Ultimately, the court determined that “[b]ecause [the plaintiffs had] not presented a cognizable First Amendment claim, there [was] no ‘important federal interest[ ] at stake’ in this case to justify intruding upon the lawmakers’ legislative privileges.” *Id.* at 1313 (citing *Gillock*, 445 U.S. at 373). Importantly, the court in *Hubbard* “emphasized the limited nature of its holding.” Order Denying Mot. to Quash, ECF No. 48 at 12 n. 5 (citing *Hubbard*, 803 F.3d at 1312 n. 13 (“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.”)).

Moreover, in the sister circuit case most on point (but omitted from Representative Devlin’s papers), the Fifth Circuit recently denied a stay of an order requiring Texas legislators to be deposed in a redistricting case, holding that the legislators were unlikely to succeed on the merits of their invocation of legislative privilege to prevent depositions. *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at \*1. After the Fifth Circuit so ruled,

the Supreme Court likewise denied a stay, allowing the depositions to proceed. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.). A host of Texas legislators have since been deposed.

The Magistrate Judge’s determination that legislative privilege can give way to discovery in redistricting litigation was not contrary to settled Eighth Circuit precedent and was consistent with reasoned decisions of sister circuits. The decision therefore was not clearly erroneous or contrary to law and should be upheld.

## **II. The Magistrate Judge Properly Applied the Five Factor Test to Determine Legislative Privilege Should Give Way in this Case.**

“Most courts that have conducted this qualified privilege analysis in the redistricting context have employed a five-factor balancing test imported from deliberative process privilege case law.” *Id.*; *see South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Rodriquez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at \*7; *Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). These factors are “(1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5) the extent to which discovery would impede legislative action.” *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 161.<sup>1</sup>

The five-factor test is appropriate here because, like the deliberative process privilege, the legislative privilege for state lawmakers is a qualified privilege that finds its roots in federal

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<sup>1</sup> The *South Carolina State Conference of NAACP* court rejected the argument advanced by Representative Devlin here that only criminal cases involve the potential for legislative privilege to give way. “It is not the simple distinction between ‘criminal’ and ‘civil’ cases which determines the availability of this evidentiary privilege, but rather, the importance of the federally created public rights at issue. And when cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield.” 584 F. Supp. 3d at 162.

common law. *See United States v. Gillock*, 445 U.S. 360, 374 (1980); Order Denying Mot. to Quash at 6-7, ECF No. 48. As a common law privilege, its protections are significantly weaker than the legislative privilege available to federal lawmakers that is rooted in the Speech and Debate Clause of the U.S. Constitution. *See Gillock*, 445 U.S. at 366. Consequently, the privilege routinely yields where necessary to advance an important federal interest.

Notably, Representative Devlin does not appeal the Magistrate Judge's *application* of the five-factor test to order his deposition, he merely contends that the test is not applicable. He has thus waived any challenge to *how* the Magistrate Judge applied the test. D.N.D. Civ. L.R. 72.1(D)(2) ("The appealing party must serve and file a written notice of appeal, which must specifically designate the order or part thereof from which the appeal is taken and the grounds for appeal."); *see also* Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

### **III. Representative Devlin's Testimony Is Relevant.**

The Magistrate Judge properly determined that that proof of legislative intent, including the motives of individual legislators, is relevant and important evidence in this case. Order Denying Mot. to Quash at 17, ECF No. 48 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339-40 (E.D. Va. 2015)). This is particularly so where, as here, freedom to exercise the fundamental right to vote free of racial discrimination is at issue. *See, e.g., Bethune-Hill*, 114 F. Supp. 3d at 339. Indeed, "judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that [redistricting] cases present." *Id.* at 337.

Plaintiffs here do not allege that the 2021 Redistricting Plan would be valid but for an improper legislative motive. Rather they seek to prove that the Plan violates federal law because

it denies Native voters an equal opportunity to participate in the political process. Under the totality of the circumstances test, testimony demonstrating the intent of 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. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021-22 (8th Cir. 2006) (listing factors relevant to a Section 2 claim). Thus, while courts have in some instances found the motivations of individual legislators to be irrelevant federal claims not at issue here, courts regularly permit Plaintiffs to put forth evidence in redistricting cases tending to show legislators' intent. *See, e.g., id.; League of United Latin Am. Citizens*, 2022 WL 2713263, at \*1; *South Carolina State Conference of NAACP*, 584 F. Supp. 3d 152, 166 (D.S.C. 2022). Representative Devlin has not cited a single case where a court determined that legislative intent was irrelevant in redistricting litigation. *See Devlin's Appeal* at 3-5, ECF 78.

As the Chair of the Redistricting Committee, Representative Devlin can testify to a broad spectrum of matters relevant to this case that go well beyond his personal motivations for supporting the Challenged Plan. Representative Devlin, for example, has personal knowledge of the information available to the Redistricting Committee at the time it passed the challenged legislation and the motives of the Committee as a whole. Likewise, Representative Devlin can testify to the responsiveness of the Redistricting Committee to the input of Tribal Leaders during the redistricting process. *See Bone Shirt*, 461 F.3d at 1021-22 (noting that lack of responsiveness from elected officials to members of the minority group is probative in determining whether Section 2 was violated). Moreover, Representative Devlin represented District 23, which prior to the 2021 redistricting included the Spirit Lake Reservation. As such, he is likely to have additional information regarding the electoral conditions and campaigns in the region—all of which is

relevant to the totality of circumstances factors Plaintiffs must prove at trial. There is no conceivable claim of legislative privilege over that material. *See League of United Latin American Citizens*, 2022 WL 2713262, at \*1. The Magistrate Judge's ruling that Representative Devlin's testimony is relevant therefore was not clearly erroneous and the decision denying the motion to quash should be upheld.<sup>2</sup>

### CONCLUSION

For the foregoing reasons, the Magistrate Judges Order was not clearly erroneous and should be affirmed. Representative Devlin's appeal should be denied.

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<sup>2</sup> To the extent Representative Devlin bases his appeal on the demands attendant to being a legislator, it bears noting that he is no longer a member of the legislature.

January 19, 2023

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

/s/ Mark P. Gaber

Mark P. Gaber

*Counsel for Plaintiffs*



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## REDISTRICTING COMMITTEE

Thursday, July 29, 2021  
Prairie Room, State Capitol  
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Bill Devlin, Larry Bellew, Joshua A. Boschee, Craig Headland, Mike Lefor, David Monson, Mike Nathe, Austen Schauer; Senators Brad Bekkedahl, Robert Erbele, Ray Holmberg, Jerry Klein, Erin Oban, Nicole Poolman, Ronald Sorvaag

**Member absent:** Senator Randy A. Burckhard

**Others present:** Representative Sebastian Ertelt, Lisbon

Chairman Devlin called the meeting to order and noted the meeting will consist of mapping training. Substantive discussion regarding redistricting and future scheduling of meeting dates and locations will take place at the committee's meeting on Thursday, August 26, 2021.

### MAPPING TRAINING

Chairman Devlin called on Mr. Stewart Berry, Vice President of Product Management, Caliper Corporation, to conduct a legislator training session on Maptitude software. Mr. Berry appeared remotely and provided interactive training on the features of Maptitude software, including how to create a new plan from an existing plan and how to create a new plan from a blank map.

No further business appearing, Chairman Devlin adjourned the meeting at 1:30 p.m.

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Emily L. Thompson  
Code Revisor

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Samantha E. Kramer  
Senior Counsel

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Claire Ness  
Counsel

## Exhibit 2





## TRIBAL AND STATE RELATIONS COMMITTEE

Tuesday, August 17, 2021

Training Room, Second Floor, Turtle Mountain Community College, 10145 BIA Road 7  
Belcourt, North Dakota

Senator Rich Wardner, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Senators Rich Wardner, Joan Heckaman, Dave Oehlke; Representatives Joshua A. Boschee, Terry B. Jones, Chet Pollert

**Member absent:** Senator Jessica Bell

**Others present:** Senator Richard Marcellais, Belcourt, and Representative Marvin E. Nelson, Rolla Nathan Davis, Executive Director, Indian Affairs Commission; Jamie Azure, Chairman, Turtle Mountain Band of Chippewa Indians  
Vonette J. Richter, Legislative Council, Bismarck  
See [Appendix A](#) for additional persons present.

Ms. Jill Grossman, Counsel, Legislative Council, reviewed the [Tribal and State Relations Committee - Background Memorandum](#) and the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

### LEGISLATIVE REDISTRICTING AND TRIBAL CENSUS DATA

Chairman Wardner requested comments on legislative redistricting noting he would report any feedback received from the tribe to the Legislative Management's interim Redistricting Committee.

Representative Nelson noted the official census numbers have been released, and the Turtle Mountain Reservation's population appears to be inaccurate.

Ms. Alysia LaCounte, General Counsel, Turtle Mountain Band of Chippewa Indians, indicated tribal data collected by the tribe's research group is more accurate than the census data.

Ms. Nicole Donaghy, Executive Director, North Dakota Native Vote, presented testimony ([Appendix B](#)) regarding legislative redistricting. She noted the Legislative Assembly should comply with the Voting Rights Act and consult with tribal governments for feedback. She noted the Turtle Mountain Reservation is its own community of interest and should remain a single legislative district.

Chairman Azure noted:

- There was dialogue between the tribe and the United States Census Bureau.
- There was a push to get an accurate count of tribal members, but members continue to mistrust the federal and state governments due to historical trauma.
- The pandemic also affected the census collection.
- The United States Census Bureau did not reach out to the Indian Health Service or the tribe's research group for supplemental tribal records or data.

Chairman Wardner noted people's reluctance to provide personal information to others likely was a hindrance for the census calculation, and he would visit with the Chairman of the Redistricting Committee regarding concerns that the reservation's population is likely higher than the census data indicates.

## INDIAN BOARDING SCHOOLS AND BURIAL SITES

Chairman Azure noted concerns regarding the possibility that members of the Turtle Mountain Reservation are buried on Indian boarding schools' land and requested support for the effort to bring those individuals back to their families for appropriate ceremonies and burials.

In response to a question from a committee member, Chairman Azure noted the state could help by asking the North Dakota congressional delegation for assistance in bringing any remains back to the tribe.

Ms. LaCounte noted the tribe would like support with the tribe's request for any pertinent records from the State Historical Society regarding the Fort Totten Indian School because many tribal members attended the school.

In response to a question from a committee member, Ms. LaCounte noted the tribe has not requested such records from the State Historical Society due to a lack of manpower.

Chairman Wardner suggested the State Historical Society be requested to present to the committee at a subsequent meeting regarding this issue.

## MISSING AND MURDERED INDIGENOUS PERSONS

Chairman Azure noted concerns regarding missing and murdered indigenous persons and problems associated with a lack of communication and cooperation between federal, state, and tribal agencies and law enforcement.

Senator Marcellais presented testimony ([Appendix C](#)) on missing and murdered indigenous persons.

Ms. Jessica Marcellais-Zaste, Ms. Beverly Gouneau, Ms. Pauline Trottier, and Mr. Glenn Longie provided testimony regarding missing and murdered family members and concerns that law enforcement officials did not sufficiently investigate or provide information to family members.

Mr. Davis noted there is interest among the tribal nations in partnerships with the State Highway Patrol.

Chairman Wardner suggested the State Highway Patrol be requested to present to the committee at a subsequent meeting regarding this issue.

## LAW ENFORCEMENT SHORTAGE AND DRUG TASK FORCE

Chairman Azure noted drug use is prevalent on the reservation, there is a shortage of law enforcement officials, and a drug task force should be formed as more resources are needed to combat drug activity.

Mr. Nathan Gustafson, Sheriff, Rolette County, provided testimony regarding the shortage of law enforcement officials in the community, the rampant drug activity and associated crime, and officer safety concerns.

Mr. Brock Baker, Juvenile Probation Officer, Turtle Mountain Reservation, provided testimony regarding law enforcement officials' desire to cooperate and the challenges in working with other agencies and navigating various jurisdictions' policies and procedures.

## GAMING AND ELECTRONIC PULL-TAB DEVICES

Chairman Azure noted electronic pull-tab devices largely are unregulated by the state, and the devices' implementation has impacted tribal economies, which rely heavily on gaming revenue. He suggested the state impose a limit on the number of devices at each site and require surveillance at each location.

Senator Heckaman noted additional full-time employees were allocated recently to the Gaming Division of the Attorney General's office to provide more oversight over electronic pull-tab devices.

Representative Pollert noted some legislators tried to pass legislation regarding this issue, but were unable to get sufficient support to enact the legislation.

## TRENTON SERVICE AREA WATER ISSUE

Ms. April Walker, Turtle Mountain Reservation Consultant, provided testimony regarding the Trenton Service Area's water needs. She noted the City of Williston has been treating water for the Trenton Service Area, but recently there has been pressure to negotiate with the Northwest Area Water Supply, rather than the Western Area Water Supply Authority.

No further business appearing, Chairman Wardner adjourned the meeting at 3:37 p.m.

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Jill Grossman  
Counsel

ATTACH:3



## TRIBAL AND STATE RELATIONS COMMITTEE

Tuesday, August 31, 2021  
 Room 210, MHA Nation Interpretive Center  
 9386 Lake Sakakawea Road  
 New Town, North Dakota

Senator Rich Wardner, Chairman, called the meeting to order at 9:10 a.m.

**Members present:** Senators Rich Wardner, Jessica Bell, Joan Heckaman, Dave Oehlke; Representatives Joshua A. Boschee, Terry B. Jones, Chet Pollert

**Members absent:** none

**Others present:** Representative Ruth Buffalo, Fargo  
 Nathan Davis, Executive Director, Indian Affairs Commission; Mark Fox, Chairman, Three Affiliated Tribes of the Fort Berthold Reservation  
 See [appendix](#) for additional persons present.

**It was moved by Representative Boschee, seconded by Senator Oehlke, and carried on a voice vote that the minutes of the August 17, 2021, meeting be approved as distributed.**

### LEGISLATIVE REDISTRICTING

Chairman Fox noted tribal concerns regarding legislative redistricting:

- The Legislative Assembly should strongly consider tribal concerns.
- The Fort Berthold Reservation should be a single legislative district.
- The census data for the reservation likely is inaccurate due to tribal members being deterred from reporting.

In response to questions from committee members, Chairman Fox noted:

- The tribe likely would not be opposed to the inclusion of other like-minded communities, such as Watford City, where energy development also is prevalent.
- The most unfavorable outcome would be splitting the reservation into different districts because the tribe does not want to dilute its ability to collectively express tribal concerns.
- Many tribal members live in nearby communities, including Watford City, Stanley, and Minot.

Representative Boschee noted the Redistricting Committee is limited slightly by the number of laptops with the licensed redistricting software, but the tribe may contact committee members or the Legislative Council for more information and assistance.

Representative Buffalo noted although she represents District 27, she is approached often regarding tribal issues because she is an enrolled member and grew up on the reservation. She noted a common theme expressed by tribal members is the desire for the reservation to be its own legislative district.

In response to a question, Representative Boschee noted:

- The Redistricting Committee tasked the Tribal and State Relations Committee with collecting input from each tribe regarding redistricting and providing a report to the Redistricting Committee.
- The Redistricting Committee will conduct public hearings at which public input will be sought, and tribal members are encouraged to attend and be involved in those discussions.

Mr. Ted Lone Fight noted he is in favor of the reservation being its own legislative district.

Ms. Melanie Moniz noted she is a resident of District 4 and supports legislative subdistricts to ensure tribal voices are heard.

Ms. Joletta Bird Bear noted she is a resident of District 4 who regularly votes in tribal and state elections, but feels her vote is diluted due to the district's large size. She noted her preference to vote in a district where her vote carries tribal issues.

Ms. Lisa DeVille noted her support for legislative subdistricts to ensure tribal members are represented fairly.

### **HEALTH CARE**

Dr. Monica Mayer, Councilwoman, Three Affiliated Tribes of the Fort Berthold Reservation, noted, as a physician, her primary concern is tribal members' health. She noted:

- The tribe has paid millions of dollars toward health care insurance premiums for tribal members, but members are not seeing the benefits.
- The tribe pays health care insurance premiums for members who are otherwise eligible for Medicaid because tribal elders face barriers when attempting to enroll in Medicaid, such as poor customer service from county social services.

Chairman Fox noted the federal government has failed to provide sufficient outreach to tribal members regarding Medicaid and Medicare eligibility and enrollment.

### **ALCOHOL TAX AGREEMENT**

Chairman Fox noted the tribe may be interested in entering a state-tribal alcohol tax agreement, but the terms need to be more favorable to the tribe. He noted:

- Past negotiations and legislation have failed.
- No tribe has entered an alcohol tax agreement because the tax revenue allocation formula is not equitable to tribes and the regulation resides with the state rather than jointly between the state and the tribe.
- The failure to allow joint regulation of alcohol sales within reservation boundaries is an erosion of the tribe's sovereignty and its authority under federal law to tax nontribal members within reservation boundaries.

Mr. John Fredericks, legal counsel, Mandan, Hidatsa and Arikara Nation, noted the allocation formula needs to be revisited because the formula does not take into account the tribe's authority to tax nontribal members who consume alcohol on the reservation or the impact of alcohol use on the reservation.

### **SALES AND USE TAX AGREEMENT**

Chairman Fox noted concerns regarding the unlawful collection of sales tax from tribal members' purchases on the reservation, and until a state-tribal sales and use tax agreement is entered, this will continue to be an issue.

### **MOTOR FUELS AND BULK SALES**

Chairman Fox noted the current motor vehicle fuel tax agreement does not contemplate bulk fuel sales. He noted the tribe would like bulk fuel sales to be included because many vendors purchase fuel in bulk, and the tribe is losing an opportunity to collect tax revenue.

### **TAXATION PROCESS FOR STRADDLE WELLS**

Chairman Fox noted oil and gas activity has increased after the resolution of the straddle wells issue, and straddle wells are no longer an issue of concern.

### **STATE-TRIBAL POLICY**

Chairman Fox noted other states, including Montana, Nevada, and Washington, have laws outlining formal state-tribal relations policies. He noted enacting such legislation in North Dakota would be a positive step toward government-to-government relations.

Ms. Cynthia Monteau noted other states have formalized consultation policies in statute outlining how the state will consult with tribes on various issues and how tribal input is gathered.

### GAMING AND ELECTRONIC PULL TAB DEVICES

Chairman Fox noted the implementation and expansion of electronic pull tab devices has severely impacted tribal gaming revenue. He noted:

- Many people do not travel to tribal casinos since games similar to slot machines are now available in their own communities.
- There is a limited number of people in the state who have the disposable income to play games of chance, and the total amount which can be spent on gaming is finite.
- Only a few charities control the vast majority of charitable gaming revenue.
- More stringent regulations and limitations should be imposed on electronic pull tab devices.

A few committee members expressed concern regarding the expansion of electronic pull tab devices and the desire to impose more regulations and limitations.

No further business appearing, Chairman Wardner adjourned the meeting at 2:54 p.m.

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Jill Grossman  
Counsel

ATTACH:1



## TRIBAL AND STATE RELATIONS COMMITTEE

Wednesday, September 1, 2021  
 Walking Eagle Ballroom, Spirit Lake Casino and Resort  
 7889 Highway 57  
 St. Michael, North Dakota

Senator Rich Wardner, Chairman, called the meeting to order at 9:04 a.m.

**Members present:** Senators Rich Wardner, Jessica Bell, Joan Heckaman, Dave Oehlke; Representatives Joshua A. Boschee, Terry B. Jones, Chet Pollert

**Members absent:** None

**Others present:** Representatives Ruth Buffalo, Fargo; Dennis Johnson, Devils Lake  
 Nathan Davis, Executive Director, Indian Affairs Commission; Douglas Yankton, Sr., Chairman, Spirit Lake Tribe  
 See [Appendix A](#) for additional persons present.

### LEGISLATIVE REDISTRICTING

Chairman Yankton noted the tribe sent a representative to a Redistricting Committee meeting to represent the tribe's interest in having the Spirit Lake Reservation be its own legislative district. He noted the reservation is the second smallest in the state, the majority of tribal land is located in one county, and the tribe may have a different opinion on redistricting compared to other tribes due to the reservation's unique geography.

Chairman Wardner noted tribes are encouraged to send representatives to Redistricting Committee meetings to provide tribal input, and the Tribal and State Relations Committee will report to the Redistricting Committee on tribal feedback regarding redistricting.

Representative Boschee noted the only out-of-town meeting approved by the Chairman of the Redistricting Committee is for Fargo, but he would visit with the Chairman regarding meeting in cities near or on reservations.

Chairman Yankton noted the tribe would prefer to be in a separate legislative district from Devils Lake. He also noted the tribe has discussed the concept of legislative subdistricts and may be open to the idea depending on how voting is structured.

Representative Boschee noted only United States census data may be used for redistricting purposes, but future legislation may want to allow census data to be supplemented with tribal enrollment data for more accurate numbers.

### STATE-TRIBAL TAX AGREEMENTS

Chairman Yankton noted the tribe may be interested in entering an alcohol or tobacco tax agreement if more favorable terms are negotiated because the current tax revenue allocation formula is not favorable to the tribe.

### TAXATION

Chairman Yankton noted concerns regarding the imposition of property tax assessed by the county on land situated within the boundaries of the reservation which is owned by enrolled tribal members. He noted the reservation is predominantly located in Benson County and the county provides services to the reservation, including the servicing of some roads, but the road servicing appears to fluctuate with the makeup of the county commission.

# Exhibit 14

Supp.App.221



## DRUG TRAFFICKING AND LAW ENFORCEMENT

Chairman Yankton noted drug trafficking is an issue of serious concern on the reservation. He noted:

- There is a severe shortage of law enforcement officials to patrol the reservation.
- The biggest issue regarding criminal activity is jurisdictional issues.
- The tribe is interested in entering agreements with different law enforcement agencies to help deter crime.

Mr. Davis noted the tribe passed a resolution to form a law enforcement commission, has been meeting with various law enforcement entities, and the tribe's unique approach to this issue will set a precedent for other tribes.

## GAMING AND ELECTRONIC PULL-TAB DEVICES

Chairman Yankton noted the implementation of electronic pull-tab devices has severely impacted tribal gaming revenue, and many tribal social programs are funded through gaming revenue.

Ms. Collette Brown, Executive Director, Gaming Commission, Spirit Lake Tribe, noted tribal gaming revenue decreased by 45 percent the 1<sup>st</sup> year after electronic pull-tab devices were implemented, and the Legislative Assembly should consider implementing more regulations.

Several committee members expressed concerns regarding electronic pull-tab devices and the desire to establish more regulations on the devices.

Several committee members expressed a desire to receive more information on the financial breakdown of charitable gaming.

## EDUCATION

Dr. Cynthia Lindquist, President, Cankdeska Cikana Community College, provided testimony ([Appendix B](#)) regarding enrollment numbers and the need for more resources, staffing, construction, and student housing.

Dr. Lindquist noted the promising fall enrollment numbers likely are due to word of mouth, the college's social media presence, and federal COVID-19 relief funding that has been used to help students with tuition, fees, and books. She noted federal COVID-19 relief only could be used toward student retention and not for construction purposes.

## STATE CONSTITUTIONAL PROVISION REGARDING INDIAN LANDS AND RIGHTS

Mr. Mark Van Norman, Special Counsel, Spirit Lake Nation, provided testimony ([Appendix C](#)) regarding amending the Constitution of North Dakota to restore original constitutional provisions relating to the recognition of Indian lands and rights.

## FISHING LICENSES

Chairman Yankton noted the tribe has a fishing licensing system, but many individuals purchase a state fishing license rather than through the tribe, and the tribe does not receive a percentage of that revenue.

## MEDICAL MARIJUANA DISPENSARY

Chairman Yankton noted he was unaware of a tribal reservation being awarded a medical marijuana dispensary and is interested in having a dispensary located in Indian country or in entering a state-tribal medical marijuana compact.

No further business appearing, Chairman Wardner adjourned the meeting at 2:30 p.m.

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Jill Grossman  
Counsel

ATTACH:3



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**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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IN RE NORTH DAKOTA LEGISLATIVE ASSEMBLY  
et al.,

*Petitioners.*

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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-PDW-ARS

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**SUPPLEMENTAL APPENDIX  
VOLUME II**

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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.

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS’ MOTION TO SET  
DEADLINES TO COMPLY WITH  
THIRD-PARTY DISCOVERY; AND**

**EMERGENCY MOTION AND  
SUPPORTING MEMORANDUM TO  
STAY BY THIRD-PARTIES NORTH  
DAKOTA LEGISLATIVE ASSEMBLY,  
STATE SENATOR RAY HOLMBERG,  
STATE SENATOR RICHARD  
WARDNER, STATE SENATOR  
NICOLE POOLMAN, STATE  
REPRESENTATIVE MICHAEL  
NATHE, STATE REPRESENTATIVE  
TERRY JONES, STATE  
REPRESENTATIVE WILLIAM  
DEVLIN AND CLAIRE NESS**

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**I. INTRODUCTION**

Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown, moved to set deadlines to comply with their third-party discovery requests. ECF 75. Movants oppose this motion, and submit this emergency motion to stay enforcement of the subpoenas.

Plaintiffs served subpoenas on the following current or former members of the North Dakota Legislative Assembly: State Senators Ray Holmberg, Richard Wardner, and Nicole Poolman; State Representatives Michael Nathe, William Devlin, and Terry Jones. Further, Plaintiffs served former senior counsel for the North Dakota Legislative Council, Claire Ness, with a subpoena to produce documents regarding the recent redistricting legislation explained in

prior briefing. The State Officials request this Court deny Plaintiffs' Motion to Set Deadlines, and also move the court to stay enforcement of the discovery subpoenas pending appeal to the Eighth Circuit. A notice of appeal and petition for writ of mandamus will be filed no later than March 28, 2023.

## **II. PROCEDURAL HISTORY**

The underlying procedural history is well-known to the Court as it has been thoroughly briefed and numerous orders have already been entered with respect to this dispute. The Plaintiffs' motion follows the district court's denial of two appeals dated March 14, 2023. See Doc. No. 71; 72. Of significant importance is that it appears the district court's March 14, 2023, Order indicated it could not discern from the record "a simple estimate from the Assembly as to the number of documents at issue." Doc. 72 at p. 4. It appears there was some confusion with respect to the information provided in support of the State Officials' arguments with respect to the columns in the "Privilege Log" and its supplements that were provided to the Plaintiffs.

In an effort to clarify this matter, an excerpt from the "Supplemental Privilege Log" provided with respect to Representative Jones is embedded below:

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

Doc. 47-4 at p. 14 of 18.

The first column, entitled “Total Number of Hits for the Key Word Searched” “shows the number of documents containing the searched keyword.” Second Affidavit of Emily Thompson at ¶ 4. The total number of all emails which generated a keyword hit was 64,849. *Id.* “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.” *Id.* 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.*

In sum, the aggregate sum of 64,849 emails identified in the first column of all searches for all State Officials will need further review to comply with the subpoenas. Thompson explained the original cursory review took approximately 64 hours of the Legislative Council's Legal Division's time. *Id.* at p. 2. She further estimated it would take approximately 640 hours of Legislative Council's time 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...." Doc. 52 at p. 2. This estimate is wholly reasonable in light of the fact the initial cursory search disclosed 64,849 emails as containing key words that may be responsive to the Plaintiffs' subpoenas.

### **III. LAW AND ARGUMENT**

Movants respectfully ask the Court to deny Turtle Mountain's Motion to Set Deadlines, and to stay Turtle Mountain's discovery requests. Movants further ask the Court to stay any further discovery sought from the State Officials, until the movants' Petition for a Writ of Mandamus and Notice of Appeal is considered by the Eighth Circuit<sup>1</sup>.

#### **A. Movants Emergency Motion to Stay Discovery Requests**

In ruling on a motion to stay, the Court considers four factors: (1) Whether the movant can make a strong showing he is "likely to succeed on the merits," (2) whether the movant will be "irreparable injured absent a stay," (3) whether the stay will "substantially injure the other parties"; and (4) "where the public interest lies." See *Hilton v. Braunskill*, 481 U.S. 770, 776-77, 107 S.Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987) (referencing the relevant portions of both Fed. Rule Civ. Pro. 62 and Fed. Rule App. Proc. 8.); see also *Nken v. Holder*, 556 U.S. 418, 426, 129

S. Ct. 1749, 1756, 173 L. Ed. 2d 550 (2009). “[W]hen the balance of equities ... weighs heavily in favor of granting the stay’ – we relax the likely-to-succeed-on-the-merits requirement.” League of Women Voters of Fla., Inc. v. Fla Sec’y of State, 32 F. 4th 1363, 1370 (11th Cir. 2022); see also Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. Unit A. 1981) (“[O]n motions for stay pending appeal the movant need not always show a ‘probability’ of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.”). As shown below, movants satisfy each element necessary to obtain a stay.<sup>2</sup>

Movants’ petition concerns important issues relating to the separation of powers, and the ability of state legislators to perform their essential duties. See United States v. Brewster, 408 U.S. 501, 524, 92 S. Ct. 2531, 2543, 33 L. Ed. 2d 507 (1972). This Court’s orders leave legislators vulnerable to retaliation lawsuits from their political opponents, making a cause of

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<sup>1</sup> The Notice of Appeal and Petition for Writ of Mandamus will be filed with the Eighth Circuit no later than March 28, 2023.

<sup>2</sup> 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 (5<sup>th</sup> 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 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.



action out of politics, and opens the floodgates to requests for internal legislative documents. The procedures required by this Court's orders interfere with the legislative process. It is important this matter be reviewed *before* the orders are enforced. The bell cannot be un-rung. Once the State Officials are forced to comply with the discovery orders, their privilege is lost. The Circuit Court must be allowed to review and rule on this Court's orders before they are enforced.

**1. Movants have provided a substantial case on the merits and a serious legal issue is involved.**

As stated in the movants numerous filings before this Court, three separate circuit courts have held legislative privilege bars state lawmakers from complying with discovery in a civil action where the United States is not a party. See American Trucking Assoc. Inc. v. Alviti, 14 F.4th 76 (1st Cir. 2021); Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018); In re Hubbard, 803 F.3d 1298 (11th Cir. 2015). The Eighth Circuit has expressed an explicit "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." See Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). This Court's orders rely upon the decisions of various District Courts, and declined to follow the decisions of the First, Ninth, and Eleventh Circuits. See American Trucking Assoc. Inc., 14 F.4th 76 (1st Cir. 2021); Lee, 908 F.3d 1175 (9th Cir. 2018); Hubbard, 803 F.3d 1298 (11th Cir. 2015).

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. See American Trucking, 14 4th 76, at 84. The Eleventh Circuit has also recently reversed a District Court discovery order on the grounds of legislative privilege. See In re Hubbard, 803 F.3d at 1303-06, 1315. The

underlying issues in these cases are substantially similar to this matter. A stay is necessary to preserve movants' interests in light of the fact the Eleventh and First Circuits reversed decisions very similar to this Court's Orders.

As the District Court found – other District Courts have been forced to attempt to construct a common law legislative privilege in piecemeal fashion. But when these cases are appealed to the Circuit Courts, the Circuit Courts have undisputedly come down on the side of the state officials, and upheld the legislative privilege. See American Trucking, 14 F.4th 76; Lee, 908 F.3d 1175; In re Hubbard, 803 F.3d 1298.

This is substantial precedent, that has set the same parameters on legislative privilege the movants assert should control here. Further, the “legislative privilege is important. It has deep roots in federal common law.” Hubbard, 803 F.3d at 1307. “The privilege protects the legislative process itself.” Id. at 1308. “One of the privilege’s principle purposes is to ensure that lawmakers are allowed to focus on their public duties.” Id. at 1310 (quotation omitted). The privilege applies to discovery requests served upon third-parties because “complying with such requests detracts from the performance of official duties.” Id.

As explained above, compliance with the subpoenas will be a substantial undertaking. See Doc 52; see also Second Aff'd of Thompson. Without a stay, the State Officials and Legislative Council will be detracted from the performance of their official duties while it is entirely possible – and likely – the Eighth Circuit will follow the reasoned decisions of its sister circuits on this issue. This is especially true in light of the fact the parameters on legislative privilege are not well-developed within the Eighth Circuit at this time. Clearly, there is a well-founded argument in support of the State Officials' position and this is a very serious legal issue. The stay should be granted for this reason alone to allow for the Eighth Circuit to consider this

issue on appeal.

**2. Movants would be irreparably injured absent a stay of discovery**

Movants would suffer irreparable harm if the Plaintiffs' motion is granted, and the Court denied movants request for a stay of discovery. As it stands, the Court's current orders require the movants to divert a substantial amount of time from their official duties to address the third-party subpoenas. Once this time is spent, it cannot be recovered. This is especially important in light of the fact the legislature is in session. Clearly, there would be an irreparable injury imposed upon the Movants if this effort were expended – during session – and the Eighth Circuit found it unnecessary under the First, Ninth and Eleventh Circuit holdings.

**3. A stay of discovery will not substantially injure the parties to this action**

The parties would not be prejudiced by a stay while these important issues are reviewed. Plaintiffs argue time is of the essence, given the June 2023 trial date for the underlying case. ECF 75. But Defendant has moved for summary judgment, and the parties have argued the case extensively, without need for the requested discovery. ECF 58, 59, 65, 73. Plaintiffs filed a lengthy brief in opposition to Defendant's motion, in which they argued legislative intent and reasoning, citing numerous public hearings and filings. ECF 65. At no point in their impassioned opposition did Plaintiffs indicate a need for further information that could be obtained through the subpoena and subpoenas duces tecum at issue here. Id. A stay would harm neither parties' trial preparations.

**4. The public interest demands a stay of discovery**

Finally, public interest is served by staying discovery pending movants' appeal. The public has a vested interest in its elected officials maintaining their ability to perform their constitutional duties freely and efficiently. This interest is evidenced through the North Dakota

Constitution's Speech or Debate Clause. See N.D. Const. Art. 4, § 15. A stay is necessary, to allow the Eighth Circuit Court to hear Movants' arguments regarding legislative privilege.

Legislative privilege is important, because "the time and energy required to defend against to 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). North Dakotans have an interest in their legislators focusing on legislating, free of concern or fear their discussions will be dissected via discovery. Legislative privilege exists to protect and "preserve the independence and thereby the integrity of the legislative process." See Brewster, 408 U.S. 501 at 524. The public has an interest in its elected legislators maintaining the ability to act independent of the other two branches of government, and maintaining the separation of powers. Id. The Court's Orders blur this separation, and weaken the legislature's ability to act independently.

Public interest is further served by allowing North Dakota legislators to maintain the ability to seek advice from third parties and communicate freely. As stated previously, the North Dakota legislature meets for only 80 days every other year. This is hardly adequate time to become an "expert" on every subject that comes across a legislator's desk. Legislators rely upon Legislative Council to educate them quickly on the issues, so they can make well-informed decisions. Diverting extensive resources from legislating to respond to the Plaintiffs' subpoenas does not serve the public interest. The public has an interest in its legislators maintaining their independence and having access to Legislative Council's legal staff. This interest substantially outweighs the Plaintiffs' interest in engaging in a fishing expedition in hopes of finding an illicit motive of one or more lawmakers – especially in the face of a properly claimed privilege. See MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859-863; Hubbard, 803 F.3d

at 1310.

**B. Movants' Opposition to Turtle Mountain's Motion to Set Deadlines**

Movants incorporate the arguments above into their opposition to Turtle Mountain's *Motion to Set Deadlines*. Seven days is without question inadequate time to organize and produce the requested documentation. There are approximately 65,000 emails containing key word hits, all of which need to be reviewed to determine what are or are not with third parties, and provide a privilege log explaining each withheld communication. The Legislature is currently in session. Legislative Council, the Legislature's legal division, would be the entity tasked with sifting through these 65,000 emails, and would clearly be preoccupied with the matters of legislative session. Movants would be unable to comply with this deadline, and perform their official duties.

Further, as noted above, the parties have briefed a motion for summary judgment, and the Court has not yet decided this matter. It is currently unresolved whether there are material disputes of fact requiring the June 2023 trial date. *See Witkin v. Lotersztain*, No. 219CV0406TLNKJNP, 2021 WL 6135924, at \*1 (E.D. Cal. Dec. 29, 2021) (Denying a motion to set deadlines stating "Defendants have filed summary judgment motions to determine whether there are material disputes of fact requiring a jury trial. Once pretrial motions are resolved, **assuming the case survives summary judgment**, the undersigned will issue an order. . . .") (emphasis added).

Again, the parties have already briefed this matter extensively, without need for the subpoenas at issue in this matter. This is, in large part, because the information Plaintiffs are requesting is publicly available, or not needed for the disposition of this case – as movants have already argued.

#### IV. CONCLUSION

For the reasons set forth above, Movants respectfully request the Court deny Plaintiffs' motion to set deadlines to comply with third-party discovery requests, and stay its previous discovery orders, until the Eighth Circuit Court of Appeals has the opportunity to review and rule upon movants' notice of appeal and petition.

Dated this 27<sup>th</sup> day of March, 2023.

SMITH PORSBORG SCHWEIGERT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of March, 2023, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM TO SET DEADLINES TO COMPLY WITH THIRD-PARTY DISCOVERY; AND EMERGENCY MOTION TO STAY BY THIRD-PARTIES NORTH DAKOTA LEGISLATIVE ASSEMBLY, STATE SENATOR RAY HOLMBERG, STATE SENATOR RICHARD WARDNER, STATE SENATOR NICOLE POOLMAN, STATE REPRESENTATIVE MICHAEL NATHE, STATE REPRESENTATIVE TERRY JONES, STATE REPRESENTATIVE WILLIAM DEVLIN AND CLAIRE NESS** 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.

MICHAEL HOWE, in his official capacity as  
Secretary of State of North Dakota,

Defendant.

Civil No. 3:22-cv-00022-PDW-ARS

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SET DEADLINES  
TO COMPLY WITH THIRD-PARTY DISCOVERY AND OPPOSITION TO  
RESPONDENTS' MOTION FOR A STAY PENDING APPEAL**

Plaintiffs respectfully submit this reply in support of their motion to set deadlines to comply with third-party discovery in this case and response in opposition to Respondents' motion for a stay pending appeal. Respondents have indicated they intend to seek appellate relief with respect to this Court's orders requiring them to comply with third-party discovery in this matter. *See* ECF 79 (Notice of Appeal). To ensure any appellate proceedings are completed prior to the trial scheduled for June of this year, this Court should deny Respondents request for a stay and require legislative respondents to produce, within seven (7) days of its order, the approximately 500 communications Respondents admit involved third-party non legislators and non-legislative staff, as well as the approximately 200 communications between Representative Jones and other legislators and legislative counsel staff, over which he has waived privilege. Furthermore, the Court should require Respondents to confer with Plaintiffs regarding a reasonable timeline for producing a privilege log with respect to the approximately 1,800 remaining communications that Respondents have identified as responsive. By Respondents' own math, this process should require

no more than 26.5 hours of staff time to complete. Finally, the Court should order Respondents to make Representative Devlin available within fourteen days of the entry of this order. Denying Respondents' request for a stay and entering a date certain by which they must comply will ensure that an extended appellate process will not threaten the trial schedule in this case by expediting any motion for a stay pending appeal in the Eighth Circuit.

“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*, 566 U.S. 418, 433-34 (2009). In evaluating whether the party seeking the stay has met its burden, Courts consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434. While courts must consider balance the relative strength of all four factors, “[t]he most important factor is the [applicant’s] likelihood of success on the merits.” *Brady v. Nat’l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *see also Nken*, 556 U.S. at 434.

### **I. Respondents Are Not Likely To Succeed on the Merits**

For all of the reasons previously discussed in this Court’s orders denying Respondents’ motion to quash and granting Plaintiffs’ motion to enforce, Respondents are not likely to succeed on the merits of their appeal. *See* ECF 48, 63, 71, 72. Indeed, Plaintiffs will not repeat their prior arguments on the merits here, other than to note that far from presenting a “substantial case” for appellate review, this Court’s finding that sharing privileged communications with third parties breaks privilege is so unremarkable as to be axiomatic. Instead, Plaintiffs rely on the Court’s previous orders and incorporate by reference their briefing the merits from the motions. *See id.*;

*see also* Mot. to Enforce, ECF 47; Reply in Support of Mot. to Enforce, ECF 53; Opp. to Mot. to Quash, ECF 56.

Nonetheless, one issue newly raised by Respondents merits a response. During the pendency of those motions, both Plaintiffs and this Court repeatedly and unsuccessfully sought to understand the basis of Respondents' claim that producing a privilege log in this case would impose an undue burden based on the time needed by Respondents to conduct the requisite review of the communications at issue. *See* Mot. to Enforce at 4, ECF 47 (attempting to calculate the number of documents at issue); Order Granting Mot. to Enforce at 19, ECF 63 (finding "the assertion that compliance with Turtle Mountain's subpoenas would require 640 hours of Legislative Council staff attorney time is not adequately explained"); Order Affirming Grant of Mot. to Enforce at 4, ECF 72 ("what is also missing from the record is a simple estimate from the Assembly as to the number of documents at issue."). For the first time, Respondents now explain that complying with the Court's orders to produce responsive documents that are not privileged or over which privilege has been waived and to produce a privilege log, imposes an undue burden because it would require them to review more than 64,000 communications. *See* Opp. to Mot. to Set Deadlines and Mot. for Stay at 3 ("Opp."), ECF 78. Taken at face value, this is certainly an eye-popping number.<sup>1</sup> But even if it is an accurate accounting, that number is also deeply misleading given that Respondents have determined that approximately 62,000 of them are "clearly non-responsive."<sup>2</sup> *Id.* But by adding together the total number of *responsive*

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<sup>1</sup> That Respondents were apparently able to conduct even a "cursory" review of all 64,849 documents in just 64 hours—a rate of over 1000 documents reviewed per hour—casts at least some doubt as to their newly-made assertion that "total number of hits for the keyword searched" in fact means "number of documents containing a keyword hit." *See* Opp. at 3, ECF 78.

<sup>2</sup> That Respondents' search results numbered in the tens of thousands, an overwhelming majority of which could be deemed "clearly non-responsive" at a rate of 1000 per hour, appears facially incredible, but is perhaps explained by the extreme breadth of the search terms chosen by

communications listed across three categories—communications between the subpoenaed individual and (1) a legislator, (2) legislative council staff, or (3) a non-legislator, non-legislative council staff third party—for all Respondents, Plaintiffs arrive at a total of just over 2,600 communications. Of these, approximately 580 are not privileged because they involved third-parties, Rep. Jones has waived privilege over another 200, and approximately 1,860 must be logged for privilege.<sup>3</sup> *See* ECF 47-4; ECF 50-1. Simple arithmetic demonstrates that if it would take Respondents 640 hours to review 64,000 documents it will take them just 26 hours to review the universe of 2,600 communications that is actually responsive to Plaintiffs’ requests.

To the extent it was not clear before, Plaintiffs hereby assure Respondents and this Court that they have no interest in obtaining or reviewing a privilege log covering tens of thousands of “clearly non-responsive” communications.<sup>4</sup> Nor do Plaintiffs think this Court’s orders could be reasonably construed to impose such an obligation. As such, Respondents are unlikely to succeed on the merits of their assertion that compliance is unduly burdensome based on the number of documents at issue.

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Respondents, e.g. “district,” “map,” and “training” and the apparent lack of any effort to limit the search terms using connectors or other traditional search methods. *See, e.g.*, ECF 47-4.

<sup>3</sup> These numbers are in line with the estimates originally provided by Plaintiffs in their motion to enforce, *see* Mot. to Enforce at 4, ECF 47, with the addition of the totals subsequently provided for Ms. Ness, *see* ECF 50-1. Again, however, this estimate is likely inflated because it does not account for any duplication or communications that contain more than keyword. Mot. to Enforce at 4 n. 1, ECF 47; *see also* Order Granting Mot. to Enforce at 19, ECF 63.

<sup>4</sup> To the extent Respondents cannot, in good faith, represent to Plaintiffs and this Court that all 62,000 documents are in fact non-responsive without further review, that does not preclude the Court from entering the relief Plaintiffs have requested—that Respondents immediately complete their review, production, and logging of the approximately 2,600 documents they have already determined *are responsive*.

## II. Respondents Have Not Shown Irreparable Harm

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, a stay is “‘an exercise of judicial discretion’ and ‘[t]he propriety of its issue is dependent upon the circumstances of the particular case.’” *Id.*

Here, Respondents’ assertion of irreparable harm is based solely on their claim that compliance will require them to “divert a substantial amount of time from their official duties to address the third-party subpoenas,” that such efforts will detract from the legislative session, and that such time “once spent . . . cannot be recovered.” *Opp.* at 8, ECF 78. As explained above, however, complying with the subpoenas will require approximately 26 hours, or just over three hours of work for each of the eight individuals identified by Respondents as sharing this task. That is hardly a “substantial amount of time,” nor can it plausibly be claimed that a three-hour commitment will severely detract from these individuals’ ability to comply with their other obligations—even during the legislative session. Finally, Respondents cannot claim as irreparable a harm that is of their own making. Respondents conducted their initial review and determined that the 2,600 documents at issue were responsive months ago—before the legislative session even started. *See Opp. to Mot to Enforce* at 3, ECF 50 (noting that the initial universe of approximately 1,400 responsive documents had been identified as of December 1, 2022, and that the additional 1,200 documents in the possession of Ms. Ness had been identified by December 30, 2022). Instead of completing their review at that time, or at any time during the intervening months, Respondents chose to sit on their hands—all the while opposing Plaintiffs attempts to enforce the subpoenas by presenting a severely inflated estimate of the burdens imposed. *See, e.g. Appeal of Order Granting Mot. to Enforce* at 17, ECF 64 (failing to explain that despite having already “excluded” documents

identified as “clearly non-responsive” during the initial review, those documents were nonetheless affirmatively *included* in Respondents calculation of the time required to comply with Plaintiffs’ requests). The Court should exercise its discretion to reject Respondents’ claim to an irreparable harm that is nothing more than the predictable result of their own procrastination.

### **III. The Balance of the Equities and the Public Interest Support Denying a Stay and Ordering Immediate Compliance.**

Plaintiffs, this Court, and the public have a strong interest in ensuring that Plaintiffs’ claim is adjudicated on a full record and in time to ensure relief is available for the 2024 election. This Court has consistently recognized those interests—both in ruling in favor of Plaintiffs and against Respondents in their attempts to preclude Plaintiffs from obtaining relevant evidence in this case, and in setting a trial schedule that provides sufficient time to resolve any appeals in advance of 2024. Respondents do not seriously dispute this, and instead simply suggest that Plaintiffs will not be prejudiced if they are forced to choose between going to trial on an incomplete record and obtaining timely relief. To state this proposition is to demonstrate its speciousness.

Moreover, it is important that Respondents be ordered to comply with this Court’s orders and Plaintiffs’ subpoenas by a date certain. Not only will that ensure the discovery is obtained in time for trial, but it will also ensure that Respondents pursue their forthcoming appeal in an expedited manner and not as a tool of delay to run out the clock before trial. Both the Fifth Circuit and the Supreme Court recently denied stays of discovery orders against legislators in which a date certain was set, and that approach ensured an expedited resolution (and denial) of the legislators’ privilege objections on appeal. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.).

Finally, the public’s interest in ensuring that North Dakota’s electoral systems do not perpetuate historical discrimination against Native American voters is substantial and, as this Court has already found, outweighs Respondents interest in preserving privilege in the redistricting

context. This is particularly so given that the bulk of the communications and testimony at issue Respondents are withholding are not privileged.

March 28, 2023

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**CERTIFICATE OF SERVICE**

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

/s/ Mark P. Gaber  
Mark P. Gaber

*Counsel for Plaintiffs*



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  
LEGISLATIVE COUNCIL – CLAIRE  
NESS’ MEMORANDUM IN REPLY TO  
PLAINTIFFS’ OPPOSITION TO  
RESPONDENTS’ MOTION FOR STAY  
PENDING APPEAL**

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**I. INTRODUCTION**

The Plaintiffs’ Response to the Motion to Stay mischaracterizes the amount of time and effort that will be required for production of the requested documents. As previously explained, the process implemented by Legislative Council’s legal division was to generate a cursory estimate as to the burden Plaintiffs’ subpoenas imposed. The only number in the “Privilege Logs” that has any level of certainty is the “Total Number of Hits for the Key Word Searched” column as it was derived from simply looking at the total number of “items” that appeared when each of the State Officials’ Outlook accounts were searched for each term. The Plaintiffs’ extrapolated numbers are simply wrong for the reasons explained below.

**II. ARGUMENT**

It has always been the Respondents’ position that it has no duty to respond to the Plaintiffs’ subpoenas in accordance with the precedent of our sister circuits. However, in a good faith effort

to substantiate the imposed burden and comply with Fed. R. Civ. P. 45 to the extent reasonably practical under the circumstances, the following steps were taken<sup>1</sup>:

**A. Explanation of Steps Taken to Provide Numbers in Respondents' "Privilege Log."**

1. A search was performed on each subpoenaed State Officials' Outlook for the following "key words:" "1504"; "Redistricting; Map"; "Subdistrict"; "District"; "Race"; "Tribal"; "Native American"; "Indian"; "Reservation"; "Voting Rights Act"; "VRA"; "Demographic"; "Criteria"; and "Training." These terms were used to provide a general estimate of the total amount of communications sought by the Plaintiffs' subpoenas. These "key words" were selected to identify at least some of the documents requested in the subpoenas. Doc. 52 at pp. 1-2.

2. The "key word" search was cooperatively performed by all eight attorneys in the Legislative Council's Legal Division. The results of the "key word" search revealed the following number of emails for each individual: (William Devlin – 6,021 emails; Ray Holmberg – 8,965 emails; Michael Nathe – 5,613 emails; Richard Wardner – 3,654 emails; Nicole Poolman – 4,976 emails; Terry Jones – 22,237 emails; Claire Ness – 13,383 emails.) This totaled 64,849 emails. Doc. 77 at p. 2.

3. The 64,849 emails underwent an extremely cursory review to identify and eliminate emails that clearly were not responsive to the subpoena (such as list serve items), and identify the sender and recipient of the emails that were not immediately eliminated. Doc. 52 at p. 2.

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<sup>1</sup> At the time the cursory review occurred, Legislative Council's attorneys worked numerous evenings and weekends to keep pace with the heightened demands leading up to session. This initial review in addition to the workload required for the Organizational Session, which is mandated to occur the first week of December pursuant to Section 7 of Article IV of the Constitution of North Dakota, was burdensome, despite the Plaintiffs' assertions.

4. The results of this cursory review were provided to the Plaintiffs in an effort to substantiate the Respondents' undue burden objection in accordance with Fed. R. Civ. P. 45 and 26.

5. Legislative Council does not possess a software program to supplant the human effort required to scan the nearly 65,000 emails responsive to the search terms. Due to the quantity of emails, and the limited resources of the legal division, these emails were rapidly reviewed and tallied<sup>2</sup>. The emails were not harvested and segregated into folders as this would have taken substantially longer than the 64 hours incurred.

**B. The Plaintiffs' position mischaracterizes the effort needed to comply with the document subpoenas.**

As previously explained, production of the requested documents will take approximately 10 times as long as the original cursory search and tally. Doc. 52 at pp. 1-2. First, the "key word" search will need to be performed again. Second, the emails will need to be manually segregated into different folders. Third, after the emails are segregated into folders, they will need to be reviewed for responsiveness to the subpoenas. Fourth, they will need to be screened for privilege. Fifth, the privileged communications will need to be logged in accordance with the Magistrate Judge's Order. Sixth, the remaining emails will need to be provided to outside counsel for review and ultimate disclosure. This is not a 26-hour process as alleged in the Plaintiffs' response. Rather, the 640-hour estimate to sift through nearly 65,000 emails is reasonable. Doc. 52 at p. 2.

The substantial undertaking explained above is exactly "why the privilege extends to discovery requests, even when the lawmaker is not a named party in the suit: complying with such requests detracts from the performance of official duties." In re Hubbard, 803 F.3d 1298, 1310 (11<sup>th</sup> Cri. 2015). This is also why the "privilege also extends to legislative aides and assistants."

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<sup>2</sup> The North Dakota Legislative Council's legal division is one of the smallest legislative legal divisions in the nation.

Lee v. City of Los Angeles, 908 F.3d 1175, 1187 n. 12 (9<sup>th</sup> Cir. 2018). Under Circuit Court precedent, the State Officials have no duty to respond to the Plaintiffs' discovery as it is barred by common-law legislative privilege. Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88; American Trucking, Inc. v. Alviti, 14 4<sup>th</sup> 76, 88-91 (1<sup>st</sup> Cir. 2021). This is precisely the issue now before the Eighth Circuit in the Respondents' appeal and petition for writ of mandamus.

Nonetheless, Legislative Council's legal division devoted approximately 64 hours of its time to conduct a cursory key word review in a good faith effort to identify the scope of the Plaintiffs' discovery request. Doc. 52 at p. 2. Plaintiffs' inaccurate and insulting allegation that Respondents chose "to sit on their hands" and or lacked "any effort to limit the search terms" completely ignores Legislative Council's important official duties. The Respondents are elected and hired to perform duties related to making laws, not respond to discovery requests in private civil actions. Plaintiff's glib attitude towards the Legislative Council's attorneys' role during, and leading up to, a legislative session is like claiming an accountant would not be burdened during the height of the tax season.

To reiterate, the results of the "cursory key word review" of the 64,849 emails were provided to Plaintiffs' counsel in an effort to simply further establish the burden their subpoenas impose. It did not include separating the actual emails into various folders for production. Had Respondents actually believed a comprehensive response – in addition to simply asserting legislative privilege – was required, the documents would have been reviewed in detail and a privilege log would have been produced in accordance with Fed. R. Civ. P. 26 and 45. However, Circuit Court precedent indicates privilege logs are not required with respect 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.”). Rather, the tallies in the chart were provided to substantiate the Respondents’ alternative undue burden objection. To comply with the subpoenas, the initial search and review would need to be repeated and numerous additional steps would be required. This is why Thompson explained subpoena compliance “would require approximately ten 8-hour days for the 8 attorneys.” Doc. No. 52 at p. 2.

Respondents went above and beyond what is required in light of a legislative privilege claim to provide a cursory estimate of the total number of documents that may be responsive to the subpoenas to substantiate an alternative objection. The Plaintiffs have taken these efforts and performed mathematical gymnastics to erroneously argue that compliance with their requests should only take 26 hours. Doc. 84 at p. 4. In essence, the Plaintiffs misconstrued and weaponized the Respondents’ good-faith effort to substantiate its alternative undue burden objection. The 640-hour estimate to respond to the Plaintiffs’ subpoenas does not change just because the Plaintiffs claim so. The 640-hour estimate is based on the first-hand knowledge of the substantial undertaking required to comply with the subpoena.

Put simply, compliance with the subpoenas will require a substantially more detailed review of the 64,849 emails that were potentially responsive from the initial cursory “key word” search as explained above. Each of those emails would have to be reviewed again to harvest the emails that were simply tallied to provide a cursory estimate. Then these would have to be reviewed to determine whether the emails are actually responsive to the request and/or subject to the privilege – whether it be attorney-client or legislative - as outlined in the Magistrate Judge’s

Orders. Further, this substantial undertaking may ultimately be deemed unnecessary by the Eighth Circuit as this exact issue is currently pending before it.

**C. Enforcement of Representative Devlin's deposition subpoena is in direct conflict with Circuit Court precedent.**

Respondents will not rehash all arguments with respect to Representative Devlin's deposition subpoena, but reiterate "plaintiffs are generally barred from deposing local legislator, even in 'extraordinary circumstances.'" Lee, 908 F.3d at 1187-88. This applies even when the claim implicates the government's intent in a racial gerrymandering case. Id. at 1188. This is because "[a]ny questioning about legislative acts, even [in the situation of someone no longer a member of Congress], would 'interfere' by having a chilling effect on Congressional freedom of speech." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 860 (D.C. Cir. 1988) (internal alterations in original, quotation omitted). This issue is now squarely before the Eighth Circuit. If the Eighth Circuit rules in accordance with the Circuit Courts, Representative Devlin's privilege will be unjustly lost.

**D. A stay is justified under these circumstances.**

The Supreme Court acknowledged "it has always been held...that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." Nken v. Holder, 556 U.S. 418, 421 (2009) (quotation omitted). In other words, a "stay simply suspend[s] judicial alteration of the status quo...." Id. at 429 (quotation omitted, alteration in original). This is certainly appropriate when there is an unsettled question of law that may protect the rights of a party. See Calvillo v. Siouxland Urology Associates, P.C., 2011 WL 5196542 at \*4 (D.S.D. October 31, 2011) (holding it was appropriate to issue a stay where the "law is unsettled" and the stay will "fully protect" a party's rights.) The Magistrate Judge acknowledged "the Assembly and the Tribes marshal extensive case in law

support of their respective positions.” Doc. 48 at p. 10. Notably, the state officials in American Trucking and Hubbard were in the same position as the Respondents before the First and Eleventh Circuits reversed the district court’s decisions and held legislative privilege barred the requested discovery. As previously explained, American Trucking, Lee, and Hubbard all held legislative privilege barred subpoenas not issued in the prosecution of federal criminal statutes or by the United States.

The Respondents should not be required to divert their attention from their official duties until the unsettled questions involving the scope of privilege as applied to state lawmakers is answered. “The legislative privilege is important. It has deep roots in federal common law.” Hubbard, 803 F.3d at 1307. This important legal doctrine will essentially be nullified if a stay is not granted until appellate review is complete. If Respondents are required to divert their time from their official duties to the monumental task of responding to a subpoena in a civil action, the entire stated purpose of legislative privilege will be lost. The time lost by what is one of the smallest legislative legal divisions in the nation during the height of the limited 80-day legislative session cannot be recovered and the Respondents would have no remedy in the event the Eighth Circuit reverses this court’s discovery orders just like in American Trucking and Hubbard.

### III. CONCLUSION

This case involves an unsettled question of law and a stay will ensure the correct law is applied before the legislative branch of the North Dakota government is forced to divert its attentions from its official duties. Principles of comity and federalism require the judiciary to allow this issue to be fully vetted before the important legislative privilege is disturbed. For the aforementioned reasons, the Respondents’ motion for a stay should be granted.



Dated this 30th day of March, 2023.

SMITH PORSBORG SCHWEIGERT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of March, 2023, a true and correct copy of the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY; SENATORS RAY HOLMBERG, RICHARD WARDNER, AND NICOLE POOLMAN; REPRESENTATIVES MICHAEL NATHE, WILLIAM R. DEVLIN, AND TERRY JONES; AND SENIOR COUNSEL AT THE NORTH DAKOTA LEGISLATIVE COUNCIL – CLAIRE NESS' MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO RESPONDENTS' MOTION FOR STAY PENDING APPEAL** 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**

<p>Turtle Mountain Band of Chippewa Indians, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al.,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>ORDER</b></p> <p>Case No. 3:22-cv-22</p>
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Before the Court are two competing motions. The first is a motion to set deadlines for compliance with third party subpoenas by the Turtle Mountain plaintiffs. Doc. No. 75. The second is a motion to stay pending appeal (or review) by 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”). Doc. No. 82. For the reasons below, the motion to set deadlines is granted, and the motion to stay discovery orders pending review is denied.

This current dispute is the latest in a series of discovery disputes in this redistricting and Voting Rights Act (“VRA”) case. In short, the Turtle Mountain plaintiffs subpoenaed Representative Devlin for a deposition and served third-party document subpoenas on the Assembly. The Assembly moved to quash the deposition subpoena as to Representative Devlin, Judge Senechal denied that motion (Doc. No. 48), and this Court affirmed her decision (Doc. No. 71). The Turtle Mountain plaintiffs moved to enforce the third-party document subpoenas, Judge Senechal granted that motion (Doc. No. 63), and this Court affirmed her decision (Doc. No. 72).

After those rulings, the Turtle Mountain plaintiffs filed their motion to set deadlines, requesting the Court set prompt deadlines for the Assembly's compliance with its subpoenas given the June 12, 2023, trial date. In response to that motion, the Assembly filed an interlocutory appeal and a petition for a writ of mandamus with the Eighth Circuit Court of Appeals. The interlocutory appeal was dismissed for lack of jurisdiction (Doc. No. 87), but the petition for a writ of mandamus remains active. The Assembly asserts that the discovery orders should be stayed pending review by the Eighth Circuit.

Two other facts are also critical for the purposes of this order. The first is the trial date. This case is set for trial on June 12, 2023. That trial date was specifically requested by the Secretary to assure it had adequate time to address any potential VRA violation. Second, the Secretary's motion for summary judgment was recently denied (Doc. No. 89), so the case is proceeding to trial on June 12.

Turning to the motion to stay, as an initial matter, the interlocutory appeal by the Assembly was dismissed by the Eighth Circuit for lack of jurisdiction. Doc. No. 87. Because there is no active appeal, to the extent the Assembly sought a stay of the discovery orders pending appeal, the motion is denied as moot. Nonetheless, the Assembly's motion can also be construed as a motion to stay discovery orders pending review of its petition for a writ of mandamus. When assessing a stay pending disposition of a writ of mandamus, federal courts consider the likelihood of success on the merits of the petition and the likelihood of irreparable harm resulting from the denial of a stay. See Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

Both factors weigh against a stay. The Assembly has not demonstrated a likelihood of success on the merits of the petition, particularly given that this is a redistricting and VRA case

and that the orders at issue are discovery orders (where no privileged documents or information were ordered to be disclosed). Indeed, as this Court previously stated:

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); 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.

Doc. No. 72. While the Assembly certainly disagrees, that disagreement does not demonstrate a likelihood of success on the merits of the petition for a writ of mandamus.

As to irreparable harm, the Assembly strongly asserts that the harm of complying with the discovery orders is significant, particularly given that the Assembly is currently in session. But the Court disagrees. These discovery issues have been ongoing for months. Beyond that, the Assembly has retained counsel to assist with the document requests and the deposition of Representative Devlin. Most importantly though, and once again, the discovery orders do not order the Assembly to disclose any privileged documents. And as for the deposition of Representative Devlin, if the Assembly believes in good faith that any question or answer during his deposition invokes state legislative privilege, the Assembly may still assert that objection at the deposition. All told, the Assembly has not demonstrated irreparable harm resulting from a denial of a stay pending review of the petition for a writ of mandamus.

To reiterate, trial will begin on June 12, 2023. That trial date was specifically requested by the Secretary and the State of North Dakota. It is essential that this set of discovery issues be resolved before trial. On these facts, a stay pending review of the petition for a writ of mandamus is not warranted, and the Assembly's motion (Doc. No. 82) is **DENIED**. And in turn, the Turtle Mountain plaintiffs' motion to set deadlines (Doc. No. 75) is **GRANTED**.

Within ten (10) days of this order, the Assembly shall produce their communications with third parties and all documents withheld as to Representative Jones. As for all other documents, the Assembly must immediately and actively begin its work on producing a privilege log and that privilege log must be produced within fourteen (14) days of this order. The deposition of Representative Devlin must be scheduled on or before April 28, 2023.

**IT IS SO ORDERED.**

Dated this 11th day of April, 2023.

/s/ Peter D. Welte  
Peter D. Welte, Chief Judge  
United States District Court