Docket No. 23-1600

In the

United States Court of Appeals

For the

Eighth Circuit

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

Petitioners.

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

PETITIONERS' RESPONSE TO RESPONDENTS' PETITION FOR REHEARING EN BANC

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Rule 35 Statement

Respondents' Petition for Rehearing En Banc mischaracterizes the panel's opinion. The panel's majority opinion is consistent with Supreme Court and Circuit Court precedent. The majority correctly acknowledged legislative privilege has limits; however, it concluded the "'extraordinary instances' in which testimony might be compelled from a legislator about legitimate legislative acts does not justify enforcing a subpoena for testimony in this case." (Op. 6). The panel explained exceptions to legislative privilege may apply in some circumstances; however, none applied in this case. (Id. at pp. 5-6) The panel's opinion follows decisions of our sister circuits and the Supreme Court. Therefore, under Fed. R. App. P. 35, the Respondent's Petition should be denied.

I. STATEMENT OF THE CASE

Petitioners sought a writ of mandamus to correct clear legal errors in the district court's orders which enforced subpoenas against current and former members of the North Dakota Legislative Assembly and its legal counsel. (App113-118; App210-214.) Respondents' stated purpose for issuing the subpoenas was to uncover an "illicit motive" of one or more state lawmakers in the 141-member Assembly with respect to its approval of a 2021 redistricting plan. (App184.) Notably, the underlying litigation – to which Petitioners were not a party – alleged the 2021 redistricting plan violated Section 2 of the Voting Rights Act ("VRA").

In their quest to discover an "illicit motive," Respondents issued a deposition subpoena to Representative Devlin (App004-006) and seven subpoenas seeking seven identical categories of documents to: Senators Holmberg, Wardner, and Poolman; Representatives Nathe, Devlin, and Jones; and Senior Counsel at the North Dakota Legislative Council Claire Ness (App049-055) (collectively "State Officials"). Respondents' subpoenas demanded State Officials produce virtually all documents and communications related to the 2021 redistricting plan in their personal files. (Op. 2 at n. *). It is undisputed these subpoenas sought information within the "sphere of legislative activity." (Op. at p. 4).

Petitioners timely objected to all subpoenas on grounds of legislative privilege and also argued the requested information was unnecessary for the underlying

litigation. After numerous motions and briefings, the district court held the State Officials must comply with all eight subpoenas. The district court ignored Supreme Court precedent and recent circuit court opinions holding legislative privilege barred this discovery. Petitioners had no other adequate means to attain the desired relief from the district court's clearly erroneous rulings than to file an emergency motion for a stay.

After granting Petitioners' emergency motion for a stay, the panel issued its opinion on June 6, 2023, holding the district court erred in requiring the State Officials to comply with Respondents' subpoenas[1]. The majority followed Supreme Court and Circuit Court decisions and determined: 1) State lawmakers share a privilege similar to that afforded to federal legislators under the Speech or Debate Clause of the Constitution; 2) Cases drawing on legislative immunity are instructive in defining the score of legislative privilege; 3) The common-law legislative privilege does not apply to prosecutions of federal criminal statutes and may yield in "extraordinary instances;" 4) Legislative privilege applied to the State Officials in this case; and 5) When legislative privilege applies, it acts as an absolute bar to interference with the legislative process. The majority's determinations are

[1] The majority also correctly noted Representative Jones did not contest the district court's determination of waiver. This issue is irrelevant to the Respondents' Petition.

supported by numerous recent Circuit Court decisions and follow the Supreme Court's directives.

Trial in the underlying § 2 VRA lawsuit took place in Fargo, North Dakota the week of June 12, 2023. To date, the district court has not issued a decision on the merits of the underlying lawsuit.

II. ARGUMENT

Respondents' Petition rests on two fundamentally incorrect premises: 1) That Common-law legislative privilege and immunity are not analogous; and 2) That the majority opinion created a circuit split with respect to the scope and application of legislative privilege. These arguments have either been expressly rejected or have no support in federal appellate case law. Respondents misrepresent the majority's decision. The majority's decision is entirely consistent with Supreme Court and circuit court opinions on legislative privilege.

En banc review is "not favored and ordinarily will not be ordered" unless "necessary to secure or maintain uniformity in the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. 35(a). A "proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts" with our sister circuits that have addressed the issue. Fed. R. App. 35(b)(1)(B). This proceeding does not implicate any of Rule 35's factors. As explained below, a circuit split would be created only if the

majority's opinion is disturbed upon an en banc rehearing. The Respondents' Petition should be denied.

A. Respondents' Arguments with Respect to the Analysis of Common-law Legislative Privilege have been Rejected by Sister Circuits.

Every circuit, including the panel majority, rejected the Respondents' underlying argument that "[w]hile state and federal legislator enjoy a similar *legislative immunity*, the same is not true for *legislative privilege*." (Resp. Pet. at p. 17) (emphasis in original). This fundamentally incorrect statement serves as the foundation for the Respondents' flawed arguments.

1. The majority's conclusion that federal and state legislators enjoy a similar legislative privilege is uniform across the circuits.

The majority explained "[s]tate legislators enjoy a privilege under the federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the Constitution." (Op. at p. 3). Every circuit to speak on this issue agrees. See La Union Del Pueblo Entero v. Abbott, 68 F.4th 228, 237 (5th Cir. 2023) ("...the legislative privilege's scope is similar for state and federal lawmakers...."); Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) ("The rationale for the privilege....applies equally to federal, state, and local officials."); In re Hubbard, 803 F.3d 1298, 1310 n. 11 (11th Cir. 2015) ("it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate

Clause.") The above circuit decisions are based on the Supreme Court's interpretation of the immunities and privileges afforded under the Speech or Debate Clause.

a. The Supreme Court's explanation of the Speech or Debate Clause is consistent with majority's decision.

The Speech or Debate Clause is read broadly and "legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975). When "a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled...once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." Id. The Court expressed "no doubt" a senator "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for events that occurred [within the legitimate legislative sphere]." Gravel v. U.S., 408 U.S. 606, 616 (1972). This is because it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." Tenney v. Brandhove, 341 U.S. 367, 377 (1951). The Supreme Court "generally ha[s] equated the legislative immunity to which state legislators are entitled...to that accorded Congressmen under the Constitution." Sup. Ct. of Va. V. Consumers Union of U.S., Inc., 446 U.S. 719, 733 (1980).

b. The majority's use of cases interpreting common-law legislative immunity in defining the scope of legislative privilege is consistent with the holdings of our sister circuits.

Respondents – citing no authority – contend the majority erred when it "drew expressly on cases involving *legislative immunity* – a concept that is distinct from legislative privilege." (Resp. Pet. at p. 16). The Fifth Circuit very recently rejected the Respondents' flawed contention as follows:

> Plaintiffs also criticize the legislators for drawing on caselaw involving either the Constitution's Speech or Debate Clause or legislative immunity (rather than legislative privilege). As for the first point, the legislative privilege that protects state lawmakers "is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." Even if the federal privilege yields to fewer exceptions than the state privilege, we see no reason to differentiate between state and federal lawmakers when determining what counts as "legitimate legislative activity." In other words, the legislative privilege's scope is similar for state and federal lawmakers—even if the privilege for state lawmakers has more exceptions. So too for legislative immunity, which the Supreme Court has often analyzed in parallel to legislative privilege. Both concepts involve the core question whether a lawmaker may "be made to answer—either in terms of questions *or* in terms of defending ... from prosecution." While the parallel between them may not run to the horizon, we follow the Supreme Court's lead in drawing on both strands even though this case involves a privilege from disclosure rather than an immunity from suit or liability.

La Union Del Pueblo Entero v. Abbott, 68 F.4th 228, 237 (5th Cir. 2023) (emphasis added) (footnotes omitted).

The Ninth Circuit also acknowledged the Supreme Court's logic on legislative immunity "supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well." Lee, 908 F.3d at 1187. The Eleventh

Circuit utilized cases involving legislative immunity in its analysis of legislative privilege as well. Hubbard, 803 F.3d at 1307-08. Respondents' criticism of the majority has no support from our sister circuits or the Supreme Court.

i. Respondents' reliance on Gillock for its contention that legislative immunity and legislative privilege are unrelated is unfounded.

Instead of acknowledging the robust consensus of authority supporting the majority's opinion, Respondents claim United States v. Gillock, 445 U.S. 360 (1980) somehow establishes common-law legislative immunity stands on different footing than common-law legislative privilege. (Resp. Pet. at p. 16). This argument exhibits Respondents' fundamental misapprehension of the majority's decision. In Gillock, a former Tennessee state senator was indicted on numerous violations of federal criminal law. Id. at 1188. Prior to his federal criminal trial, the senator claimed privilege and moved to suppress all evidence related to his legislative activities. Id. at 362-366. The Court held Gillock's privilege could not be used to suppress evidence under the following rationale:

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

> Thus, **in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.**
>
> We conclude, therefore, that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the **enforcement of federal criminal statutes**, comity yields. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon,* 418 U.S. 683, 94...(1974), when balanced against the need of **enforcing federal criminal statutes**. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held **insufficient** to justify **denying judicial power to secure all relevant evidence in a criminal proceeding**.... Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would **impair the legitimate interest of the Federal Government in enforcing its criminal statutes** with only speculative benefit to the state legislative process.

Id. at 372-73 (internal footnotes omitted) (emphasis added).

Gillock reaffirmed that common law immunities and privileges afforded to state legislators apply in civil actions. Id. at 372. Gillock did not distinguish between the common law legislative immunity and privilege afforded to state lawmakers. Rather, Gillock heavily cited Tenney – a civil case applying legislative immunity - to explain the difference between the application of common law privileges afforded to state officials in federal civil versus federal criminal proceedings. Gillock merely held a state lawmaker – who is not entitled to immunity from federal criminal prosecution - cannot invoke legislative privilege to suppress relevant evidence necessary for prosecution of a federal crime. This is why the panel

decision and sister circuits cite Gillock and acknowledge state officials are not entitled to legislative immunity or privilege in federal criminal actions. (Op. at p. 3); Abbott, 68 F.4th at 237; Hubbard, 803 F.3d at 1310 n. 11; Lee, 908 F.3d at 1187 at n. 10-11.

The majority and sister circuits concluded state lawmakers share a *similar*, but not identical, legislative privilege to their Washington counterparts. Respondents fundamentally misinterpret Gillock and misrepresent the majority's opinion.

B. Respondents Incorrectly Assert the Panel's Decision Expanded the Scope of Common-law Legislative Privilege.

Contrary to Respondents' argument, the majority did not hold the legislative privilege is "absolute." (See Resp. Pet. at p. 15-16). Rather, the majority followed decisions of the Supreme Court and our sister circuits in explaining the scope of legislative privilege.

1. The majority followed the Supreme Court and sister circuits by explaining legislative privilege has constraints.

As explained above, the majority correctly applied Gillock, and explained "state legislators do not enjoy the same privileges as federal legislators in criminal actions." (Op. at p. 3). The majority also acknowledged legislative privilege may be limited by the "extraordinary instances" exception noted in Village of Arlington Heights v. Metropolitan Housing Development. Corp., 429 U.S. 252, 268 (1977).

(Op. at pp. 5-6). This is the same basis under which our sister circuits describe legislative privilege as "qualified." The Fifth Circuit recently explained:

> The legislative privilege gives way "where important federal interests are at stake, as in the enforcement of federal criminal statutes." According to the Supreme Court, "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions." **We have thus recognized that the legislative privilege "is qualified."** While "important federal interests" may be at stake in **criminal as well as "extraordinary"** civil cases, **the qualifications do not subsume the rule**.

Abbott, 68 F.4th at 237-38 (emphasis added) (footnotes omitted).

The majority correctly concluded state legislative privilege is limited by federal criminal actions and "extraordinary instances." See Id. at 232, 235-239; see also American Trucking, 14 F.4th 76, 86-91 (Held legislative privilege applied when the underlying action was "neither a federal criminal case nor a civil case in which the federal government is a party."); Hubbard, 803 F.3d 1298, 1310-1315 (11th Cir. 2015) (Held legislative privilege applied to state officials and explained "for the purpose of legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government."); Lee, 908 F.3d 1175, 1186-88 (9th Cir. 2018) (Held legislative privilege applied to bar deposition of local lawmakers, but acknowledged '"extraordinary instances'...might justify an exception to the privilege.") The majority did not create a circuit split when it acknowledged legislative privilege is inapplicable in

federal criminal prosecutions and may yield in "extraordinary instances." (Op. at pp. 3, 5-6).

2. The majority's application of legislative privilege is consistent with holdings of sister circuits.

Respondents' assert that "[c]ompared with *Gillock*, the panel placed much more weight on the interference rationale and much less weight on the value of enforcing federal law." (Resp. Pet. at p. 18). If the State Officials were subject to federal criminal prosecution, this argument might be appropriate. However, this is a private civil action to which the State Officials were non-parties.

a. The majority correctly held this case did not present an "extraordinary instance" to which legislative privilege must yield.

The majority correctly held these proceedings did not present the "potential for 'extraordinary instances' in which testimony might be compelled from a legislator about legitimate legislative acts." (Op. at p. 6). The majority explained "[a] claim under § 2 of the [VRA] does not depend on whether the disputed legislative districts were adopted 'with the intent to discriminate against minority voters,' for the statute repudiated an 'intent test.' *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986)."[2] (Op. at p. 6) Therefore, the majority held "[a]ny exception to

[2] Gingles explained the intent test under the VRA "was repudiated for three principal reasons – it is unnecessarily divisive because it involves charges of racism on the part of individual officials or the entire communities, it places an inordinately difficult burden of proof on plaintiffs, and it asks the wrong question." Id. at 43-44.

legislative privilege that might be available in a case that is based on a legislature's alleged intent is thus inapplicable." (Op. at p. 6). This is perfectly in line with our sister circuits.

In Abbott, the plaintiffs – which included the United States government - sued the Texas Secretary of State alleging legislation violated the VRA. Abbott, 68 F.4th at 231-32. Plaintiffs "sought discovery from individual, non-party legislators related to the circumstances surrounding" the enacted legislation. Id. at 232. The district court rejected the legislators' claim of legislative privilege and the legislators appealed. Id. The Fifth Circuit held that case was not "one of those 'extraordinary instances' in which the legislative privilege must 'yield[ ].'" Id. at 237. Abbott explained "[p]laintiffs' attempt to require state legislators to produce documents is far closer on the continuum of legislative immunity and privilege to...suits under 42 U.S.C. § 1983...than it is to the criminal prosecution under federal law at issue in *Gillock*." Id. at 239. Therefore, "a state legislator's common-law absolute immunity from civil actions precludes the compelled discovery of documents pertaining to the legislative process that Plaintiffs seek here." Id. at 239-40.

Likewise, the Ninth Circuit held legislative privilege barred depositions of local lawmakers in a racial gerrymandering case. Lee, 908 F.3d at 1183, 1187-88. Lee acknowledged "claims of racial gerrymandering involve serious allegations," but "a categorical exception whenever a constitutional claim directly implicates the

government's intent...would render the privilege 'of little value'" Id. at 1188 (citation omitted). Lee explained Village of Arlington Heights, 429 U.S. at 268 suggested a claim alleging racial discrimination "was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege." Id. This application is also consistent with the First and Eleventh Circuits. See American Trucking, 14 F.4th at 87-91 (holding legislative privilege blocked discovery sought from former and current state officials where the underlying case alleged violation of the dormant Commerce Clause); Hubbard, 803 F.3d at 1303-1315 (holding same where the underlying case alleged violation of the First Amendment).

The majority's decision "qualified" legislative privilege in the same sense as explained by the Supreme Court and sister circuits. The majority correctly held a plaintiff's invocation of legislative intent in connection with allegations of racial discrimination – whether under Equal Protection or the VRA – does not fall "within the subset of 'extraordinary instances' that might justify an exception to the privilege." Lee, 908 F.3d at 1188; see also Abbott, 68 F.4th at 237-38. This is especially true in a § 2 VRA case where an inquiry into legislative motives "asks the wrong question." See Gingles, 478 U.S. at 43-44; See also American Trucking, 14 F.4th at 90 (Alternatively holding that even if legislative privilege may yield in some circumstances, "the need for the discovery requested here is simply too little to

justify such a breach of comity.") The majority avoided a circuit split with its well-reasoned explanation of legislative privilege's scope.

3. The majority correctly applied legislative privilege.

Respondents misapprehend the panel's analysis with respect to the scope of legislative privilege and instead err by asserting "the panel's ruling that the privilege is 'absolute' is thus out of step with other circuits, and its rationale conflicts with *Gillock*." (Resp. Pet. at p. 11). The panel did not make such a ruling. Rather, the majority concluded when legislative privilege applies, "the privilege is an 'absolute bar to interference.'" ((Op. at p. 3 (quoting Eastland, 421 U.S. at 503)). This is a correct statement of law.

Legislative "privilege protects the legislative process itself." Hubbard, 803 F.3d at 1308. "One of the privilege's principle purposes is to ensure that lawmakers are allowed to focus on their public duties...That is why the privilege extends to discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Id. at 1310. Accordingly, the "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Id. "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference...the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time

citizen-legislator remains commonplace." Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998). Legislative privilege "serves the 'public good' by allowing lawmakers to focus on their jobs rather than on motions practice in lawsuits." Abbott, 68 F.4th at 237.

This is why sister circuits "that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." American Trucking, 14 F.4th at 88. Unless the privilege barred such interference, it would "render the privilege of little value." See Lee, 908 F.3d at 1188. Accordingly, it is an "error of law" for a court to require "the privileged documents be specifically designated and described, and that precise and certain reasons for preserving the confidentiality be given." Hubbard, 803 F.3d at 1309. Holding otherwise destroys the privilege's purpose. This is especially true here where the "district court did not dispute the acts were undertaken within the sphere of legitimate legislative activity." (Op. at p. 4).

When the privilege applies, it must be "an 'absolute bar to interference.'" (Op. at p. 3). Holding otherwise permits the "substantial intrusion" into the legislative process that must "usually be avoided." Vill. of Arlington Heights, 429 U.S. at 268 n. 18. The majority's application of legislative privilege as an "absolute bar to interference" is consistent with Supreme Court and sister circuit precedent.

III. CONCLUSION

The majority's opinion does not conflict with any decisions of the United States Supreme Court or with the authoritative decisions of sister circuits. See Fed. R. App. P. 35(b). An en banc rehearing is "not favored" and the well-reasoned and legally consistent panel decision should not be disturbed. Therefore, Respondents' Petition should be denied.

Dated this 14th day of August, 2023.

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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 motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) as it does not exceed 3,790 words.

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 14th day of August, 2023.

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

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2023, I electronically submitted the foregoing **PETITIONERS' RESPONSE TO RESPONDENTS' PETITION FOR REHEARING EN BANC** 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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