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

Case No: 3:22-cv-00022

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

*** *** ***

I. INTRODUCTION

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

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

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

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

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

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

II. RELEVANT FACTUAL BACKGROUND

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

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

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

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

III. LAW AND ARGUMENT

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

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

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

Fed. R. Ev. 501.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alviti, 14 F. 4th at 88.

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

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

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

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

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

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

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

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

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

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

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

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

propose to ask them and to cover their personal notes of the deliberative process." Id. at 1304. Further, in a case involving the federal Voting Rights Act, the Florida court held the "privilege also extends to staff members at least to the extent the proposed testimony would intrude on the legislators' own deliberative process and their ability to communicate with staff members on the merits of proposed legislation." Id.

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

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

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

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

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

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

> Plaintiffs contend that the district court erred in barring the depositions of Ellison, Wesson, and other officials involved in the redistricting process. First, according to Plaintiffs, the legislative privilege does not apply at all to state and local officials. We disagree.
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> The legislative privilege has deep historical roots that the Supreme Court has traced back to "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries....
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> Like their federal counterparts, state and local officials undoubtedly share an interest in minimizing the "distraction" of "divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation." *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). The rationale for the privilege—to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box—applies equally to federal, state, and local officials. "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference ...." *Bogan v. Scott-Harris*, 523 U.S. 44, 52, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). We therefore hold that state and local legislators may invoke legislative privilege.
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> Plaintiffs next argue that, even assuming the privilege applies to state and local officials, it is only a qualified right that should be overcome in this case. Plaintiffs have failed to persuade us that the privilege was improperly applied here.
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> Although the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony, it has repeatedly stressed that "judicial inquiries into legislative or executive motivation represent a substantial intrusion" such that calling a decision maker as a witness "is therefore 'usually to be avoided.' " *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).
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> In *Village of Arlington Heights*, the plaintiff brought an Equal Protection challenge against local officials, alleging that their refusal to rezone a parcel of land for redevelopment was motivated by racial discrimination. *Id.* at 254, 97 S.Ct. 555. While the Court acknowledged that "[t]he legislative or administrative

> history may be highly relevant," it nonetheless found that even "[i]n extraordinary instances ... such testimony frequently will be barred by privilege." *Id.* at 268, 97 S.Ct. 555 (citing *Tenney*, 341 U.S. 367, 71 S.Ct. 783). Applying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in "extraordinary circumstances." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984) (citing *Vill. of Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555).
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> We recognize that claims of racial gerrymandering involve serious allegations: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial ... class."' *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting)). Here, Defendants have been accused of violating that important constitutional right.
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> But the factual record in this case falls short of justifying the "substantial intrusion" into the legislative process. *See Vill. of Arlington Heights*, 429 U.S. at 268 n.18, 97 S.Ct. 555. Although Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render the privilege "of little value." *See Tenney*, 341 U.S. at 377, 71 S.Ct. 783. *Village of Arlington Heights* itself also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of "extraordinary instances" that might justify an exception to the privilege. 429 U.S. at 268, 97 S.Ct. 555. Without sufficient grounds to distinguish those circumstances from the case at hand, we conclude that the district court properly denied discovery on the ground of legislative privilege.

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

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

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

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

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

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

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

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

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

> To the extent that discriminatory intent is relevant, the probative value of the discovery sought by American Trucking is further reduced by the inherent challenges of using evidence of individual lawmakers' motives to establish that the legislature as a whole enacted RhodeWorks with any particular purpose. The Supreme Court has warned against relying too heavily on such evidence. *See United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); cf. *Va. Uranium, Inc. v. Warren*, —— U.S. ——, 139 S. Ct. 1894, 1907–08, 204 L.Ed.2d 377 (2019) (plurality opinion) ("Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product[,] ... [and] risk[s] displacing the legislative compromises actually reflected in the statutory text."). Thus, when evaluating whether a state statute was motivated by an intent to discriminate against interstate commerce, we ordinarily look first to "statutory text, context, and legislative history," as well as to "whether the statute was 'closely tailored to achieve the [non-discriminatory] legislative purpose'" asserted by the state. *Family Winemakers of Cal. v. Jenkins,* 592 F.3d 1, 13 (1st Cir. 2010) (quoting *Gwadosky, 430 F.3d at 38*). To be clear, we do not hold that evidence of individual legislators' motives is always irrelevant per se; we mean only to point out that it is often less reliable and therefore less probative than other forms of evidence bearing on legislative purpose, and this case does not appear to present a contrary example.
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> In sum, even assuming that a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest, the need for the discovery requested here is simply too little to justify such a breach of comity. At base, this is a case in which the proof is very likely in the eating, and not in the cook's intentions.

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

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

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

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

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

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

IV. CONCLUSION

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

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

Dated this 17th day of November, 2022.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2022, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF RESPONDENTS MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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