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 REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO QUASH SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

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I. INTRODUCTION

The Intervenors fail to establish how Representative William Devlin's testimony is probative in determining any material fact in this case. Instead, they focus extensively on a "five-factor" test crafted for a lesser privilege that has not been adopted by any Circuit Court. Further, the Intervenors wholly ignored the recent First, Ninth, and Eleventh Circuits who recently held legislative privilege bars the deposition of non-federal lawmakers. Representative Devlin's motion to quash is supported by Circuit Court precedent and should be granted.

II. LAW AND ARGUMENT

The Intervenors fail to explain why Representative Devlin's deposition testimony is necessary for the disposition of this case. The party seeking discovery bears the burden to make a threshold showing of relevance before anyone is required to produce "information which does not necessarily bear upon the issues in the case." Precourt v. Fairbank Reconstruction Corp., 280 F.R.D. 462, 467 (D.S.D. 2011) (citing Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992). Further, "a subpoena issued under Rule 45 should be quashed to the extent it seeks

irrelevant information." Jordan v. Commissioner, Mississippi Dept. of Corrections, 947 F.3d 1322, 1329 (11th Cir. 2020). Evidence is relevant only if it "has a tendency to make a fact more or less probable than it would be without the evidence; and [ ] the fact is of consequence in determining the action." Fed. R. Evi. 401. The Supreme Court held on numerous occasions that delving into the motives of individual legislators should be avoided by the judiciary. See Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) ("The Court has recognized that inquiries into legislative motives are a hazardous matter…What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.") (quotations omitted)); see also Virginia Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1907-08 (2019) ("Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product."); Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) ("…[I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators.").

Clearly, any inquiry into Representative Devlin's motivations or opinions about redistricting invite speculation and would not make any fact more or less probable. Additionally, the Intervenors have not explained why any of Representative Devlin's testimony would be "of consequence in determining the action." In cases involving allegations of discriminatory legislation, the proof "is very likely in the eating, and not in the cook's intentions." American Trucking Associations, Inc. v. Alviti, 14 F.4th 76, 90 (1st Cir. 2021). Clearly, Representative Devlin's testimony does not necessarily bear upon the issues in the case and the Intervenors failed to meet their initial burden.

Notably, the Intervenors allege they seek "information about the process by which the plan was adopted and its underlying policies." Doc. 41 at p. 1. To the extent this information is not covered by legislative privilege, it all is readily available to the public. "If the party seeking the information can easily obtain the same information without burdening the nonparty, the court will quash the subpoena." Precourt, 280 F.R.D. at 467. As this Court previously noted, "videos of Redistricting Committee hearings are a matter of public record." Walen v. Burgum et al., Case No. 1:22-cv-00031, Doc. 58-1 at p. 25. Non-privileged information - whether relevant or not - can easily be obtained without burdening Representative Devlin as it is a matter of public record.

While ignoring their initial burden, the Intervenors argue legislative privilege is qualified and urges the Court to adopt an imported "five-factor" test which has no support from the Circuit Courts. Doc. 41 at pp. 1-6. As an initial matter, "federal courts have had to determine in a piecemeal fashion what protections should be afforded to state legislators." Jackson Municipal Airport Authority v. Bryant, 2017 WL 6520697 at *3 (S.D. Miss. Dec. 19, 2017). This has led to drastically different results across the country. See American Trucking Assoc., Inc. v. Alviti, 496 F.Supp.3d 699, 715 (D. R.I. 2020) ("[s]ome courts have held that state legislative privilege provides no bar against discovery because legislative privilege is one of non-evidentiary use…not one of non-disclosure. *This approach is clearly in the minority*[1]….") (internal citations and quotations omitted) (first emphasis in original)). The First, Ninth, and Eleventh Circuits have all recently rejected the "minority" view. See 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) (all holding legislative privilege barred discovery sought from non-federal lawmakers). Put simply, the

[1] Notably, the Alviti district court opinion followed the minority view and was reversed on appeal by Alviti, 14 F.4th 76 (1st Cir. 2021).

"legislative privilege protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts.*" Hubbard, 803 F.3d at 1310 (emphasis in original) (internal quotation omitted). "This is why the privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Id.

The Intervenors' argument that legislative privilege is "qualified" does not help their case. The "qualified" nature of legislative privilege stems from U.S. v. Gillock, 445 U.S. 360 (1980). In Gillock, the Court held that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." Id. at 373. In Hubbard, the Eleventh Circuit explained the "qualified" nature of legislative privilege under Gillock as follows:

> To be sure, 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." *Gillock,* 445 U.S. at 373, 100 S.Ct. at 1193. But the Supreme Court has explained that, for purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government. *See id.* at 372–73, 100 S.Ct. at 1193 ("[I]n protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions."). This is not a federal criminal investigation or prosecution.

Hubbard, 803 F.3d at 1311-12 (emphasis added).

As explained in Hubbard, the legislative privilege is not absolute because it yields to the enforcement of federal criminal statutes; however, that does not make it inapplicable here. See also Alviti, 14 F.4th 76 (1st Cir. 2021); Lee, 908 F.3d 1175 (9th Cir. 2018). Specifically, the Ninth Circuit determined legislative privilege is an absolute bar to deposition testimony of local lawmakers in a racial gerrymandering case. Lee, 908 F.3d at 1187-88.

Nonetheless, the Intervenors urge the Court employ "a five-factor balancing test imported from deliberative process privilege case law."[2] Doc. 41 at p. 2. Indeed, some district courts have applied this test to legislative privilege; however, the Circuit Courts have not. This is because "the *common-law* deliberative process privilege [is] weaker than, and thus more readily outweighed than, the constitutionally-rooted legislative process privilege." Kay v. City of Rancho Palos Verdes, 2003 WL 25294710 at *18 (C.D. Cal. Oct. 10, 2003). A review of Ninth Circuit precedent shows the multi-factor test argued by the Intervenors is inapplicable to legislative privilege.

In F.T.C. v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984), the court noted:

> …deliberative process is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure. Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions[3].

Id. at 1161.

The Ninth Circuit analyzed legislative privilege in a discriminatory gerrymandering claim in Lee and declined to apply the multi-factor test even though it was argued by the parties[4]. Instead,

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[2] Notably, district courts disagree as to whether the deliberative process privilege even applies to the legislative branch. Compare Doe v. Nebraska, 788 F.Supp.2d 975, 986 (D. Neb. 2011) (concluding the legislative privilege may convert to the deliberative process privilege as applied to state legislators in some circumstances) with Alviti, 496 F.Supp.3d at 715 (D.R.I. 2020) (noting the deliberative process privilege "protects only executive branch officials, and therefore is inapplicable to the Speaker and Representatives."). This further illustrates district courts have applied legislative privilege in a piecemeal fashion with drastically different results. However, the First, Ninth, and Eleventh Circuits have not approached this issue in a piecemeal fashion and their unified approach is far more consistent with Supreme Court case law on this issue.

[3] This mirrors the test argued by the Intervenors with the exception that the Intervenors argue "the seriousness of the litigation" should be included as an additional factor. See Doc. 58 at p. 6.

[4] The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege" but noted – like the Intervenors here – "some courts have done so." Lee,

Lee relied on Supreme Court precedent and "likewise concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances.'" Id. at 1187-88. Further, even when "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." Id. at 1188 (citing Tenny v. Brandhove, 341 U.S. 367, 377 (1951). Lee held the "district court properly denied discovery on the ground of legislative privilege." Id. This rationale was recently followed by two other Circuit Courts in Alviti, 14 F.4th 76 (1st Cir. 2021) and Hubbard, 803 F.3d 1298 (11th Cir. 2015). None of these recent Circuit Court opinions adopted the five-factor test imported from the weaker deliberative process privilege. While legislative privilege is "qualified" under Gillock - in the sense it is inapplicable in federal criminal prosecutions - it does not require the application of the multi-factor test. This Court should follow the recent Circuit Court decisions and apply legislative privilege as a bar to deposition testimony.

The decisions of the First, Ninth, and Eleventh Circuits are supported by Supreme Court caselaw. The Supreme Court has observed in "some extraordinary instances the [legislative] members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony will frequently be barred by privilege." Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 (1977). The mere fact this case involves the Voting Rights Act does not negate legislative privilege. Consistent with the rationale of higher courts, "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." U.S. v. Florida, 886 F.Supp.2d 1301, 1304 (N.D. Fla. 2012).

Case 15-55478, DktEntry: 29-1 (Appellees Brief), P. 53 of 60 (per PACER). The appellees in Lee and the Intervenors cite Comm' for a Fair and Balanced Map v. Illinois St. Bd. of Elections, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) for this proposition. Compare Id. to Doc. 41 at p. 2.

"Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege." Id. at 1303. This makes perfect sense as "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good...The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader...." Tenney, 341 U.S. at 377 (1951). Put simply, "[l]egislators 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." Florida, 866 F.Supp. at 1303. This rationale is consistent with the separation of powers and decisions of the First, Ninth, and Eleventh Circuits. Therefore, Representative Devlin's motion to quash should be granted.

III. CONCLUSION

For the aforementioned reasons, Representative Devlin's motion to quash should be granted.

Dated this 8th day of December, 2022.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg
Scott K. Porsborg (ND Bar ID #04904)
sporsborg@smithporsborg.com
Brian D. Schmidt (ND Bar ID #07498)
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for North Dakota Legislative Assembly and Representative William Devlin

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2022, a true and correct copy of the foregoing **MEMORANDUM IN REPLY TO PLAINTIFFS' RESPONSE TO 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:

ATTORNEYS FOR PLAINTIFFS

Michael S. Carter — carter@narf.org
Matthew Campbell — mcampbell@narf.org
Attorneys At Law
1506 Broadway
Boulder, CO 80301

ATTORNEYS FOR PLAINTIFFS

Mark P. Garber — mgaber@campaignlegal.org
Molley E. Danahy — mdanahy@campaignlegal.org
Attorneys At Law
1101 14th St. NW, Ste. 400
Washington, DC 20005

ATTORNEY FOR PLAINTIFFS

Timothy Q Purdon — tpurdon@robinskaplan.com
Attorney at Law
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501

ATTORNEY FOR PLAINTIFFS

Samantha B. Kelty — kelty@narf.org
Attorney at Law
1514 P St. NW, Suite D
Washington, D.C. 20005

ATTORNEY FOR PLAINTIFF

Bryan Sells — bryan@bryansellslaw.com
Attorney at Law
P.O. Box 5493
Atlanta, GA 31107-0493

ATTORNEYS FOR DEFENDANT ALVIN JAEGER

Matthew A Sagsveen
Assistant Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

masagsve@nd.gov

David R. Phillips
Special Assistant Attorney General
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247

dphillips@bgwattorneys.com

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