

**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

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS  
SERVED ON MEMBERS OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY  
AND LEGISLATIVE COUNCIL STAFF**

Plaintiffs seek to enforce the subpoenas duces tecum served on certain members of the North Dakota Legislative Assembly and Legislative Council staff (collectively "Respondents"). Because Plaintiffs seek only a narrow set of documents over which privilege either does not apply or has been waived, the Court should grant Plaintiffs' motion to enforce.

**I. Respondents Have Failed to Show that the Communications Sought are Covered by Legislative Privilege.**

As detailed in their motion, Plaintiffs seek only those communications that have already been identified by Respondents over which legislative privilege does not exist or has been waived, *i.e.*, communications between Respondents and third parties, and communications over which Representative Jones has waived privilege by testifying publicly about the challenged plan, the legislature's intent in adopting it, and his conversations with other legislators, legislative counsel, outside lawyers, and third parties. Although Respondents explain at great length the history and protections afforded them by the legislative privilege, they make no effort to explain why they are

entitled to withhold documents over which no such privilege applies. As such, the Court should grant Plaintiffs' motion.

**A. Respondents' Communications with Third Parties**

As explained in Plaintiffs' motion, no reasonable claim of privilege exists with respect to communications that involve or were shared with third parties. *See* Mot. at 8-9, ECF 47. Respondents do not seriously dispute this. Instead, they continue to erroneously assert that the legislative privilege serves as an absolute bar to discovery against legislators. *See, e.g.*, Opp. at 4-10, ECF 50. But despite Respondents' lengthy canvass of the history and scope of the legislative privilege, they fail to identify a single case suggesting that the legislative privilege extends to communications with third parties or is preserved when otherwise privileged material is shared with third parties. In fact, courts that have considered this issue routinely find that it does not. *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.”).

Instead, Respondents rely solely on cases where there was no dispute that the subpoenaed information was privileged, and the task for the court was to determine whether the interests asserted were sufficient to overcome the privilege. *See, e.g., Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) (“Thus, the only question is whether the district court committed an error of law or exceeded the scope of its discretion in determining that American Trucking's interest in obtaining evidence of the State Officials' subjective motives outweighed the comity considerations implicated by the subpoenas.”); *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015) (noting “none of the information sought could have been outside the privilege”); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018) (considering only whether all state and local officials can assert legislative privilege and whether the legislative privilege asserted should be overcome). Notably, the magistrate judge has already considered whether Plaintiffs’ interest here outweighs the legislative interest in maintaining the privilege with respect to this case and found in favor of Plaintiffs. *See* Order Denying Mot. to Quash, ECF 48. But that analysis is irrelevant here, where Plaintiffs do not seek to overcome Respondents’ assertion of legislative privilege, but rather to obtain documents to which it does not apply.

Permitting Respondents to withhold responsive documents that have been shared with third parties would significantly expand the legislative privilege well beyond reason, particularly in light of their failure to identify any authority in support of such a position. *Cf., e.g., Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at \*6 (N.D. Ill. Oct. 12, 2011) (noting that “a number of courts have rejected the notion that the common law

immunity of state legislators gives rise to a general evidentiary privilege.”). Likewise, it would fly in the face of the general principle that sharing information with third parties abrogates privilege. *See id.* at \*10 (“As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider.”). The Court should decline Respondents’ invitation to expand the privilege in so unprecedented a manner. *See, e.g., Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov’t*, 849 F.3d 615, 624 (5th Cir. 2017) (finding that the legislative 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.”); *see also id.* (noting that “the legislative privilege for state lawmakers is, at best, one which is qualified”); *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at \*1 (5th Cir. May 20, 2022) (“Both this court and the Supreme Court have confirmed that the state legislative privilege is not absolute.”).

For these reasons, Plaintiffs respectfully request that the Court grant the motion to enforce and order Respondents to produce all responsive communications involving or shared with third-parties who are not legislators, legislative staff, or legislative counsel.<sup>1</sup>

#### **B. Communications Sought from Representative Jones**

Respondents do not contest that Representative Jones waived his own assertion of legislative privilege by testifying publicly about the subject matter of this litigation and his related

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<sup>1</sup> Respondents’ objections to producing communications with third parties fail for Ms. Ness for the same reason they do the other respondents—such communications are not covered by any privilege. To the extent Ms. Ness had communications with non-legislators, non-legislative staff, and non-legislative counsel who might nonetheless be entitled to assert some privilege, the appropriate mechanism for dealing with such assertions is a privilege log. *See Fed. R. Civ. P. 45(e)(2)*.

communications. *See* Opp. at 17, ECF 50; *see also* Order Denying Mot. to Quash at 19-20, ECF 48 (finding that “Representative Jones waived any legislative privilege by testifying about his legislative activities at the preliminary injunction hearing”). Although Respondents assert in a footnote that they “do not concede that Jones has waived his privilege,” Opp. at 17 n.6, ECF 50, this is insufficient to preserve the argument and thus it is waived. *See United States v. Howard*, 532 F.3d 755, 760 (8th Cir. 2008) (holding that an argument was waived where the party raised the issue but “failed to support [the] conclusion with any argument, facts, reasoning, or citation to authority”); *see also Anderson v. Durham D & M, L.L.C.*, 606 F.3d 513, 515 n.2 (8th Cir. 2010) (holding that an argument had been waived where the opening brief “made only passing reference” to the claim); *see also, e.g., Fields v. Henry*, No. 17-CV-2662 (WMW/KMM), 2019 WL 6037425, at \*1 n. 2 (D. Minn. Nov. 14, 2019) (declining to consider “new arguments that were not presented to the magistrate judge”) (citing *Britton v. Astrue*, 622 F.Supp. 771, 776 (D. Minn. 2008)). The Court should therefore find, again, that Representative Jones has waived his privilege. *See* Mot. at 5-7, 9-10; *see also* Order, Denying Mot. to Quash at 19-20, ECF 48.

Rather than contest his waiver, Respondents assert only that Representative Jones cannot be compelled to produce documents or communications over which *another* legislator is entitled to and has invoked the privilege. Opp. at 17, ECF 50. But the case relied on by Respondents acknowledges that “an individual legislator should be able to waive the privilege over the objection of a majority of his or her peers,” particularly with respect to “his own motivations, his opinion regarding the motivation of the body as a whole, the information on which the body acted, the body's knowledge of alternatives, and deviations from procedural or substantive rules typically employed.” *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179 (C.D. Cal. 2002). This is precisely the type of information sought here.

As such, Plaintiff respectfully requests that the Court order that Representative Jones produce all responsive communications already identified. Further, as noted in Plaintiffs' motion, Respondents agreed to search Representative Jones's phone and produce the keyword search results to Plaintiffs in the same format as the other Respondents. Since the motion to enforce was filed, Counsel for Plaintiffs has followed up with Respondents' counsel repeatedly on the status of the search. *See, e.g.*, Ex. 1 (Jan. 11, 2023 Email to S. Porsborg). To date, there has been no response. *Id.* As such, Plaintiffs respectfully request that the Court order Representative Jones to conduct or complete the search of his phone using the search terms prepared by his counsel; and produce all responsive communications. To the extent Representative Jones seeks to redact portions of or withhold any communication on the basis of a privilege invoked by another legislator, the Court should order that he produce a privilege log identifying the date of the communication; the identity of the recipients, participants, and individuals with whom the communication was shared; the subject of the communication; the identity of the privilege holder; the privilege being invoked; and the basis therefore.

## **II. Respondents Fail to Establish That Production Would Constitute an Undue Burden.**

“In analyzing whether a subpoena constitutes an ‘undue burden,’ the Court may consider ‘(1) relevance of the information requested; (2) the need of the party for production; (3) the breadth of the request for production; (4) the time period covered by the subpoena; (5) the particularity with which the subpoena describes the requested production; and (6) the burden imposed.’” *In re Whatley v. Canadian Pac. Ry. Ltd.*, No. 1:16-CV-74, 2021 WL 1951003, at \*5 (D.N.D. May 14, 2021) (quoting *In re Levaquin Products Liab. Litig.*, 2010 WL 4867407, at \*2 (D. Minn. Nov. 9, 2010)). Respondents “bear[] the burden to demonstrate that compliance would be unreasonable or oppressive.” *Cody v. City of St. Louis*, 2018 WL 5634010, at \*3 (E.D. Mo. Oct. 31, 2018). “This

burden cannot be satisfied with conclusory statements.” *Whatley*, 2021 WL 1951003 at \*5 (quoting *Reed v. Envirotech Remediation Servs., Inc.*, 2010 WL 11470123, at \*2 (D. Minn. July 20, 2010)).

The subpoenaed information is relevant, narrowly tailored, and cannot be obtained through other means. Further, Respondents have failed to demonstrate the alleged burden with particularity, and any harms arising out of compliance are largely of their own making. For these reasons, the Court should grant Plaintiffs’ motion.

**A. The Subpoenaed Information Is Relevant**

This Court has already held that proof of legislative intent is relevant and important evidence in redistricting cases, including the motives of individual legislators. Order Denying Mot. to Quash at 17, ECF 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 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. As such courts regularly permit Plaintiffs to put forth evidence 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). In response, Respondents contend that legislative intent is irrelevant because even an “illicit legislative motive” would not be sufficient reason to strike down an otherwise valid legislative enactment. Opp. at 12, ECF 50 (quoting *U.S. v. O’Brien*, 391 U.S. 367, 384 (1968)). But 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, communications demonstrating “illicit motive” by one or more legislators would certainly be relevant and probative evidence of an ongoing history of voting-related discrimination, the extent to which voting is

racially polarized, and the use of racial appeals in the political process. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021-22 (8th Cir. 2006) (listing factors for courts to consider in evaluating a Section 2 claim). Furthermore, Representative Jones's documents and communications are relevant for reasons other than legislative intent as well. He represented the district containing the MHA Nation, and served on the Tribal-State Relations Committee, but was not the candidate of choice of Native voters in his district. His documents and communications may bear on electoral conditions, campaign materials, and the Legislature's responsiveness to the Native American community in North Dakota. Thus, even if not dispositive as to the legislature's intent as a whole, the information sought is relevant to Plaintiffs' claim. Indeed, the scope of discovery allowed under the Federal Rules is "extremely broad," *Whatley*, 2021 WL 1951003 at \* 4, and certainly encompasses the information Plaintiffs seek here. Furthermore, because the requested information is solely in the hands of Respondents and unnamed third parties, Plaintiffs have no other reasonable way to obtain the same. As such, they have demonstrated sufficient need to justify the burdens imposed.

#### **B. The Information Sought Is Narrowly Tailored**

As discussed above, Plaintiffs seek only a narrow subset of the documents and communications already identified by Respondents—non-privileged communications with third parties and communications over which privilege has been waived. Respondents' assertion that Plaintiffs are demanding "essentially every single document and communication related to the 2021 Redistricting Process," *Opp.* at 14, ECF 50, is simply false. Furthermore, Plaintiffs have not challenged the search terms developed by Respondents, nor the scope of the search conducted, nor demanded additional searches be conducted. *Cf.* Thompson Decl. at 2, ECF 52 (estimating that additional time would be required to conduct additional searches and review additional



documents); Suppl. Objections at 2, ECF 47-4 (describing the search process and noting “we believe the search terms used have captured all relevant communications.”). As such, Respondents’ claim that the breadth of the search imposes an undue burden fail.<sup>2</sup>

**C. The Burden Asserted Is Unsubstantiated and Largely of Respondents’ Own Making**

Respondents’ complaints about the burden imposed by producing their communications with third parties are similarly unavailing. Notably, Respondents do not raise any objection to the burden of actually producing the narrow universe of documents plaintiff seek here, rather their objections revolve solely around the necessity of conducting a privilege review. But Respondents requested and obtained additional time to respond to the subpoena specifically to conduct this review *See* Mot. at 3, ECF 47. And they have now had months to complete the same. *Id.* Yet Respondents opted to rest entirely on their assertion that a privilege log was unnecessary because no non-privileged documents exist—even *after* a partial analysis of the search results revealed the existence of the limited universe of nonprivileged documents Plaintiffs now seek. *See* Mot at 4; *see also, supra*, Part I (explaining that communications with third parties are not privileged). Respondents’ failure to conduct the review in a timely manner such that they now face competing demands on their time is a burden of their own making and cannot be attributed to Plaintiffs.

Finally, Respondents have failed to provide either Plaintiffs or the Court with the basic information necessary to evaluate their claim of burden: the number of documents at issue. *See* Mot. at 4, ECF 47 (explaining that the search results provided by Respondents identify by

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<sup>2</sup> Respondents did not raise any objections regarding the scope of the subpoenas in their initial objections. *See* ECF 47-2 (asserting only that the subpoena was unduly burdensome because it sought publicly available material and that 30 days was not sufficient time to review and evaluate which responsive documents were protected by privilege). *Id.* Thus they waived any objections to the scope of the requests.

individual keyword the number of documents in which that word appears, but not the total number of documents at issue).<sup>3</sup> As such, the burden alleged by respondents is largely conclusory. *Cf. Whatley*, 2021 WL 1951002 at \* 5 (noting that requirement to demonstrate undue burden “cannot be satisfied with conclusory statements.”) *Whatley*, 2021 WL 1951003 at \* 5. Respondents assert that it will take 8 lawyers 80 hours *each* to conduct the privilege review, *see* Thompson Decl. at 2, ECF 52, but fail to explain how many documents actually need to be reviewed—information that is necessary to determine if this estimate is remotely credible. Moreover, this estimate includes time for conducting additional searches and reviewing additional results that Plaintiffs have not requested. *See id.* The Court should therefore decline to find an undue burden and should grant Plaintiffs’ motion in full. In the alternative, the Court should grant Plaintiffs’ motion and Order Respondents to produce 1) all communications between or involving Respondents and third parties; 2) all communications by Representative Jones; and 3) a privilege log for any communications withheld by Representative Jones on the basis of another legislator’s assertion of privilege.

### 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

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<sup>3</sup> Plaintiffs attempted to make a rough estimate based on the keyword results provided by Respondents but that the estimate is likely to be substantially inflated due to the overlap between keywords such as “subdistrict” and “district” and the significant likelihood that a single communication would contain multiple keyword hits yet be counted separately in the totals for each keyword. *See Mot.* at 4. In other words, because of the way the results have been disaggregated, it is impossible to add up the total number of documents at issue based on the numbers provided by Respondents.

privilege log containing individualized descriptions of each responsive document Respondents are withholding on the basis of privilege.

January 12, 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

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