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

Case No: 1:22-cv-00031

Charles Walen, individual; and Paul Henderson, an individual,

Plaintiffs,

v.

Doug Burgum, in his official capacity as Governor of the State of North Dakota; Alvin Jaeger in his official capacity as Secretary of State of the State of North Dakota.

Defendants,

and

The Mandan, Hidatsa and Arikara Nation, Cesar Alvarez, and Lisa Deville,

Defendant-Intervenors.

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 Terry B. Jones make this limited appearance for the sole purpose of quashing the Mandan, Hidatsa, and Arikara Nation, Lisa DeVille and Cesaro Alvarez, Jr.'s (collectively "Tribal Defendants") November 2, 2022, *Subpoena to Testify at a Deposition in a Civil Action* directed toward Representative Jones.[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 Jones are

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

parties to this action and neither has made any appearance in this action other than to assert legislative privilege in response to the Tribal Defendants' subpoena.

The Complaint asserts the subdivision of two North Dakota legislative districts violates the Equal Protection Clause of the United States Constitution. Defendants Doug Burgum (Governor) and Alvin Jaeger (Secretary of State) have denied these claims. The Tribal Defendants intervened in this matter, also denying Plaintiffs' allegations.

[redacted]

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

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 discriminatory gerrymandering cases.

The Ninth Circuit applied the above-described legal framework in a case directly applicable to Representative Jones' motion to quash 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.
>
> The legislative privilege has deep historical roots that the Supreme Court has traced back to "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries....
>
> 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.
>
> 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.
>
> 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)).
>
> 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).
>
> 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.
>
> 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 Jones is clearly entitled to legislative privilege and his motion to quash should be granted. The common law - as explained above – clearly establishes that legislative privilege applies to preclude state lawmakers from testifying in private civil actions asserting claims under Equal Protection and 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 discriminatory gerrymandering. Lee, 908 F.3d at 1186-88 (9th Cir. 2018). For these reasons, Representative Jones is clearly entitled to legislative privilege, should not be compelled to testify at his deposition, and this motion to quash should be granted.

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

First, Representative Jones's testimony lacks probative value to the issues before the Court. Representative Jones did not serve on the Redistricting Committee. He did not play a role in the initial development of the redistricting plan. He is simply one representative out of ninety-four. He spoke briefly on the floor, advocating against the plan.[5] The comments of an individual legislator are not sufficient evidence to support Plaintiffs' allegations. It appears the subpoena seeks only to have Representative Jones testify as to his personal motivations for publicly opposing the legislative decision. 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 Tribal Defendants seek to obtain from Representative Jones. The First Circuit explained the rationale behind applying legislative privilege to state lawmakers in the discrimination context in Alviti.

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. As here, the underlying lawsuit was based on alleged discrimination, 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

[5] It should be noted that Representative Jones represents District 4, one of the two districts that the plan proposed to divide into sub-districts. Thus, Representative Jones is one of four representatives directly impacted by the sub-district plan.

> 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.
>
> 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 Jones' 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 Jones' intent is 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 be procured easily from other sources and Representative Jones'

testimony lacks probative value in determining the action[6]. This is yet another reason to grant Representative Jones' 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. Evi. 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 Jones from testifying at a deposition. It also is clear comity commands careful consideration and both the United States and North Dakota Constitution expressly provide no lawmaker shall be questioned for any words or used in any speech or debate in legislative proceedings. Compare U.S. Const. Art. 1, Sec. 6; N.D. Const. 4, § 15. Put simply, 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 Tribal Defendants' subpoena to Representative Jones appears to serve no other purpose than what was contemplated by the Circuit Courts in Hubbard, Alviti, and Lee. This type of discovery clearly is barred by the Federal Rules of Civil Procedure, Federal

[6] Any evidence Representative Jones could provide is readily available to the Tribal Defendants. Representative Jones spoke publicly, on the floor of the North Dakota House, against this bill. He provided his thoughts, and explained his motivations as to why he did not agree with the plan. Video of these speeches are readily available online at:
https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20221110/-1/22663?startposition=20211109133934
and
https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20221110/-1/22663?startposition=20211109140709
and
https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20221110/-1/22663?startposition=20211109144351.

Rules of Evidence, and the Federal common law of legislative privilege. Therefore, Representative Jones' motion to quash should be granted.

C. The Court Must Quash the Subpoena Issued to Representative Jones if the Tribal Defendants Seek Discussions Between Representative Jones and Legislative Council

It is possible Tribal Defendants do not seek Representative Jones' testimony regarding his motivations or legislative actions, but rather, seek his testimony regarding conversations he had with counsel regarding the legality of the sub-district plan. The Tribal Defendants cannot use this subpoena to attempt to discover discussions Representative Jones had with legal counsel 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). Tribal Defendants request Representative Jones testify as to privileged communications, and thus, the subpoena must be quashed.

IV. CONCLUSION

The Tribal Defendants seek to depose a member of the North Dakota Legislative Assembly, based on his public opposition to the bill. The Tribal Defendants improperly seek the disclosure of information protected by legislative privilege and attorney-client privilege. The subpoena must be quashed, pursuant to Fed.R.Civ.P. 45(d)(3). There is no testimony Representative Jones 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 Terry B. Jones respectfully request this Court quash Tribal Defendants' *Subpoena to Testify at a Deposition in a Civil Action.*

Dated this 16th day of November, 2022.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

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Attorneys for North Dakota Legislative Assembly and Representative Terry B. Jones

CERTIFICATE OF SERVICE

I hereby certify that on the 16th 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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By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Charles Walen, et al.,
Plaintiff
v.
Doug Burgum, et al.
Defendant

Civil Action No. 1:22-CV-00031-CRH

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Terry B. Jones

(Name of person to whom this subpoena is directed)

❒ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Place:	Date and Time:
Robins Kaplan LLP 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	11/17/2022; 9 AM CST

The deposition will be recorded by this method: Stenographic and/or videographic means

❒ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/2/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Intervenors, who issues or requests this subpoena, are:

Mark Gaber, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, DC 20005; 202-736-2200; mgaber@campaignlegal.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

EXHIBIT A

Civil Action No. 1:22-CV-00031-CRH

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____ on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of North Dakota

Turtle Mountain Band of Chippewa Indians, et al.
Plaintiff
v.
Alvin Jaeger, in his official capacity as Secretary of State of North Dakota
Defendant

Civil Action No. 3:22-cv-00022

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Terry B. Jones
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place:	Date and Time:
Robins Kaplan LLP Attn: Timothy Q. Purdon 1207 West Divide Avenue, Ste. 200 Bismarck, ND 58501	October 29, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Molly E. Danahy
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:
Molly Danahy, Campaign Legal Center, 1101 14th St. NW, Ste. 400, Washington, D.C. 20005, 202-736-2200
mdanahy@campaignlegalcenter.org

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

EXHIBIT
tabbies
B

Civil Action No. 3:22-cv-00022

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

DEFINITIONS

1. "You," "Your," and refers to Terry B. Jones, whether in your official capacity as a legislator, your capacity as a candidate, or your capacity as an individual, and all past and present agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on your behalf or subject to your control.

2. "Legislature" refers to the North Dakota Legislative Assembly and all past and present members, committees, agents, advisors, employees, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

3. "Redistricting Committee" refers to the interim Redistricting Committee of the 67th Legislature of the State of North Dakota convened for the purpose of developing a legislative redistricting plan and all past and present committee members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

4. "2021 State Legislative Maps" or "Maps" refer to the Statewide Redistricting Plan for Legislative Districts in the State of North Dakota, adopted in House Bill 1504, H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021).

5. "2021 Redistricting Process" refers to the legislative process leading up to and during the placement of district lines in the 2021 State Legislative Maps.

6. "Communication(s)" shall mean any exchange or transfer of information between two or more persons or entities, including, but not limited to documents, audio recordings, photographs, data, or in any other form including electronic forms such as e-mails or text messages.

7. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

8. "Document" shall mean all documents, electronically stored information, and tangible things within the broadest possible interpretation of writing, as contained within Rule 1001 of the Federal Rules of Evidence, and/or within the broadest possible interpretation of "document," "electronically stored information," or "tangible thing," as contained in Rule 34 of the Federal Rules of Civil Procedure.

9. "Item" is defined as documents, communications, electronically stored information, and tangible things. See, e.g., Fed. R. Civ. P. 34.

10. "Person" means any natural person, firm, association, partnership, joint venture, corporation, business trust, banking institution, unincorporated association, government agency or any other entity, its officers, directors, partners, employees, agents, and representatives.

11. "And" and "or" mean and include both the conjunctive and the disjunctive, and shall be construed as necessary to bring within the scope of this production request all responses that might otherwise be construed to be outside their scope.

12. In these definitions and in the Requests below, the singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

INSTRUCTIONS

1. This subpoena requires You to produce all responsive, non-privileged Documents that are in Your actual or constructive possession, custody, or control under Federal Rule of Civil Procedure 45. Unless otherwise requested, your responses to this subpoena shall comprise all information in Your possession, custody, or control; these requests are not limited to Documents within your physical possession. You shall make a diligent, reasonable, good-faith effort to produce any and all requested documents that are readily ascertainable and in Your possession, or that are readily ascertainable and otherwise within Your "control," meaning documents that You have the "legal right to obtain" within the meaning of the local rules of this Court and binding Eighth Circuit precedent.

2. Your response must provide each Document or category of Documents requested in electronic form. Where an electronic copy of a particular Document cannot be obtained, You must produce copies of the Document or state with specificity the grounds for objecting to the request. *See* Fed. R. Civ. P. Rule 45(a)(1), (d)(2)(B).

3. To the extent that Your responses to this subpoena may be enlarged, diminished, or otherwise modified by information acquired subsequent to Your initial responses hereto, Plaintiffs request that You promptly supplement Your responses with Documents reflecting such changes.

4. In providing the Documents called for by this subpoena, You shall produce them as they are kept in the usual course of business, including all file folders, envelopes, labels, indices, or other identifying or organizing material in which such Documents are stored or filed, under which they are organized, or which accompany such Documents or organize and label them to correspond with the specific request(s) to which they relate.

5. In the event that any Document called for by this subpoena has since been destroyed, discarded or otherwise disposed of, identify each such Document by stating: (i) the author, addressor or addressee; (ii) the addressee or recipient of any indicated or blind copies; (iii) the date, subject matter and number of pages of the Document; (iv) the identity of any attachments or appendices to the Document; (v) all persons to whom the Document was distributed, shown or explained; (vi) the date, reason and circumstances of disposal of the Document; and (vii) the person authorizing and carrying out such disposal and each and every person with knowledge concerning the circumstances under which such Document was destroyed or disposed of.

6. This subpoena contemplates production of each requested Document in its entirety, without abbreviation or expurgation, except as justified by claims of attorney-client privilege or attorney work product protection. Any redacted material must be clearly identified on the Document.

7. If You claim any portion of any responsive Document is privileged or otherwise excludable from production or disclosure, You are requested to produce the non-privileged portion of the Document, with the privileged portion thereof redacted, and provide information that adequately describes the nature of the redacted portion in a manner that allows Plaintiffs to assess each claim of privilege or exclusion. Examples of information that adequately describes the nature of each redacted portion include: (i) the type of Document; (ii) the author, addressor, or addressee; (iii) the addressee or recipient of any indicated or blind copies; (iv) the date, subject matter, and number of pages of the document; (v) the identity of any attachments or appendices to the Document; (vi) all persons to whom the Document was distributed, shown, or explained; and (vii) the custodian and location of the Document. For each portion of any responsive Document redacted, You must expressly state the type of privilege claimed or other reason for withholding the information and the circumstances upon which You base Your claim of privilege or exclusion. *See* Fed. R. Civ. P. 45(e)(2)(A).

8. If You claim that you are unable to provide certain responses to this subpoena on the basis of the "undue burden or expense" requirement under Federal Rule of Civil Procedure 45(d)(1), please identify the documents You are unable to provide and the basis for Your determination that providing them would result in "undue burden or expense."

9. Unless otherwise indicated, all requests refer to Items created between January 1, 2020 and the present.

DOCUMENTS TO BE PRODUCED

1. All Documents and Communications regarding Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.

2. All Documents and Communications regarding tribal input, including regarding written submissions or verbal testimony from tribal representatives, with respect to the 2021 Redistricting Process or Maps.
3. All Documents and Communications regarding redistricting criteria for the 2021 Redistricting Process or Maps.
4. All Documents and Communications regarding District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.
5. All Documents and Communications regarding trainings provided to legislators in preparation for or as a part of the 2021 Redistricting Process.
6. All Documents and Communications reflecting the identity of map drawers in the 2021 Redistricting Process.
7. All Documents and Communications related to racial polarization or demographic studies conducted by the Redistricting Committee or Legislature as a part of or in preparation for the 2021 Redistricting Process.