

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 REPLY TO
INTERVENOR-DEFENDANTS'
OPPOSITION TO MOTION TO QUASH
SUBPOENA TO TESTIFY AT A
DEPOSITION IN A CIVIL ACTION**

I. INTRODUCTION

The Intervenors request the Court set-aside legislative privilege and subject Representative Jones to unrestricted deposition testimony. The Intervenors rely on scattered district court opinions while ignoring recent Circuit Court opinions cited in the opening brief. Importantly, the Legislative Assembly is a non-party and its members should not be subject to the discovery process.

II. LAW AND ARGUMENT

The Intervenors' brief argues that Representative Jones' testimony "is relevant to Plaintiffs' racial gerrymandering claim; if it were not, they would not have elicited it at the preliminary injunction hearing...." Doc. No. 58 at p. 7. A close review of the testimony elicited

from Plaintiffs' counsel at the preliminary injunction hearing shows the Plaintiffs merely asked him to confirm: 1) He was an elected representative of District 4 (Doc. 58-1 at pp. 8-9); 2) He attended two or three Redistricting Committee meetings even though he was not a committee member (Id. at p. 9); 3) He testified before the Redistricting Committee (Id. at p. 11); 4) His observations of the committee meetings (Id. at p. 14); 5) Proposed redistricting maps were presented to the House floor (Id. at pp. 14-15); 6) He spoke during the floor debate related to the proposed maps (Id. at p. 15); 6) A redistricting bill was passed with the subdistricts included (Id.); and 7) He resides within subdistrict 4A (Id. at p. 16). The Court noted that the video shown during Representative Jones' testimony and "other videos of the Redistricting Committee hearings are a matter of public record" and had been reviewed prior to the hearing. Id. at p. 25.

The probative information relating to the Plaintiffs' claims is a matter of public record and readily available to the parties. It is well-settled that "parties should also avoid unnecessarily requiring the third parties to provide discovery which Plaintiff can produce." MNG 2005, Inc. v. Paymentech, LLC, 2021 WL 2454212 at *2 (E.D. Mo. June 16, 2021) The Intervenor has failed to show how relevant information could not be produced by the parties as it is public information.

Representative Jones' opinions or beliefs about the Legislative Assembly's decision to pass the redistricting bill lack probative value. "[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). Supreme Court case law dictates "inquiries into legislative motives are a hazardous matter...What motivates one legislator to make a speech about a statute is not necessarily motivates scores of others to enact it." Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (quotations omitted). The Court also noted that "[t]rying 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.” Virginia Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1907-08 (2019). “Furthermore, it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators.” Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (quotation omitted). Specifically, proof of discriminatory legislation “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).

Rule 45 “prohibits the discovery of information where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information.” In re Missouri Dept. of Corrections, 839 F.3d 732, 736 (8th Cir. 2016) (internal quotation omitted). The Intervenor failed to establish why testimony from one legislator is needed. There is no need to discern one legislator’s motivations when determining this action. See Dobbs, 142 S.Ct. at 2255; Virginia Uranium, 139 S.Ct. at 1907-08; Bogan, 523 U.S. at 55. This case presents an equal protection challenge to the Legislative Assembly’s redistricting plan. Doc No. 1. It is well-established that “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” Palmer v. Thompson, 403 U.S. 217, 224 (1971).

Additionally, the Supreme Court explained “that judicial inquiries into legislative...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.” Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 n. 18 (1977) (internal quotation omitted). Even if legislative privilege were not at issue, the information sought is not relevant and constitutes a substantial burden upon the legislative branch of government. Therefore, the subpoena should be quashed for this reason alone.

Nonetheless, Intervenor's erroneously assert legislative "privilege must give way in this case even if it did apply." Doc. No. 58 at p. 5. In lieu of addressing the First, Ninth, and Eleventh Circuit precedents explained in the supporting brief, Intervenor's rely upon various district court cases in support of their argument. These cases are unhelpful as "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). These "piecemeal" determinations by district courts have led to drastically different results. Compare Florida v. U.S., 886 F.Supp. 2d 1301 (N.D. Fla. 2012) (holding legislative privilege barred state lawmakers' discovery participation in Voting Rights Act case); Benisek v. Lamone, 241 F.Supp.3d 566, 576-77 (D. Md. 2017) (requiring lawmakers to testify subject to a post-testimonial protective order before any testimony became public). Further, "[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..." American Trucking Assoc., Inc. v. Alviti, 496 F.Supp.3d 699, 715 (D. R.I. 2020) (internal citations and quotations omitted) (first emphasis in original). The Ninth, First, and Eleventh Circuits all recently clarified that legislative privilege is a bar to discovery. See Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018); Alviti, 14 F.4th 76 (1st Cir. 2021); In re Hubbard, 803 F.3d 1298 (11th Cir. 2015).

The Intervenor's correctly assert legislative privilege is "qualified." Doc. 58 at p. 5. However, this qualification stems from U.S. v. Gillock, 445 U.S. 360 (1980) which provides the following in relevant part:

Thus, in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.

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).

We conclude, therefore, that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields... the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes...

Id. at 373 (emphasis added) (internal citations omitted).

If this case involved the enforcement of a federal criminal statute, legislative privilege would clearly yield under Gillock. However, this case is “neither a federal criminal case nor a civil case in which the federal government is a party.” Alviti, 14 F.4th at 88. This court should also follow the “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.” Id. at 88-90. Most notably, Lee, 908 F.3d 1175 (9th Cir. 2018) held legislative privilege barred deposition testimony of lawmakers in a racial gerrymandering lawsuit. Legislative privilege clearly applies here.

Perhaps acknowledging legislative privilege applies, the Intervenor urge this Court to employ “a five-factor balancing test imported from deliberative process privilege case law.” Doc. No. 58 at p. 6 (emphasis added). However, this “five-factor” test has not been adopted by Circuit Courts who have applied legislative privilege. The rationale for this is clear as “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 Intervenor 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 decisions²."

Id. at 1161.

However, when the Ninth Circuit recently analyzed legislative privilege in the scope of a discriminatory gerrymandering claim in Lee, 908 F.3d 1175 (9th Cir. 2018), it refused to apply this multi-factor test even though it was argued by the parties³. Instead, 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 where "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, 341 U.S. at 377). 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 In re 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.

² This mirrors the test argued by the Intervenor with the exception that the Intervenor argues "the seriousness of the litigation" should be included as an additional factor. See Doc. 58 at p. 6.

³ The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege" but noted - like the Intervenor here - "some courts have done so." Lee, Case 15-55478, DktEntry: 29-1 (Appellees Brief), P. 53 of 60 (per PACER). The appellees in Lee and the Intervenor 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. 58 at p. 6.

However, if Representative Jones' testimony at the preliminary injunction hearing effectuates a waiver, it is not all-encompassing. In Cano v. Davis, 193 F.Supp.2d 1177 (C.D. Cal. 2002), a lawmaker elected to waive his privilege and provide testimony. Id. at 1179. Cano held the lawmaker "may not give unfettered testimony regarding the legislative acts of other members" and "may not testify to the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege." Id. (emphasis added)

The scope of testimony allowed by a lawmaker who waived legislative privilege allows only for disclosure of information which is publicly available or completely irrelevant. The scope of remaining permissible topics for which Representative Jones could testify is insufficient to overcome a motion to quash a subpoena pursuant to Rule 45. See MNG 2005, 2021 WL 2454212 at *2; Jordan, 947 F.3d at 1329; Dobbs, 142 S.Ct. 2228, 2255; Virginia Uranium, 139 S.Ct. 1894, 1907-08; Missouri Dept. of Corr., 839 F.3d at 736; Alviti, 14 F.4th at 90; Palmer, 403 U.S. at 224.

III. CONCLUSION

For the aforementioned reasons, the Motion to Quash should be granted.

Dated this 7th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2022, a true and correct copy of the foregoing **MEMORANDUM IN REPLY TO INTERVENOR-DEFENDANTS' OPPOSITION 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:

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