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

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, et al., Plaintiffs, v. ALVIN JAEGER, in his official capacity as Governor of the State of North Dakota, et al., Defendant.	Civil No. 3:22-cv-00022-PDW-ARS

PLAINTIFFS' OPPOSITION TO NORTH DAKOTA LEGISLATIVE ASSEMBLY'S AND REP. WILLIAM A DEVLIN'S MOTION TO QUASH

The North Dakota Legislative Assembly's and Rep. William Devlin's motion to quash the deposition subpoena served upon Rep. Devlin should be denied. Contrary to Movant's contention, the legislative privilege is not absolute—it is at best qualified, and federal courts routinely conclude it must give way to discovery in redistricting litigation. The same should hold true here. Rep. Devlin chaired the Redistricting Committee and thus has substantial knowledge and information about the process by which the plan was adopted and its underlying policies. This information should not be concealed from the public in this important litigation about the fundamental right to vote.

ARGUMENT

II. The legislative privilege is qualified and in redistricting cases such as this must give way in favor of discovery.

The deposition of Rep. Devlin is proper because the legislative privilege is qualified and, as courts have routinely found in redistricting litigation, must give way to discovery in this case. "[T]he legislative privilege for state lawmakers is, at best, one which is qualified." *League of*

United Latin Am. Citizens v. Abbott ("*LULAC*"), No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022).[1] The 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." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). "Redistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." *Bethune-Hill v. Va. State Bd. of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). The legislative privilege therefore "must be a qualified privilege in such a scenario and yield in the face of an evidentiary need that lies at the core of the inquiry required by the Supreme Court in redistricting cases." *Id.*

"Most courts that have conducted this qualified privilege analysis in the redistricting context have employed a five-factor balancing test imported from deliberative process privilege case law." *Id.*; *see South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Rodriquez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7; *Favors*, 285 F.R.D. at 209-10; *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). These factors are "(1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5)

[1] Notably, in *LULAC* the legislators' motion to quash was denied and the legislators were ordered to sit for depositions regarding the Texas redistricting plans. The legislators sought an emergency stay in the United States Supreme Court after they failed to obtain one in the Fifth Circuit, and that request was denied by the Supreme Court. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.) ("Application for stay presented to Justice Alito and by him referred to the Court denied.").

the extent to which discovery would impede legislative action." *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 161.[2]

Application of these factors weighs in favor of a ruling that the privilege must give way. First, the testimony sought is highly relevant. Rep. Devlin chaired the Redistricting Committee and thus has substantial knowledge and information about the proceedings that led to the adoption of the plan that Plaintiffs contend violates the Voting Rights Act. Although discriminatory intent is not a required showing under Section 2 of the VRA, information related to the purpose and circumstances of the plan's adoption are nevertheless relevant to the totality of circumstances factors courts consider in Section 2 litigation.

Second, while circumstantial evidence regarding the adoption of the plan by the Redistricting Committee may be available and the public hearings are available, a redistricting litigant "need not confine their proof to circumstantial evidence alone." *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 164 (internal quotation marks omitted).

Third, as the *South Carolina State Conference of NAACP* court and others adjudicating redistricting litigation have found, "every redistricting case litigated in the federal courts demonstrates that at some juncture, state interests give way when the conflict with the constitutionally guaranteed fundamental right to vote free from racial discrimination," and thus "[t]he third factor weighs in favor of disclosure." *Id.* at 165.

[2] The *South Carolina State Conference of NAACP* court rejected the argument advanced by Movants here that only criminal cases involve the potential for legislative privilege to give way. "It is not the simple distinction between 'criminal' and 'civil' cases which determines the availability of this evidentiary privilege, but rather, the importance of the federally created public rights at issue. And when cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield." 584 F. Supp. 3d at 162.

Fourth, this is "not a case where individual legislators are targeted by a private plaintiff seeking damages." *Id.* Rather, "Plaintiffs' stated purpose is to overturn legislative action on [Voting Rights Act] grounds." *Id.* As a result, "[t]his factor suggests the legislative privilege ought to yield to Plaintiffs' attempt to enforce a substantial public right." *Id.*

Fifth, "the legislative independent interest and the risk of chilling legislative function 'is significantly reduced, if not eliminated, [ ] when the treat of personal liability is removed.'" *Id.* (quoting *Owen v. City of Independence, Mo.*, 445 U.S. 622, 656 (1980)); *see also Bethune-Hill*, 114 F. Supp. 3d at 336 (stating that redistricting case involved "important *public* rights guaranteed by federal law).

These factors weigh in favor of allowing the deposition of Rep. Devlin to proceed.

CONCLUSION

For the foregoing reasons, the motion to quash should be denied.

December 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 1, 2022, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

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