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

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown. Plaintiffs, v. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota. Defendant	)	**REPRESENTATIVE WILLIAM DEVLIN AND THE NORTH DAKOTA LEGISLATIVE ASSEMBLY'S NOTICE OF APPEAL FROM THE MAGISTRATE'S DECEMBER 22, 2022, ORDER DENYING MOTIONS TO QUASH**

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 72(a) and D.N.D. Civ. L.R. 72.1(D)(2), the North Dakota Legislative Assembly and Representative William Devlin (collectively "Respondents") appeal the Magistrate's December 22, 2022, Order denying their motion to quash subpoena to testify at a deposition in a civil action[1]. The Magistrate's Order is contrary to the law and should be modified or set aside in accordance with Fed. R. Civ. P. 72(a) and D.N.D. Civ. L.R. 72.1(D)(2).

II. SPECIFICATION OF ISSUES FOR APPEAL

Respondents specify the following issues for appeal:

1) The Magistrate erred by failing to apply legislative privilege as a complete bar to the depositions of Representative Devlin.

2) The Magistrate erred by applying the five-factor test imported from the lesser deliberative process privilege.

[1] In accordance with D.N.D. Civ. L.R. 72.1(D)(2), the Magistrate's Order subject to this appeal is dated December 22, 2022. The Order is filed as Document No. 48. There was no hearing before the magistrate judge on this motion; therefore, no transcript exists.

3) The Magistrate erred by denying the Respondents' motion to quash.

III. BASIS FOR OBJECTIONS TO MAGISTRATE'S ORDER

A. Specification of Error No. 1 – The Magistrate Erred by Failing to Apply Legislative Privilege as a Complete Bar to the Deposition Representative Devlin.

Representative Devlin has made no appearance in this case other than to state an objection and quash a "Subpoena to Testify at a Deposition in a Civil Action" commanding him to testify on November 18, 2022. Representative Devlin was the elected member for District 23 of the North Dakota Legislative Assembly. https://ndlegis.gov/biography/bill-devlin (accessed Jan. 3, 2023). Upon being served with a subpoena to testify in this action, he objected and filed a motion to quash claiming his testimony was barred by legislative privilege.

The Magistrate failed to follow the recent rulings of sister circuits and instead relied upon district court decisions to find legislative privilege did not bar Representative Devlin's deposition. The Eleventh, Ninth, and First Circuits all recently held that legislative privilege is a bar to state lawmakers' participation in discovery. In re Hubbard, 803 F.3d 1298 (11th Cir. 2015); Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2018); American Trucking Assoc. Inc. v. Alviti, 14 F. 4th 76 (1st Cir. 2021). The Magistrate's Order is contrary to Eighth Circuit's "policy that a sister circuit's reasoned decision deserves great weight and precedential value" in an effort to "maintain uniformity in the law among the circuits" and avoid "needless division and confusion" to prevent "unnecessary burdens on the Supreme Court docket." Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979).

The sister circuits acknowledge "it is well-established that state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause." Hubbard, 803 F.3d at 1310 n. 11 (11th Cir. 2015); see also Lee, 908

F.3d at 1187 (same). Here, the Magistrate's Order was not only contrary to the sister circuits' reasoned decisions, but also contrary to the Supreme Court's directives on legislative privilege.

1. The Magistrate's Order Ignores the Supreme Court's Directives on Legislative Privilege.

The Speech or Debate Clause is found in Section 6 of Article 1 of the United States Constitution which provides Senators and Representatives "shall in all Cases...be privileged ... for any Speech or Debate in either House, they shall not be questioned in any other Place." In Tenney v. Brandhove, 341 U.S. 367, (1951) the Court explained extension of legislative privilege to state lawmakers was necessary because the Speech or Debate Clause "was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege[2]." Tenney, 341 U.S. at 786. Tenney noted that legislative privilege is secured for the intention of enabling state representatives "to execute the functions of their office" and should be liberally applied "without inquiring whether the exercise [of the functions of their office] was regular according to the rules of the house, or irregular and against their rules." Id. at 373-74 (quoting Coffin v. Coffin, 4 Mass. 1, 19 (Mass. 1808)). Tenney further explained that even a "claim of unworthy purpose does not destroy the privilege." Id. at 377. Twenty-four years after Tenney, the Supreme Court reiterated "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the [Speech or Debate] Clause, then the Clause simply would not provide the protection historically undergirding it...The wisdom of congressional approach or methodology is not open to judicial veto." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508-09 (1975). The Court explained the Clause's purpose "is to protect the individual legislator, not simply for his

[2] Notably, North Dakota has also specifically protected the privilege in its constitution. N.D. Const. Art. 4, § 15.

own sake, but to preserve the independence and thereby the integrity of the legislative process." U.S. v. Brewster, 408 U.S. 501, 524 (1972). "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers...." Id. "In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Eastland, 421 U.S. at 503 (1975) (internal quotation omitted).

To be sure, legislative privilege is not absolute as the Supreme Court has "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." U.S. v. Gillock, 445 U.S. 360, 372 (1980). However, "in protecting the independence of state legislatures, *Tenney* and subsequent cases...have drawn the line at civil actions." Id. at 373. More recently, the Court acknowledged "the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace." Bogan v. Scott-Harris, 523 U.S. 44, 44-45 (1998). Although in "some extraordinary instances [legislative] members might be called to the stand at trial to testify the purpose of the official action, although even then such testimony frequently will be barred by privilege." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977). Clearly, the Magistrate's Order is inconsistent with the Supreme Court's directives.

2. The Magistrate's Order is Inconsistent with the Sister Circuit's Application of Legislative Privilege Under Supreme Court Directives.

Under Supreme Court precedent, the Circuit Courts acknowledge the Speech or Debate Clause shields "legislators from private civil actions that create [ ] a distraction and force [ ]

Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (alterations in original) (internal quotation omitted) (emphasis added). Further, sister circuits applied legislative privilege to state lawmakers and concluded:

> While *Tenney's* holding rested upon a finding of immunity, its logic supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well. 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."

Lee, 908 F.3d at 1187 (quoting Eastland, 421 U.S. at 503) (alteration in original).

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." Id. One of the legislative "privilege's principal purposes is to ensure that lawmakers are allowed to focus on their public duties." Hubbard, 803 F.3d at 1310 (internal quotation omitted). "That is why the privilege extends to discovery requests, even when the lawmaker is not named a party in the suit: complying with such requests detracts from the performance of official duties." Id (emphasis added).

The sister circuits recognize claims of discrimination are important and involve the government's intent; however, even where - as here – the "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.'" Lee, 908 F.3d at 1188 (citing Tenney, 341 U.S. at 377); see also Alviti, 14 F. 4th at 88; Hubbard, 803 F.3d at 1312. This is especially true when the lawmakers are not named as a party to the pending litigation because complying with discovery requests

detracts from the performance of official duties. Hubbard, 803 F.3d at 1310; see also MINPECO, S.A., 844 F.2d at 859 (D.C. Cir. 1988).

In 2015, the Eleventh Circuit exercised appellate jurisdiction under the collateral order doctrine to quash subpoenas directed to state lawmakers to produce documents relating to the contents and passage of the subject legislation, similar proposals, and any communications regarding the subject legislation and the other plaintiffs in the lawsuit. Hubbard, 803 F.3d at 1303-1315. In light of a thorough analysis of the Supreme Court's decisions in Brewester, Tenney, and Eastland, as well as the D.C. Circuit's decision in MINPECO, the Eleventh Circuit concluded that legislative "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Id. at 1310. As a result, the Eleventh Circuit reversed "the district court's denial of the four lawmakers' motions to quash." Id. at 1315.

In 2018, the Ninth Circuit affirmed the district court's decision to bar depositions of local lawmakers involved in a redistricting process. Lee, 908 F.3d at 1186. The Ninth Circuit relied on the Supreme Court's opinions in Tenney, Eastland, Bogan, and Vill. of Arlington Heights, and determined that in "[a]pplying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances.'" Id. at 1187-88. Specifically, the Ninth Circuit held that "[a]lthough Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render of the privilege 'of little value.'" Id. at 1188 (citing Tenney, 341 U.S. at 377). The Ninth Circuit further noted that Village of Arlington Heights also involved a "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. 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. (internal citation omitted).

The First Circuit granted a writ of advisory mandamus to "assist other jurists, parties, or lawyers" in addressing claims of legislative privilege. Alviti, 14 F.3d at 85 (1st Cir. 2021). The First Circuit explained the district court failed to apply legislative privilege as a bar to subpoenas issued to state lawmakers seeking document production. Id.at 83. Alviti noted the "legal questions about the scope of the legislative privilege as applied to state lawmakers" were "unsettled" and "the lower courts have developed divergent approaches to answering them." Id. at 85. In its analysis, Alviti overturned the district court's denial of the state lawmakers' motion to quash subpoenas and correctly noted that **"[b]oth 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 (emphasis added) (citing Hubbard, 803 F.3d at 1311-12; Lee, 908 F.3d at 1186-88). Like the Ninth Circuit, Alviti noted:

> [Plaintiff's] argument suggests a broad exception overriding the important comity considerations that undergird the assertion of a legislative privilege by state lawmakers. Many cases in federal courts assert violations of federal law by state legislators who are not joined as parties to the litigation. Were we to find the mere assertion of a federal claim sufficient, even one that addresses a central concern of the Framers, the privilege would be pretty much unavailable largely whenever it is needed.

Id. at 88.

Alviti, applied legislative privilege as one of the bases for its decision to quash subpoenas served upon state lawmakers[3]. Three sister circuits recently held a private party's request for discovery from a state lawmaker was "barred by common-law legislative privilege." Id. at 88;

[3] Alviti also explained the need for information sought from state legislators "is simply too little to justify such a breach of comity." Alviti, 14 F.3d at 90.

Lee, 908 F.3d 1186-1189; Hubbard, 1303-1315. The Eighth Circuit's policy of affording "great weight and precedential value" to "sister circuit's reasoned decision[s]" was also stated in light of "three decisions of our sister circuits." Miller, 610 F.2d at 539 (8th Cir. 1979). Therefore, the Magistrate's Order finding legislative privilege did not act as a bar to Representative Devlin's deposition subpoena is contrary to Eighth Circuit precedent and should be reversed.

B. The Magistrate Erred by Applying the Five-Factor Test Imported from the Lesser Deliberative Process Privilege.

The Magistrate's Order applied a "five-factor test imported from the deliberative process privilege context to determine when the state legislative privilege must yield to a need for evidence." Doc. 48 at pp. 14-19. The Magistrate's Order relies on district court opinions for this contention; however, none of the sister circuits applied this test. See Hubbard, 803 F.3d at 1303-1315; Lee, 908 F.3d at 1186-1188; Alviti, 14 F.3d at 85-88. Specifically, in Lee, the Ninth Circuit declined to apply this test even though it was argued by the parties[4]. This is significant as the Ninth Circuit previously applied the five-factor test to deliberative process privilege. See F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). However, "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). This is best exhibited by the Ninth Circuit's refusal to apply the test to legislative privilege when it previously applied the test to the deliberative process privilege. Compare Lee, 908 F.3d at 1186-1188 with Warner Comm. Inc., 742 F.2d at 1161. Under Eighth Circuit precedent, the Magistrate's Order erred by failing to follow the

[4] The appellees in Lee correctly stated "this Court has never used a balancing test with regard to legislative privilege" but noted – like the Intervenors here – "some courts have done so." Lee, Case 15-55478, Dkt Entry: 29-1 (Appellees Brief), P. 53 of 60 (per PACER).

decisions of the sister circuits when it applied the five-factor test. See Miller, 610 F.2d at 539.

C. Specified Issue No. 3 – The Magistrate Erred by Denying the Respondents' Motion to Quash.

The Magistrate erred by denying the Respondents' motion to quash Representative Devlin's subpoena by finding "the Tribes' need for evidence outweighs the state legislative privilege and the court will decline to quash the subpoenas." Doc. No. 48 at p. 16. In the Eighth Circuit, "discovery is not permitted where no need is shown." Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999).

The Supreme Court's prohibition on legislator's testimony in court proceedings has been clear. See Soon Hing v. Crowley, 113 U.S. 703, 701-11 (1885) ("As the rule is general, with reference to enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them…"); U.S. v. O'Brien, 391 U.S. 367, 384 (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."); Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022) (noting same).

Moreover, the Plaintiffs have not shown why the information they seek from the Respondents is needed in this litigation. Their Complaint states a claim for relief under Section 2 of the Voting Rights Act and asserts the Legislative Assembly's decision continues "to dilute the votes" of the Plaintiffs' "in violation of Section 2 of the VRA." Doc. No. 1 at pp. 30-31 at ¶¶ 124-131.

> To succeed on a § 2 vote dilution claim, a plaintiff initially must prove three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive" (i.e., that members of the group generally vote the same way); and (3) that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

Alabama State Conf. of Nat'l Assoc. for Advancement of Colored People v. Alabama, 2020 WL 583803 at * 9 (M.D. Ala. Feb. 5, 2020) (quoting Thonrburg v. Gingles, 478 U.S. 30, 50 (1986)).

If the Plaintiff meets their initial burden, they must then satisfy a multi-factor "totality of the circumstances" test[5]. Id. Notably, none of these factors contemplate the motives of individual legislators. Id. Representative Devlin's testimony cannot help the Plaintiffs meet their burden in this case. They cannot go on a fishing expedition through the use of a subpoena to depose a state lawmaker. See United States v. One Assortment of 93 NFA Regulated Weapons, 897 F.3d 961, 967 (8th Cir. 2018) (noting the Federal Rules do not allow fishing expeditions in discovery.) The Magistrate's Order erred by finding the deposition testimony of Devlin was needed in this action.

IV. CONCLUSION

For the aforementioned reasons, the Magistrate's December 22, 2022, Order should be reversed and the Respondents' motion should be granted.

Dated this 5th day of January, 2023.

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[5] In a Section 2 claim under the VRA, "the totality-of-circumstances inquiry asks whether a neutral electoral standard, practice, or procedure, when interacting with social and historical conditions, works to deny a protected class the ability to elect their candidate of choice on an equal basis with other voters." Id. at * 11 (quotations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2023, a true and correct copy of the foregoing **REPRESENTATIVE WILLIAM DEVLIN AND THE NORTH DAKOTA LEGISLATIVE ASSEMBLY'S NOTICE OF APPEAL FROM THE MAGISTRATE'S DECEMBER 22, 2022, ORDER DENYING MOTIONS TO QUASH** 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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