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

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

RESPONSE IN OPPOSITION TO REPRESENTATIVE WILLIAM DEVLIN'S APPEAL OF THE MAGISTRATE'S DECEMBER 22, 2022, ORDER DENYING MOTIONS TO QUASH

The Magistrate Judge's order denying Representative Devlin's motion to quash should be affirmed. The Magistrate Judge correctly concluded that the legislative privilege is qualified and, as is the case in most federal redistricting litigation, must give way in light of the important federal interests at stake.

STANDARD OF REVIEW

The Court's review of a Magistrate Judge's finding on nondispositive matters, like the one at issue, is "extremely deferential." *Kraft v. Essentia Health*, No. 3:20-CV-121, 2022 WL 2619848, at *3 (D.N.D. July 8, 2022); *see also Jordan v. Comm'r, Mississippi Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020) (holding that a decision on a motion to quash subpoenas should be reviewed under the "clearly erroneous" or "contrary to law" standard). The party bringing the appeal bears the burden of proving the Magistrate Judge's decision was clearly erroneous or contrary to law. *Id.* Any objection to the Magistrate Judge's order not "specifically designate[d]" in the timely filed notice of appeal is waived and unreviewable on appeal. D.N.D. Civ. L.R. 72.1(D)(2); Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to."); *see also St. Jude Med. S.C., Inc. v. Tormey*, 779 F.3d 894, 901–02 (8th Cir. 2015) (holding that party could not challenge magistrate's nondispositive pretrial discovery order on appeal as he did not timely file objections before district court).

ARGUMENT

I. Legislative privilege is not a complete bar to the deposition of Representative Devlin and must give way in favor of discovery.

The Magistrate Judge correctly determined that the deposition of Representative Devlin is proper because "the legislative privilege for state lawmakers is, at best, one which is qualified," and must give way in favor of discovery in this case. *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017); *League of United Latin Am. Citizens v.*

Abbott, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022) ("Both [the Fifth Circuit] and the Supreme Court have confirmed that the state legislative privilege is not absolute."); Order Denying Mot. to Quash at 15, ECF No. 48 (finding that "[n]early all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified"). 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.*, 849 F.3d at 624. Because it is qualified, the legislative privilege "may be overcome by an appropriate showing." Order Denying Mot. to Quash at 10, Doc. 48 (citing *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006)).

"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). As such, federal courts routinely hold that the legislative privilege must give way to discovery in redistricting litigation. *See, e.g.*, *League of United Latin Am. Citizens*, 2022 WL 2713263, at *1; *Bethune-Hill*, 114 F. Supp. 3d at 337; *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022).

The sister circuit cases Representative Devlin cites are not to the contrary. *See* Devlin Appeal at 2 (citing *Am. Trucking Assoc., Inc. v. Alviti*, 14 F.4th 76 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015)); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); Order Denying Mot. to Quash, ECF No. 48 at 11-13 (distinguishing Respondents' cases from this case). Indeed, none of the cases

Representative Devlin cites take the radical position he advances that the legislative privilege amounts to an absolute bar to discovery against state legislators outside of federal criminal prosecutions. Instead, these courts engage in a careful and fact-specific analysis to determine whether there is a sufficient federal interest such that the legislative privilege should give way to discovery in the particular instance.

In *Alviti*, for example, the First Circuit recognized "a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest[.]" *Alviti*, 14 F.4th at 90. Ultimately, the court determined that the plaintiffs' Dormant Commerce Clause challenge turned primarily on the effect of the challenged law, would not be substantially affected by evidence of the subpoenaed individuals' purpose in passing the law, and as a result held that the need for discovery was not weighty enough to overcome the legislative privilege. *Id.* at 89-90.

But unlike in Commerce Clause cases, courts regularly permit parties to inquire into legislative intent in redistricting litigation. *See, e.g.*, *League of United Latin Am. Citizens*, 2022 WL 2713262, at *1; *Bethune-Hill v. State Bd. Of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015); *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022). This is because the enforcement of Section 2 of the Voting Rights Act is an important federal interest, even where that interest advanced through litigation by private parties. *See, e.g.*, *Favors*, 285 F.R.D. at 219 (finding that the claims at issue in redistricting litigation "counsel in favor of allowing discovery"); *Singleton v. Merrill*, No. 2:21-cv-1530-AMM, 2022 WL 265001, at *79 (N.D. Ala. Jan. 24, 2022)); *League of Women Voters of Fla. v. Lee*, 340 F.R.D. 446, 457 (N.D. Fla. 2021) ("All litigation is serious. But . . . voting-rights litigation is especially serious."); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014) ("[T]he right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance."); Order

Denying Mot. to Dismiss, ECF No. 30 at 11 (noting that "there has been private enforcement of Section 2 since the VRA's inception) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020); *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999).

Similarly, the legislative privilege recognized in *Hubbard* is a far cry from the blanket protection Representative Devlin asserts. Like the First Circuit, the Eleventh Circuit acknowledged that "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests such as 'the enforcement of federal criminal statutes.'" *Hubbard*, 803 F.3d at 1311 (quoting *United States* v. *Gillock*, 445 U.S. 360, 373 (1980)). The court thus rested its analysis of whether legislative privilege should give way on whether the subpoenas at issue served an important federal interest. *Id.* at 1312-13. Ultimately, the court determined that "[b]ecause [the plaintiffs had] not presented a cognizable First Amendment claim, there [was] no 'important federal interest[ ] at stake' in this case to justify intruding upon the lawmakers' legislative privileges." *Id.* at 1313 (citing *Gillock*, 445 U.S. at 373). Importantly, the court in *Hubbard* "emphasized the limited nature of its holding." Order Denying Mot. to Quash, ECF No. 48 at 12 n. 5 (citing *Hubbard*, 803 F.3d at 1312 n. 13 ("Our decision should not be read as deciding whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim than the one [plaintiffs] made here.")).

Moreover, in the sister circuit case most on point (but omitted from Representative Devlin's papers), the Fifth Circuit recently denied a stay of an order requiring Texas legislators to be deposed in a redistricting case, holding that the legislators were unlikely to succeed on the merits of their invocation of legislative privilege to prevent depositions. *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1. After the Fifth Circuit so ruled,

the Supreme Court likewise denied a stay, allowing the depositions to proceed. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.). A host of Texas legislators have since been deposed.

The Magistrate Judge's determination that legislative privilege can give way to discovery in redistricting litigation was not contrary to settled Eighth Circuit precedent and was consistent with reasoned decisions of sister circuits. The decision therefore was not clearly erroneous or contrary to law and should be upheld.

II. The Magistrate Judge Properly Applied the Five Factor Test to Determine Legislative Privilege Should Give Way in this Case.

"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 v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012); *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) the extent to which discovery would impede legislative action." *South Carolina State Conference of NAACP*, 584 F. Supp. 3d at 161.[1]

The five-factor test is appropriate here because, like the deliberative process privilege, the legislative privilege for state lawmakers is a qualified privilege that finds its roots in federal

[1] The *South Carolina State Conference of NAACP* court rejected the argument advanced by Representative Devlin 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.

common law. *See United States v. Gillock*, 445 U.S. 360, 374 (1980); Order Denying Mot. to Quash at 6-7, ECF No. 48. As a common law privilege, its protections are significantly weaker than the legislative privilege available to federal lawmakers that is rooted in the Speech and Debate Clause of the U.S. Constitution. *See Gillock*, 445 U.S. at 366. Consequently, the privilege routinely yields where necessary to advance an important federal interest.

Notably, Representative Devlin does not appeal the Magistrate Judge's *application* of the five-factor test to order his deposition, he merely contends that the test is not applicable. He has thus waived any challenge to *how* the Magistrate Judge applied the test. D.N.D. Civ. L.R. 72.1(D)(2) ("The appealing party must serve and file a written notice of appeal, which must specifically designate the order or part thereof from which the appeal is taken and the grounds for appeal."); *see also* Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

III. Representative Devlin's Testimony Is Relevant.

The Magistrate Judge properly determined that that proof of legislative intent, including the motives of individual legislators, is relevant and important evidence in this case. Order Denying Mot. to Quash at 17, ECF No. 48 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339-40 (E.D. Va. 2015)). This is particularly so where, as here, freedom to exercise the fundamental right to vote free of racial discrimination is at issue. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 339. Indeed, "judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that [redistricting] cases present." *Id.* at 337.

Plaintiffs here do not allege that the 2021 Redistricting Plan would be valid but for an improper legislative motive. Rather they seek to prove that the Plan violates federal law because

it denies Native voters an equal opportunity to participate in the political process. Under the totality of the circumstances test, testimony demonstrating the intent of one or more legislators would certainly be relevant and probative evidence of an ongoing history of voting-related discrimination, the extent to which voting is racially polarized, and the use of racial appeals in the political process. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021-22 (8th Cir. 2006) (listing factors relevant to a Section 2 claim). Thus, while courts have in some instances found the motivations of individual legislators to be irrelevant federal claims not at issue here, courts regularly permit Plaintiffs to put forth evidence in redistricting cases tending to show legislators' intent. *See, e.g.*, *id*; *League of United Latin Am. Citizens*, 2022 WL 2713263, at *1; *South Carolina State Conference of NAACP*, 584 F. Supp. 3d 152, 166 (D.S.C. 2022). Representative Devlin has not cited a single case where a court determined that legislative intent was irrelevant in redistricting litigation. *See* Devlin's Appeal at 3-5, ECF 78.

As the Chair of the Redistricting Committee, Representative Devlin can testify to a broad spectrum of matters relevant to this case that go well beyond his personal motivations for supporting the Challenged Plan. Representative Devlin, for example, has personal knowledge of the information available to the Redistricting Committee at the time it passed the challenged legislation and the motives of the Committee as a whole. Likewise, Representative Devlin can testify to the responsiveness of the Redistricting Committee to the input of Tribal Leaders during the redistricting process. *See Bone Shirt*, 461 F.3d at 1021-22 (noting that lack of responsiveness from elected officials to members of the minority group is probative in determining whether Section 2 was violated). Moreover, Representative Devlin represented District 23, which prior to the 2021 redistricting included the Spirit Lake Reservation. As such, he is likely to have additional information regarding the electoral conditions and campaigns in the region—all of which is

relevant to the totality of circumstances factors Plaintiffs must prove at trial. There is no conceivable claim of legislative privilege over that material. *See League of United Latin American Citizens*, 2022 WL 2713262, at *1. The Magistrate Judge's ruling that Representative Devlin's testimony is relevant therefore was not clearly erroneous and the decision denying the motion to quash should be upheld.[2]

CONCLUSION

For the foregoing reasons, the Magistrate Judges Order was not clearly erroneous and should be affirmed. Representative Devlin's appeal should be denied.

[2] To the extent Representative Devlin bases his appeal on the demands attendant to being a legislator, it bears noting that he is no longer a member of the legislature.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

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