

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

Turtle Mountain Band of Chippewa
Indians, *et al.*,

Plaintiffs,

v.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022-PDW-ARS

**PLAINTIFFS' MOTION FOR LEAVE
TO MAKE AN OFFER OF PROOF**

At the beginning of the trial in this matter, the plaintiffs requested leave to make an offer of proof in order to preserve their right to seek further review of the Eighth Circuit's recent decision granting a writ of mandamus quashing the plaintiffs' subpoenas to certain members of the North Dakota Legislature. The Court denied that request from the bench but later invited the plaintiffs to file a written motion making the same request. This is that motion.

Rule 103 of the Federal Rules of Evidence prescribes a certain procedure for preserving objections to evidentiary rulings: "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and ... if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed R. Evid. 103(a)(2). In other words, in order to preserve the right to appeal an evidentiary ruling, a party must

generally make an offer of proof informing the court of the substance of the evidence, so that a reviewing court can determine whether the evidentiary ruling affected the party's "substantial rights" or was merely harmless error. *Id.*; see, e.g., *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995) ("Under Fed. R. Evid. Rule 103 error may not be predicated on the exclusion of evidence unless there is an offer of proof providing the substance of the excluded evidence.").

Here, although the plaintiffs believe that this Court's ruling with respect to legislative privilege was correct, the plaintiffs wish to preserve a claim of error in the Eighth Circuit's ruling that has resulted in the exclusion of documents and testimony from members of the Legislature from the trial of this case. That ruling was issued on June 6, and the Eighth Circuit's mandate to this Court has not yet issued. The current deadline for filing a petition for rehearing en banc is Tuesday, June 20.

If the plaintiffs do not at least attempt to make an offer of proof before the trial record closes, then under Rule 103 they will have arguably failed to preserve their claim of error, and any petition for rehearing en banc would arguably become moot as a result of that failure. The Eighth Circuit's ruling would become unreviewable, and it might be ineligible for vacatur under the *Munsingwear* doctrine should this Court rule in the plaintiffs' favor prior to resolution of further review of the Eighth Circuit's opinion. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (noting that the "established practice" when a case has become moot on appeal is to vacate the unreviewable decision); *Karcher v. May*, 484 U.S. 72, 83 (1987) (stating that *Munsingwear* is inapplicable when

appeal becomes moot because losing party declines to pursue appeal and not because of circumstances unattributable to parties).

An offer of proof here would not require the Court to leave the trial record open or to delay its ruling in any way. It would not affect the Court's consideration of the merits at this stage whatsoever. It would merely permit the plaintiffs to preserve their claim of error. Should the Court grant leave, the plaintiffs would submit the following proffer: the documents withheld by the subpoena recipients subject to legislative privilege would support a conclusion that the North Dakota Legislature has been unresponsive to the particular concerns of Native Americans, and that the Legislature's asserted justification for the configuration of District 9 is tenuous. These facts are probative of vote dilution under Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 37 (1986).

The plaintiffs believe, however, that they satisfy the totality-of-circumstances test without the material subject to discovery dispute.

CONCLUSION

The Court should grant the plaintiffs leave to make an offer of proof.

June 12, 2023

/s/ Michael S. Carter

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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.

/s/ Mark P. Gaber

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