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. Michael Howe, in his official capacity as Secretary of State of North Dakota. Defendant.	**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO SET DEADLINES TO COMPLY WITH THIRD-PARTY DISCOVERY; AND** **EMERGENCY MOTION AND SUPPORTING MEMORANDUM TO STAY BY THIRD-PARTIES NORTH DAKOTA LEGISLATIVE ASSEMBLY, STATE SENATOR RAY HOLMBERG, STATE SENATOR RICHARD WARDNER, STATE SENATOR NICOLE POOLMAN, STATE REPRESENTATIVE MICHAEL NATHE, STATE REPRESENTATIVE TERRY JONES, STATE REPRESENTATIVE WILLIAM DEVLIN AND CLAIRE NESS**

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I. INTRODUCTION

Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown, moved to set deadlines to comply with their third-party discovery requests. ECF 75. Movants oppose this motion, and submit this emergency motion to stay enforcement of the subpoenas.

Plaintiffs served subpoenas on the following current or former members of the North Dakota Legislative Assembly: State Senators Ray Holmberg, Richard Wardner, and Nicole Poolman; State Representatives Michael Nathe, William Devlin, and Terry Jones. Further, Plaintiffs served former senior counsel for the North Dakota Legislative Council, Claire Ness, with a subpoena to produce documents regarding the recent redistricting legislation explained in

prior briefing. The State Officials request this Court deny Plaintiffs' Motion to Set Deadlines, and also move the court to stay enforcement of the discovery subpoenas pending appeal to the Eighth Circuit. A notice of appeal and petition for writ of mandamus will be filed no later than March 28, 2023.

II. PROCEDURAL HISTORY

The underlying procedural history is well-known to the Court as it has been thoroughly briefed and numerous orders have already been entered with respect to this dispute. The Plaintiffs' motion follows the district court's denial of two appeals dated March 14, 2023. See Doc. No. 71; 72. Of significant importance is that it appears the district court's March 14, 2023, Order indicated it could not discern from the record "a simple estimate from the Assembly as to the number of documents at issue." Doc. 72 at p. 4. It appears there was some confusion with respect to the information provided in support of the State Officials' arguments with respect to the columns in the "Privilege Log" and its supplements that were provided to the Plaintiffs.

In an effort to clarify this matter, an excerpt from the "Supplemental Privilege Log" provided with respect to Representative Jones is embedded below:

Representative Terry Jones OUTLOOK SEARCH RESULTS January 1, 2020 - November 16, 2022				
Searched Key Word	Total Number of Hits for the Key Word Searched	Communications Between the Subpoenaed Individual and Legislators	Communications Between the Subpoenaed Individual and Legislative Council Staff	Communications Between the Subpoenaed Individual and Non-Legislator, Non-Legislative Council Staff Individuals
1504	83	5	3	4
Redistricting	794	32	14	16
Map	2,529	21	6	6
Subdistrict	59	21	4	7
District	6,006	29	8	22
Race	2,351	4	1	6
Tribal	1,553	10	1	4
Native American	1,109	8	1	4
Indian	2,426	3	2	3
Reservation	609	11	2	4
Voting Rights Act or VRA	161	10	-	4
Demographic	372	2	-	1
Criteria	514	3	1	1
Training	3,671	1	3	2

Doc. 47-4 at p. 14 of 18.

The first column, entitled "Total Number of Hits for the Key Word Searched" "shows the number of documents containing the searched keyword." Second Affidavit of Emily Thompson at ¶ 4. The total number of all emails which generated a keyword hit was 64,849. Id. "This is the total number of emails that generated keyword hits, and the total number of emails that Legislative Council staff would have to review to determine what is to be provided pursuant to the subpoenas, and to prepare a privilege log as ordered." Id. Next, "the communications identified in the key word search were not reviewed in any detail other than to identify the sender and recipients and eliminate any correspondence, that at a glance, clearly could be identified as nonresponsive, such as daily or weekly publication list serve items." Doc. 52 at p. 2. Based on an extremely cursory review, any items identified as clearly non-responsive (such as list serve items) were excluded from the final three columns of the "privilege log." Id.

In sum, the aggregate sum of 64,849 emails identified in the first column of all searches for all State Officials will need further review to comply with the subpoenas. Thompson explained the original cursory review took approximately 64 hours of the Legislative Council's Legal Division's time. Id. at p. 2. She further estimated it would take approximately 640 hours of Legislative Council's time to review "the documents identified in the 'key word' search to determine whether each document actually is responsive to the Plaintiffs' request and perform an additional search and review of correspondence that was not flagged in a key word search, but may be responsive…." Doc. 52 at p. 2. This estimate is wholly reasonable in light of the fact the initial cursory search disclosed 64,849 emails as containing key words that may be responsive to the Plaintiffs' subpoenas.

III. LAW AND ARGUMENT

Movants respectfully ask the Court to deny Turtle Mountain's Motion to Set Deadlines, and to stay Turtle Mountain's discovery requests. Movants further ask the Court to stay any further discovery sought from the State Officials, until the movants' Petition for a Writ of Mandamus and Notice of Appeal is considered by the Eighth Circuit[1].

A. Movants Emergency Motion to Stay Discovery Requests

In ruling on a motion to stay, the Court considers four factors: (1) Whether the movant can make a strong showing he is "likely to succeed on the merits," (2) whether the movant will be "irreparable injured absent a stay," (3) whether the stay will "substantially injure the other parties"; and (4) "where the public interest lies." See Hilton v. Braunskill, 481 U.S. 770, 776-77, 107 S.Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987) (referencing the relevant portions of both Fed. Rule Civ. Pro. 62 and Fed. Rule App. Proc. 8.); see also Nken v. Holder, 556 U.S. 418, 426, 129

S. Ct. 1749, 1756, 173 L. Ed. 2d 550 (2009). "'[W]hen the balance of equities … weighs heavily in favor of granting the stay' – we relax the likely-to-succeed-on-the-merits requirement." League of Women Voters of Fla., Inc. v. Fla Sec'y of State, 32 F. 4th 1363, 1370 (11th Cir. 2022); see also Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. Unit A. 1981) ("[O]n motions for stay pending appeal the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."). As shown below, movants satisfy each element necessary to obtain a stay.[2]

Movants' petition concerns important issues relating to the separation of powers, and the ability of state legislators to perform their essential duties. See United States v. Brewster, 408 U.S. 501, 524, 92 S. Ct. 2531, 2543, 33 L. Ed. 2d 507 (1972). This Court's orders leave legislators vulnerable to retaliation lawsuits from their political opponents, making a cause of

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[1] The Notice of Appeal and Petition for Writ of Mandamus will be filed with the Eighth Circuit no later than March 28, 2023.

[2] The only appellate decision upon which Plaintiffs cited below in support of their argument was League of United Latin Am. Citizens Abbott v. United States, 2022 WL 2713263 (5th Cir. May 20, 2022). This order denied the appellants' request to stay district court depositions pending appeal. Id. at * 2. The following day, appellants requested an emergency application for a stay to the Supreme Court in a consolidated case entitled Guillen et al v. League of United Latin American Citizens, Sup. Ct. Case No. 21A756 (Docket Entry May 21, 2022). The United States, as a plaintiff in the underlying consolidated lawsuit responded to the emergency application and explained "the United States' complaint alleges that Texas's 2021 Congressional redistricting plan violates Section 2 of the Voting Rights Act." Sup. Ct. Case No. 21A756 (Docket Entry May 23 "Response to application from respondent United States" at p. 6). The United States served deposition subpoenas on state legislators. Id. at p. 7. The United States differentiated American Trucking, Hubbard, and Lee by explaining those cases "arose in a private suit, not an enforcement action by the United States." Id. at p. 25. Therefore, this case is inapplicable.

action out of politics, and opens the floodgates to requests for internal legislative documents. The procedures required by this Court's orders interfere with the legislative process. It is important this matter be reviewed *before* the orders are enforced. The bell cannot be un-rung. Once the State Officials are forced to comply with the discovery orders, their privilege is lost. The Circuit Court must be allowed to review and rule on this Court's orders before they are enforced.

1. Movants have provided a substantial case on the merits and a serious legal issue is involved.

As stated in the movants numerous filings before this Court, three separate circuit courts have held legislative privilege bars state lawmakers from complying with discovery in a civil action where the United States is not a party. See American 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). The Eighth Circuit has expressed an explicit "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." See Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979). This Court's orders rely upon the decisions of various District Courts, and declined to follow the decisions of the First, Ninth, and Eleventh Circuits. See American Trucking Assoc. Inc., 14 F.4th 76 (1st Cir. 2021); Lee, 908 F.3d 1175 (9th Cir. 2018); Hubbard, 803 F.3d 1298 (11th Cir. 2015).

The First Circuit recently held a similar situation presented an "extraordinary case" as it raises unsettled legal questions about legislative privilege as applied to state lawmakers and lower courts have developed divergent approaches to answering them. See American Trucking, 14 4th 76, at 84. The Eleventh Circuit has also recently reversed a District Court discovery order on the grounds of legislative privilege. See In re Hubbard, 803 F.3d at 1303-06, 1315. The

underlying issues in these cases are substantially similar to this matter. A stay is necessary to preserve movants' interests in light of the fact the Eleventh and First Circuits reversed decisions very similar to this Court's Orders.

As the District Court found – other District Courts have been forced to attempt to construct a common law legislative privilege in piecemeal fashion. But when these cases are appealed to the Circuit Courts, the Circuit Courts have undisputedly come down on the side of the state officials, and upheld the legislative privilege. See American Trucking, 14 F.4th 76; Lee, 908 F.3d 1175; In re Hubbard, 803 F.3d 1298.

This is substantial precedent, that has set the same parameters on legislative privilege the movants assert should control here. Further, the "legislative privilege is important. It has deep roots in federal common law." Hubbard, 803 F.3d at 1307. "The privilege protects the legislative process itself." Id. at 1308. "One of the privilege's principle purposes is to ensure that lawmakers are allowed to focus on their public duties." Id. at 1310 (quotation omitted). The privilege apples to discovery requests served upon third-parties because "complying with such requests detracts from the performance of official duties." Id.

As explained above, compliance with the subpoenas will be a substantial undertaking. See Doc 52; see also Second Aff'd of Thompson. Without a stay, the State Officials and Legislative Council will be detracted from the performance of their official duties while it is entirely possible – and likely – the Eighth Circuit will follow the reasoned decisions of its sister circuits on this issue. This is especially true in light of the fact the parameters on legislative privilege are not well-developed within the Eighth Circuit at this time. Clearly, there is a well-founded argument in support of the State Officials' position and this is a very serious legal issue. The stay should be granted for this reason alone to allow for the Eighth Circuit to consider this

issue on appeal.

2. Movants would be irreparably injured absent a stay of discovery

Movants would suffer irreparable harm if the Plaintiffs' motion is granted, and the Court denied movants request for a stay of discovery. As it stands, the Court's current orders require the movants to divert a substantial amount of time from their official duties to address the third-party subpoenas. Once this time is spent, it cannot be recovered. This is especially important in light of the fact the legislature is in session. Clearly, there would be an irreparable injury imposed upon the Movants if this effort were expended – during session – and the Eighth Circuit found it unnecessary under the First, Ninth and Eleventh Circuit holdings.

3. A stay of discovery will not substantially injure the parties to this action

The parties would not be prejudiced by a stay while these important issues are reviewed. Plaintiffs argue time is of the essence, given the June 2023 trial date for the underlying case. ECF 75. But Defendant has moved for summary judgment, and the parties have argued the case extensively, without need for the requested discovery. ECF 58, 59, 65, 73. Plaintiffs filed a lengthy brief in opposition to Defendant's motion, in which they argued legislative intent and reasoning, citing numerous public hearings and filings. ECF 65. At no point in their impassioned opposition did Plaintiffs indicate a need for further information that could be obtained through the subpoena and subpoenas duces tecum at issue here. Id. A stay would harm neither parties' trial preparations.

4. The public interest demands a stay of discovery

Finally, public interest is served by staying discovery pending movants' appeal. The public has a vested interest in its elected officials maintaining their ability to perform their constitutional duties freely and efficiently. This interest is evidenced through the North Dakota

Constitution's Speech or Debate Clause. See N.D. Const. Art. 4, § 15. A stay is necessary, to allow the Eighth Circuit Court to hear Movants' arguments regarding legislative privilege.

Legislative privilege is important, because "the time and energy required to defend against to 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). North Dakotans have an interest in their legislators focusing on legislating, free of concern or fear their discussions will be dissected via discovery. Legislative privilege exists to protect and "preserve the independence and thereby the integrity of the legislative process." See Brewster, 408 U.S. 501 at 524. The public has an interest in its elected legislators maintaining the ability to act independent of the other two branches of government, and maintaining the separation of powers. Id. The Court's Orders blur this separation, and weaken the legislature's ability to act independently.

Public interest is further served by allowing North Dakota legislators to maintain the ability to seek advice from third parties and communicate freely. As stated previously, the North Dakota legislature meets for only 80 days every other year. This is hardly adequate time to become an "expert" on every subject that comes across a legislator's desk. Legislators rely upon Legislative Council to educate them quickly on the issues, so they can make well-informed decisions. Diverting extensive resources from legislating to respond to the Plaintiffs' subpoenas does not serve the public interest. The public has an interest in its legislators maintaining their independence and having access to Legislative Council's legal staff. This interest substantially outweighs the Plaintiffs' interest in engaging in a fishing expedition in hopes of finding an illicit motive of one or more lawmakers – especially in the face of a properly claimed privilege. See MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 859-863; Hubbard, 803 F.3d

at 1310.

B. Movants' Opposition to Turtle Mountain's Motion to Set Deadlines

Movants incorporate the arguments above into their opposition to Turtle Mountain's *Motion to Set Deadlines*. Seven days is without question inadequate time to organize and produce the requested documentation. There are approximately 65,000 emails containing key word hits, all of which need to be reviewed to determine what are or are not with third parties, and provide a privilege log explaining each withheld communication. The Legislature is currently in session. Legislative Council, the Legislature's legal division, would be the entity tasked with sifting through these 65,000 emails, and would clearly be preoccupied with the matters of legislative session. Movants would be unable to comply with this deadline, and perform their official duties.

Further, as noted above, the parties have briefed a motion for summary judgment, and the Court has not yet decided this matter. It is currently unresolved whether there are material disputes of fact requiring the June 2023 trial date. See Witkin v. Lotersztain, No. 219CV0406TLNKJNP, 2021 WL 6135924, at *1 (E.D. Cal. Dec. 29, 2021) (Denying a motion to set deadlines stating "Defendants have filed summary judgment motions to determine whether there are material disputes of fact requiring a jury trial. Once pretrial motions are resolved, **assuming the case survives summary judgment**, the undersigned will issue an order. . . .") (emphasis added).

Again, the parties have already briefed this matter extensively, without need for the subpoenas at issue in this matter. This is, in large part, because the information Plaintiffs are requesting is publicly available, or not needed for the disposition of this case – as movants have already argued.

IV. CONCLUSION

For the reasons set forth above, Movants respectfully request the Court deny Plaintiffs' motion to set deadlines to comply with third-party discovery requests, and stay its previous discovery orders, until the Eighth Circuit Court of Appeals has the opportunity to review and rule upon movants' notice of appeal and petition.

Dated this 27th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2023, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM TO SET DEADLINES TO COMPLY WITH THIRD-PARTY DISCOVERY; AND EMERGENCY MOTION TO STAY BY THIRD-PARTIES NORTH DAKOTA LEGISLATIVE ASSEMBLY, STATE SENATOR RAY HOLMBERG, STATE SENATOR RICHARD WARDNER, STATE SENATOR NICOLE POOLMAN, STATE REPRESENTATIVE MICHAEL NATHE, STATE REPRESENTATIVE TERRY JONES, STATE REPRESENTATIVE WILLIAM DEVLIN AND CLAIRE NESS** 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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