Docket No. 23-1600

In the

United States Court of Appeals

For the

Eighth Circuit

In re North Dakota Legislative Assembly, Senator Ray Holmberg, Senator Richard Wardner, Senator Nicole Poolman, Representative Michael Nathe, Representative William R. Devlin, Representative Terry Jones, Senior Counsel at the North Dakota Legislative Council Claire Ness,

Petitioners.

On Petition for a Writ of Mandamus
To The United States District Court for the District of North Dakota
In Case No. 3:22-cv-00022

EMERGENCY MOTION FOR STAY OF DISTRICT COURT'S APRIL 11, 2023, ORDER DENYING PETITIONERS' MOTION TO STAY AND GRANTING RESPONDENTS' MOTION TO SET DEADLINES

Scott K. Porsborg (ND State Bar ID No. 04904)
sporsborg@smithporsborg.com
Brian D. Schmidt (ND State Bar ID No. 07498)
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58501
(701) 258-0630

Attorneys for Petitioners.

I. INTRODUCTION

Respondents request an emergency stay of the district court's April 11, 2023 order which is attached as Exhibit # 1. Although this Court directed the Turtle Mountain Plaintiffs file a response to Respondents' Petition no later than April 17, 2023, the district court ordered non-party Respondents "immediately and actively" undertake steps contrary to their legislative privilege claim. Further, the district court ordered Respondents to forfeit their legislative privilege by producing documents no later than April 21, 2023. If Respondents' motion is not granted, this Court's mandamus review will be moot, their legislative privilege will be lost, they will suffer irreparable harm, or risk contempt sanctions. Time is of the essence.

The district court's order fundamentally misapplied legislative privilege when it reasoned "no privileged documents or information were ordered to be disclosed" in denying Respondents' motion for a stay. Legislative privilege does not protect individual documents, but rather the "privilege protects the legislative process itself…." In re Hubbard, 803 F.3d 1298, 1308 (11th Cir. 2015) Put another way, "legislative privilege protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts*." Id. at 1308 (internal quotation omitted). Legislative privilege has deep historical roots and exists to ensure "lawmakers are allowed to focus on their public duties" which is "why the privilege extends to discovery requests" because "complying with such

requests detracts from the performance of official duties." Id. at 1310. This is why the First, Ninth, and Eleventh Circuits all recently held requests for discovery from state lawmakers in a private civil action were barred by legislative privilege. American Trucking v. Alviti, 14 F.4th 76 (1st Cir. 2021); Lee v. City of Los Angeles, 908 F.3d 1175 (9th Cir. 2019); Hubbard, 803 F.3d 1298 (11th Cir. 2015).

Despite this unified guidance from our sister circuits, the district court placed Respondents in an untenable position. If a stay is not granted, Respondents will either lose their properly-asserted legislative privilege or risk contempt sanctions while this Court reviews the underlying discovery order. This is problematic as the district court ordered compliance during the North Dakota Legislative Assembly's constitutionally limited eighty-day biennial regular session[1]. Compliance with the district court's order will require the review of approximately 65,000 emails to determine responsiveness, preparation of a privilege log, and disclosure of documents that clearly are subject to privilege. This will divert approximately 640 hours of legislative staff time during the final days of the biennial session.

[1] Section 7, Article IV of the North Dakota Constitution provides "[n]o regular session of the legislative assembly may exceed eighty natural days during the biennium." The North Dakota Legislative Assembly commenced its 2023 regular session on January 3, 2023. (App217). As "[d]ays spent in regular session need not be consecutive," it is unclear at this time as to when the 2023 regular session of the North Dakota Legislative Assembly will end. See N.D. Const. Art. IV, § 7.

Despite these circumstances, the district court determined Respondents failed to establish irreparable harm because it could outsource these tasks to a private law firm. This is an unreasonable requirement to impose upon a non-party legislative body. The district court did not consider the cost and burden required to comply with subpoenas issued in a private civil action.

A stay pending disposition of the Respondents' petition is warranted in these circumstances. There is a fair prospect this Court will grant mandamus and reverse the district court's discovery order. The First Circuit recently granted mandamus to do so under the same circumstances in American Trucking. The Eleventh Circuit - finding it had supplemental jurisdiction over this issue – also reversed a district court's discovery order under the same set of circumstances in Hubbard. Further, the Ninth Circuit affirmed the district court's order finding legislative privilege barred discovery against local lawmakers in Lee. A holding adverse to the Respondents' Petition will create a circuit split. Additionally, the Respondents will suffer irreparable harm if a stay is not granted pending this Court's review. Once legislative privilege is lost in this case, it is gone forever. Candid debate in legislative proceedings will be chilled under a threat of legislators either having to disclose certain communications or expend large sums to hire private counsel to asses legislative privilege on a document-by-document basis and complete a lengthy

Appellate Case: 23-1600 Page: 4 Date Filed: 04/13/2023 Entry ID: 5265138

privilege log. There is no remedy for this harm. Therefore, the Respondents' emergency motion for a stay should be granted.

II. Respondents Unsuccessfully Filed a Motion to Stay Enforcement of the Order Subject to the Respondents' Petition for Writ of Mandamus.

On March 27, 2023, Respondents filed an "Emergency Motion and Supporting Memorandum to Stay" enforcement of the district court's order enforcing subpoenas. Doc. 78. The district court denied the Respondents' motion on April 11, 2023, and ordered Respondents comply as follows:

> Within ten (10) days of this order, the Assembly shall produce their communications with third parties and all documents withheld as to Representative Jones. As for all other documents, the Assembly must immediately and actively begin its work on producing a privilege log and that privilege log must be produced within fourteen (14) days of this order. The deposition of Representative Devlin must be scheduled on or before April 28, 2023.

Exhibit # 1 at p. 4.

The district court reasoned there is no irreparable harm to the Respondents even though the North Dakota Legislative Assembly is in session because it has "retained counsel to assist with the document requests and the deposition of Representative Devlin." Id. at p. 3. The district court reasoned the underlying case the Respondents have "not demonstrated a likelihood of success on the merits of the petition, particularly given that this is a redistricting and VRA case and that the orders at issue are discovery orders…." Id. at pp. 2-3. The district court's conclusions are erroneous.

III. Respondents are Entitled to a Stay of the District Court's Discovery Order.

The non-party Respondents are in an untenable position. If they comply with the district court's order to produce documents within 10 days, their legislative privilege will be lost forever. The district court denied Respondents a stay in part because "the discovery orders do not order the Assembly to disclose any privileged documents." Exhibit # 1 at p. 3. This is incorrect and contrary to the privilege.

A. Legislative Privilege Protects the Legislative Process, not Individual Documents.

Legislative privilege does not protect individual documents, but rather the "privilege protects the legislative process itself…." Hubbard, 803 F.3d at 1308. "Regardless the level of government, the exercise of legislative discretion should not be inhibited by the federal judiciary." Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998). The rationale for the privilege is "to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box…." Lee, 908 F.3d at 1187. "One of the privilege's principle 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. "The legislative privilege 'protects against inquiry into acts that occur in the regular course of the

Appellate Case: 23-1600 Page: 6 Date Filed: 04/13/2023 Entry ID: 5265138

legislative process and *into the motivation for those acts.*'" Id. (quoting United States v. Brewster, 408 U.S. 501, 525 (1972)). In relying on the rationale set forth in Hubbard, a recent district court decision acknowledged legislative "privilege serves to prevent parties from harassing legislators" even in lawsuits claiming a violation of Section 2 of the Voting Rights Act. League of Women Voters of Florida, Inc. v. Lee, 340 F.R.D. 446, 452-454 (N.D. Fla. 2021).

The district court's order infringes upon the legislative process. It diverts attention from the performance of official duties, harasses legislators, and impermissibly allows an inquiry into the acts that occur in the regular course of the legislative process. The privilege provides broad protection to legislative bodies, their members, and staff from discovery matters in private civil actions. American Trucking, 14 F.4th 76; Lee, 908 F.3d 1175; Hubbard, 803 F.3d 1298. The district court's order must be stayed as it compels Respondents to forego their privilege while this Court considers Respondents' Petition.

B. The District Court Erred by Concluding Third-party Communications are Outside the Scope of Legislative Privilege.

As explained above, legislative privilege protects the legislative process and is not applied on a document-by-document basis. The district court's order misapplied this fundamental principal and instead concluded "privilege cannot apply" to "disclosure of communications to third parties." Exhibit # 1 at p. 3. This is contrary to reasoned decisions of our sister circuits. In Hubbard, the subject

Appellate Case: 23-1600 Page: 7 Date Filed: 04/13/2023 Entry ID: 5265138

subpoenas requested – among other things – "[a]ll communications (including emails) sent or received that related to or concerned the bill that became [law]…" Hubbard, 803 F.3d at 1310 n. 4. In American Trucking, the subpoenas sought "materials relating to…public statements made by the [state officials] and others." American Trucking, 14 F.4th at 83. Both the Eleventh and First Circuits held legislative privilege barred disclosure of these third-party communications.

After Hubbard, a federal court correctly held, "it is consistent with *in re Hubbard,* to conclude that activity engaged in by legislators is still protected by legislative privilege even if there are communications with non-legislators, as long as the communications were pursuant to the proposal, formulation, and passage of legislation." Thompson v. Merrill, 2020 WL 254317 at *3 (M.D. Ala. May 19, 2020). This is because "the maintenance of confidentiality is not the fundamental concern of the legislative privilege." League of Women Voters of Florida, Inc., 340 F.R.D at 452, 454 (N.D. Fla. 2021). Even in a Voting Rights Act case "the privilege serves to prevent parties from harassing legislator…for actions those legislators take in their legislative capacity." Id. at 452, 454. The district court's order is inconsistent with circuit court precedent and decisions interpreting it.

C. The Stated Purpose of the Subpoenas Strikes at the Heart of Legislative Privilege.

To compound matters, the district court previously acknowledged the Turtle Mountain Plaintiffs' subpoenas seek "communications demonstrating 'illicit

Appellate Case: 23-1600 Page: 8 Date Filed: 04/13/2023 Entry ID: 5265138

motive' by one or more legislators…." (App184.) While this information is irrelevant, the subpoenas seek information central to the privilege's protection.

Legislative "privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." Hubbard, 803 F.3d at 1310. When subpoenas seek to "support the lawsuit's inquiry into the motivation behind [legislation]", they seek "an inquiry that strikes at the heart of legislative privilege." Id. A categorical exception to legislative privilege whenever a claim "directly implicates the government's intent" would render "the privilege of little value." Lee v. City of Los Angeles, 908 F.3d at 1188 (9th Cir. 2019). Consistent with this logic, our sister circuits consistently held legislative privilege bars discovery from state lawmakers in private civil actions. See Id.; Hubbard, 803 F.3d at 1310-1313; American Trucking v. Alviti, 14 F.4th 76 (1st Cir. 2021).

D. The District Court's Order Compelling Representative Devlin to Attend a Deposition is in Direct Conflict with Legislative Privilege.

The Supreme Court previously explained placing a lawmaker on the stand is to be avoided because their testimony frequently will be barred by legislative privilege. Village of Arlington Heights, 429 U.S. at 268 n.18. However, the district court's order requires the "deposition of Representative Devlin must be scheduled on or before April 28, 2023." Exhibit # 1 at p. 4. This order conflicts with both Supreme Court precedent and a recent Ninth Circuit holding. In Lee, the Ninth Circuit held "plaintiffs are generally barred from deposing local legislators, even in

extraordinary circumstances." Lee, 908 F.3d at 1187-88 (internal quotations omitted) While acknowledging "claims of racial gerrymandering involve serious allegations," Lee explained these were not "within the subset of 'extraordinary instances' that might justify an exception to the privilege…we conclude the district court properly denied discovery on the ground of legislative privilege." Id. at 1188.

This is because "[a]ny questioning about legislative acts, even [in the situation of someone no longer a member of Congress], would 'interfere' by having a chilling effect on Congressional freedom of speech." MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 860 (D.C. Cir. 1988) (internal alterations in original, quotation omitted). Therefore, if the Respondent's stay is denied, Representative Devlin will be forced to forego his legislative privilege.

E. The Eleventh Circuit Granted State Lawmakers a Stay When Confronted with the Same Situation.

The Respondents are in the same situation as the Alabama state lawmakers in the Eleventh Circuit's case in Hubbard. The state lawmakers requested the district court stay enforcement of its discovery order holding legislative privilege did not bar discovery from them. See Alabama Education Assoc. et al. v. Bentley et al., U.S. Dist. Ct. N. Dist. Ala., Case No. 5:11-cv-00761-CLS, Doc. Nos. 148, 153, 157. The district court denied the state officials' motion to stay and ordered they respond to the plaintiffs' subpoenas by February 1, 2013. Id. at Doc. 157. During the pendency of a concurrently filed notice of appeal and petition for writ of mandamus,

the Eleventh Circuit granted the "petitioners' emergency motions to stay the district court's...order directing the petitioners to respond to the subpoenas duces tecum no later than February 1, 2013." In re Hubbard, 11th Cir. Case No. 13-10281-C & 13-10382-C (Order dated Jan. 31, 2013). Ultimately, the Eleventh Circuit held legislative privilege barred the plaintiffs' subpoenas to the state lawmakers and reversed the district court's discovery order. Hubbard, 803 F.3d at 1310-1313.

Had the Eleventh Circuit not granted the emergency motion to stay, the state officials would have been forced to either forfeit their correctly asserted privilege or risk being in contempt of court. This is the situation confronting the Respondents. As a practical matter, the Court should follow the Eleventh Circuit's guidance and grant Respondent's motion to stay during the pendency of this mandamus review.

Moreover, Respondents are entitled to a stay pending mandamus review under the Supreme Court's stated criteria. "To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). Respondents satisfy both factors of this test.

1. There is a fair prospect the Court will grant mandamus.

The issue subject to the Respondents' Petition is whether legislative privilege bars non-party state lawmakers from compliance with subpoenas issued in a private

civil action. In this Circuit, mandamus is "an appropriate vehicle to review orders compelling the production of documents or testimony claimed to be privileged…." Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 953-54 (8th Cir. 1979). The purpose of Respondent's Petition is to review the district court's denial of their claim to legislative privilege. As explained above, the district court fundamentally misapplied the privilege which led to its erroneous conclusions. Respondents are forced to seek mandamus review to preserve it. This Court already ordered the Turtle Mountain Plaintiffs submit a response to the Respondents' Petition. There is a fair prospect this Court will follow its sister circuits and grant mandamus.

a. If the Court rules against the Respondents, it will create a circuit split.

Consistent with this Court's precedent, the First Circuit granted a writ of mandamus to address the unsettled legal questions about legislative privilege as applied to state lawmakers and noted lower courts developed divergent approaches to answering them. American Trucking, 14 4th at 84 (1st Cir. 2021). The First Circuit noted "the degree to which state officials may be subjected to discovery in civil cases alleging violations of the federal constitution raises important questions about the appropriate balance of power between the states and the federal government." Id. at 85. All three Circuit Courts that have considered a request for discovery directed to lawmakers in a private civil case held common-law legislative privilege barred the

request. Id. at 90-91; Lee, 908 F.3d at 1186-88; Hubbard, 803 F.3d at 1310-1313. If the Court were to find against the Respondents, it would create a circuit split.

Our sister circuits have been steadfast in their application of legislative privilege because the "legislative privilege is important…The privilege protects the legislative process itself…The privilege applies whether or not the legislators themselves have been sued." Hubbard, 803 F.3d at 1307-08. The First Circuit explained it had "little doubt that it will become increasingly common to subpoena state lawmakers" if it did not reverse the district court's order and stop the practice. See American Trucking, 14 4th at 85. It is likely, this Court will follow the First Circuit's lead and grant mandamus to answer this unsettled legal question and prevent subpoenas to state lawmakers from becoming a common practice.

The Respondents' position is supported by the circuit courts and it is likely the Court will grant mandamus to resolve this important issue. Moreover, mandamus also likely will be granted because the subpoenas seek irrelevant information protected by privilege and compliance will be oppressive to the public interest.

2. Mandamus is appropriate because this is an extraordinary circumstance in which an oppressive subpoena seeks irrelevant information.

In this Circuit, "mandamus may issue in extraordinary circumstances to forbid discovery of irrelevant information, whether or not it is privileged, where discovery would be oppressive and interfere with important state interests." In re Lombardi,

Appellate Case: 23-1600 Page: 13 Date Filed: 04/13/2023 Entry ID: 5265138

741 F.3d 888, 895 (8th Cir. 2014). The First Circuit held the state officials' petition for a writ of mandamus seeking review of a district court's discovery order disregarding legislative privilege presented an "extraordinary case" because it "raises unsettled legal questions about the scope of the legislative privilege as applied to state lawmakers…." American Trucking, 14 F.4th at 84. This analysis applies here and mandamus likely will be granted on the important issue.

a. The information sought in the subpoenas is not only protected by legislative privilege, but also irrelevant.

The Plaintiffs' subpoenas request irrelevant information. They seek to engage in a fishing expedition in hopes of finding "illicit motives" of one or more legislators. (App184). Even if this information existed, it is not relevant to the Plaintiffs' underlying Voting Rights Act claims. The Supreme Court explained individual legislator's motives are irrelevant a Section 2 claim under the VRA claim as follows:

> The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question."…The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Thonburg v. Gingles, 478 U.S. 30, 43-44 (1986) (emphasis added) (footnotes and internal quotations omitted).

This is consistent with the longstanding Supreme Court precedent establishing inquiries into an individual lawmaker's motives are not only barred by legislative

privilege (See Hubbard, 803 F.3d at 1310), but also are an "impracticable," "futile," and a "hazardous matter." See Soon Hing v. Crowley, 113 U.S. 703, 710-711 (1885); Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2255 (2022). This analysis applies to all categories of discovery ordered by the district court.

b. The subpoenas infringe upon an important state interest.

There can be no more important state interest than one established in a State Constitution. The North Dakota Constitution contains its own Speech or Debate Clause. N.D. Const. Art. IV, § 15. Allowing members of the Legislative Assembly and their staff to focus on their official duties during an 80-day biennial legislative session certainly serves an important state interest. They have a critically important public task at hand – legislating – which should not and cannot be imperiled by compliance with discovery requests in a private civil action. If mandamus is not granted, any dissatisfied private party could subpoena state lawmakers to divert attention from official duties and hamper the legislative process via the federal courts. This is exactly why legislative privilege serves an important interest and bars discovery requests from non-party state lawmakers in private civil actions.

For the reasons stated above, the Respondents have shown there is a "fair prospect that a majority of the Court will vote to grant mandamus." Hollingsworth, 558 U.S. 190. There is reason to believe this Court will follow its sister circuits that considered "a private party's request for such discovery in a civil case" and find it

"barred by the common-law legislative privilege." American Trucking, 14 F.4th at 88. Respondents satisfy the first prong necessary to obtain a stay pending the disposition of their petition for a writ of mandamus.

3. There is a likelihood that irreparable harm will result from the denial of a stay.

Respondents will suffer irreparable harm if their motion for a stay is denied. "Irreparable harm occurs when a party has no adequate remedy at law…." Gen. Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 319 (8th Cir. 2009). The harm to Respondents is two-fold. First, responding to the subpoenas will require a substantial investment of time and detract the North Dakota Legislative Assembly from its official duties in the midst of an 80-day biennial legislative session. Second, Respondents' privilege will be lost and future frank discussions about pending legislation will be chilled for fear of disclosure. Respondents have no other remedy for the loss of their legislative privilege. The discovery cannot be undone.

a. Responding to the subpoenas in this private civil action will substantially divert from the performance of Respondents' important official duties.

The district court stated multiple times that the non-party Respondents can simply engage outside counsel to alleviate the burden of responding to the subject subpoenas. (See App186; Exhibit # 1 at p. 3.) This reasoning is contrary to the law. See Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 927 (8th Cir. 1999) ("concern for the unwanted burden thrust upon non-

parties is a factor entitled to special weight in evaluating the balance of competing needs."); see also Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 799 (9th Cir. 1994) ("[t]he Federal Rules also afford nonparties special protection against the time and expense of complying with subpoenas.") If the district court's reasoning is accepted, no represented entity ever could sustain irreparable harm because they simply can engage the services of outside counsel to respond to a discovery request regardless of its scope. This is unreasonable and especially concerning in this case. Respondents provided substantial evidence explaining the labor required to comply with the Plaintiffs' subpoenas.

After initial receipt of the subpoenas, various "key words" were identified to "provide a general estimate of the communications sought by the Plaintiffs' subpoena." (App215-216). A cursory "key word" search was performed on each subpoenaed Respondent's Outlook account. (App215). The initial cursory "key word" search identified 64,849 potentially responsive emails. (App129). The 64,849 potentially responsive emails 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." (App216). The combined time to conduct the cursory "key word" search consumed approximately sixty-four hours of the North Dakota Legislative Council's Legal Division's attorneys' time. (App216). Emily Thompson, who is

Appellate Case: 23-1600 Page: 17 Date Filed: 04/13/2023 Entry ID: 5265138

the Legal Division Director for the North Dakota Legislative Council, explained the burden imposed for full compliance with the subpoenas as follows:

> If Legislative Council's Legal Division is mandated 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 to the Plaintiffs' request, I estimate this more extensive review, along with a review of any other documents that may be responsive to the subpoena, would require approximately ten 8-hour days for eight attorneys. **It is my estimate that compliance with the Plaintiffs' subpoenas would require approximately 640 hours of Legislative Council's time**....

(App216-217) (emphasis added).

The Legislative Council's Legal Division drafts bills and resolutions introduced by the Legislative Assembly's 141 legislators during session, testifies at legislative bill hearings, and provides research and legal advice to legislators. (App217). The Legal Division's attorneys act as aides to members of the Legislative Assembly. (Id). Thompson explained in "addition to the obvious burden placed on the legislators, compliance with the Plaintiffs' subpoena also would be a substantial burden on Legislative Council which would severely limit the Legal Division's ability to timely complete its duty to serve the Legislative Branch during the legislative session." (Id). The burden of responding to the subpoenas will impact the function of the North Dakota Legislative Assembly and is why legislative privilege "extends to legislative aides and assistants." Lee, 908 F.3d at 1187 n.12.

Appellate Case: 23-1600 Page: 18 Date Filed: 04/13/2023 Entry ID: 5265138

Thompson's estimate did not account for the production of a detailed privilege log as ordered by the district court. That is because a privilege log is not required to assert a claim of legislative privilege. See Hubbard, 803 F.3d at 1309 (holding that given the purpose of legislative privilege, state lawmakers are not required to designate and describe the "precise and certain reasons for preserving" the privilege.) Preparation of a privilege log will require review of approximately 65,000 emails to determine which actually are responsive to the subpoena and then provide detailed reasons for withholding the documentation. Per the district court's order, this monumental task is to be completed within 14 days in the later portion of North Dakota's eighty-day biennial regular legislative session.

Respondents have no remedy for lost time. The required hours necessary to comply with subpoenas that seek irrelevant and unnecessary evidence of an "illicit motive" by one or more legislators in a private civil action **cannot** be allocated to the important public duty of legislating. Respondents have no adequate remedy and a stay should be granted.

c. The Legislative Assembly will be irreparably harmed because its speech will be chilled if it is required to respond to the subpoenas.

If Respondents are required to comply with the subpoenas in light of their properly claimed privilege, it will set a dangerous precedent. Not only will it chill candid legislative member communication, but it will impermissibly enable federal

Appellate Case: 23-1600 Page: 19 Date Filed: 04/13/2023 Entry ID: 5265138

courts to imperil legislative independence. See American Trucking, 14 F.4th at 85 ("We have little doubt that it will become increasingly common to subpoena state lawmakers in connection with such claims if we do not review the district court's order at this juncture.") In fact, the Supreme Court "has recognized, ever since Fletcher v. Peck, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 n. 18 (1977). In light of Arlington Heights, legislative privilege applies to bar discovery in a Voting Rights Act case pursuant to the following well-reasoned analysis:

> *Arlington Heights* accurately sets out the law on this subject. The considerations that support the result include the burden that being compelled to testify would impose on state legislators, the chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due a coordinate branch of government. Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes. Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege.

Florida v. U.S., 886 F.Supp.2d 1301, 1303 (N.D. Fla. 2012) (emphasis added).

There are "important comity considerations that undergird the assertion of a legislative privilege by state lawmakers." American Trucking, 14 F.4th at 88. Once the judiciary takes legislative privilege away, it cannot be returned. State lawmakers

Appellate Case: 23-1600 Page: 20 Date Filed: 04/13/2023 Entry ID: 5265138

forever will be cognizant of the prospect that any comments or documents produced during the legislative process may be subject to the power of judicially ordered disclosure. Therefore, Respondents have clearly established irreparable harm as required to justify a stay pending the disposition of a petition for a writ of mandamus.

IV. CONCLUSION

For the aforementioned reasons, the Respondents' emergency motion for a stay pending disposition of this writ of mandamus must be granted to preserve the status quo while the Court considers whether: 1) It will follow the precedent of our sister circuits and find legislative privilege bars the state lawmakers from responding to the subpoenas in this private civil action; or 2) It will create a circuit split and follow the district court's decision. The Respondents' motion should be granted.

Dated this 13th day of April, 2023.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg
Scott K. Porsborg (ND Bar ID #04904)
sporsborg@smithporsborg.com
Brian D. Schmidt (ND Bar ID #07498)
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) as it uses the proportionally spaced typeface of Times New Roman in 14-point font.

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) as it does not exceed 5,200 words and Fed. R. App. P. 27(d)(2)(B) as it does not exceed 20 pages.

The electronic version of the foregoing Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28(A)(d) was scanned for viruses and that the scan showed the electronic version of the foregoing is virus free

Dated this 13th day of April, 2023.

By *_/s/ Scott K. Porsborg_*
SCOTT K. PORSBORG

Appellate Case: 23-1600 Page: 22 Date Filed: 04/13/2023 Entry ID: 5265138

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2023, I electronically submitted the foregoing **EMERGENCY MOTION FOR STAY OF DISTRICT COURT'SAPRIL 11, 2023 ORDER DENYING PETITIONERS' MOTION TO STAY AND GRANTING RESPONDENTS' MOTION TO SET DEADLINES** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

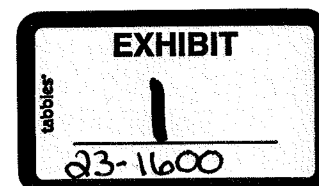
By /s/ Scott K. Porsborg
SCOTT K. PORSBORG

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

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Alvin Jaeger, in his Official Capacity as Secretary of State of North Dakota, et al., Defendants.	**ORDER** Case No. 3:22-cv-22

Before the Court are two competing motions. The first is a motion to set deadlines for compliance with third party subpoenas by the Turtle Mountain plaintiffs. Doc. No. 75. The second is a motion to stay pending appeal (or review) by the North Dakota Legislative Assembly, Senators Ray Holmberg, Richard Wardner, and Nicole Poolman, Representatives Michael Nathe, William R. Devlin, and Terry Jones, and former Senior Counsel to the North Dakota Legislative Council Claire Ness (collectively, the "Assembly"). Doc. No. 82. For the reasons below, the motion to set deadlines is granted, and the motion to stay discovery orders pending review is denied.

This current dispute is the latest in a series of discovery disputes in this redistricting and Voting Rights Act ("VRA") case. In short, the Turtle Mountain plaintiffs subpoenaed Representative Devlin for a deposition and served third-party document subpoenas on the Assembly. The Assembly moved to quash the deposition subpoena as to Representative Devlin, Judge Senechal denied that motion (Doc. No. 48), and this Court affirmed her decision (Doc. No. 71). The Turtle Mountain plaintiffs moved to enforce the third-party document subpoenas, Judge Senechal granted that motion (Doc. No. 63), and this Court affirmed her decision (Doc. No. 72).



After those rulings, the Turtle Mountain plaintiffs filed their motion to set deadlines, requesting the Court set prompt deadlines for the Assembly's compliance with its subpoenas given the June 12, 2023, trial date. In response to that motion, the Assembly filed an interlocutory appeal and a petition for a writ of mandamus with the Eighth Circuit Court of Appeals. The interlocutory appeal was dismissed for lack of jurisdiction (Doc. No. 87), but the petition for a writ of mandamus remains active. The Assembly asserts that the discovery orders should be stayed pending review by the Eighth Circuit.

Two other facts are also critical for the purposes of this order. The first is the trial date. This case is set for trial on June 12, 2023. That trial date was specifically requested by the Secretary to assure it had adequate time to address any potential VRA violation. Second, the Secretary's motion for summary judgment was recently denied (Doc. No. 89), so the case is proceeding to trial on June 12.

Turning to the motion to stay, as an initial matter, the interlocutory appeal by the Assembly was dismissed by the Eighth Circuit for lack of jurisdiction. Doc. No. 87. Because there is no active appeal, to the extent the Assembly sought a stay of the discovery orders pending appeal, the motion is denied as moot. Nonetheless, the Assembly's motion can also be construed as a motion to stay discovery orders pending review of its petition for a writ of mandamus. When assessing a stay pending disposition of a writ of mandamus, federal courts consider the likelihood of success on the merits of the petition and the likelihood of irreparable harm resulting from the denial of a stay. See Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

Both factors weigh against a stay. The Assembly has not demonstrated a likelihood of success on the merits of the petition, particularly given that this is a redistricting and VRA case

and that the orders at issue are discovery orders (where no privileged documents or information were ordered to be disclosed). Indeed, as this Court previously stated:

> It is worth noting and keeping in mind that Judge Senechal's order required three actions: (1) disclosure of communications to third parties (because privilege cannot apply); (2) production of documents from Representative Jones (who waived state legislative privilege); and (3) production of a privilege log for any documents withheld based on privilege. None of those directives are extraordinary or unusual, nor do they require disclosure of any privileged documents.

Doc. No. 72. While the Assembly certainly disagrees, that disagreement does not demonstrate a likelihood of success on the merits of the petition for a writ of mandamus.

As to irreparable harm, the Assembly strongly asserts that the harm of complying with the discovery orders is significant, particularly given that the Assembly is currently in session. But the Court disagrees. These discovery issues have been ongoing for months. Beyond that, the Assembly has retained counsel to assist with the document requests and the deposition of Representative Devlin. Most importantly though, and once again, the discovery orders do not order the Assembly to disclose any privileged documents. And as for the deposition of Representative Devlin, if the Assembly believes in good faith that any question or answer during his deposition invokes state legislative privilege, the Assembly may still assert that objection at the deposition. All told, the Assembly has not demonstrated irreparable harm resulting from a denial of a stay pending review of the petition for a writ of mandamus.

To reiterate, trial will begin on June 12, 2023. That trial date was specifically requested by the Secretary and the State of North Dakota. It is essential that this set of discovery issues be resolved before trial. On these facts, a stay pending review of the petition for a writ of mandamus is not warranted, and the Assembly's motion (Doc. No. 82) is **DENIED**. And in turn, the Turtle Mountain plaintiffs' motion to set deadlines (Doc. No. 75) is **GRANTED**.

Within ten (10) days of this order, the Assembly shall produce their communications with third parties and all documents withheld as to Representative Jones. As for all other documents, the Assembly must immediately and actively begin its work on producing a privilege log and that privilege log must be produced within fourteen (14) days of this order. The deposition of Representative Devlin must be scheduled on or before April 28, 2023.

IT IS SO ORDERED.

Dated this 11th day of April, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court