No. 23-1600

In the
United States Court of Appeals
For the Eighth Circuit

IN RE NORTH DAKOTA LEGISLATIVE ASSEMBLY et al.,

Petitioners.

On Petition for a Writ of Mandamus to the
United States District Court for the District of North Dakota

RESPONDENTS' PETITION FOR REHEARING EN BANC

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Rule 35 Statement

This petition for rehearing en banc presents a question of exceptional importance about the scope of state legislative privilege: whether the state legislative privilege in civil cases is qualified or absolute. The panel's holding that the privilege is an "absolute bar" that applies whenever legislators are acting "in the sphere of legitimate legislative activity" (Op. 3), conflicts with the authoritative decisions of every other circuit that has addressed the issue.

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Statement of the Case

This is a mandamus action seeking relief from an order requiring one state legislator, five former state legislators, and one former legislative aide to comply with subpoenas for documents and a deposition. A three-judge panel granted in part their petition for a writ of mandamus directing the district court to quash all but one of those subpoenas, and the plaintiffs in the underlying action now seek rehearing of the matter by the full Court.

This matter arises from a lawsuit challenging North Dakota's recently enacted state legislative redistricting plan. Two Tribal Nations and a group of individual Native Americans sued the North Dakota Secretary of State alleging that the new map violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The plaintiffs served seven document subpoenas on the legislators and the aide seeking documents related to the redistricting process. They served a deposition subpoena on one former state legislator who had represented one of the districts at issue in the suit. The Secretary of State had identified each person subpoenaed as having

discoverable information that he might use to support his case. (Supp. App. 96, 101, 102.)

After the legislators objected, the plaintiffs moved to enforce the subpoenas. In their motion, the plaintiffs sought to obtain two categories of documents: (1) responsive documents and communications shared with any individual who was neither a legislator nor a legislative council staff member; and (2) all responsive documents in the possession of one representative who had waived his privilege by testifying voluntarily in court about his involvement in the redistricting process. The plaintiffs also sought a privilege log identifying responsive documents withheld on the basis of any privilege.

The magistrate judge granted the plaintiffs' motion, ordering the legislators to produce communications between them and third parties because "the state legislative privilege does not protect information a legislator discloses to a third party." (App. 177.) The magistrate judge also found that one legislator had waived his own legislative privilege—but not the privileges of other legislators—by testifying voluntarily. The magistrate judge therefore ordered him

to produce any responsive documents withheld on the basis of his own legislative privilege and to produce a privilege log for any documents withheld on the basis of any non-waived privilege. Finally, the magistrate judge ordered the other legislators to produce a privilege log for any remaining responsive documents withheld on the basis of any asserted privilege. The legislators appealed to the district court, which affirmed.

Around the same time, the legislator whom plaintiffs sought to depose moved to quash his subpoena. The magistrate judge applied a five-factor test and concluded that, under the circumstances, the plaintiffs' need for the legislator's deposition testimony outweighed the legislator's interest in nondisclosure. The legislator appealed, and the district court affirmed.

The legislators then petitioned this Court for mandamus relief from both discovery orders. In a divided decision, the panel granted the petition in part and directed the district court to quash the document subpoenas except as to the legislator who had waived his privilege. The panel also directed the district court to quash the deposition subpoena.

The panel majority held that the state legislative privilege is an "absolute bar" that applies whenever legislators are "acting in the sphere of legitimate legislative activity." (Op. 3 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975), and *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).) Because the subpoenas sought documents and testimony that occurred within that sphere, they were "therefore privileged from inquiry." (Op. 4.) The magistrate judge's conclusion to the contrary, the majority explained, was based on an incorrect view of the state legislative privilege as a qualified one that depends on the circumstances of the case. (*Id.*)

Concurring and dissenting in part, Judge Kelly viewed the privilege as qualified and said that the majority's ruling to the contrary "sweeps too broadly." (Op. 8.) Judge Kelly noted that the state legislative privilege can be waived and that a privilege log "is an appropriate mechanism for resolving any privilege disputes that may arise." (Op. 9.) Judge Kelly also noted that the courts below could assess any assertion of legislative privilege if a legislator declined to answer specific questions during a deposition. Judge

Kelly thus concluded that the district court didn't abuse its discretion when it granted the plaintiffs' motion to enforce the document subpoenas and denied the motion to quash the deposition subpoena.

Argument

The Court should rehear this case en banc because the panel majority's holding on the scope of the state legislative privilege in civil cases "sweeps too broadly" and conflicts with every other circuit that has addressed the issue.

As the majority recognized, the Supreme Court has spoken authoritatively on the scope of the state legislative privilege *in criminal cases*. In *United States v. Gillock*, 445 U.S. 360, 372-73 (1980), the Court held that state legislators don't enjoy the same privilege as federal legislators in criminal cases. While federal legislators enjoy an absolute privilege rooted in the Constitution's Speech or Debate Clause, state legislators enjoy only a qualified privilege, based on principles of comity, that yields "where important federal interests are at stake." *Id.* at 373.

But the Supreme Court hasn't yet addressed the scope of the state legislative privilege *in civil cases*. Filling in the gap, other circuits have held that the privilege in civil cases is also a qualified privilege that is not only waivable but can also be overcome in some cases to vindicate important federal interests. *See LULAC Tex. v. Hughes*, 68 F.4th 228, 236 (5th Cir. 2023); *Jackson Mun. Airport Auth. v. Harkins,* 67 F.4th 678, 687 (5th Cir. 2023); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018); *Jefferson Cmty. Health Care Ctrs. Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017); *In re Hubbard,* 803 F.3d 1298, 1311 (11th Cir. 2015).

The panel's ruling that the privilege is "absolute" is thus out of step with other circuits, and its rationale conflicts with *Gillock*.

I. The Court should rehear this case because the panel's ruling on the scope of the state legislative privilege creates a circuit split on an issue of exceptional importance.

Legislative privilege is an evidentiary privilege governed by federal common law and applied through Rule 501 of the Federal Rules of Evidence.

Federal legislators enjoy an absolute privilege rooted in the Speech or Debate Clause, which provides that "for any Speech or Debate in either House" of Congress, Senators and Representatives "shall not be questioned in any other place." U.S. Const. art. I § 6, cl. 1. Although the Clause's plain text refers only to oral statements made on the House or Senate floor, the Supreme Court has interpreted the provision "broadly to effectuate its purposes," which are (1) to "ensur[e] the independence of the legislature" and (2) to "reinforce[e] the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178-180 (1966). The privilege applies when federal legislators or their aides are acting "within the 'sphere of legitimate legislative activity.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). And

it applies in both civil and criminal cases. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995).

But the Speech or Debate Clause "by its terms is confined to federal legislators." *Gillock*, 445 U.S. at 374. As a result, the Supreme Court in *Gillock* specifically declined to recognize an absolute evidentiary privilege for state legislators, holding instead that any such privilege must yield "where important federal interests are at stake." *Id.* at 373.

In reaching that conclusion, moreover, the Court rejected an argument that the historical and policy considerations that inspired the Speech or Debate Clause should lead the Court to recognize a comparable privilege for state legislators. *See id.* at 368-74. The Court explained that the separation of powers doctrine underlying the Speech or Debate Clause doesn't support a state legislative privilege because state legislatures are not a "coequal branch" of the federal government. *Id.* at 370. The Court also reasoned that the principle of comity between the federal and state governments doesn't require the extension of a "speech or debate type privilege" to state legislators because "federal interference in

the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *Id.* at 370; *see also id.* at 373. The Court recognized that denying an evidentiary privilege to state legislators "may have some minimal impact on the exercise of [their] legislative function," but it concluded that the legitimate interest of the federal government in enforcing its criminal statutes outweighed that level of intrusion. *Gillock* thus establishes that legislative privilege offers more limited protection for state lawmakers than the absolute evidentiary privilege available to federal legislators through the Speech or Debate Clause.

While *Gillock* was a criminal case, other circuits have held that the state legislative privilege provides only a qualified protection from disclosure in civil cases as well. In *Harkins*, for example, the Fifth Circuit upheld an order that, among other things, required eight non-party state legislators to produce a privilege log for any documents withheld on the basis of legislative privilege. 67 F.4th at 687. The district court "noted that because

legislative privilege is qualified, the Legislators must produce a privilege log before any assertions can be assessed." *Id.* at 682. And the Fifth Circuit "agree[d] with the district court that a privilege log is necessary to determine which of the requested documents and communications are protected by legislative privilege." *Id.* at 687. Every other circuit court that has addressed the issue in a civil case has likewise recognized that the state legislative privilege is qualified by exceptions to which the privilege yields.

Here, by contrast, the panel majority described the state legislative privilege as an "absolute bar" and directed the district court to quash the legislative subpoenas in their entirety—thus vacating the magistrate judge's order requiring the legislators to produce a privilege log—except as to the one legislator who voluntarily waived his privilege by testifying in court. (Op. 3, 6; *see also id.* at 8-9 (Kelly, J., concurring in part and dissenting in part).) The panel majority found that a privilege log isn't necessary here, because *any* inquiry into legislative activity is "barred by the legislative privilege." (Op. 4.) Full stop.

That ruling conflicts with the Fifth Circuit's decision in *Harkins* and with the decisions of every other circuit that has considered the issue. No other circuit has held that the state legislative privilege is an absolute bar to civil discovery. (See the cases cited above at page 11.) That lopsided circuit split is reason enough to grant en banc review.

II. The Court should also rehear this case because the panel's rationale conflicts with the rationale of *Gillock*.

This Court should also grant review because the panel's rationale for an absolute privilege is inconsistent with *Gillock*.

The panel majority drew expressly on cases involving *legislative immunity*—a concept that is distinct from legislative privilege. The Supreme Court has held that the Speech or Debate Clause immunizes federal legislators from liability in "civil as well as criminal actions" arising from activities "within the 'legitimate legislative sphere.'" *Eastland*, 421 U.S. at 502-03. This immunity shields Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per

curiam). And the Supreme Court has held that state and local legislators enjoy "an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980) (citing *Tenney*, 341 U.S. at 367). When it applies, legislative immunity is "absolute." *Eastland*, 421 U.S. at 503.

While state and federal legislators enjoy a similar *legislative immunity*, the same is not true for *legislative privilege*. In *Gillock*, the Supreme Court expressly rejected the argument that state legislators, like federal legislators, should enjoy a comparable legislative privilege. In doing so, the Court rejected the "interference" rationale. 445 U.S. at 370. It described the impact of denying state legislators an absolute evidentiary privilege as "minimal." *Id.* at 373. And it placed significant countervailing weight on the federal interests involved in enforcing federal law. *Id.* at 371-73.

Here, the panel correctly observed that "the Supreme Court otherwise has generally equated the legislative immunity to which state legislators are entitled to that accorded Members of Congress

under the Constitution." (Op. 3 (citing *Consumers Union*, 446 U.S. at 733). But then the panel then asserted that "there is no reason to conclude that state legislators and their aides are entitled to lesser protection than their peers in Washington," because "[l]egislative privilege, like legislative immunity, reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation." (Op. 3 (cleaned up).) The panel therefore concluded that "[t]he bar to interference extends beyond immunity from liability to the compelled discovery of documents or testimony, because legislators 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" (Op. 3 (quoting *Dombrowski*, 387 U.S. at 85).)

Compared with *Gillock*, the panel placed much more weight on the interference rationale and much less weight on the value of enforcing federal law. But the panel failed to explain why the impact of having to respond to non-party subpoenas in civil cases is on a par with defending against suits seeking criminal or civil

liability for legislative activity or why that risk of interference should override important federal interests in civil cases but not in criminal cases. The majority's focus on the interference rationale is especially misplaced here because all but one of the subpoena recipients are no longer engaged in legislative activity.

This Court should therefore grant review to recalibrate that balance. Courts in other circuits have often ordered the production of documents over assertions of state legislative privilege when necessary to enforce important federal voting rights. *See, e.g.*, *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 456-58 (N.D. Fla. 2021); *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 2335805, at *4-5 (E.D. Mich. May 23, 2018); *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553, 555 (D. Md.), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339, 343 (E.D. Va. 2015); *Veasey v. Perry*, No. 2:13-cv-193, 2014 WL 1340077, at *2-3 (S.D. Tex. Apr. 3, 2014); *Favors v. Cuomo*, 285 F.R.D. 187, 218-19, 221 (E.D.N.Y. 2012). And just two days after the panel's decision in this case, the Supreme Court upheld the Voting Rights Act in a decision that

reinforces the importance of those rights. *See Allen v. Milligan*, 143 S. Ct. 1487 (2023). Particularly in light of that decision, it would be anomalous for the Eighth Circuit to strike the wrong balance between state and federal interests here.

Conclusion

This Court should grant en banc review to avoid a circuit split regarding the scope of the state legislative privilege in civil cases and to bring this Court's precedent in line with *Gillock*.

Dated: July 20, 2023

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 35(b)(2)(A) of the Federal Rules of Appellate Procedure because, excluding parts of the brief listed in Rule 32(f), it contains 2,649 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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Addendum: Panel Opinion

United States Court of Appeals
For the Eighth Circuit

No. 23-1600

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

Petitioners,

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: April 17, 2023
Filed: June 6, 2023

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

We consider here a petition for writ of mandamus filed by several current or former members of the North Dakota Legislative Assembly and a legislative aide. The petitioners seek relief from orders of the district court directing them to comply with subpoenas for documents or testimony in a civil case brought against the State of North Dakota. *See Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-0022 (D.N.D.). The underlying lawsuit alleges violations of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a). The plaintiffs seek to develop evidence of alleged "illicit motive" by legislators who enacted a redistricting plan for state

legislative districts. The petitioners argue that the discovery orders infringe on legislative privilege and that the subpoenas should be quashed.*

Three conditions must be satisfied for this court to issue a writ of mandamus. First, the party seeking the writ must have no other adequate means to attain the relief desired. Second, the petitioner must show that his or her right to relief is clear and indisputable. Third, this court must be satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Mandamus is an appropriate remedy where a claim of privilege is erroneously rejected during discovery, because the party claiming privilege has no other adequate means to attain relief, and the enforcement of the discovery order would destroy the privilege. *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000); *In re Gen. Motors Corp.*, 153 F.3d 714, 715 (8th Cir. 1998).

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*The plaintiffs issued a subpoena for testimony to former state representative William R. Devlin. They issued seven document subpoenas to current or former legislators and one legislative aide, seeking documents and communications regarding the following:

(1) Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.

(2) Tribal input, including regarding written submissions or verbal testimony from tribal representatives, with respect to the 2021 Redistricting Process or Maps.

(3) Redistricting criteria for the 2021 Redistricting Process or Maps.

(4) District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.

(5) Trainings provided to legislators in preparation for or as part of the 2021 Redistricting Process.

(6) The identity of map drawers in the 2021 Redistricting Process.

(7) Racial polarization or demographic studies conducted by the Redistricting Committee or Legislature as part of or in preparation for the 2021 Redistricting Process.

The petitioners rely on a claim of legislative privilege. State legislators enjoy a privilege under the federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the Constitution. And a privilege that protects legislators from suit or discovery extends to their aides. *Gravel v. United States*, 408 U.S. 606, 616 (1972); *Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015). Although state legislators do not enjoy the same privilege as federal legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360, 372-73 (1980), the Supreme Court otherwise has generally equated the legislative immunity to which state legislators are entitled to that accorded Members of Congress under the Constitution. *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 733 (1980). In civil litigation, there is no reason to conclude that state legislators and their aides are "entitled to lesser protection than their peers in Washington." *Reeder*, 780 F.3d at 805; *see Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). Legislative privilege, like legislative immunity, reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

Legislative privilege applies where legislators or their aides are "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). When legislators are functioning in that sphere, the privilege is an "absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The bar to interference extends beyond immunity from liability to the compelled discovery of documents or testimony, because legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). This protection applies whether or not the legislators are

parties in a civil action: "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 Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988); *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. The degree of intrusion is not material; "any probing of legislative acts is sufficient to trigger the immunity." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419 (D.C. Cir. 1995) (emphasis omitted).

The conditions for legislative privilege are plainly satisfied here. The plaintiffs in the underlying lawsuit seek documents and testimony from legislators and an aide concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota. The district court did not dispute that the acts were undertaken within the sphere of legitimate legislative activity. The acts are therefore privileged from inquiry. Absent a waiver of the privilege, the subpoenas should have been quashed based on legislative privilege.

We conclude that the district court's conclusion to the contrary was based on a mistaken conception of the legislative privilege. In its order enforcing the document subpoenas, the district court reasoned that legislative privilege did not apply because the subpoena sought communications between legislators and third parties. The legislative privilege, however, is not limited to a bar on inquiry into communications among legislators or between legislators and their aides. The privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly. Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and their aides to gather evidence about this legislative activity is thus barred by the legislative privilege. *See Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980). The authority on which the district court relied for a narrower

understanding of the privilege has since been reversed on this basis. *See Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, No. 21-60312, 2023 WL 3333607, at *5 (5th Cir. May 10, 2023). The dissent endorses the district court's order requiring the production of "nonprivileged communications," but does not acknowledge that the order was premised on a mistaken conclusion that the legislative privilege affords no protection against discovery of communications between a legislator and third parties.

With respect to the order enforcing a subpoena for testimony from Representative Devlin, the district court did not simply consider whether the subpoena would inquire into acts within the legitimate legislative sphere, but instead applied a five-factor test akin to that used to determine the scope of the deliberative process privilege. The district court reasoned that redistricting legislation "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." R. Doc. 71, at 3 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015)). The cited authority, in turn, relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Supreme Court addressed a challenge to restricting legislation based on the Equal Protection Clause of the Fourteenth Amendment. In that context, the Court said that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id*. at 268. The Court further observed that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," and are "usually to be avoided." *Id*. at 268 n.18 (internal quotation omitted).

The potential for "extraordinary instances" in which testimony might be compelled from a legislator about legitimate legislative acts does not justify enforcing a subpoena for testimony in this case. Dicta from *Village of Arlington Heights* does not support the use of a five-factor balancing test in lieu of the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege. Even where "intent" is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996). And here, the underlying case does not even turn on legislative intent. A claim under § 2 of the Voting Rights Act does not depend on whether the disputed legislative districts were adopted "with the intent to discriminate against minority voters," for the statute repudiated an "intent test." *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). Any exception to legislative privilege that might be available in a case that is based on a legislature's alleged intent is thus inapplicable. *See Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88-89 (1st Cir. 2021). The dissent's proposal to order a deposition during which a legislator could "invoke legislative privilege" does not sufficiently appreciate that compulsory process constitutes a "substantial intrusion" into the workings of a legislature that must "usually be avoided." *Vill. of Arlington Heights*, 429 U.S. at 268 n.18; *see Lee*, 908 F.3d at 1188.

For these reasons, we grant in part the petition for writ of mandamus, and direct the district court to quash the subpoenas for petitioner Devlin to testify, and for petitioners Holmberg, Wardner, Poolman, Nathe, Devlin, and Ness to produce documents and other information. We deny the petition with respect to the subpoena for petitioner Jones to produce documents. The district court enforced that subpoena on the alternative ground that Jones waived his legislative privilege by testifying at a preliminary injunction hearing in another case concerning redistricting legislation. R. Doc. 72 at 5 & n.1; R. Doc. 63, at 5. The petitioners do not discuss or dispute the district court's conclusion of waiver, so we have no occasion to address it. But

Jones—having declined even to challenge an independent ground for the district court's order regarding his subpoena—has not demonstrated a clear and indisputable right to relief.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from the grant of mandamus relief in this case. The legislative petitioners have not shown that this "drastic and extraordinary" remedy is appropriate. Cheney, 542 U.S. at 380 (citation omitted). In my view, this case involves neither "a judicial usurpation of power" nor "a clear abuse of discretion" by the district court. Id. (cleaned up).

The subpoenas at issue here sought documents and communications from the legislative petitioners regarding allegations that the 2021 redistricting plan enacted by the North Dakota Legislature violated the Voting Rights Act. When the legislative petitioners objected, the plaintiffs, among whom include the Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation (the Tribes), moved to enforce the subpoenas. From there, the district court identified three categories of relevant evidence based on a search the legislative petitioners conducted of their official email accounts and personal phones: (1) communications between the legislative petitioners and another legislator; (2) communications between the legislative petitioners and legislative council staff; and (3) communications between the legislative petitioners and an individual who was neither a legislator nor a legislative council staff member. The Tribes only sought disclosure of materials that fell in the third category—communications that the Tribes argue are nonprivileged because they have been shared with "third parties." In short, the Tribes sought documents and communications for which any privilege had been waived.

In its petition for mandamus, the legislative petitioners contend broadly that, where the United States is not a party, any and all "request[s] for discovery . . . in a civil case [are] barred by common-law legislative privilege." The legislative petitioners acknowledge that the privilege is "qualified," but their argument recognizes no exception for discovery in a case like this one. At a minimum, however, the state legislative privilege can be waived. See Jackson Mun. Airport Auth., 2023 WL 3333607, at *5 (noting that the "legislative privilege can be waived when certain conditions apply"). And the legislative petitioners fail to address the issue of waiver. As a result, this court has no basis to determine whether the legislative petitioners believe they have, or have not, waived privilege as to any of the documents and communications shared with third parties. An order quashing the subpoenas here is likely to prohibit the discovery of at least some nonprivileged materials relevant to the pending litigation. That result sweeps too broadly.

Moreover, the legislative petitioners fail to explain how a privilege log would not adequately prevent disclosure of documents and communications that are protected by the state legislative privilege. They bear the burden of establishing the privilege. See Fed. R. Civ. P. 45(e)(2)(A) ("A person withholding subpoenaed information under a claim that it is privileged" must "expressly make the claim" and "describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."). And here, the district court instructed the legislative petitioners to produce a privilege log, "sufficient to distinguish privileged from non-privileged" materials, that would describe "the general nature of the document, the identity of the author, the identities of all recipients, and the date on which the document was written" for any communications they sought to withhold based on a claim of legislative privilege. The legislative petitioners' assertion that a privilege log is "not required with respect to a claim of legislative privilege" ignores that the district court ordered the disclosure of only nonprivileged materials. See Jackson Mun. Airport Auth., 2023 WL 3333607, at *5 (agreeing with the district court that a privilege log

was "necessary to determine which of the requested documents and communications are protected by legislative privilege"). A privilege log is an appropriate mechanism for resolving any privilege disputes that may arise, and the district court is best placed to determine whether and for what documents the state legislative privilege could apply.

Finally, the legislative petitioners argue that they would face an "undue burden" if compelled to produce the requested communications, which they assert number over 64,000 and would require 640 hours to review. See Fed. R. Civ. P. 45(d)(3)(A)(iv) (requiring that a court "quash or modify a subpoena" that "subjects a person to undue burden"). But the district court identified just 2,655 responsive materials in their possession, and of these, the legislative petitioners would need to produce about 558 documents and communications. As such, the district court concluded that the record did not support the petitioners' contention that the production of these materials would require the amount of work they claimed. These findings by the court are not clearly erroneous, and I see no reason to disturb them. See Silverman v. Silverman, 312 F.3d 914, 916 (8th Cir. 2002) (stating that where the district court's underlying finding is "solely a question of fact," we review it for clear error). All told, the district court recognized that some of the requested communications may be protected by the state legislative privilege. And in granting the motion to enforce the subpoenas, it directed the petitioners to produce only those materials that are nonprivileged. The district court did not abuse its discretion.

Nor did the district court abuse its discretion in denying the motion to quash the subpoena for testimony directed at Representative Devlin. The legislative petitioners broadly assert that Devlin's deposition is "barred by legislative privilege." But Representative Devlin remains free to invoke legislative privilege and decline to answer questions that intrude on the legislative process. And the petitioners do not contend that such limitations placed on Devlin's deposition, if imposed, would be insufficient to protect his assertion of privilege.

The district court thus acted well within its authority when it granted the motion to enforce the subpoenas to produce nonprivileged communications directed to the legislative petitioners, including Representative Jones, and denied the motion to quash the deposition subpoena directed to Representative Devlin. Mandamus relief, under these circumstances, is not warranted.
