

No. 23A-_____

IN THE
Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *ET AL.*,

Applicants,

v.

NORTH DAKOTA LEGISLATIVE ASSEMBLY, *ET AL.*,

Respondents.

**PETITIONERS' APPLICATION TO EXTEND TIME
TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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**APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF
CERTIORARI**

TO: The Honorable Brett M. Kavanaugh, Circuit Justice for the Eighth Circuit

Pursuant to Supreme Court Rule 13.5, Petitioners Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Collette Brown, Wesley Davis, and Zachary King respectfully request that the time to file their petition for a writ of certiorari in this matter be extended for 60 days up to and including Monday February 5, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The Court of Appeals issued its opinion (App. A) on June 6, 2023 and denied rehearing en banc on September 6, 2023 over the dissent of Judge Kelly (App B.). The Eighth Circuit granted a petition for a writ of mandamus filed by Respondents and directed the district court to quash subpoenas to various former and current legislators and legislative staff in an underlying action challenging certain North Dakota legislative districts as violating Section 2 of the Voting Rights Act.

JURISDICTION

This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1). Under Supreme Court Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari is currently due to be filed on or before December 5, 2023. Petitioners are filing this Application more than ten days before that date. S. Ct. R. 13.5. Respondent Michael Howe, in his official capacity as Secretary of State, is unopposed to the requested extension. At the time of this filing, Respondents North Dakota Legislative Assembly,

et al., had not responded to the request for a position. Petitioners will notify the Court of their position once it is communicated to them.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. The decision below created a circuit split regarding the scope of legislative privilege in civil cases. The court held that state legislative privilege is an “absolute bar” that applies whenever legislators are “acting in the sphere of legitimate legislative activity.” App. A at 3 (internal quotation marks omitted). As a result, current and former legislators could neither be deposed nor required to produce documents in response to civil discovery requests. The court likewise held that the subpoena recipients could not be required to submit a privilege log. App. A at 4. The court denied the petition for a writ of mandamus with respect to a particular legislator who had waived the privilege through prior testimony in the case. App. A at 6-7. Judge Kelly concurred in part and dissented in part. Judge Kelly concluded that the legislative privilege is qualified, can be overcome by important federal interests (including enforcing the Voting Rights Act), can be waived, and that a privilege log “is an appropriate mechanism for resolving privilege disputes that may arise.” App. A at 9.

The panel majority’s decision conflicts with other circuits, which have held that legislative privilege can 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 decision also is inconsistent with this Court's decision in *United States v. Gillock*, 445 U.S. 360, 372-73 (1980). In *Gillock*, this Court held that state legislators do not enjoy the same privilege as federal legislators in criminal cases. The Court reasoned that members of Congress enjoy a privilege rooted in the Constitution's Speech or Debate Clause while state legislators enjoy only a qualified privilege. *Id.* at 373. That qualified privilege is based on principles of comity and yields "where important federal interests are at stake." *Id.* Here, the panel majority concluded 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." App. A at 3. The court found that to be so even though all but one of the subpoena recipients were no longer legislators or legislative employees.

The Eighth Circuit issued its opinion granting the petition for writ of mandamus in this case on the eve of trial. Petitioners proceeded to trial and the district court permitted them to make an offer of proof regarding the expected content of the evidence they would offer had the discovery been allowed, thus preserving Plaintiffs' appellate rights with respect to the Eighth Circuit's decision. *See Order, Turtle Mountain Band of Chippewa Indians, et al. v. Howe*, No. 3:22-cv-00022-PDW-

ARS (D.N.D. June 15, 2023), ECF No. 113; Trial Tr. Vol. 3 at 8-9. But the district court did not consider that offer of proof in reaching its decision in this case, *see id.*, and the district court ultimately ruled in Petitioners' favor on November 17, 2023. The District Court concluded that the state legislative district configuration in northeastern North Dakota violated Section 2 of the Voting Rights Act by packing and cracking Native American voters in the region. Memorandum Opinion, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:00022-PDW-ARS (Nov. 17, 2021), ECF No. 125.

Last week, a panel of the Ninth Circuit unanimously signaled its intent to affirm a district court's order enforcing subpoenas to certain Arizona legislators in a case challenging voting restrictions in that state, lifting an emergency stay previously imposed by a separate motions panel mere hours after hearing argument in the case after finding that "the circumstances no longer justify a stay order." Order, *In re Ben Toma*, No 23-70179 (9th Cir. Nov. 16, 2023).¹ The Arizona Legislature has filed an emergency application for a stay in this Court, relying heavily on the Eighth Circuit's decision over which Petitioners seek review here. *See Application for Stay, Ben Toma, et al. v. United States District Court for the District of Arizona*, No. 23A452 (U.S. Nov. 20, 2023).

2. A 60-day extension is appropriate in this case for a number of reasons. First, the district court's judgment in Petitioners' favor may ultimately render the

¹ The panel stated that "a written disposition containing the panel's reasoning will be filed in short order." *Id.*

present dispute over the scope of legislative privilege moot and thus make vacatur of the Eighth Circuit’s decision below appropriate. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Whether the defendant in the underlying case—the Secretary of State of North Dakota—appeals from the district court’s judgment and, if so, how that appeal proceeds will bear on the necessity and timing of this Court’s review of the Eighth Circuit’s legislative privilege decision and the potential for *Munsingwear* vacatur of that decision. An extension of time will allow for those matters to come into greater clarity.

Second, Petitioners’ counsel have a number of litigation matters, including before this Court, that are proceeding simultaneously and would benefit from additional time to prepare the petition for a writ of certiorari in this matter. *See, e.g., Trevino v. Soto-Palmer*, No. 23-484; *Garcia v. Hobbs*, No. 23-467; *Petteway v. Galveston County, Texas*, No. 23A449; *Ben Toma v. United States District Court for the District of Arizona*, No. 23A452; *Garfield County et al. v. Biden et al.*, No. 23-4106, Order (10th Cir. filed September 14, 2023); *Winnebago Tribe of Neb. v. Thurston County*, No. 8:23-cv-0020 (D. Neb.); *Mi Familia Vota v. Fontes*, No. 2:22-cv-00509-SRB (D. Ariz.). Given these commitments, an extension of time will permit Petitioners to best present the issues in a petition for a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant a sixty-day extension, up to and including February 5, 2024, within which to petition for a writ of certiorari.

November 24, 2023

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Respectfully submitted,

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