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

CHARLES WALEN, *et al.*, *Plaintiffs*, v. DOUG BURGUM, in his official capacity as Governor of North Dakota, *et al.*, *Defendants*, and MANDAN, HIDATSA AND ARIKARA NATION, *et al.*, *Intervenor-Defendants.*	Civil No. 1:22-CV-00031

RESPONSE IN OPPOSITION TO NORTH DAKOTA LEGISLATIVE ASSEMBLY AND REPRESENTATIVE TERRY JONES' APPEAL OF THE MAGISTRATE'S DECEMBER 22, 2022, NON-DISPOSITIVE ORDER

The Magistrate Judge's order denying the motion to quash Representative Jones' subpoena for deposition should be affirmed. Representative Jones has failed to appeal the Magistrate Judge's conclusion that he waived legislative privilege by testifying at the preliminary injunction hearing, and he has thus waived any argument to the contrary. This alone resolves this appeal. But the Magistrate Judge was likewise correct in rejecting Representative Jones' claim of absolute privilege and in ordering his deposition as is common in federal redistricting litigation.

BACKGROUND

On May 5, 2022, this Court held a hearing on Plaintiffs' motion for a preliminary injunction. Plaintiffs' first witness was Representative Jones, who voluntarily appeared and testified on behalf of Plaintiffs. *See* ECF No. 58-1 at 7. On direct examination, Representative Jones testified that "[t]here was information coming to me from members on the Redistricting Committee that they were considering subdistricts in Districts 4 and District 9" and that eventually "the members on the committee were telling me that it was getting very serious." *Id.* at 9. He testified in Court that he had testified to the Redistricting Committee in opposition because "the information I was getting as I was studying was that what was happening was not appropriate, was unconstitutional." *Id.* at 10. When asked on direct whether "[i]n addition to attending meetings, did you discuss with members of the Redistricting Committee your concerns about the redistricting process and subdistricts in Districts 4 and 9," Representative Jones testified, "[y]es, I did." *Id.* at 10. Testifying about these private conversations, Representative Jones stated that "[s]omehow in my discussions with them and in the stuff that I was watching them discuss they missed the point that you had to meet all three of [the *Gingles* preconditions], and so I was desperately trying to explain to them that there's more than just one criteria that had to have been met." *Id.* at 11.

Plaintiffs' counsel also asked Representative Jones to testify about conversations Representative Jones had regarding Legislative Council's work. Representative Jones testified that he asked Redistricting Committee members "whether voting data had been compiled" to analyze the requirements of the Voting Rights Act, and affirmed that his questions to members were about "whether Legislative Council had performed those analyses for the Redistricting Committee" and he was told they had not. *Id.* at 34. Then, on recross examination, Representative Jones testified that he also asked Legislative Council attorney Clair Ness specifically about this. *Id.* at 36.

In their deposition testimony, Plaintiffs revealed that Representative Jones voluntarily spoke with them about the redistricting process, and specifically discussed the constitutionality of the subdistricts and their lawsuit. ECF No.71-1 at 25:12-27:23 (Henderson Deposition Tr.); ECF No. 71-2 at 19:2-14, 21:10-22:14 (Walen Deposition Tr.). During his testimony, Mr. Walen revealed that he speaks with Representative Jones "almost four or five times a week," and has discussed the subdistrict boundaries and his lawsuit. *Id.* at 30:17-20.

STANDARD OF REVIEW

The Court's review of a magistrate judge's finding on nondispositive matters, like the one at issue, is "extremely deferential." *Kraft v. Essentia Health*, No. 3:20-CV-121, 2022 WL 2619848, at *3 (D.N.D. July 8, 2022); *see also Jordan v. Comm'r, Mississippi Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020) (holding that a decision on a motion to quash subpoenas should be reviewed under the "clearly erroneous" or "contrary to law" standard). The party bringing the appeal bears the burden of proving the Magistrate Judge's decision was clearly erroneous or contrary to law. *Id.* Any objection to the Magistrate Judge's order not "specifically designate[d]" in the timely filed notice of appeal is waived and unreviewable on appeal. D.N.D. Civ. L.R. 72.1(D)(2); Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely

objected to."); *see also St. Jude Med. S.C., Inc. v. Tormey*, 779 F.3d 894, 901–02 (8th Cir. 2015) (holding that party could not challenge magistrate's nondispositive pretrial discovery order on appeal as he did not timely file objections before district court).

ARGUMENT

I. The Magistrate Judge's order should be affirmed because Representative Jones has not appealed the ruling that he waived legislative privilege by testifying at the preliminary injunction hearing.

This Court should deny Representative Jones' appeal because he failed to object to the Magistrate Judge's conclusion that he waived legislative privilege by testifying at the preliminary injunction hearing. *See* Fed. R. Civ. P. 72(a); D.N.D. Civ. L.R. 72.1(D)(2). The Magistrate Judge correctly held that Representative Jones waived legislative privilege by testifying in the preliminary injunction hearing about matters that might otherwise be privileged and properly determined that Representative Jones' waiver was an independent reason to deny his Motion to Quash. Order at 20, ECF No. 72 (ruling that "even if Representative Jones would have been protected by the state legislative privilege, the privilege was waived by his testimony at the preliminary injunction hearing."). "A legislator who agrees to testify of course may be deposed; by voluntarily testifying, the legislator waives any legislative privilege on the subjects that will be addressed in the testimony." *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). Waiver of legislative privilege "need not be 'explicit and unequivocal,' and may occur either in the course of litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (quoting *Almonte v. City of Long Beach*, No. CV 04-4192 (JS) (JO), 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005)). The reason for this rule is straightforward:

the legislative privilege may not be used as both shield and sword whereby a legislator "strategically waive[s] it to the prejudice of other parties." *Favors*, 285 F.R.D. at 212.

Representative Jones does not object to this finding, nor does he dispute that he waived legislative privilege. By failing to "specifically designate" the Magistrate Judge's finding of waiver of legislative privilege as a ground for appeal, Representative Jones has waived appeal on this issue. D.N.D. Civ. L.R. 72.1(D)(2) ("The appealing party must serve and file a written notice of appeal, which must specifically designate the order or part thereof from which the appeal is taken and the grounds for appeal."); *see also* Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to."). The Court can end its inquiry there.

II. The Magistrate Judge correctly rejected Representative Jones' invocation of an absolute privilege from discovery.

The Magistrate Judge correctly determined that the deposition of Representative Jones is proper because "the legislative privilege for state lawmakers is, at best, one which is qualified," and must give way in favor of discovery in this case. *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017); *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022) ("Both [the Fifth Circuit] and the Supreme Court have confirmed that the state legislative privilege is not absolute."); Order Denying Mot. to Quash at 15, ECF No. 72 (finding that "[n]early all cases to consider the issue, including those cited by the Assembly, recognize the state legislative privilege as qualified"). The privilege "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624. Because it is qualified, the legislative privilege "may be

overcome by an appropriate showing." Order Denying Mot. to Quash at 10, ECF No. 72 (citing *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006).

"Redistricting litigation 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." *Bethune-Hill v. Va. State Bd. of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). As such, federal courts routinely hold that the legislative privilege must give way to discovery in redistricting litigation. *See, e.g.*, *League of United Latin Am. Citizens*, 2022 WL 2713263, at *1; *Bethune-Hill*, 114 F. Supp. 3d at 337; *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022). Most courts have thus applied the same five-factor test adopted by the Magistrate Judge. *See, e.g.*, *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Rodriquez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7; *Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014).[1]

The sister circuit cases Representative Jones cites are not to the contrary. *See* Jones Appeal at 7 (citing *Am. 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)); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); Order Denying Mot. to Quash at 11-13, ECF No. 72 (distinguishing Respondents' cases from this case). Indeed, none of the cases Representative Jones cites take the radical position he advances that the legislative privilege amounts to an absolute bar to discovery against state legislators, except in federal criminal prosecutions. Instead,

[1] Representative Jones rests his appeal on *whether* the five-favor test applies—he does not appeal how the district court applied the test, and thus has waived any such objection.

these courts engage in a careful and fact specific analysis to determine whether there is a sufficient federal interest such that the legislative privilege should give way to discovery in the particular instance.

In *Alviti*, for example, the First Circuit recognized "a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest[.]" *Alviti*, 14 F.4th at 90. Similarly, the court in *Hubbard* "emphasized the limited nature of its holding." Order Denying Mot. to Quash at 12 n. 5, ECF No. 72 (citing *Hubbard*, 803 F.3d at 1312 n. 13 ("Our decision should not be read as deciding whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim than the one [plaintiffs] made here.")). Moreover, in the sister circuit case most on point, the Fifth Circuit recently denied a stay of an order requiring Texas legislators to be deposed in a redistricting case, holding that the legislators were unlikely to succeed on the merits of their invocation of legislative privilege to prevent depositions. *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1. After the Fifth Circuit so ruled, the Supreme Court likewise denied a stay, allowing the depositions to proceed. *See Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.). A host of Texas legislators have since been deposed.

The Magistrate Judge correctly concluded this was a case where the privilege must give way, because enforcement of Section 2 of the Voting Rights Act is an important federal interest, even where that interest advanced through litigation by private parties. *See, e.g.*, *Favors*, 285 F.R.D. at 219 (finding that the claims at issue in redistricting litigation "counsel in favor of allowing discovery"); *Singleton v. Merrill*, No. 2:21-cv-1530-AMM, 2022 WL 265001, at *79 (N.D. Ala. Jan. 24, 2022)); *League of Women Voters of Fla. v. Lee*, 340 F.R.D. 446, 457 (N.D. Fla. 2021) ("All litigation is serious. But . . . voting-rights litigation is especially serious."); *Page*

v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014) ("[T]he right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance.").

III. Representative Jones' Testimony Is Relevant and Necessary.

The Magistrate Judge properly determined that proof of legislative intent, including the motives of individual legislators, is relevant and important evidence in this case. Order Denying Mot. to Quash at 17, ECF No. 72 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339-40 (E.D. Va. 2015)). This is particularly so where, as here, freedom to exercise the fundamental right to vote free of racial discrimination is at issue. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 339. While courts have in some instances found the motivations of individual legislators to be irrelevant to the specific claim at issue, courts regularly permit Plaintiffs to put forth evidence in redistricting cases tending to show legislators' intent. *See, e.g.*, *id*; *League of United Latin Am. Citizens*, 2022 WL 2713263, at *1; *South Carolina State Conference of NAACP*, 584 F. Supp. 3d 152, 166 (D.S.C. 2022). Representative Jones has not cited a single case where a court determined that legislative intent was irrelevant in redistricting litigation. *See* Jones' Appeal at 3-5.

Moreover, Representative Jones represented the district containing the MHA Nation, and served on the Tribal-State Relations Committee, but was not the candidate of choice of Native voters in his district. His deposition may bear on electoral conditions, campaign materials, and the Legislature's responsiveness to the Native American community in North Dakota—all matters relevant to the totality of circumstances test that governs Intervenor-Defendants' Section 2 defense to Plaintiffs' *Shaw* claim. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir. 2006) (setting forth totality of circumstances Senate Factors). Thus, even if not dispositive as to the legislature's intent as a whole, the information sought is relevant the claims and defenses in this lawsuit.

Representative Jones' argument that his testimony is not relevant because this case is brought under the Equal Protection Clause of the U.S. Constitution, rather than the Voting Rights Act—and because Intervenor Defendants do not bear the burden of proof—similarly fails. *See* Jones' Mot. at 5. Intervenor-Defendants' main defense against Plaintiffs' racial gerrymandering claim is that Section 2 required the creation of District 4A and thus the district cannot, as a matter of law, be an unconstitutional racial gerrymander. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) (assuming that compliance with Section 2 is a compelling justification for the use of race in redistricting). Representative Jones's misconception is similar to the fundamental misconception of the legal standard Plaintiffs have advanced in this matter. Plaintiffs contend that the only question in this case is whether the legislature had sufficient evidence before it—at the time the redistricting plan was enacted—to believe the VRA required subdistrict 4A. In their view, the inquiry ends there—that is, if the legislature's evidence was insufficient at the time, then the Court must invalidate the map as a racial gerrymander *even if the Court concludes Section 2 in fact required the subdistrict.*

This is wrong. First, it does not prove that race (as opposed to respecting the boundaries of a sovereign nation or other race-neutral factors) predominated in the decision-making. Second, it misconceives the legal standard. Even if racial considerations *did* predominate, compliance with Section 2 is a compelling justification regardless of *when* that VRA obligation is established. The only thing that changes based upon when the VRA obligation is established is the burden of proof a State (or intervening defendants) must meet in proffering the VRA as a defense to a racial gerrymandering lawsuit. If the legislature does its due diligence and gathers sufficient evidence of the *Gingles* preconditions to justify the race-based line drawing at the time of enactment, then the State is given "breathing room" to have made a good faith mistake. *Cooper v. Harris*, 581 U.S.

285, 292-93 (2017). That is, if the Court later determines that the legislature had "good reasons" or a "strong basis in evidence" to determine a VRA obligation existed, then even if the legislature got it wrong, the district is nevertheless upheld because those "good reasons" provided a compelling justification to think the VRA required the district. *Id.* On the other hand, if the legislature did a shoddy job in gathering evidence of the *Gingles* preconditions—or even if it gathered no evidence at all—VRA compliance is still a compelling justification that overcomes strict scrutiny in a subsequent racial gerrymandering suit. But in that circumstance, the State (and intervening defendants) lose the benefit of the relaxed "good reasons" standard. Instead, they must *actually prove* the VRA required the district. *Cf. Bethune-Hill*, 580 U.S. at 194 (noting that legislative inquiry gives benefit of "good reasons" standard which "does not require the State to show that its action was 'actually . . . necessary' to avoid a statutory violation"). In this way, the rights of minority citizens under the Voting Rights Act are always enforced regardless of the legislature's diligence (over which they have no control). A contrary reading would require the Court to order a remedy for the racial gerrymandering claim that violates the Voting Rights Act, and would immediately open any map imposed to remedy the purported *Shaw* violation to successful challenge in a new Section 2 lawsuit.

I. The Scope of Representative Jones' Deposition Should Not Be Limited.

Representative Jones has broadly waived any claim of legislative privilege with respect to the 2021 redistricting process, Subdistrict 4A, or this lawsuit, and as such his testimony on relevant matters should not be limited. Representative Jones testified extensively at the preliminary injunction hearing about the redistricting process as well as his own motivations and the motivations of the legislature in adopting the plan. *See supra.* During his testimony, Representative Jones revealed the contents of conversations with members of the Redistricting Committee,

discussed the redistricting process, and offered his opinion on the motivations of mapmakers. *Id.* Intervenor-Defendants are entitled to probe that evidence.

The deposition similarly should not be limited to exclude conversations with North Dakota Legislative Council because Representative Jones has waived legislative and attorney client privilege with respect to these conversations. "Voluntary disclosure of attorney client communications expressly waives the privilege." *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998). "The waiver covers any information directly related to that which was actually disclosed." *Id.*; *see also PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 992 (8th Cir. 1999) (noting that such waiver "typically appl[ies] . . . to all communications on the same subject matter").

During this testimony at the preliminary injunction hearing, Representative Jones testified that he had had private conversations with Ms. Ness from Legislative Council and conversations with Redistricting Committee members about their interactions with Legislative Council, and that he learned that Legislative Council had conducted no analysis of voting patterns. By testifying as such, he has waived any legislative or attorney client privilege he may otherwise have had with Legislative Council.

Representative Jones cannot use privileges—whether legislative or attorney client—as both a shield and sword, selectively revealing information he deems beneficial while shielding from discovery information that may not be. As he has waived relevant privileges, he must testify as to these matters.

CONCLUSION

For the foregoing reasons, the Magistrate Judges Order was not clearly erroneous and should be affirmed. Representative Jones' appeal should be denied.

January 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

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