No. 23-847

In The Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,
Petitioners,

v.

NORTH DAKOTA STATE LEGISLATIVE ASSEMBLY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF OF *AMICUS CURIAE* THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Republican Governors Public Policy Committee, or RGPPC, is a public policy-focused nonprofit organization associated with the Republican Governors Association, which brings together Governors and Governors' staff to discuss best practices in an effort to support the common good through good governance.

RGPPC's mission is to promote efficient and responsible government practices, which in turn results in good public policy—including in the judicial sphere. RGPPC understands that, to pursue good public policy across the country, governors, their staffers, and the legislators with whom they work must be permitted the room to explore what works and what does not. The decision below cultivates that space and respects the legislative process, and, for that reason, it should not be disturbed.

Accordingly, RGPPC submits this brief in support of the Respondents.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.2, counsel of record for all parties were notified of *amicus curiae*'s intent to file an amicus brief in this case on February 26, 2024.

SUMMARY OF THE ARGUMENT

"[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion" into the rightful province of State legislating, and distracting discovery "is therefore usually to be avoided." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (quotation omitted).

Petitioners wish to flip the script by making intrusion the general rule and comity the exception. In pursuit of this endeavor, they manufacture a circuit split where none exists. But the rule remains (and is followed by every circuit court): When state legislative and executive officials act within the sphere of legitimate legislative activity, the legislative privilege is a complete bar to discovery, except in the most extraordinary of cases.

The various Governors and their staff must be able to function freely within that legitimate legislative activity sphere, where appropriate within their respective State constitutional structures. Petitioners' rule would create a chilling effect by placing the application of the privilege into the hands of federal judges, who would engage in a *post hoc* balancing test. Our constitutional structure, however, prioritizes comity and federalism, not intrusion into the sovereignty of the individual States. A balancing test would render the purposes of the rule—to avoid substantial intrusion into the rightful province of State legislating—null.

Finally, Petitioners seek vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), but the Eighth Circuit's decision is not an adverse decision on the merits of Petitioners' claims in the

district court, and they will not be prejudiced by the decision's staying on the books. Moreover, the decision below is obviously correct, making the equitable assertion of *Munsingwear* non-imperative here.

ARGUMENT

I. The Eighth Circuit's decision is correct in protecting all those who participate constitutionally in the legislative processes of their respective States.

State-level legislative immunity enjoys federal legal status, approximating the federal legislative immunity found in the Speech or Debate Clause of the Constitution, as the court below recognized. *In re N.D. Legis. Assembly*, 70 F.4th 460, 463 (8th Cir. 2023). It is, therefore, a federal privilege. Those involved in the legislative process, as well as their aides, are protected from suit or discovery in respect to litigation dealing with those legislative acts—when they are "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The Eighth Circuit is right: Within that sphere, the privilege provides an "absolute bar to interference." *In re N.D. Legis. Assembly*, 70 F.4th at 463 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975)).

Petitioners instead seek to establish a *post hoc* balancing test. Federal judges would balance the interests of the state officials, governors, and others, against the federal interest. The result would be impossible to predict; the test, therefore, is impossible for the Governors (and their partners in

the Legislatures) to operate under. It would work to chill their legislative speech within the state constitutional sphere. As a matter of judicial restraint and federalism, then, the court below—consonant with others—has the right test.

Governors and their top staffers may assert legislative privilege on their own behalf to protect acts taken pursuant to legislative functions in accordance with their respective state constitutions because, "[l]ike their federal counterparts, state and local officials undoubtedly share an interest in minimizing the 'distraction' of 'divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation.'" *Lee v. City of L.A.*, 908 F.3d 1175, 1187 (9th Cir. 2018) (quoting *Eastland*, 421 U.S. at 503).

It is well-established, at the very least, that individuals—including Governors—who engage with legislators in the course of the legislative process are protected by the privilege as third parties. See*, e.g.*, *La Union Del Pueblo Entero v. Abbott*, No. 23-50201, 2024 U.S. App. LEXIS 3789, at *14 (5th Cir. Feb. 16, 2024) ("[T]he legislative privilege covers material provided by or to third parties involved in the legislative process because all of these actions occur within the regular course of the legislative process") (citations and quotations omitted).

But more importantly, the privilege may be asserted by Governors and their staffers in their own right in relation to their actions in the "proposal, formulation, and passage of legislation." See *Ala. Educ. Ass'n v. Bentley (In re Hubbard)*, 803 F.3d 1298, 1308 (11th Cir. 2015); see also *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021) (applying privilege to former Governor where

Governor's statements regarding legislation were at issue, so the "Governor, though not a member of the state legislature, possessed whatever legislative privilege that the state legislators possessed.").

It is by now axiomatic that federal courts, when considering state lawmaking, find that legislating may be done by entities and persons beyond the institution of a State Legislature itself. The most striking recent affirmance of this was *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, in which this Court held that a source of legislation was not limited to the entity of the Legislature, and it looked to Arizona's own constitution to determine what else functioned as a "'source of legislation' on equal footing with the representative legislative body." 576 U.S. 787, 795, 135 S. Ct. 2652, 2660 (2015) (quoting *Queen Creek Land & Cattle Corp. v. Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451 (Ariz. 1972)). Just last term, this Court reaffirmed the central reasoning in *Smiley v. Holm* "that a state legislature's 'exercise of . . . authority' under the Elections Clause 'must be in accordance with the method which the State has prescribed for legislative enactments.'" *Moore v. Harper*, 143 S. Ct. 2065, 2071 (2023) (citing *Smiley v. Holm*, 285 U.S. 355, 367 (1932)). In other words—at least as far as the "Legislature" in the Elections Clause is concerned—a Governor may well be "acting in the sphere of legitimate legislative activity," *Tenney*, 341 U.S. at 376, so long as it is in a "manner … in which the constitution of the State has provided that laws shall be enacted," *Smiley*, 285 U.S. at 368.

Governors, of course, engage in the legislative process all the time. *Smiley* concerned a Governor's veto. See *id.* ("Whether the Governor of the State,

through the veto power, shall have a part in the making of state laws is a matter of state polity."). "[S]uch participation," *id.*, exists in the form of veto power, line-item approval, and written line-item objections and suggested amendments in many States. *See* Ala. Const., Art. V, § 126; Ariz. Const., Art. V, § 7; Ark. Const., Art. 6, § 17; Colo. Const., Art. IV, § 12; Conn. Const., Art. IV., § 16; Idaho Const., Art. IV, § 11; Mich. Const., Art. V, § 19; Mont. Const., Art. VI, § 10; N.Y. Const., Art. IV, § 7; N.D. Const., Art. V, § 9; Tenn. Const., Art. III, § 18; Tex. Const., Art. IV, § 14; Utah Const., Art. VII, § 8; Va. Const., Art. V, § 6; Wash. Const., Art. III, § 12; W.Va. Const., Art. VII, § 14; Wyo. Const., Art. 4, § 9. Some gubernatorial veto powers are even included in the legislative parts of state constitutions. See*, e.g.*, La. Const., Art. III.

Under the various State constitutions, Governors have other legitimate legislative powers. Most Governors have the power to convene or adjourn their respective Legislatures under certain circumstances. See Ala. Const., Art. V, § 122; Alaska Const., Art. III, § 17; Ariz. Const., Art. V, § 4; Ark. Const., Art. 6, § 19; Colo. Const., Art. IV, § 9; Conn. Const., Art. IV, § 10; Del. Const., Art. III, § 16; Ga. Const., Art. V, § II, ¶ VII(a); Idaho Const., Art. IV, § 9; Iowa Const., Art. IV, § 11; Kan. Const., Art. I, § 5; Ky. Const., § 80; Me. Const., Art. V, Pt. 1, § 13; Md. Const., Art. II, § 16; Mass. Const., Pt. II, Ch. II, § I, Art. VI; Mich. Const., Art. V, § 15; Miss. Const., Art. V, § 121; Mo. Const., Art. IV, § 9; Mont. Const., Art. VI, § 11; Neb. Const., Art. IV, § 8; Nev. Const., Art. 5, § 9; N.H. Const., Pt. Second, Art. 50; N.J. Const., Art. V, § 1, ¶ 12; N.Y. Const., Art. IV, § 3; N.C. Const., Art. III, § 5(7); Ohio Const., Art. III, § 8;

Okla. Const., Art. 6, § 7; Or. Const., Art. V, § 12; Pa. Const., Art. IV, § 12; R.I. Const., Art. IX, § 7; S.C. Const., Art. IV, § 19; S.D. Const., Art. IV, § 3; Tenn. Const., Art. III, § 9; Tex. Const., Art. IV, § 8; Utah Const., Art. VII, § 6; Va. Const., Art. V, 5; Wis. Const., Art. V, § 4. Governors may propose budgets, a policymaking act. See*, e.g.*, La. Const., Art. IV, § 5(D); Mich. Const., Art. V, § 18; Mont. Const., Art. VI, § 9; Neb. Const., Art. IV, § 7; N.C. Const., Art. III, § 5(3); R.I. Const., Art. IX, § 15.

Federal courts have accordingly allowed the legislative privilege to cover Governors' actions, for example, when signing a bill into law, *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003), or when "advocating and promoting legislation," *Baraka v. McGreevey*, 481 F.3d 187, 196–97 (3d Cir. 2007). Therefore, "the privilege serves to prevent parties from harassing . . . the Governor" for actions taken in the "legislative capacity." *League of Women Voters of Fla. v. Lee*, 340 F.R.D. 446, 454 (N.D. Fla. 2021) (applying the legislative privilege to the Governor's office after the office asserted legislative privilege).

This accords with the purposes undergirding the privilege in the first place that hold true in the state legislative context: "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference . . . ." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). The privilege "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."

In re N.D. Legislative Assembly, 70 F.4th at 464. When those functions bring in Governors and their aides, all parties involved must be free to pursue the legislative enterprise without fear of after-the-fact federal judicial balancing.

II. The Eighth Circuit's decision is consonant with the approaches of other circuits.

Petitioners fail to manufacture even the semblance of disagreement regarding their proposed balancing test for civil cases. Collecting cases, the Eleventh Circuit recently concluded: "None of [the federal] circuits have subjected the privilege to such a test, and at least four of them have rejected this approach." *Pernell v. Fla. Bd. of Governors of the State Univ.*, 84 F.4th 1339, 1345 (11th Cir. 2023) (citing *Lee*, 908 F.3d at 1188 (holding that unsubstantiated "claims of racial gerrymandering," though "serious," "fall[] short of justifying the 'substantial intrusion' into the legislative process" of a discovery request (citation omitted)); *Am. Trucking Ass'ns, Inc.*, 14 F.4th at 88 ("[This] argument suggests a broad exception overriding the important comity considerations that undergird the assertion of a legislative privilege by state lawmakers."); *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 239–40 (5th Cir. 2023) ("[A] state legislator's common-law absolute immunity from civil actions precludes the compelled discovery of documents pertaining to the state legislative process that Plaintiffs seek here."); *In re North Dakota Legis. Assembly*, 70 F.4th at 465 ("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."). The Eleventh Circuit is simply correct, dissents in some of the above cases notwithstanding. Not only is there no split, but rather, a strong consensus has emerged: aside from extraordinary cases, the privilege is an absolute bar to discovery in civil cases.

Petitioners' argument for the balancing test rests on an extension of *United States v. Gillock*, in which this Court denied a state legislator privilege, stating, "although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *United States v. Gillock,* 445 U.S. 360 (1980), 373. *Gillock* itself, however, was a federal criminal case, and the Court explicitly recognized that civil cases were on the other side of a "line." *Id.* As the Eleventh Circuit explained, "[t]he Supreme Court has never expanded the *Gillock* exception beyond criminal cases." *Pernell*, 84 F.4th at 1344. And "the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony." *Lee*, 908 F.3d at 1187. Accordingly, *none* of the circuits have extended *Gillock*'s balancing test to the civil context, instead applying the narrow exception only to "extraordinary cases." The Fifth Circuit, for example, has clarified that this means "extraordinary civil cases." See *La Union Del Pueblo Entero*, 2024 U.S. App. LEXIS 3789, at *27. That court has laid out a sensible three-element test for when the absolute bar must yield in extraordinary cases: (1) the important federal interests implicated must go beyond mere constitutional or statutory civil claims that include

only civil rights claims; (2) the civil case must be more analogous to a federal criminal prosecution than to a case where private plaintiffs seek to vindicate their own rights; and (3) the civil case cannot be brought so frequently that it would destroy state legislative privilege, thereby violating principles of federalism. *Id*. at *27–28.

What the appellate courts are doing is sensible and non-contradictory. Perhaps understanding that, Petitioners retreat, suggesting more modestly that "more guidance from this Court would aid in resolution of these disputes." Pet.19. But more guidance from this Court would only be necessary if the lower courts were consistently missing the mark. Instead, the lower courts have been rightly deciding these cases. The First, Fifth, Eighth, Ninth, and Eleventh have all recently gotten it right, not wrong. Perhaps, in the future, a different circuit will adopt Petitioners' test, and the issue would be cert-worthy and warrant "more guidance from this Court." But for now, it is not.

III. The Eighth Circuit's correct decision should not be disturbed for *Munsingwear* or any other reason.

First, it's not clear from this Court's precedents that *Munsingwear* even applies in a discovery dispute. *Munsingwear* is about ensuring that an adverse decision on the merits does not stay on the books after it becomes unreviewable during the appellate process. It is about when a "civil case" has become moot before an appellate decision "on the merits." 340 U.S. at 39. Or as this Court has otherwise phrased it: "A party who seeks review of

the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). In other words, *Munsingwear* is available only when there's been an adverse ruling *on the merits* of the case.

But a discovery dispute is a different animal. Though spun off from a civil case, discovery disputes, including such disputes on appeal, are distinct from the underlying civil case on the merits. This case is a perfect example. Petitioners indeed lost the privilege issue on a writ of mandamus in the Eighth Circuit. *In re N.D. Legis. Assembly*, 70 F.4th at 465. However, that loss is not an adverse decision on the merits, the likes of which are the target of *Munsingwear*. And the Eighth Circuit, in granting the petition for writ of mandamus in part, issued no judgment in that ancillary matter. Rather, the Eighth Circuit directed "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." *Id*. An order to quash is a discovery order and therefore does not trigger *Munsingwear*. *See, e.g.*, *Coty Inc. v. C Lenu, Inc.*, No. 10-21812-CIV-HUCK, 2011 U.S. Dist. LEXIS 14813, at *16 (S.D. Fla. Feb. 15, 2011) (holding that *Munsingwear* and *Bancorp* were inapplicable because the party was seeking "to vacate a discovery Order."). Therefore, neither of the two premises for *Munsingwear*—namely, a ruling on the merits that is adverse—is even present here.

Second, and finally, even were *Munsingwear* available, the doctrine should not be applied anyway

because this Court's time and intervention are unwarranted. *Munsingwear* vacatur is a discretionary use of this Court's equitable powers, and Petitioners still bear the burden of illustrating that the decision below earns vacatur. But for the reasons stated above, the decision below is in full accord with the circuit consensus and need not be disturbed.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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