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 IN OPPOSITION OF RESPONDENTS NORTH DAKOTA STATE LEGISLATIVE ASSEMBLY ET AL.

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QUESTIONS PRESENTED

The Petitioners' presented questions mischaracterize the Eighth Circuit's decision and the vacatur doctrine. The Eighth Circuit's decision created no conflict with this Court's precedent or circuit split. Moreover, Petitioners attempt to frame this case as moot — which it is not — and assert the equitable doctrine of vacatur should apply to erase caselaw with which they simply do not agree. Petitioners elected to proceed to trial without the requested discovery and prevailed. They do not have to acquiesce in any judgment, and fail to show how the public interest is served by vacating the Eighth Circuit's only legislative privilege precedent. Petitioners request this Court ignore well-settled precedent and fail to establish any grounds sufficient to grant their petition. The questions presented are as follows:

1. Should this Court review the Eighth Circuit's decision to grant the North Dakota Legislative Assembly's petition for a writ of mandamus and quash discovery subpoenas because of the well-established common law legislative privilege?

2. Should this Court apply the extraordinary equitable doctrine of vacatur to a dispute that is not moot?

3. Should this Court apply the extraordinary equitable doctrine of vacatur when Petitioners elected to proceed to trial (at which they prevailed on the merits) despite the Eighth Circuit's mandamus decision, have no judgment against them, and seek vacatur only to erase caselaw they deem unfavorable?

4. Should this Court apply the equitable doctrine of vacatur when the public interest is well-served by the only decision of the Eighth Circuit defining the application of legislative privilege to elected State legislators in a private civil action?

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STATEMENT OF THE CASE

Petitioners commenced the underlying lawsuit against the North Dakota Secretary of State ("Secretary") — in his official capacity — alleging North Dakota's redistricting plan diluted Native American votes and violated § 2 of the Voting Rights Act.[1] Pet. App.2. Respondents were not named defendants in Petitioners' lawsuit against the Secretary. However, in an effort to develop evidence of an alleged "illicit motive" in the redistricting process, Petitioners issued subpoenas for documents and deposition testimony to current and former North Dakota legislators and a legislative aide.[2] Pet.App.2.

Unlike most States, North Dakota's Constitution limits the North Dakota Legislative Assembly ("Assembly") to an eighty-day regular session each biennium. N.D. Const. Art. IV § 7. Consequently, citizens from North Dakota's forty-seven legislative districts are elected as either senators or representatives to serve in the part-time Assembly. *See* N.D. Const.

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[1] The underlying case is entitled *Turtle Mountain Band of Chippewa Indians, et al. v. Howe*, No. 3:22-cv-22 (D.N.D. 2022).

[2] Representative Terry Jones was also served with a subpoena for deposition testimony in parallel litigation entitled *Walen et al. v. Burgum et al.* Case No. 1:22-cv-31 (D.N.D. 2022). In *Walen*, the plaintiffs alleged North Dakota's redistricting plan violated Equal Protection. Pet.App.15-16. Representative Jones waived his legislative privilege, Respondents did not challenge that determination before the Eighth Circuit, and it is not at issue here. Pet.App.8. However, the magistrate judge combined *Walen* and *Turtle Mountain* for the purpose of issuing the December 22, 2022, discovery order on Respondents' motion to quash. Pet.App.13.

Art. IV §§ 5, 7; *see also* N.D.C.C. § 54-03-01.14. A majority of the legislative privilege dispute occurred during the preparation for, and duration of, the 2023 biennial regular session.

I. The Legislative Privilege Dispute

Respondents moved to quash Petitioners' deposition subpoena and objected to the document subpoenas on grounds of legislative privilege. Pet.App. 16. Petitioners subsequently moved to enforce the document subpoenas. Pet.App.40. Respondents resisted the Petitioners' motion on the grounds of legislative privilege and also asserted compliance would impose an undue burden. Pet.App.41. Specifically, Respondents proffered evidence that approximately six-hundred-forty hours of labor — in the midst of the biennial regular session — were needed to comply with the Petitioners' subpoenas. Pet.App.61.

The magistrate judge denied the Respondents' motion to quash the deposition subpoenas on December 22, 2022, and granted the Petitioners' motion to enforce the document subpoenas on February 9, 2023. Pet.App.38, 61-62. In doing so, the magistrate judge erroneously applied a five-factor balancing test to conclude Petitioners' need for evidence of an individual legislator's intent in a § 2 vote dilution case outweighed Respondents' interest of non-disclosure. Pet.App.24, 31-35, 65. The magistrate judge found the Respondents could engage outside counsel to perform the estimated six-hundred-forty hours of labor required for compliance and avoid an undue burden. Pet.App.61. Respondents appealed the magistrate judge's decisions to the district court judge. Pet.App.63, 71. The district court judge affirmed the magistrate judge's decisions. Pet.App.70, 77.

Respondents promptly petitioned the Eighth Circuit for a writ of mandamus to protect the legislative privilege.[3] Pet.App.2. The Eighth Circuit stayed the district court's orders and issued its decision granting Respondents' petition on June 6, 2023. Pet.App.1. The panel determined mandamus was appropriate because Respondents' claim of privilege was "erroneously rejected during discovery" based on the district court's "mistaken conception of the legislative privilege." Pet.App.3, 5. Respondents had "no other adequate means to attain relief, and the enforcement of the discovery order would destroy the privilege." Pet.App.3. The Eighth Circuit explained it was undisputed Respondents' "acts were undertaken within the sphere of legitimate legislative activity." Pet.App.5. No exceptions to legislative privilege under either *U.S. v. Gillock*, 445 U.S. 360 (1980) or *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) applied. Pet.App.3-4, 6-8. The Eighth Circuit explained, "the subpoenas should have been quashed based on legislative privilege" and directed the district court to do so. Pet.App.5, 8.

Petitioners unsuccessfully petitioned for rehearing.[4] Pet.App.79. Only one judge on the *en banc* Eighth

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[3] Circuits have authorized non-party State lawmakers to challenge legislative privilege issues by either a writ of mandamus or an interlocutory appeal. *See, e.g., American Trucking v. Alviti*, 14 F.4th 76, 83-86 (1st Cir. 2021) (mandamus); *In re Hubbard*, 803 F.3d 1298, 1305-1307 (11th Cir. 2015) (interlocutory appeal).

[4] Petitioners filed their Petition for Rehearing En Banc on July 20, 2023, which was approximately one month after conclusion of the district court's trial on the merits of Petitioners' § 2 claim against the Secretary. Pet.Reh'g En-Banc, *In re N.D. Legislative Assembly*, No. 23-1600 (8th Cir. July 20, 2023). Notably, Petitioners

Circuit voted to grant rehearing — the judge who dissented from the panel opinion. Pet.App.8-12, 79. The panel had already rejected the dissent's view as failing to "sufficiently appreciate" the purpose of legislative privilege as defined by this Court and other circuits. Pet.App.3-4, 8.

II. The Underlying Litigation is Still Pending

The district court held a trial on the merits of Petitioners' vote dilution claims against the Secretary in June 2023. Pet.App.79. On November 17, 2023, the district court concluded North Dakota's districts violated § 2 of the VRA and directed the Secretary and Assembly to adopt a remedial plan. *Turtle Mountain Band of Chippewa Indians v. Howe*, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023). The Secretary appealed from the district court's judgment. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. 2023). The Secretary's appeal remains pending with the Eighth Circuit.

Once the district court ordered the Assembly to adopt a remedial plan, it moved to intervene to protect its unique legislative redistricting interests during the remedial proceedings. *See Turtle Mountain Band of Chippewa Indians et. al. v. Howe*, No. 3:22-CV-00022-PDW-ARS, Doc. 137 (Dec. 8, 2023). The district court denied the Assembly's motion, the Assembly timely appealed, and the appeal is still pending. *See Turtle Mountain Chippewa, et al v. N. D. Legislative Assembly*, No. 23-3697 (8th Cir. 2023). The district court also denied the Assembly's request for a reasonable opportunity to adopt a remedial plan, and imposed the

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did not allege this dispute was moot and never sought vacatur from the Eighth Circuit. *See id.*

Petitioners' proposed plan upon the North Dakota electorate by judicial fiat. The Assembly timely appealed from that order, and that appeal is still pending. *See Turtle Mountain Chippewa, et al v. N. D. Legislative Assembly*, No. 24-1171 (8th Cir. 2024).

REASONS TO DENY THE PETITION

The Court should deny the petition for two reasons. ***First***, the petition presents no cert-worthy question. The Eighth Circuit correctly applied this Court's precedent. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1971); *Gillock*, 445 U.S. 360; *Arlington Heights*, 429 U.S. 252; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975). The Eighth Circuit also did not create any circuit split in its application of legislative privilege to the facts of this case. The courts of appeals have vindicated the legislative privilege in similar circumstances. *See, e.g.*, *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339 (11th Cir. 2023); *La Union Del Pueblo Entero v. Abbott*, 93 F.4th 310 (5th Cir. 2024); *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018); *Am. Trucking*, 14 F.4th 76; *Hubbard*, 803 F.3d 1298.

Petitioners misrepresent the Eighth Circuit's decision, this Court's precedent, and the consensus holdings of sister circuits. The law on legislative privilege among the circuits is consistent with this Court's precedent and the Eighth Circuit's decision. But Petitioners request this Court set aside the common law legislative privilege and overturn more than 200 years of "unquestioned" precedent establishing it is "not

consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney*, 341 U.S. at 788. The petition presents no issues worthy of this Court's plenary review.

Second, the petition presents no basis for vacating the Eighth Circuit's legislative privilege decision. The case is not moot. The case is still ongoing with multiple pending appeals. Yet, Petitioners request vacatur simply because they do not agree with the Eighth Circuit's ruling regarding well-settled legislative principles. Although Petitioners claim mootness, they — not Respondents — caused it. Petitioners cannot show equitable considerations favor vacatur of the Eighth Circuit's decision. This case does not present a close call and the petition should be denied.

I. THE PETITION INVOLVES NO CERT-WORTHY ISSUES.

This Court will grant a petition for writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. Petitioners must first establish this case provides "compelling reasons" for this Court to grant plenary review before its request for vacatur should even be considered. They have not done so. Petitioners ignore the robust consensus of caselaw supporting the Eighth Circuit's decision. The Eighth Circuit—like other circuits—faithfully applied this Court's decisions relating to the legislative immunity and privilege. The Eighth Circuit's decision in this case did not create a circuit split. The Eighth Circuit's application of well-established principles of legislative privilege provides no basis for this Court to grant certiorari.

A. The Eighth Circuit Correctly Concluded State Legislators are Entitled to a Legislative Privilege that "Largely Approximates" Protections Afforded to Federal Legislators Under the Speech or Debate Clause.

Legislative privilege "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). "Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection on the independence and integrity of the legislature. . . ." *U.S. v. Johnson*, 383 U.S. 169, 178 (1966). Even prior to the American Revolution, the colonies "had built up a strong tradition of legislative privilege." *Tenney*, 341 U.S. at 374 n.3. Against this historical backdrop, the Founders included the Speech or Debate Clause in the Constitution to reinforce the separation of powers and bar Federal lawmakers from being made to answer for actions taken within the sphere of legitimate legislative activity. *See Johnson*, 383 at 178; *Gravel v. U.S.*, 408 U.S. 606, 616, 624 (1972).

In accordance with this history, North Dakota and a vast majority of States, "have specific provisions in their Constitutions protecting the privilege." *Tenney,* 341 at 376; *see also* N.D. Const. Art. IV Sec. 15 ("Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings"). This Court stated "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

Consequently, under Fed. R. Evid. 501's invocation of the common law, it is "well-established that state lawmakers possess a legislative privilege that is 'similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.'" *Hubbard*, 803 F.3d at 1310 n. 11 (quoting *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)); *Am. Trucking*, 14 F.4th at 87 (holding State lawmakers' assertion of legislative privilege is governed by federal common law rather than the Speech or Debate Clause); *Lee*, 908 F.3d at 1187 ("We therefore hold that state and local legislators may invoke legislative privilege"); *La Union*, 93 F.4th at 322 (holding same); *Pernell*, 84 F.4th at 1343 (same).

The Eighth Circuit acknowledged as much and held "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." Pet.App.3. This is perfectly in line with this Court's precedent and its sister circuits.

B. The Eighth Circuit Was Correct to Consider Cases Describing Legislative Immunity to Describe the Legislative Privilege.

Contrary to Petitioners' assertions (Pet.15-17), the Eighth Circuit followed precedent when it considered cases drawing upon legislative immunity to aid its interpretation of legislative privilege. The parallels between legislative immunity and legislative privilege are supported by history. The genesis of both doctrines lies in the Speech or Debate Clause and is extended to State legislators by the common law. *See Gillock*, 445

U.S. at 372 n. 10; *see also Arlington Heights* 429 U.S. at 268.

In fact, the First Circuit explained "[t]he terms 'immunity' and 'privilege' have at times been used interchangeably" by this Court; however, it appears clear "immunity" contemplates potential liability and "privilege" refers to evidentiary issues. *Am. Trucking*, 14 F.4th at 86 n. 6. This Court's precedent supports such a conclusion. *See e.g.*, *Eastland*, 421 U.S. at 503 (explaining "legislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results [(immunity)] but also from the burden of defending themselves [(privilege)]"); *Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer-either in terms of questions or in terms of defending himself from prosecution-for the events that occurred at the subcommittee meeting."); *Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998) (explaining the long-standing rule establishing when individuals "are invested with legislative powers, they <u>are exempt from individual liability</u> for the passage of any [law] within their authority, and their motives in reference thereto will not be inquired into." (*quoting* 1 J. Dillon, LAW OF MUNICIPAL CORPORATIONS § 313, pp. 326-327 (3d ed. 1881) (emphasis in original)); *Arlington Heights*, 429 U.S. at 268 (Relying on the legislative immunity holding in *Tenney* to explain testimony from members of a lawmaking body "frequently will be barred by privilege").

In drawing upon both legislative immunity and privilege, this Court explained "a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time,

energy, and attention from their legislative tasks to defend the litigation. Private civil actions may be used to delay and disrupt the legislative function." *Eastland*, 421 U.S. at 503. Once judicial power is "brought to bear" on lawmakers acting in the "legitimate legislative sphere" that "legislative independence is imperiled." *Id*. This Court made clear the legislative privilege provides protection to state and local lawmakers because "the time and energy required to defend against a lawsuit are of particular concern at the local level, where part-time citizen-legislator remains commonplace." *Bogan*, 523 U.S. at 52. These concerns directly apply to Respondents who serve or served as part-time citizen-legislators in the Assembly. N.D. Const. Art. IV §§ 5, 7; N.D.C.C. § 53-03-01.15.

This robust consensus of authority supports the Eighth Circuit's conclusion that "[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." Pet.App.4. The Eighth Circuit's conclusion follows that of its sister circuits. *See Lee*, 908 F.3d at 1187 (explaining that while this Court's analysis in *Tenney* "rested upon a finding of immunity, its logic supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well"); *Pernell*, 84 F.4th at 1343 ("Although the core of the privilege is a state legislator's immunity from civil suit for acts related to legislative proceedings . . . we have explained that this privilege extends to discovery requests because complying with such requests detracts from the performance of official duties." (quotation

omitted)); *La Union*, 64 F.4th at 237 (explaining legislative immunity is "often analyzed in parallel to legislative privilege"); *Hubbard*, 803 F.3d at 1308, 1312 (drawing on cases applying legislative immunity to explain legislative privilege); *Am. Trucking*, 14 F.4th at 87 (Same). The Fifth Circuit explained that while the parallel between legislative immunity and legislative privilege "may not run to the horizon, we follow the Supreme Court's lead in drawing on both strands even though this case involves a privilege from disclosure rather than an immunity from suit or liability." *La Union*, 68 F.4th at 237.

Under this well-established precedent, the Eighth Circuit — like its sister circuits — correctly acknowledged legislative privilege "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." Pet.App.4 (*quoting MINPECO, S.A. v. Conticommidity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988)). Put another way, "[l]egislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes . . . Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued." *E.E.O.C. v. Wash. Suburban Sanitary Com'n.*, 631 F.3d 174, 181 (4th Cir. 2011).

Clear precedent also shows the Eighth Circuit correctly held legislative privilege extends to legislative aides. Pet. App. 3. This was not a novel conclusion as this Court explained "that for the purpose of construing the privilege a Member and his aide are to be treated

as one." *Gravel*, 408 U.S. at 616 (internal quotation omitted); *see also Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (explaining the common law application of the protections afforded to State legislators having taproots in the Speech or Debate Clause extends to legislative aides). This is because the legislative privilege "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member itself." *Gravel*, 408 U.S. at 618. The Eighth Circuit's determination that all Respondents may invoke the privilege simply follows established precedent. Petitioners were wrong to assert it was an error to draw upon cases interpreting legislative immunity to describe and apply the legislative privilege to Respondents in this case.

C. The Eighth Circuit Correctly Applied This Court's Precedent from Both *Gillock* and *Arlington Heights* to Determine No Exception to the Privilege Applied in This Case.

The Eighth Circuit's conclusion that Respondents' legislative privilege "largely approximates" the protections under the Speech or Debate Clause follows this Court's precedent. Petitioners' assertion that the Eighth Circuit's decision "is erroneous and inconsistent with this Court's precedent in *United States v. Gillock*" (Pet.13) is simply wrong. In fact, the Eighth Circuit expressly held "state legislators do not enjoy the same privilege as federal legislators in criminal actions" under *Gillock*. Pet.App.3. The Eighth Circuit also analyzed the possible "extraordinary instances" exception this Court's dicta noted in *Arlington Heights*, but found it did not apply in this case. The Eighth Circuit's correct

analysis of this Court's precedent belies Petitioners' argument that it impermissibly extended "an absolute privilege to state lawmakers." Pet.13. Petitioners expend great effort in making this argument, but ignore this Court's actual statements.

1. This Case Did Not Invoke the Federal Criminal Prosecution Exception to Legislative Privilege Established in *Gillock*.

To be sure, *Gillock* clearly established the legislative privilege must yield when State lawmakers are subject to federal criminal prosecutions. Respondents never argued to the contrary and the Eighth Circuit expressly acknowledged this point. Pet.App.3. Petitioners contort *Gillock* and ignore this Court's reasoning to make a baseless attack on the Eighth Circuit's opinion. Pet.13-21.

Before deciding *Gillock*, this Court recognized it "cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress." *Gravel*, 408 U.S. at 627. In *Gillock* this Court again acknowledged "[f]ederal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent." *Gillock*, 445 U.S. at 373 n.11. Importantly, this Court granted certiorari in *Gillock* "to resolve a conflict in the Circuits over whether the federal courts in a **federal criminal prosecution** should recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator charged with [violating the Hobbs Act and RICO]." *Id.* at 361-62, 373 n.11 (emphasis added).

This Court spent considerable time explaining the federal common law in *Tenney* was limited to "a civil action brought by a private plaintiff to vindicate private rights." *Id.* at 372 n.10. This is because "in protecting the independence of state legislators" the common law had "drawn the line at civil actions." *Id.* at 373. Cases which recognized the applicability of legislative privilege in a "civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *Id.* at 372. In light of these guardrails, this Court stated that "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." *Id.* at 373 (emphasis added). Clearly, the Eighth Circuit harmonized *Gillock* when it concluded "state legislators do not enjoy the same privilege as federal legislators in criminal actions." Pet.App.3.

2. The Eighth Circuit Correctly Considered This Court's Dicta in *Arlington Heights.*

Nothing in the Eighth Circuit's decision is contrary to dicta from *Arlington Heights* where this Court acknowledged legislative privilege might have to yield in "extraordinary instances." *Arlington Heights*, 429 U.S. at 268; Pet.App.6-7. Unlike *Arlington Heights*, the underlying litigation does not involve allegations of intent, making discovery into a legislators' redistricting motivations a wasted fishing expedition. *Compare id.* at 265, *with* Pet.App.7 ("underlying case does not even turn on legislative intent").

In *Arlington Heights* this Court considered whether the Village's denial of the Housing Development's zoning request was racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Arlington Heights*, 429 U.S. at 254, 265. Unlike Petitioners' vote dilution claims arising under § 2 of the VRA, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. In dicta, this Court explained legislative history may be highly relevant and "[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. However, this Court cautioned "that judicial inquiries into legislative . . . motivation represent a substantial intrusion" and "[p]lacing a decisionmaker on the stand is therefore 'usually to be avoided.'" *Id.* n.18. This Court further qualified its statement and explained the "foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.*

Unlike the Equal Protection claim in *Arlington Heights* — which required proof of "racially discriminatory intent or purpose" (429 U.S. at 265) — intent of discriminatory animus is irrelevant to prove vote dilution under § 2 of the VRA. *See Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986). This Court explained its prior test requiring "proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters . . . was repudiated. . . . " *Id.* "All that matters under § 2

and under a functional theory of vote dilution is voter behavior, not its explanations." *Id.* at 73.

In light of this Court's clear directive in *Thornburg*, the Eighth Circuit correctly concluded "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." Pet.App.7. Petitioners' attempt "to develop evidence of an alleged 'illicit motive' by legislators who enacted a redistricting plan for state legislative districts," (Pet.App.2) was irrelevant as it focused on the "wrong question." *See* , *Thornburg*, 478 U.S. at 44, 73. The Eighth Circuit correctly explained "[a]ny exception to legislative privilege that might be available in a case that is based on a legislature's alleged intent is thus inapplicable." Pet.App.7-8. Therefore, the "extraordinary instances" referenced in *Arlington Heights* were not present here. Pet.App.7.

3. The Eighth Circuit Did Not Create a Circuit Split in Its Application of *Gillock* and *Village of Arlington Heights.*

Petitioners erroneously claim the Eighth Circuit created a circuit split because it did not use the term "qualified" to describe legislative privilege. Pet.20. This argument has no merit. Legislative privilege is only described as "qualified" because *Gillock* explained it did not apply in federal criminal prosecutions and dicta of *Arlington Heights* recognized a potential exception for "extraordinary instances." *La Union*, 68 F.4th at 237-38. The Eighth Circuit's approach follows

that of every court of appeals to have considered the issue. Every one of these courts—like the Eighth Circuit—vindicated the legislative privilege.

For starters, the privilege's exception for criminal prosecutions has been acknowledged by both the Eighth Circuit and its sister circuits. Pet.App.3; *Hubbard*, 803 F.3d at 1311-12 ("[F]or the purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government."); *La Union*, 68 F.4th at 238 (explaining *Gillock* established legislative privilege does not apply to federal criminal prosecutions). In fact, as of 2021, the First Circuit explained "[b]oth courts of appeals that have considered a private party's request for such discovery in a civil case have found it barred by the common-law legislative privilege." *Am. Trucking*, 14 F.4th at 88. This continues to hold true as *Gillock* does not expand the exception to legislative privilege beyond criminal cases. *See e.g.*, *Pernell,* 84 F.4th at 1344; *La Union*, 93 F.4th at 323-24.

Like *Gillock*, the Eighth Circuit followed its sister circuits' interpretation of the possible exception for "extraordinary instances" referenced in *Arlington Heights*' dicta. In accordance with sister circuits, the Eighth Circuit carefully evaluated the circumstances of this case and concluded the potential for 'extraordinary instances' where the privilege may be overcome were not present. Pet.App.7.; *see e.g.*, *Lee*, 908 F.3d at 1188 (holding legislative privilege applied to deny discovery in a racial gerrymandering case because the factual record did not fall into the subset of "extraordinary instances" that might justify an exception to the privilege); *La Union*, 68 F.4th at 237-38 (holding

claims alleging an amendment to the Texas Election Code violated the Fourteenth Amendment and the VRA did not constitute "one of those 'extraordinary instances' in which the legislative privilege must 'yield'") (cleaned up)).

Also, the Eighth Circuit's determination that Petitioners' attempted fishing expedition "to develop evidence of alleged 'illicit motives' by legislators who enacted a redistricting plan" fell short of overcoming the privilege is in lockstep with its sister circuits. *See Hubbard*, 803 F.3d at 1312 (holding "legislative privileges must be honored and the subpoenas quashed" in a claim where the "subjective motivations of the lawmakers" was irrelevant to the ultimate issue); *Am. Trucking*, 14 F.4th at 88 ("[E]ven assuming that a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest, the need for the discovery requested here is simply too little to justify such a breach of comity").

Petitioners' resistance to circuit precedent is further exemplified by their claim that several lower courts have ordered legislators to comply with civil discovery under a mistaken belief legislative privilege's limitation under *Gillock* subjects the privilege to a balancing test. Pet.20. The district court cases cited in Petitioners' brief, like the district court below, believed the "qualified balancing analysis (five-factor test) is a better fit in this type of redistricting case." Pet.App.67. The Eighth Circuit, like other courts of appeals, explained this Court's precedent "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." Pet.App.7; *accord Pernell*, 84

F.4th at 1345 ("None of our sister circuits have subjected the [legislative] privilege to such a test, and at least four of them have rejected this approach. . . . We agree and join them.")

The Eighth Circuit's decision did not create a circuit split as to its application of legislative privilege in the underlying private civil action. Petitioners are wrong to assert otherwise. The Eighth Circuit correctly determined no exceptions to legislative privilege applied based on the facts of this case and no cert-worthy issues are present here.

D. The Eighth Circuit Did Not Create a Circuit Split When It Held Legislative Privilege — When Applicable — Is an "Absolute Bar" to Interference.

There is no error in the Eighth Circuit's discussion about legislative privilege acting as an "absolute bar" to civil discovery in this particular case. Petitioners erroneously assert the Eighth Circuit "[b]reaking with the other circuits . . . found that the state legislative privilege is an 'absolute bar' to civil discovery against state legislators and directed the district court to quash the subpoenas in their entirety." Pet.20. This is a misrepresentation of the Eighth Circuit's decision. Rather, the Eighth Circuit correctly found the "conditions for legislative privilege are plainly satisfied here" as it was undisputed Respondents' "acts were taken within the sphere of legitimate legislative activity." Pet.App.5. The Eighth Circuit was correct that "[w]hen legislators are functioning in that sphere, the privilege is an 'absolute bar from interference.'" Pet.App.4 (quoting *Eastland*, 421 U.S. at 503). Again, this conclusion is in perfect harmony with this Court's

precedent. *Eastland*, 421 U.S. at 503 (explaining "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference").

This "absolute bar" to discovery of information related to acts taken within the legitimate sphere of legislative activity is consistent with the very purpose of legislative privilege. *See id.* at 85 (explaining "legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected . . . from the burden of defending themselves."); *U.S. v. Brewster*, 408 U.S. 501, 525 (1972) (The privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."); *Hubbard*, 803 F.3d at 1308 ("The privilege protects the legislative process itself. . . . "); *Lee*, 908 F.3d at 1187 ("The rationale for the privilege — to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box — applies equally to federal, state, and local officials."); *La Union*, 68 F.4th at 237 (explaining legislative privilege "serves the 'public good' by allowing lawmakers to focus on their jobs rather than on motions practice in lawsuits").

In light of this well-established purpose, the circuits explain that "if . . . private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply." *Wash. Suburban Sanitary Com'n.*, 631 F.3d at 181; *see also Pernell*, 84 F.4th at 1343 (when "a discovery request inquires into legislative acts or the motivation for actual performance of legislative acts, state legislators can protect the integrity of the legislative process by invoking the privilege to quash the request" (cleaned

up)). This is because "[t]he privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." *Hubbard*, 803 F.3d at 1310. Put more bluntly, "the legislative privilege is 'absolute' where it applies at all." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995). Clearly, the Eighth Circuit did not break with other circuits in noting that legislative privilege is "an absolute bar to interference" when legislators act within the sphere of legitimate legislative activity.

Nor was the Eighth Circuit wrong to not require a privilege log from the legislators in this case. *Cf.* Pet.20-21. This is especially true here where it was undisputed Respondents' "acts were undertaken within the sphere of legitimate legislative activity." Pet.App.5. There is "no need for the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege." *Pernell*, 84 F.4th at 1343 (quoting *Hubbard*, 803 F.4th at 1311). It is "enough to point out . . . that the only purpose of the subpoenas was to further [the] inquiry into the lawmakers' motivations . . . and that their legislative privileges exempted them from such inquiries." *Id.*

Petitioners also make the unfounded assertion that the Eighth Circuit's holding "is remarkable in light of the third-party nature of the communications at issue." Pet.21. The Petitioners sought third-party communications "to develop evidence of an alleged 'illicit motive' by legislators who enacted a redistricting plan" which occurred "within the sphere of legitimate legislative activity." Pet.App.2, 5. The Eighth Circuit was certainly in line with the extensive

authority from both this Court and its sister circuits when it quashed the subpoenas. *See La Union*, 68 F.4th at 236 (holding "[a]n exception for communications 'outside the legislature' would swallow the rule almost whole . . . A privilege that protected so little of the lawmaking process would not rightly be called 'legislative'" and rejected such an attack "on the privilege's scope").

This makes sense as legislative privilege protects against inquiry into acts taken in the legitimate sphere of legislative activity. *Brewster*, 408 U.S. at 525; *Eastland*, 421 U.S. at 503; *Hubbard*, 803 F.3d at 1308, 1310; *Wash. Suburban Sanitary Com'n.*, 631 F.3d at 181; *Pernell*, 84 F.4th at 1343; *Williams*, 62 F.3d at 416. The Eighth Circuit followed precedent when it refused to allow Petitioners to circumvent 200 years of "unquestioned" precedent establishing inquiries "into the motives of legislators" are not consonant with our scheme of government. *Tenney*, 341 U.S. at 788. In sum, the petition presents no cert-worthy issues and should be denied.

II. PETITIONERS' REQUEST FOR VACATUR MUST BE DENIED.

Because the petition lacks any basis for this Court to grant certiorari on the merits, it should be denied. That should be the end of Petitioners' request for vacatur. The underlying litigation is still ongoing with an unknown future. The Eighth Circuit's decision provides needed protection to Respondents in the event Petitioners change course. Petitioners seek vacatur here simply to erase precedent they do not like. This rationale is grossly insufficient. "It is petitioner's burden, as the party seeking relief from

the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Petitioners cannot meet their burden to establish either mootness or their equitable entitlement to vacatur.

A. Petitioners Cannot Demonstrate This Case Is Moot.

"The burden of demonstrating mootness is a heavy one." *L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation omitted). Petitioners have not met it here. They contend vacatur of the Eighth Circuit's legislative privilege decision is warranted because the district court's favorable judgment on the merits of their vote dilution claim against the Secretary ended their need to obtain the discovery. Pet.9. Petitioners cannot establish mootness by merely asserting they no longer need discovery they once insisted upon. *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (explaining "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"). The case is still ongoing, the Eighth Circuit has set the rules if legislative privilege issues re-emerge, and the "public interest in having the legality of the practices settled, militates against a mootness conclusion." *U.S. v. W.T. Grant*, 345 U.S. 629, 632 (1953).

There is a strong public interest in whether elected officials should be required to divert their time and energy from legitimate legislative functions to responding to discovery requests in a private civil action. *See Eastland*, 421 U.S. at 503. The Eighth Circuit's

decision provides needed protection to Respondents in the event Petitioners change course and seek future discovery in the event of a remand. *See Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (explaining speculative future conduct may overcome mootness).

This case is also not moot because it is "capable of repetition, yet evading review." *Fed. Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This Court explained a case is not moot when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id*. Both elements are easily satisfied here.

If Petitioners' argument is taken as true, the "challenged action" — the Eighth Circuit's issuance of a writ of mandamus quashing the subpoenas approximately two weeks prior to trial — "was in its duration too short to be fully litigated" and arrive before this Court "prior to its expiration." *See Turner v. Rogers*, 564 U.S. 431, 440 (2011). Petitioners assert this case became moot upon entry of judgment in their favor against the Secretary on November 17, 2023. Pet.9. Accepting Petitioners' argument, this mandamus action expired approximately five months after its issuance on June 6, 2023. *See id*.; Pet.App.1. Under this Court's precedent, this action was "too short" to be fully litigated prior to its expiration. *See Turner*, 564 U.S. at 439-40 ("Our precedent makes clear that the 'challenged action,' Turner's imprisonment for up to 12 months, is 'in its duration too short to be fully litigated . . . (and arrive here) prior to its 'expiration'").

As to the second element, Respondents initiated this mandamus proceeding and are clearly the "complaining party" in this action. There is a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *see also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (finding case not moot under "capable of repetition, yet evading review" exception when a party "faces some likelihood of becoming involved in the same controversy in the future") (dicta). Disputes over Respondents' assertion of legislative privilege will continue to arise. This is true for the lawmakers in North Dakota and other State legislatures within the Eighth Circuit. In fact, the First Circuit acknowledged the prevalence of this issue when it granted mandamus to establish precedent on legislative privilege because it was "confident that the questions presented [related to legislative privilege] are likely to recur, especially if we deny review . . . We have little doubt that it will become increasingly common to subpoena state lawmakers . . . if we do not review the district court's order at this juncture." *Am. Trucking*, 14 F.4th at 85. In 2021, the First Circuit explained in "just the past four years, three other circuits have considered the standard governing state lawmakers' claim of legislative privilege" and this issue has since worked its way through the circuits on numerous occasions. *See id.; see also La Union*, 68 F.4th 228; *Pernell*, 84 F.4th 1339; Pet.App.1-12. This Court's "reasonable expectation" standard is easily satisfied here.

Also, Assembly members will continue to assert legislative privilege as a bar to discovery in civil

actions when it is applicable. *See First. Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978) (holding case not moot where a party insists it will continue to assert its rights). Where it can "reasonably be assumed" a party "will someday be subjected to another order" on the same unique issue of short duration, the "controversy before us is not moot" because it is "capable of repetition, yet evading review." *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 603 (1982) (holding that even though a trial court's order excluding the press and public during live testimony expired at the completion of trial, the dispute was "capable of repetition, yet evading review"). There is no need to evaluate Petitioners' request for vacatur because this case is not moot.

B. Petitioners Cannot Establish Equitable Entitlement to Vacatur.

Even if Petitioners could declare the case moot, they cannot make the requisite showing to establish "equitable entitlement to the extraordinary remedy of vacatur" of the Eighth Circuit's legislative privilege opinion. *U.S. Bancorp*, 513 U.S. at 26. Petitioners assert *United States v. Munsingwear*, 340 U.S. 36, 39 (1950), directs it is the "established practice" of this Court to vacate the judgment below when a case has "become moot while on its way here or pending our decision on the merits." Pet.8. However, this Court stated "the portion of Justice Douglas' opinion in *Munsingwear* describing the 'established practice' for vacatur was dictum . . . [and] [t]his to us seems a prime occasion for invoking our customary refusal to be bound by dicta." *U.S. Bancorp*, 513 U.S. at 23; *see also Staley v. Harris Cnty.*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc) ("[T]he Supreme Court rejected the

uniform rule reflected in *Munsingwear* when it decided *U.S. Bancorp*. . . . It is *U.S. Bancorp*, not the earlier case of *Munsingwear*, that controls our decision today, and, as we have indicated, *U.S. Bancorp* requires that we look at the equities of the individual case."); *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) ("*U.S. Bancorp* makes clear that the touchstone of vacatur is equity . . . it rejected the notion that automatic vacatur was the 'established practice' whenever mootness prevents review of a lower court decision."). Rather, *U.S. Bancorp* clarified vacatur is an equitable remedy and applies where 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*, 513 U.S. at 391. Under this Court's precedent, Petitioners cannot establish any of the requirements for equitable vacatur.

1. Petitioners Cannot Show There Were Vagaries of Circumstance.

No unexpected or inexplicable change in circumstances exist in this case. Rather, Respondents sought mandamus from the Eighth Circuit to protect their well-established legislative privilege. The Eighth Circuit followed precedent and quashed the Petitioners' subpoenas. Petitioners declined to seek a continuance of trial to allow for further review of the legislative discovery issues. They instead elected to proceed with trial on the merits against the Secretary—without requested discovery from Respondents—and prevailed in the district court. That litigation strategy is not grounds for vacating the Eighth Circuit's decision that preceded it. Put simply, if Petitioners' position is accepted as true, they caused this case to be moot by

proceeding to trial without seeking a continuance to exhaust their appellate-review rights on this discovery matter. It was Petitioners—not Respondents—who created the alleged mootness.

This cannot be grounds for an equitable entitlement to vacatur as this Court explained "denial of vacatur is merely one application of the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *U.S. Bancorp*, 513 U.S. at 25 (quotation omitted) (cleaned up). Put another way, " . . . granting vacatur to a party who both causes mootness and pursues dismissal based on mootness serves only the interests of that party. *Amoco Oil Co. v. U.S. E.P.A.*, 231 F.3d 694, 699 (10th Cir. 2000). "Granting vacatur under these circumstances amounts to a de facto reversal of an abandoned claim and encourages parties with unfavorable judgments to file an appeal, comply with the judgment, and then request the judgment be vacated." *Id.*

It is well-established a "dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal." *Dilley*, 64 F.3d at 1371. This is exactly what Petitioners attempt here. Petitioners admit they filed an unsuccessful petition for rehearing with the Eighth Circuit "[a]fter trial concluded." Pet.7. Petitioners did not claim this case was moot and did not request vacatur in their petition for rehearing. *See* Pet. Reh'g. En-Banc, *In re N.D. Legislative Assembly*, No. 23-1600 (8th Cir. July 20, 2023). After their unsuccessful petition, Petitioners now erroneously argue this matter is moot and the Eighth Circuit's decision should be vacated. They omit that Respondents did nothing to moot this

dispute.[5] Rather, Petitioners waited until after judgment was entered to request this Court's review for the sole purpose of obtaining an equitable remedy. Such gamesmanship cannot be rewarded with vacatur as it is exactly what *U.S. Bancorp*'s "equitable" requirement is designed to prevent.

2. Petitioners Do Not Have to "Acquiesce" in Any Judgment.

There is no judgment entered against Petitioners that would warrant vacatur. The Eighth Circuit's mandamus writ is unlike other cases where parties are "subject to a money judgment or any injunctive relief as a result of the [circuit] court's judgment. In this regard, [Petitioners are] not 'forced to acquiesce in the judgment'" under *U.S. Bancorp. Hall v. Louisiana*, 884 F.3d 546, 553 (5th Cir. 2018). Instead, Petitioners seek to vacate a judgment that sets the ground rules for legislative privilege in a still-ongoing lawsuit. This does not fit within the scope of *U.S. Bancorp* and Petitioners' request for vacatur could be denied for this reason alone.

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[5] Petitioners argue the Legislative Assembly's attempted intervention after judgment in the underlying lawsuit somehow impacts this appeal. Pet.11, n. 3. This argument is meritless in light of the facts and posture of the underlying dispute. The Assembly's post-judgment motion to intervene was to protect the Assembly's unique interests in accordance with N.D.C.C. § 54-35-17. Specifically, the Assembly sought to intervene in the post-judgment remedial stage to protect its constitutional interest in developing and enacting redistricting legislation. The Assembly did not seek to participate in trial or engage in discovery. Moreover, none of the individual Respondents attempted to intervene.

3. The Public Interest Is Not Served by Vacating the Eighth Circuit's Decision.

Petitioners' request for vacatur must also fail because they cannot show the "public interest" would be served by vacating the Eighth Circuit's decision. *See U.S. Bancorp*, 513 U.S. at 26. Specifically, this Court stated "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *Id.* There are substantial "benefits that flow to litigants and the public from the resolution of legal questions" by circuit courts. *Id*. at 27. Put another way, "the public policy of bringing to bear all judicial thinking on an important issue certainly outweighs the [Petitioners'] interest in having an unfavorable precedent obliterated." *Keeler v. Mayor & City Council of Cumberland*, 951 F. Supp. 83, 84 (D. Md. 1997).

It is quite difficult—if not impossible—to imagine how the equities favor vacatur of the Eighth Circuit's decision. Petitioners' request paves the way for elimination of appellate decisions on interlocutory discovery matters not just in this case, but also in all other cases. Any disappointed party would simply claim the sought after discovery is no longer needed and the unfavorable discovery decision would be extinguished. Petitioners' request for vacatur is little more than a request to erase the Eighth Circuit's precedent on the law of legislative privilege. But the "establishment of precedent argues against vacatur, not in favor of it." *Mahoney v. Babbitt*, 113 F.3d 219, 223 (D.C. Cir. 1997) (explaining that if a decision in a prior restraint First

Amendment case were vacated due to the government's failure to appeal from a preliminary injunction, "the judicial system could seldom establish precedent governing future cases of prior restraint"). The same rationale holds true with respect to discovery orders which are generally not subject to immediate appeal. *See Collins as Next of Friend of J.Y.C.C. v. Doe Run Res. Corp.*, 65 F.4th 370, 374-75 (8th Cir. 2023). It also exemplifies why neither *Munsingwear* nor *U.S. Bancorp* should permit vacatur of discovery orders. *See Coty Inc. v. C Lenu, Inc.*, No. 10-21812-CIV, 2011 WL 573837, at *3-5 (S.D. Fla. Feb. 15, 2011) (explaining in detail why neither *Munsingwear* nor *Bancorp* justify vacatur of discovery orders). The Petitioners' request is not consonant with the "public interest" and would deprive the legal community of valuable precedent that correctly defines an elected State legislator's obligations in a private civil action.

Petitioners provide no valid reason as to why vacatur is appropriate. Rather, they only seek vacatur in a self-serving attempt to erase the Eighth Circuit's decision because they simply do not agree with the result. *See SD Voice v. Noem*, 987 F.3d 1186, 1191 (8th Cir. 2021). (Defendants who offered "no argument as to how vacatur here serves the public interest, instead arguing only how vacatur serves them" failed to show entitlement to vacatur). Here, vacatur would only serve the Petitioners' interest to impermissibly have "an unfavorable precedent obliterated." *Keeler*, 951 F. Supp. at 84. The equities clearly do not favor vacatur and Petitioner's request for such extraordinary and equitable relief must be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied as the Eighth Circuit followed established precedent, did not create a circuit split, and Petitioners failed to satisfy their burden to establish the extraordinary and equitable remedy of vacatur.

Respectfully submitted,

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