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

REPLY OF PETITIONERS

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I. The Court should vacate under *Munsingwear* because this case is moot.

A. The privilege dispute is moot.

As the Petition explains, the Court should vacate the Eighth Circuit's decision under *United States v. Munsingwear* because the dispute is now moot. The Assembly's contrary assertion is meritless.

First, Respondents contend that "Petitioners cannot establish mootness by merely asserting they no longer need discovery they once insisted upon." Br. 23. But it is not that Petitioners no longer *need* the discovery; rather, the entry of a favorable judgment *forecloses* their ability to obtain it. "[I]f there is no pending trial in which [the requested] discovery can be used, the availability of discovery subpoenas becomes a moot question." *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 101 (D.C. Cir. 2012) (cleaned up); *see also United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (vacating judgment because discovery dispute became moot while case was before the Supreme Court); *Green v. Nevers*, 196 F.3d 627, 622 (6th Cir. 1999) (holding that discovery dispute was mooted by disposition of case). Indeed, Rule 45 only permits subpoenas in a "pending" action. Fed. R. Civ. P. 45(a)(2). Petitioners have never stopped *wanting* the discovery at issue, there is simply no legal basis upon which to obtain the discovery post-judgment.

Second, Respondents contend this matter is not moot because the Defendant has appealed the

underlying case. Br. 22-23. But that appeal is limited to (1) whether Petitioners could enforce Section 2 of the Voting Rights Act pursuant to 42 U.S.C. § 1983 and (2) whether Petitioners established the first and second *Gingles* preconditions. *See* Appellant's Br., *Turtle Mountain v. Howe*, No. 23-3655 (8th Cir. Jan. 25, 2023). Respondents hint at a potential remand following the disposition of the appeal. *See* Br. 23. But even if there were a remand, it could only be with respect to the district court's determination on the first and/or second *Gingles* preconditions. The subpoenas at issue in this action have no bearing on those issues, and Respondents do not contend otherwise. *See* Fed. R. Civ. P. 45(d) (limiting scope of discoverable information); Fed. R. Civ. P. 26(b)(1) (limiting scope of discoverable information to that "relevant to any party's claim or defense"). This matter would not be revived during any potential remand.

Third, Respondents contend the matter is not moot because it is capable of repetition yet evading review. Br. 24. But Respondents do not cite any instance in which this Court has applied this exception to preclude *Munsingwear* vacatur. Rather, this exception arises when a party *seeking review* demonstrates that a case that no longer features a live dispute should nevertheless be decided on appeal. The capable-of-repetition-yet-evading-review exception is not relevant here. Even if it were, Respondents have not shown that the exception applies.

Respondents contend that the first element—that the challenged action is too short in duration to be

fully adjudicated—is satisfied merely because *in this case* the matter ceased being a live dispute. But the first element of the mootness exception is not satisfied simply because a controversy is no longer live—were it so, the mootness exception would swallow the rule. Rather, "the 'capable of repetition, yet evading review' exception is concerned not with particular lawsuits, but with classes of cases that, absent an exception, would *always* evade judicial review." *Wallingford v. Bonta*, 82 F.4th 797, 801 (9th Cir. 2023) (quoting *Protectmarriage.com-Yes on 8 v. Bowen*, 725 F.3d 827, 836 (9th Cir. 2014) (emphasis in original)). The particular circumstances of *this* case—the Eighth Circuit's issuance of its mandamus decision mere days before trial commenced and the district court's speedy issuance of judgment—are what mooted this case. Respondents do not attempt to show—nor could they—that redistricting cases are of a particular *category* that will *always* feature discovery orders that evade this Court's appellate review. Indeed, redistricting cases often languish for years before judgment. *See, e.g.*, *Abbott v. Perez*, 585 U.S. 579 (2018) (lawsuit challenging Texas redistricting maps filed in 2011 and judgment issued in 2017).

Moreover, Respondents have not shown that the second element—that the party advancing an appeal will again suffer the same injury—is satisfied. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (explaining the exception requires that "there [be] a reasonable expectation that the same complaining party [will] be subjected to the same action again" (second bracket in original)). Respondents mistakenly identify

themselves as the "complaining party." Br. 25. Although Respondents are advocating that this matter is not moot, they do so only to escape vacatur of the Eighth Circuit's decision, not because *they* were advancing an appeal that became moot. Petitioners, not Respondents, are the relevant "complaining party" for purposes of the mootness exception because they are denied review due to mootness. In an ordinary posture, the party seeking review asserts the capable-of-repetition-yet-evading-review exception. Respondents have inverted it by advancing the exception to defend a judgment they wish to preserve, but that does not change the parties to whom the elements apply.

In any event, Respondents have not shown that *any* party has a reasonable expectation of encountering a legislative privilege dispute again. First, this appears to be the first time the issue ever arose in North Dakota. Second, only one of the Respondents, Rep, Mike Nathe, is still a member of the Assembly, and he will be term limited from running for re-election after the 2024 election cycle. *See* N.D. Const. art. XV. Thus, there is no reasonable expectation that *any* of the subpoena recipients will hold their offices during the 2031 redistricting cycle, which is the first time this issue could arise again.[1] Third, there is no reasonable expectation that the 2031 Assembly will enact redistricting legislation that violates Petitioners' rights under Section 2 of the Voting Rights Act, thus triggering the potential for

[1] The only recipients were individual legislators and staff members. Petitioners did not subpoena the Assembly itself.

litigation in which Petitioners might again seek discovery from legislators and staff. This Court is "unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place [it] at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320 (1988); *see United States v. Sanchez-Gomez*, 584 U.S. 381, 391-92 (2018) (collecting cases). Even where the Court has made that assumption in civil cases, it has "rested on the litigants' inability, for reasons beyond their control, to prevent themselves from transgressing and avoiding recurrence of the challenged conduct." *Sanchez-Gomez*, 584 U.S. at 393. North Dakota is not helplessly likely to violate Section 2 again in 2031 such that the second mootness exception element is satisfied. Indeed, federal courts have clarified North Dakota's obligations, and this Court should assume it will comply in the future.

The discovery dispute became moot before this Court could adjudicate it.

B. *Munsingwear* vacatur is appropriate.

This Court's "*Munsingwear* practice is well-settled." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023). Because the case became moot while on its way to this Court, vacatur is appropriate. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Respondents' assertions that the Court should depart from its usual course are meritless.

First, Respondents erroneously contend that this case falls into the narrow exception to *Munsingwear* vacatur outlined in *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1984), because Petitioners

purportedly "caused" this action to become moot when they won their Section 2 claim at trial. Br. 27-28. In *Bancorp*, the Court declined to extend *Munsingwear* vacatur to cases that become moot due to settlement. 513 U.S. at 24-45. The Court found that where a case becomes moot because of a party's "voluntary forfeiture of review," the party is not entitled to the equitable doctrine of vacatur. *Id.* But Petitioners did not settle their claims, nor did they abandon their attempts to seek review of the ruling below. To the contrary, when the Eighth Circuit issued its ruling mere days before trial began, Petitioners took the unusual step of making an offer of proof at trial regarding the discovery at issue, precisely because they sought to avoid forfeiting their opportunity to seek review of the decision. *See* Pet. 7, App.152; *Cf. Bancorp*, 513 U.S. at 24-25.

Moreover, the fact that this case became moot because Petitioners won their Section 2 claim at trial does not preclude vacatur. *See Alvarez v. Smith*, 558 U.S. 87, 95-96 (2009) (declining to apply *Bancorp* exception in a collateral action mooted by the resolution of the underlying case). In *Alvarez*, the Court found that a collateral challenge to a state forfeiture action became moot when the underlying dispute resolved after the state voluntarily returned some of the disputed property and the property owners accepted the forfeiture of the remaining cash. 558 U.S. 95-96. Recognizing that the underlying action essentially settled, the Court nonetheless held that the collateral action became moot by "happenstance," such that *Munsingwear* vacatur was

appropriate. *Id.* The Court held that because the underlying action involved a different legal question than the collateral action and resolved on "substantive grounds in the ordinary course of [the] proceedings," the "desire to avoid review" of the collateral action "played no role at all in producing" the termination of the underlying action. *Id.* at 97. Thus, it found that "the kind of 'voluntary forfeiture of a legal remedy'" at issue in *Bancorp* was not present in the collateral case.

So too here. Petitioners did not proceed to trial on their Section 2 claims to avoid review of the Eighth Circuit's privilege ruling but rather to obtain relief on their claim that North Dakota violated federal law by diluting the votes of Native Americans. Indeed, the case for vacatur here is even stronger than in *Alvarez* because Petitioners did not settle their Section 2 claim. Respondents' assertion that equity demands Petitioners delay obtaining relief on their substantive claim because Respondents filed a collateral challenge to a discovery order rather than seeking relief in the normal course of litigation finds no basis in *Bancorp*. And the suggestion that equity required Plaintiffs to seek a trial continuance is particularly disingenuous given that Respondents sought to intervene in the underlying action after judgment was entered and argued that the trial judgment came *too late* for Petitioners to obtain relief on their claims. *See* Assembly's Reply in Support of Motion for Stay, *Turtle Mountain Band of Chippewa Indians, et al. v. Michael Howe*, No. 3:22-cv-0022, (D.N.D. Dec. 12, 2023), Doc.148 at 4.

Indeed, in light of Respondents' subsequent actions, equity and the public interest weigh heavily in favor of vacatur here. Respondents utilized an extraordinary writ to avoid discovery obligations on the grounds that participating in the litigation would be an undue distraction from their legislative function. *See, e.g.*, Br. 9-10. Then, after judgment was entered and discovery was over, they sought to intervene as a party in the case, stay the trial court judgment, contest the trial court record and the judgment on the merits, and participate fully on appeal. Assembly's Brief in Support of Motion to Intervene, *Turtle Mountain*, No. 3:22-cv-0022, (D.N.D. Dec. 8, 2023), Doc.150 at 8 n.5, 12, 15 (asserting in motion to intervene that the district court erred in finding a Section 2 violation, contesting whether Petitioners "met their burden to establish liability," and expressly "preserv[ing] all arguments for appeal"); Assembly's Reply in Support of Motion for Stay, *Turtle Mountain*, No. 3:22-cv-0022, (D.N.D. Dec. 12, 2023), Doc.148. at 3n.2, (arguing, unsuccessfully, that a stay was warranted because Plaintiffs do not have a cause of action under Section 1983); *id.* at 6-7 (asserting that "[t]he Assembly contests the Court's application of *Gingles*," that "the Plaintiffs failed to meet their burden of proof" and that "[t]he Assembly preserves its right to contest the merits on appeal"); *cf.* Br. 29 n.5 (asserting that the Respondent Assembly sought to intervene solely in the remedial process). Equity and fairness preclude Respondents from preserving a judgment that allowed them to avoid discovery on the grounds that participating in a lawsuit would distract them from

their legislative duties, only to turn around and demand to be made party to the suit once the threat of discovery passed and the dispute was moot.

Second, Respondents erroneously contend that Petitioners cannot show that this case became moot due to the vagaries of circumstance, because "no unexpected or inexplicable circumstances" occurred to moot the case. Br. 27. This Court has never applied an "unexpected or inexplicable" test for vacatur, and Respondents offer no authority to suggest otherwise. Nor do they address the authority cited by Petitioners, Pet. 9, demonstrating that this Court routinely applies *Munsingwear* vacatur to cases where mootness occurred due to entirely predictable circumstances, such as the occurrence of an election, *Ritter v. Migliori*, 143 S. Ct. 297 (2022) (Mem.), or the inauguration of a new president, *Trump v. Citizens for Ethics and Responsibility in Washington*, 141 S. Ct. 1262 (2021) (Mem.). Thus, even assuming it was "expected" or "explicable" that the district court might enter judgment in Petitioners' favor before the resolution of this collateral action, that does not preclude vacatur. *See id*; *see also Alvarez*, 558 U.S. at 97 (vacating lower court judgment in collateral action that was mooted by resolution of underlying action "in the ordinary course").

Third, Respondents erroneously contend that vacatur is inappropriate here because there is no "judgment" in which Petitioners must acquiesce. Br. 29. Once again, Respondents offer no authority to support this assertion and it is plainly wrong. Rather than avail themselves of the usual procedures for

challenging a discovery ruling—for example, complying with the order subject to a protective order to preserve its appellate rights, *see, e.g.*, *League of United Latin American Citizens v. Abbott*, No. 23-50407, 2022 WL 2713263 at *1-2 (5th Cir. May 20, 2022), or refusing to comply with the ruling and appealing any resultant contempt order, *see, e.g. United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (vacating denial of motion to quash under *Munsingwear* on petition for certiorari from contempt order)—Respondents filed an original action in the Eighth Circuit for a mandamus order that would determine the respective parties' rights to the discovery at issue. *See* App.1. In granting Respondents' petition for an extraordinary writ, the divided panel entered judgment for Respondents. Judgment, *In re North Dakota Legislative Assembly*, Case No. 23-1600 (June 6, 2023); *see also Hartman v. Greenhow*, 102 U.S. 672, 675 (1880) ("The judgment denying the writ of mandamus was a final [judgment]" which "stands like the judgment in an ordinary action at law, subject to review under similar circumstances."). Respondents offer no reason why this Court should depart from its "settled practice," of vacating judgments in moot cases, *Acheson*, 601 U.S. at 5, simply because the judgment entered was a writ of mandamus.

Finally, Respondents erroneously contend that it goes against the public interest to allow vacatur of interlocutory discovery rulings. In support of this assertion Respondents cite numerous lower court decisions, all of which are inapposite. *See* Br. 30-31.

More importantly, this argument is foreclosed by *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018). There, the Court, citing *Munsingwear*, vacated a Second Circuit decision reversing the denial of a motion to quash after determining that there was no longer a live dispute between the parties with respect to information sought. The Court should do the same here.

II. Certiorari is warranted because the Eighth Circuit's decision conflicts with this Court's precedent.

If not moot, this case would present a certiorari-worthy question. The district court ordered Respondents to produce non-privileged communications with third parties and a privilege log. Pet. 20. As explained in the Petition, the Eighth Circuit's ruling that the state legislative privilege is an "absolute bar" to civil discovery—including of non-privileged material—conflicts with the decisions of this Court and other circuits. *See* Pet. 13-21. Respondents contend that the panel did not err because "it was undisputed Respondents' 'acts were undertaken within the sphere of legitimate legislative authority.'" Br. 21. But the very heart of the dispute was whether Respondents were obligated to produce non-privileged communications, whether any of their communications with third parties were privileged, and whether the privilege—if it attached—had been waived. Pet. 20-21; App.3, 7. The district court ordered the production of a privilege log specifically to allow it to resolve these questions. Instead, the divided panel applied an "absolute bar" to discovery.

The error in that decision is illustrated by communications produced in related litigation by Respondent Terry Jones. After the panel below declined to set aside the finding that Jones had waived privilege in the related case *Walen v. Burgum*, App.8, Jones produced communications with non-legislators regarding their collective plans to raise funds for and file the *Walen* suit. These communications indisputably fell outside the scope of legislative privilege but would have nonetheless been protected from disclosure under the ruling below had Jones not independently waived his privilege by voluntarily testifying at the preliminary injunction hearing in *Walen*.

Thus, even assuming the district court erred in finding that every third-party communication was categorically non-privileged, the panel committed the same error in determining that every communication between a legislator and a third-party that touches on subjects before the legislature falls within the legitimate sphere of legislative authority. Rather than make this determination itself, the panel was obligated to first allow the district court to apply its newly announced test upon a full evaluation of the record, including a privilege log. *See Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 245, (1964) (holding that a writ of mandamus "cannot be used 'to actually control the decision of the trial court'" and finding that the circuit court erred when it "undertook a de novo examination of the record" in mandamus action). *See also* Pet. 6, 20; App.8-12.

CONCLUSION

The petition should be granted, and the Eighth Circuit's decision should be vacated under *Munsingwear*.

Respectfully submitted,

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