IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0187

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIEL HOGAN; GEORGE STARK; LUKAS ILLION; and BOB BROWN,

Plaintiffs and Appellants,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellee,

and

STATE SENATOR KEITH REGIER,

Intervenor-Appellee.

INTERVENOR-APPELLEE'S RESPONSE BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County Cause No. DDV 2023-702,
The Honorable Chris Abbott, Presiding

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STATEMENT OF ISSUES

1. Whether the district court correctly quashed the subpoena commanding State Senator Keith Regier to testify and produce documents relating to SB 109?[1]

STATEMENT OF THE CASE

Senator Regier sponsored Senate Bill 109 (2023) ("SB 109") in response to *Brown v. Jacobsen*, 590 F. Supp. 3d 1273 (D. Mont. 2022), which declared Montana's public service commission districts unconstitutional on the grounds they lacked population parity. (Doc. 153, FOF ¶ 6.)

Plaintiffs challenged SB 109 alleging political discrimination and a loss of the right of suffrage. (Doc. 1.) Plaintiffs moved for a preliminary injunction and the Secretary of State moved to dismiss. (Doc. 153 FOF, ¶¶ 39–40.) The district court denied both motions. (Doc. 153 FOF, ¶ 42.)

On May 16, 2024, Plaintiffs served a subpoena and subpoena *duces tecum* on Senator Regier commanding him to sit for a deposition and produce legislative documents. (Doc. 64 at 3–4.) Senator Regier moved to

[1] Senator Regier intervened to protect and preserve his legislative privilege. Regier Intervention Br. at 3 (May 23, 2025).

quash the subpoena because legislative privilege barred production of documents and his deposition. (Doc. 47, 48, 51.) Plaintiffs argued Montana doesn't recognize legislative privilege and the right to know compels production. (Doc. 50.) On July 12, 2024, the district court accepted Senator Regier's arguments, rejected Plaintiffs' arguments, and quashed the subpoena except when Senator Regier had waived privilege. (Doc. 64.)

STATEMENT OF THE FACTS

Senator Regier provided consistent public testimony during the 2023 Montana Legislative Session regarding SB 109. (Doc. 153, FOF ¶¶ 6, 15.) Senator Regier testified during legislative hearings, "the big emphasis was the population and sticking with what the Redistricting Committee did" on the house districts. (Doc. 153, FOF ¶ 15.) Senator Regier maintained consistent rationales throughout legislative proceedings. (Doc. 153, FOF ¶¶ 15, 17, 58–62.)

Senator Regier, throughout legislative proceedings, maintained he never looked at partisan data and nothing in the record contradicts his statements. (Doc. 153, FOF ¶¶ 59–60.)

Plaintiffs throughout this case cast Senator Regier's legislative actions in "a sinister light" without objective evidence to support such accusations. (Doc. 29 at 41.)

Plaintiffs, "[a]s part of their efforts to plumb the motivations behind enactment of SB 109" requested the 'junque file' from Legislative Services Division. (Doc. 64 at 3.)[2] Unsatisfied with the junque file and official legislative proceedings, Plaintiffs took the extraordinary step of commanding Senator Regier to appear at a deposition and produce documents. (Doc. 48 at 4.) Plaintiffs' purpose was to probe Senator Regier's motivations and intent for SB 109. Op.Br. at 43. Senator Regier objected under Mont. R. Civ. P. 45(d)(3)(A)(iii) and (iv).

The district court quashed most of the Rule 45 subpoena because it sought privileged information. (Doc. 64 at 16, 24–29.) The district court did not rule on Senator Regier's Rule 45(d)(3)(A)(iv) arguments. (*E.g.*, Doc. 64 at 29 ("In sum, the Court will quash the subpoena duces tecum on grounds of legislative privilege except to the extent it command

[2] The record is silent on whether Senator Regier was notified of Plaintiffs' request—which would have enabled the Senator to assert privilege. Setting aside the drafter comments, it does not appear the junque file contains any of Senator Regier's mental impressions. (Doc. 50, Van Kley Aff. Ex. A.)

Senator Regier to disclose communications with state and local executive branch officials.").)

The district court reviewed the record of official proceedings for its findings of fact at trial. (Doc. 153, FOF ¶¶ 15, 17, 57–69.) The district court declined to accept Plaintiffs' invitation to presume Senator Regier wasn't truthful in his multiple, consistent, public statements. (Doc. 153, FOF ¶ 70.)

STANDARD OF REVIEW

Mont. R. Civ. P. 45 permits a party to compel a non-party to attend a deposition and "produce designated documents, electronically-stored information, or tangible things in that person's possession." Mont. R. Civ. P. 45(a)(1)(A)(iii). Such a subpoena may be quashed if, among other things, the subpoena "requires disclosure of privileged or other protected matter, if no exception or waiver applies." *Id.* 45(d)(3)(A)(iii).

This Court ordinarily reviews a district court's discovery order for abuse of discretion. *Egan Slough Cmty. v. Flathead Cty. Bd. of Cty. Comm'rs*, 2022 MT 57, ¶ 15, 408 Mont. 81, 506 P.3d 996. This Court, however, exercises plenary review of constitutional questions and

reviews a district court's decision on such questions for correctness. *Id.* ¶ 16.

SUMMARY OF THE ARGUMENT

I. The 1972 Montana Constitution preserves a preexisting legislative privilege in Article V, Section 8 that continues an unbroken tradition from the 1689 English Bill of Rights through the 1889 Montana Constitution. That privilege protects against the compelled production of documents or information that reveals a legislator's internal deliberations or motivations for legislative acts. Neither Article II, Section 9's "right to know" nor Article V, Section 10(3)'s legislative openness guarantee abrogate legislative privilege.

II. The district court correctly recognized Article V, Section 8 confers an absolute privilege to Senator Regier against compulsory testimony or document protection unless waived and quashed Plaintiffs' subpoenas on those grounds.

III. The district court correctly declined to limit Senator Regier's privilege on mere allegation he acted contrary to his oath of office. All state officials swearing an oath to the constitution are owed a presumption they carry out their duties in good faith.

ARGUMENT

I. The text and historical context of the 1972 Montana Constitution establishes a preexisting legislative privilege under Article V, Section 8 that protects a legislator's internal deliberations and motivations about legislative acts.

Montana's "right to know" guarantee secures the "openness of government documents and operations," but that right "is not absolute." *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 17–18, 390 Mont. 290, 412 P.3d 1058. And Article II, Section 9's "right to know" doesn't abrogate "preexisting legal privileges" that were "protected by statute or common law at the time of [the Constitution's] adoption" that are "necessary for the integrity of government." *O'Neill v. Gianforte*, 2025 MT 2, ¶ 13, 420 Mont. 125, 561 P.3d 1018 (quoting *Nelson*, ¶¶ 15, 20). Indeed, the 1972 Framers clearly intended "that Article II, Section 9, would not affect preexisting legal privileges against public disclosure." *Nelson*, ¶ 22. The questions then are whether Montana law contained a legislative privilege that pre-existed and survived adoption of the 1972 Constitution and whether it allowed a legislator to shield from disclosure information about their internal deliberations and motivations for legislation. *O'Neill*, ¶¶ 13–14. The short answer to both questions is "yes."

A. The 1972 Framers incorporated legislative privilege through Article V, Section 8's text.

To determine whether legislative privilege pre-existed and survived passage of the 1972 Constitution, this Court must construe Article V, Section 8 according to the "historical and surrounding circumstances under which the Framers drafted the Constitution." *Nelson*, ¶ 14. To do that, this Court must consider the history of the relevant text used in the 1972 Constitution, as well as the scores of federal and state cases interpreting similar language in their constitutions. *See Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 30, 348 Mont. 80, 201 P.3d 8 (Montana courts properly rely on federal precedent to interpret Montana constitutional provisions with federal analogues).

1. Legislative privilege, as expressed in the text of Article V, Section 8, predates the 1972 Constitution.

Legislative privilege has deep roots in the Anglo-American legal tradition, dating back well before our Nation's founding. Indeed, the privilege emerged from the sixteenth and seventeenth century conflicts between the English Parliament and the Tudor and Stuart monarchies "during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *United States v. Johnson*,

383 U.S. 169, 178 (1966); *accord Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). The English Bill of Rights of 1689, which sought to address these abuses, provided: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." *Johnson*, 383 U.S. at 178 (quoting 1 Wm. & Mary, Sess. 2, c. II). And since the Glorious Revolution, "the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Id.*

Before independence, eight colonies recognized legislative privilege protections. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 230–31 n.22 (2003). And the federal Speech or Debate Clause—which closely tracks the language from the 1689 English Bill of Rights and the Articles of Confederation—was approved at the Constitutional Convention "without discussion and without opposition." *Johnson*, 383 U.S. at 177–78. The federal Speech or Debate Clause provides:

> The Senators and representatives … shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

U.S. Const. art. I, § 6, cl. 1. Forty-three states have adopted a speech or debate clause into their state constitutions modeled directly after the federal Speech or Debate Clause. *Smith v. Iowa Dist. Court*, 3 N.W.3d 524, 532 (Iowa 2024) (citing *Developments in the Law—Privileged Communications: VI. Inst. Privileges*, 98 Harv. L. Rev. 1450, 1615 n.129 (1985)); *see also Tenney*, 341 U.S. at 375 n.5 (listing states with constitutional provisions protecting legislative immunity); *Fann v. Kemp*, 515 P.3d 1275, 1281 (Ariz. 2022) ("Most states … have preserved common law legislative immunity in their respective constitutions.").

Like forty-two other states, Montana follows this longstanding and widespread tradition of safeguarding legislative privilege. Montana's Speech or Debate Clause closely tracks the federal provision's language, providing that:

> A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

Mont. Const. art. V, § 8.

The 1972 Framers adopted this language from the 1889 Constitution with minimal changes through a unanimous voice vote.

III 1972 Mont. Const. Conv. 595 (1981). Given that Article V, Section 8 was essentially a cut-and-paste of its 1889, 1789, and 1689 forbears, it strains credulity to suggest that the 1972 Convention delegates intended to limit or abolish legislative privilege "without a single acknowledgment of such an intention during the convention debates." *See Nelson*, ¶ 28; *see also O'Neill*, ¶ 20; III 1972 Mont. Const. Conv. 595 (1981) (Del. Robinson). By adopting that language without opposition, the 1972 Framers imported a meaning dating back to the 1689 English Bill of Rights. And nothing in the 1972 Convention reveals an intent to supersede or abolish privileges derived from this text. *See Nelson*, ¶¶ 20-22.[3] So the unbroken trail from the text of the 1689 English Bill of Rights to the current text of Montana's Speech or Debate Clause establishes the existence of a legislative privilege. *See O'Neill*, ¶ 24.

2. Legislative privilege is necessary for the integrity of government.

"The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of

[3] *Cf. Antonin Scalia & Brian Garner,* READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) (canon of presumption against change in the common law); *id.* at 327 (canon of presumption against implied repeal).

Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). The Clause is thus an "essential [] grant of privilege," *id.* at 516, that reinforces "the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178. In short, the privilege isn't for "private indulgence but for the public good." *Tenney*, 341 U.S. at 377.

The immunities prevent "intrusion by the Executive and the Judiciary into the sphere of protected legislative activities." *United States v. Helstoski*, 442 U.S. 477, 491 (1979); *Powell v. McCormack*, 395 U.S. 486, 502 (1969). And "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977). "A court proceeding that probes legislators' subjective intent in the legislative process is a 'deterrent[] to the uninhibited discharge of their legislative duty.'" *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 238 (5th Cir. 2023) (quoting *Tenney*, 341 U.S. at 377).

Legislative privilege serves manifold purposes under Montana's Constitution. It reinforces Montana's express separation of powers and legislative independence. *Johnson*, 383 U.S. at 178; *Cooper v. Glaser*, 2010 MT 55, ¶¶ 10–12, 355 Mont. 342, 228 P.3d 443; *see also McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 58, 405 Mont. 1, 493 P.3d 980 (McKinnon, J., concurring) ("The constitutional doctrine of separation of powers does not tolerate the control, interference, or intimidation of one branch of government by another."). It also preserves candor and allows legislators to fully and freely discharge their duties. *Tenney*, 341 U.S. at 377; *Abbott*, 68 F.4th at 238; *United States v. Peoples Temple of Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981); *Cooper*, ¶ 12; *cf. O'Neill*, ¶ 24 (gubernatorial privilege allows the governor to receive candid advice necessary for the integrity of government). Legislative privilege is a necessary and enduring cornerstone of our constitutional framework.

B. Article V, Section 8 provides an absolute privilege against compelled testimony and compelled document production.

Montana's Speech or Debate Clause should provide Montana legislators with the same degree of protection afforded to federal legislators under the federal Speech or Debate Clause. *Cooper*, ¶¶ 10–14;

see also Kafka, ¶¶ 30, 162 (Montana courts properly rely on federal precedent to interpret Montana constitutional provisions with federal analogues).

Legislative privilege confers three "absolute" protections. *In re Sealed Case*, 80 F.4th 355, 365 (D.C. Cir. 2023). The first is immunity from suit. *Id.*; *see also Cooper*, ¶¶ 10–14. The second is an evidentiary privilege prohibiting the use of legislative acts as evidence in a judicial proceeding. *Sealed Case*, 80 F.4th at 365. And the third is a testimonial privilege prohibiting compelled testimony about legislative acts, which comes from the text of the Clause itself: "shall not be questioned in any other place." *Id*. (quoting U.S. Const. art. I, § 6, cl. 1); *see also Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 86 (1st Cir. 2021) (applying an "absolute evidentiary privilege" to all evidentiary matters). The privilege protects against the compelled disclosure of documents. *See, e.g.*, *Minpeco, S.A v. Conticommodity Servs., Inc.*, 844 F.2d 856, 862 (D.C. Cir. 1988) (Congress "may not be compelled to provide evidence that would compromise the protection extended by the Constitution to the legislative process itself."); *United States v. Hubbell*, 530 U.S. 27, 40 (2000) (compelled testimony can stem from compelled production of documents).

"The term 'questioned' should be understood broadly to mean 'subjected to examination by another body.'" *Edwards v. Vesilind*, 790 S.E.2d 469, 477 (Va. 2016) (addressing identical clause in the Virginia Constitution).

The U.S. Supreme Court explicitly recognized the "incontrovertible" claim that the text of the Constitution prohibits the questioning of a legislator, about a legislative act, outside the legislative arena. *Gravel v. United States*, 408 U.S. 606, 615–16 (1972). The Supreme Court had "no doubt [a legislator] may not be made to answer – either in terms of questions *or* in terms of defending himself from prosecution…." *Id.* at 616 (emphasis added). *Gravel* affirmed that the Speech or Debate Clause confers both an immunity from suit and a protection from compulsory questioning.

Beyond the three "absolute" protections that legislative privilege confers, it also forbids inquiry into a legislator's motives. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). Even though the Clause's language provides a "very large, albeit essential, grant of privilege" which may immunize "reckless men to slander and even destroy others with impunity," that was still "the conscious choice of the Framers." *Brewster*, 408 U.S. at 516; *see also Cooper*, ¶¶ 13–14. And this

tradeoff was considered necessary to "effectuate [the] purpose of protecting the independence of the Legislative Branch." *See id.* Since at least *Tenney*, the Supreme Court has construed the Speech or Debate Clause to forbid "inquir[y] into the motives of legislators." *See* 341 U.S. at 377.

Federal courts uniformly elevate legislative privilege over competing interests. "The privilege would be of little value if [a legislator] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, 341 U.S. at 377. Litigants' views of their own case cannot overcome the absolute privilege. *See Sealed Case*, 80 F.4th at 365 ("Legislative acts receive these protections regardless of the Member's subjective motives."); *see also, e.g.*, *United States v. Renzi*, 769 F.3d 731, 749 (9th Cir. 2014) (Congressman's legislative privilege rights superseded defendant's Fifth and Sixth Amendment rights to present a defense). Legislative privilege applies to efforts to compel the production of documents or information—by subpoena or a right to know request—tantamount to questioning a legislator about their motivations as to core legislative acts. *See SEC v.*

Comm. on Ways & Means of the U.S. House of Representatives, 161 F. Supp. 3d 199, 242 (S.D.N.Y. 2015) (requests for testimony or documents regarding core legislative acts "forbidden by the Speech or Debate Clause"); *cf. Nelson*, ¶ 30 (documents protected by attorney-client and work-product privileges not subject to disclosure under Article II, Section 9).

The absolute nature of the privilege "is supported by the absoluteness of the terms 'shall not be questioned,' and the sweep of the terms 'in any other Place.'" *Eastland*, 421 U.S. at 503. If legislative privilege (or immunity) applies to testimony or documents, "it is absolute." *Fann*, 515 P.3d at 1281.

C. Legislative privilege protects the sphere of legitimate legislative activity.

Legislative privilege attaches to "legislative acts undertaken within the legislative process." *Sealed Case*, 80 F.4th at 363. The heart of legislative privilege is speech or debate in the legislature. *Gravel*, 408 U.S. at 625. But it reaches other "legislative acts"—that is, matters integral to members' deliberative and communicative processes by which they "participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with

respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* At a minimum, this includes acts undertaken as a part of legislating, *see Doe v. McMillan*, 412 U.S. 306, 324 (1973), such as information gathering, communications with constituents and advocacy groups, and related activities, *see SEC*, 161 F. Supp. 3d at 242. Indeed, "most states have broadly applied the terms 'speech' or 'debate' to cover a broad scope of legislative activity." *Stivers v. Beshear*, 659 S.W.3d 313, 320 (Ky. 2022); *see also, e.g.*, *Fann*, 515 P.3d at 1281 (adopting Gravel's articulation of the scope of legislative privilege).

Information gathering and bill drafting unquestionably fall within the scope of legislative privilege. *See Tenney*, 341 U.S. at 376–78 (coining term "sphere of legitimate legislative activity" to refer to legislative acts done while discharging a legislator's duty). And "[a] legislator's communication regarding a core legislative function is protected by legislative privilege, regardless of where and to whom it is made." *Edwards*, 790 S.E.2d at 480 (citing *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)); *see also In re 2022 Legislative Districting of the State*, 282 A.3d 147, 195 (Md. Ct. App. 2022) ("[C]onfidentiality is a core feature of the drafting

process before a bill is filed…. There is no question that [legislative] privilege applies to the information sought by Petitioners, as they seek non-public information concerning the drafting of legislation."). To these acts, legislative privilege's broad protections apply. *See Sealed Case*, 80 F.4th at 365.

The privilege attaches to legislative acts performed by a legislator's agent or assistant as if it were done by the legislator personally. *Gravel*, 408 U.S. at 616; *see also Lee v. City of L.A.*, 908 F.3d 1175, 1187 (9th Cir. 2018) (legislative privilege extends to legislative aides and assistants); *Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011) (quashing subpoena directed at budget analyst); *Fann*, 515 P.3d at 1281 ("Legislative immunity applies to legislators, legislative aides, and legislative contractors' legislative activities."); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984) ("The privilege applies equally to legislative aides and commission staff members who are engaged in legislative activity."). As *Gravel* explains:

> "[I]t is literally impossible, in view of the complexities of the modern legislative process … for [legislators] to perform their legislative tasks without the help of aids and assistants; that the day-to-day work of such aides is so critical to the [legislator's] performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the

> central role of the Speech or Debate Clause … will inevitably be diminished and frustrated."

408 U.S. at 616–17.

The privilege also attaches to communications with third parties who are brought into the legislative process. *See, e.g.*, *Edwards*, 790 S.E.2d at 483; *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 454 (N.D. Fla. 2021) ("[C]ommunications with third parties are subject to legislative privilege so long as those communications were part of the formulation of legislation."); *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 671 (D. Ariz. 2016) ("the cases instruct that all of a legislator's communications 'that bear on potential legislation' are privileged") (quoting *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) (communications with executive branch, constituents, interested organizations, and members of the public are protected by legislative privilege if these communications "constitute information gathering in connection with or in aid of … legislative acts"); *cf. Abbott*, 68 F.4th at 237 (legislative privilege was not waived because legislators "did not send privileged documents to third parties outside the legislative process; instead they brought third parties into the process."); *Miller v.*

Transamerican Press, Inc., 709 F.2d 524, 530 (9th Cir. 1983) (because "[o]btaining information pertinent to potential legislation or investigation" is a legitimate legislative activity, the federal legislative privilege applies to communications in which constituents urge their congressperson to initiate or support some legislative action and provide data to document their views); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980) ("Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures" and is protected).[4]

The privilege isn't without limits. It doesn't apply to activity outside the legislative process. *See Brewster*, 408 U.S. at 516 (legislative privilege doesn't cover all acts that only "'relate' to the legislative process" because it was not intended "to make Members of Congress super-citizens, immune from criminal responsibility"). Federal cases make clear "that everything a Member of Congress may regularly do is not a legislative act." *Doe*, 412 U.S. at 313. For example, the privilege doesn't apply to political acts routinely engaged in by legislators, such as speech-making

[4] Senator Regier complied with, and does not cross-appeal, the district court's order finding waiver when the Senator communicated with executive branch officials. *See infra* 26.

outside the legislative arena and performing errands for constituents. *See Brewster*, 408 U.S. at 512 (providing examples of "political" acts). It also doesn't apply to the performance of administrative tasks. *Fann*, 515 P.3d at 1284. It's "limited to an act which was clearly a part of the legislative process—the due functioning of the process." *Brewster*, 408 U.S. at 515–16.

The threshold question is whether an *act* is a legislative act, regardless of motive or the actor. When courts analyze whether something is a "legislative act," they aren't "qualifying" the privilege, they're defining the scope. *Sealed Case*, 80 F.4th at 364. If something qualifies as a legislative act, the absolute privilege attaches. *Id.* at 365 ("Across a wide variety of factual circumstances, the Supreme Court and this circuit have faithfully applied the *Gravel* test and the principles animating it to determine whether an act is legislative and therefore privileged under the Speech or Debate Clause.").

II. The district court correctly quashed Plaintiff's subpoena because it sought to question Senator Regier about his legislative acts.

The district court correctly recognized legislative privilege falls within *Nelson's* exception. (Doc. 64 at 15.) The district court also correctly

walked through each step of the analysis—the existence of the privilege, the absolute nature of the privilege, the scope of the privilege—before concluding that the privilege bars both compulsory testimony and production of documents.

A. The district court applied the correct legal framework in quashing Plaintiffs' subpoenas.

"By the time of the Montana Constitutional Convention and the ratification of the Constitution it produced, the principles of legislative immunity from suit or arrest and privilege against compelled testimony regarding a legislator's legitimate legislative acts were firmly embedded in the landscape of American law." (Doc. 64 at 11.) The district court traced the origins of the privilege to English Parliament and Colonial America. (Doc. 64 at 8–9) (citing *Johnson*, 383 U.S. at 178; Huefner, *supra*, at 231). The district court further identified the privilege flows from two constitutional provisions: the Speech or Debate Clause and the separation of powers. (Doc. 64 at 6–7, n.4 (collecting cases finding legislative privilege in state constitutions based on those states' separation of powers provisions).

The district court recounted the 1972 Constitutional Convention Proceedings that adopted Article V, Section 8 with minimal changes

compared to the 1889 Montana Constitution. (Doc. 64 at 6–7, 11.) "There is no suggestion that the Convention delegates intended to modify the traditional scope of the legislative privilege in any way." (Doc. 64 at 11.)

The district court correctly rejected Plaintiffs' arguments that the 1972 Framers silently abrogated legislative privilege through Article II, Section 9 of the Montana Constitution. (Doc. 64 at 13.) "The Supreme Court declined in *Nelson* to infer that the Framers intended the right to know to abrogate the attorney-client and work-product privileges for public bodies 'without a single acknowledgment of such an intention during the convention debate.'" (Doc. 64 at 13 (quoting *Nelson*, ¶ 28).) "It is not reasonable to suggest that the Convention delegates or ratifying public … intended to circumscribe the meaning or scope of an express legislative immunity provision that was nearly a cut-and-paste of its 1889, 1789, and 1689 forebears without a single word on the subject." (Doc. 64 at 13.) "Thus, the Court concludes that like its federal analogue, Article V, Section 8 guarantees legislators a privilege against testifying in connection with their legislative acts." (Doc. 64 at 13.) "[T]he legislative privilege is both *textual* and part of a centuries-old legal tradition." ((Doc. 64 at 12 n.5) (emphasis added).)

"The text, history, and surrounding circumstances … compels but one conclusion: as a matter of first principles, Article V, Section 8 of the Montana Constitution confers an absolute testimonial privilege for state legislators regarding their legislative acts." (Doc. 64 at 15.) The district court based its decision on the "the 'absoluteness of the terms shall not be questioned and the sweep of the terms in any other Place.'" ((Doc. 64 at 14) (quoting *Eastland*, 421 U.S. at 503).)

The district court rejected reading the privilege as qualified. (Doc. 64 at 15.) It correctly noted that plaintiffs primarily relied on federal common law cases and not federal or state constitutional privilege cases. (Doc. 64 at 14–15); *see also* ((Doc. 51 at 9–13) (discussing state law legislative privilege cases).) Because the constitutional iteration of legislative privilege confers an absolute privilege, Plaintiffs could not overcome Article V, Section 8's protections. (Doc. 64 at 15.)

The district court next had little difficulty in concluding "communications and documents" related to information "gathered and relied upon in drafting legislation" qualify as a "core legislative action[]" within the scope of the privilege. (Doc. 64 at 16.)

The district court recognized that a "party may not compel the production of nonpublic documents that contain a legislator's deliberations and motivations or would be tantamount to questioning the legislator about their deliberations and motivations." (Doc. 64 at 20.) It carefully noted "requests for production carry the same potential to disrupt the work of the legislature and chill legislative inquiry." (Doc. 64 at 18). And "as a formal matter, the Constitution says that members of the legislature 'shall not be questioned' for their legislative acts. A question—that is, 'a query directed to a witness,' Black's Law Dictionary 1503 (11th ed. 2019)—is simply a request for information." (Doc. 64 at 19.)

The district court did find limited waiver of legislative privilege when a legislator communicates with members of the judicial or executive branch. (Doc. 64 at 28.)

The district court's order applied the text and history of Article V, Section 8 to affirm that legislative privilege is an exception to Article II, Section 9. To reach that conclusion, the district court applied this Court's reasoning in *Nelson*. Like this Court in *Cooper*, the district court looked at federal precedent to guide the interpretation of Montana's Speech or

Debate Clause. In so doing, the district court correctly declined to authorize an invasion into a legislator's protected motivations and intent consistent with longstanding constitutional principles. ((Doc. 64 at 21–22) (citing *United States v. Brewster*, 408 U.S. 501, 525 (1972); *Johnson*, 383 U.S. at 169, 173–77; *Tenney*, 341 U.S. at 377; *Fletcher v. Peck*, 10 U.S. 87, 130 (1810).)

B. Plaintiffs' arguments on appeal fail.

Plaintiffs misstate, misunderstand, and outright ignore the bases for the district court's order. Op.Br. at 43–51. As below, *see* (Doc. 51 at 2), Plaintiffs fail to address the textual source of legislative privilege—the phrase "shall not be questioned in any other place for any speech or debate in the legislature." Mont. Const. art. V, § 8. They also raise no arguments (nor could they) that the information sought falls outside the sphere of legislative activity. And they openly admit they seek to question Senator Regier about "the legislative intent behind SB 109." Op.Br. 43.

Each of Plaintiffs' arguments fails on its face.

First, *O'Neill* changes neither the methodology nor the outcome. Op.Br. at 16–17, 44. The district court applied the same test for exceptions to Article II, Section 9 as this Court applied in *O'Neill*. *But see*

Op.Br. 44. *O'Neill* didn't invent a new test, it applied *Nelson*. *O'Neill*, ¶ 13 (citing *Nelson*, ¶¶ 15, 20, 22). The district court applied a functionally identical test. *Supra*, 23–25.

Second, Plaintiffs' argument that the district court relied on post-1972 precedent to create an exception to the right to know botches the caselaw, context, and constitutional analysis in one fell swoop. Op.Br. at 17, 45–46, 48–49. The 1972 Constitution came to fruition in a period where legislative privilege was part of the legal zeitgeist. *See* Huefner, *supra*, at 250 (recounting the relatively large number of Supreme Court decisions on the scope of legislative privilege between 1966 and 1979). The events that led up to *Gravel* in 1972 took place—very publicly—in 1971.[5] What's more (and dispositive) is that in *Cooper*, this Court looked to decisions from that period to guide interpretations of Article V, Section 8—including *Gravel*. *See Cooper*, ¶¶ 9, 11 (citing *Gravel* (1972) and *Johnson* (1966)). Those decisions, and their progeny, didn't create a new privilege. They applied the "incontrovertible" privilege embedded in the text to new factual circumstances. *Gravel*, 408 U.S. at 616.

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[5] *See, e.g.*, *U. S. Terms Gravel Not Immune From Subpoena*, N.Y. TIMES, Sept. 9, 1971, https://www.nytimes.com/1971/09/09/archives/us-terms-gravel-not-immune-from-subpoena.html.

As the U.S. Supreme Court noted, "[t]he Speech or Debate Clause has been directly passed on by this Court relatively few times in 190 years." *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979). So too in Montana. *See Cooper*, ¶ 10; *cf. O'Neill*, ¶ 22 (*O'Neill* grounded gubernatorial privilege in a constitutional provision that had *never* been litigated). The dearth of caselaw doesn't diminish clear constitutional text. The legislative privilege embedded in Article V, Section 8, is no less "incontrovertible," *Gravel*, 408 U.S. at 616, simply because before this case, no party sought to depose a legislator over that legislator's objections. Just as in *Cooper*, this Court should look to both pre- and post-1972 cases that analyze the constitutional text. *Cooper*, ¶¶ 10–14; *see also supra* 23–25.

Third, Plaintiffs make no real attempt to contradict the district court holding that "legislative privilege is both textual and part of a centuries-old legal tradition." (Doc. 64 at 12 n.5.) Nor do they offer any substantive discussion on the meaning of the relevant constitutional text. *See* Op.Br. at 43–51; (Doc. 50 at 3–8.) Instead, Plaintiffs offer meager authority, or simply misinterpret federal cases, to the contrary. Op.Br. at 45–46.

Start with *Coffin*. It's often cited for the proposition that legislative privilege applies to more than the literal words spoken in debate. *See Hutchinson*, 443 U.S. at 124 (citing *Coffin v. Coffin*, 4 Mass. 1, 27–28 (1808)) ("the Court has given the Clause a practical rather than a strictly literal reading"); (Doc. 64 at 9). Nothing in *Coffin* remotely suggests reading "shall not be questioned" out of the Constitution and limiting legislative privilege to immunity from prosecution. So too with *Kilbourn v. Thompson*, 103 U.S. 168, 201 (1880). *Kilbourn* commands reading the Speech or Debate Clause broadly. *See Johnson*, 383 U.S. at 179 (explaining early Speech or Debate Clause cases). *Johnson*, in 1966, plainly prohibited inquiry into the motivation for a legislative act. 383 U.S. at 184. These cases don't abrogate legislative privilege because they passed judgment on immunity from prosecution. But their reasoning was then applied to cases that did concern privileges grounded in the "shall not be questioned" language. *See Gravel*, 408 U.S. at 616; *Sealed Case*, 80 F.4th at 365.

Plaintiffs also cite a short, non-precedential New York trial court opinion to limit the reach of Montana's Constitution. Op.Br. at 46 (citing *Lincoln Bldg. Assocs. v. Barr*, 147 N.Y.S.2d 178, 182 (Mun. Ct. City of

N.Y. 1955). This citation is hardly grounds to support that Article V, Section 8 extends only to immunity. *See Coads v. Nassau Cnty.*, 223 N.Y.S.3d 803, 817 (N.Y. Sup. Ct. 2024) ("Lincoln Bldg. Associates rests upon a weak foundation" and "[t]wo more recent New York cases [involving] the discovery phase of an action diverge completely from" it); *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995) (after appellant argued that testimonial privilege is "weaker" than immunity privilege, the court noted that "[l]ooking only to the text" it "would be inclined to conclude that, if anything, appellant ha[d] it backwards").

Courts apply an absolute privilege to legislative acts. *Supra* 13–16. The limitation is found in the scope of the Clauses. *Supra* 16–21. But Plaintiffs readily acknowledge they seek exactly what the Clauses protect. Op.Br. at 43 ("Plaintiffs sought documents and a deposition from Regier related to the legislative intent behind SB 109."). But as the U.S. Supreme Court said in 1951, "the claim of an unworthy purpose does not destroy the privilege … [and] it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators…." *Tenny*, 341 U.S. at 377.

Plaintiffs then take a myopic view of *Cooper* to limit Article V, Section 8 to immunity from suit. Op.Br. at 47. Certainly, *Cooper* established an absolute immunity from suit. *Cooper*, ¶ 14; (Doc. 64 at 13 n.6). But Plaintiffs skate over that this Court relied on post-1972 authority to arrive at the correct conclusion. *Cooper*, ¶¶ 11–12 (citing federal and state cases).[6]

Next, Plaintiffs incorrectly argue that *O'Neill* forecloses a constitutional privilege based on Montana's conception of separation of powers. Op.Br. at 49–50. That dramatically overreads *O'Neill*.

Legislative privilege is "necessary for the integrity of government," because, in part, the separation of powers demands the privilege. *Supra.* 11–12; (Doc. 64 at 6, 8–9); *see also McLaughlin*, ¶ 58 (McKinnon, J., concurring) ("The constitutional doctrine of separation of powers does not tolerate the control, interference, or intimidation of one branch of

[6] *Cooper* also favorably cites *Tenney* for the proposition that legislative privilege or immunity supports the rights of the people. *Cooper*, ¶ 11; *see supra* 11–12. This alone negates Plaintiffs barely developed argument that unsupported allegations justify haling legislators into court proceedings for their legislative acts. Op.Br. at 50.

government by another.").[7] Legislative privilege, long before the 1972 Constitution, was a bulwark supporting the separation of powers. *Johnson*, 383 U.S. at 177–79. Article V, Section 8 imports that same purpose and meaning.

Finally, Plaintiffs' briefing is limited to whether the Montana Constitution recognizes any form of legislative privilege. Op.Br. at 51. In doing so they fail to raise alternative arguments for qualified versus absolute privilege, the scope of the privilege, or its application to non-legislators. This Court must disregard any such arguments made in reply. *State v. Porter*, 2018 MT 16, ¶ 16 n.1, 390 Mont. 174, 410 P.3d 955. The district court addressed each of these issues below. *Supra* 24–25

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[7] *O'Neill* helpfully outlines aspects of judicial privilege that correlate to legislative privilege and the legislative process. "Judicial privilege is cabined by the public disclosure of the record upon which a judicial ruling is based and the publication of the ruling, which discloses the factual basis and legal authorities upon which the court relied." *O'Neill*, ¶ 21 n.2. Judicial privilege protects a judicial officer's deliberations and mental impressions, while still requiring open proceedings and a written record of any ultimate act. Article V contains similar guardrails. *See* Mont. Const. art. V, § 10(3); *AP v. Usher*, 2022 MT 24, ¶ 20, 407 Mont. 290, 503 P.3d 1086. Montana's Constitution, thus, strikes a balance that promotes a *public* good in legislative privilege and candid advice, *Tenney*, 341 U.S. at 377, while also guaranteeing open legislative proceedings, Mont. Const. art. V, § 10(3). And the record of those open proceedings is the only relevant record to determine legislative intent. *City of Missoula v. Pope*, 2021 MT 4, ¶ 17 n.1, 402 Mont. 416, 478 P.3d 815.

(absolute privilege); *supra* 25 (scope); (Doc. 64 at 19–21, 26–28) (application to non-legislators). If this Court affirms the text "shall not be questioned" confers a legislative privilege, then it should also affirm the rest of the district court's order based on Plaintiffs' acquiescence.

C. The district court correctly quashed the subpoena without imposing further burdens on Senator Regier.

The district court ordered "requests for production to be barred by legislative privilege where the request seeks non-public information that necessitates disclosure of a legislator's motivations or deliberations or is tantamount to questioning the legislator about their motivations or deliberations." (Doc. 64 at 23.) The district court then applied this underlying reasoning to the subpoena topics. (Doc. 64 at 24–29.)

The district court only required a detailed privilege log if Senator Regier asserted a non-legislative privilege claim over a document. (*E.g.*, Doc. 64 at 29.) This supports the underlying rationale of legislative privilege. *Supra* 11–12; *Edwards*, 790 S.E.2d at 478–79 (because legislative privilege exists to promote legislative independence from other branches, "a legislator is generally not required to produce a detailed privilege log"). The Speech or Debate Clause frees the legislator

from the burden of defending himself. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). When a privilege log is not necessary to determine whether privilege applies, requiring production of such a privilege log only burdens the legislator. *See N.C. State Conf. of the NAACP v. McCrory*, 2014 U.S. Dist. LEXIS 185130, *28 (M.D.N.C. Nov. 20, 2014) ("the Court concludes that a privilege log, particularly one containing the level of detail requested by Plaintiffs, would itself significantly intrude into the legislative sphere, and would also place a heavy burden on the legislators in contravention of one of the aims of the legislative privilege").

Federal courts recognize that requiring non-party legislators to produce a detailed privilege log potentially defeats the purpose of the privilege. *See In re Hubbard*, 803 F.3d 1298, 1309–10 (11th Cir. 2015); *accord Edwards*, 790 S.E.2d at 478–79. "The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments." *Hubbard*, 803 F.3d. at 1310. Thus, when a "subpoena's only purpose [is] to support the lawsuit's inquiry into

the motivation" behind a legislative act the court correctly quashes the subpoena without requiring production of a privilege log. *Id.*[8]

Plaintiffs limited the scope of their subpoena to "the intent animating SB 109." (Doc. 50 at 19.) The subpoena therefore implicated only what legislative privilege protects: Senator Regier's motivations or deliberations. Production of a privilege log nor production of documents *in camera* would not assist the district court assess the claim of privilege—because the privilege squarely applied. *Supra* 24–25.

On appeal, Plaintiffs assert that *O'Neill* requires the district court to order production of privileged documents for *in camera* review. Op.Br.50. That misreads *O'Neill* and misunderstands the purpose of a privilege log and *in camera* review generally. First, *O'Neill* makes clear the party asserting privilege bears the burden on proving the application. *O'Neill*, ¶ 26. A government party may do so via *in camera* inspection, production of a privilege log, or through a motion to quash. *O'Neill*, ¶ 26 (the "government entity … may do so via a privilege log"); *McLaughlin*, ¶¶ 47, 57 (quashing an overbroad subpoena that may have swept up

[8] This Court has applied a similar approach in handling subpoenas aimed at the judicial branch. *See McLaughlin*, ¶ 57 (quashing subpoena in total without first requiring a privilege log or *in camera* review).

confidential material without requiring *in camera* review or production of a privilege log); *see also United States v. Reynolds*, 345 U.S. 1, 8 (1953) (courts must determine applicability of a privilege "without forcing a disclosure of the very thing the privilege is designed to protect."). Second, the throughline in each process is the party asserting privilege must satisfy the reviewing tribunal of the applicability of the privilege. *O'Neill*, ¶ 27; *Reynolds*, 345 U.S. at 8; *see also United States v. Zubaydah*, 595 U.S. 195, 205 (2022) (the reviewing court determines how far it will probe to assess the validity of an asserted privilege). That occurred here. (Doc. 64 at 23–29.)

At bottom, Plaintiffs admit the information they want implicates a core legislative act and concerns the "intent animating SB 109." (Doc. 50 at 19.) In this case, neither production of a privilege log nor *in camera* review would assist the tribunal because application of the privilege was apparent on the face of the subpoena.[9] In other words, if the privilege exists, there's no dispute about whether it applies to the testimony or

[9] If documents must be produced for *in camera* review, this Court must also consider who reviews such documents. Mont. R. Civ. P. 53 allows courts to appoint special masters. Such appointments may be particularly warranted in cases where in camera review of privileged documents risks tainting an ultimate factfinder's view of the case.

documents at issue. The district court correctly limited production of a privilege log to other claims of privilege.

III. The district court correctly presumed Senator Regier acted in good faith.

The Montana Constitution recognizes a presumption of good-faith by state officials. "*Members of the legislature* and all executive, ministerial and *judicial officers*, shall take and subscribe the following oath …: 'I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity (so help me God).'" Mont. Const. art. III, § 3 (emphasis added). Members of this Court have correctly recognized the solemnity and seriousness of this oath. *Mont. Env't Info. Ctr. v. Gianforte*, 2025 MT 112, ¶ 45, 442 Mont. 136, 569 P.3d 555 (Shea, J., concurring). As Justice Shea stated, this Court takes that oath "gravely seriously." *Id.* (citing Mont. Const. art. III, § 3). Legislators, including Senator Regier, swear that same oath. It demeans a co-equal branch to presume legislators swearing that same oath take the oath less seriously than judicial officers.

Plaintiffs ask this Court to presume legislators violate their oath of office on mere allegation. Op.Br. at 24–27, 50. That threadbare argument

runs headlong into centuries of established caselaw. *See Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege."); *Fletcher*, 10 U.S. at 131 (courts do not invalidate laws on the "allegation" of "impure motives" that "influenced certain members").

And contrary to Plaintiffs' arguments, this Court firmly recognizes a "presumption of regularity" attaches to legislative fact-finding. *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 18, 354 Mont. 133, 227 P.3d 42. Montana isn't alone. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926); *accord Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 213 (2022) (Sotomayor, J., dissenting) (concurring with majority that accepting petitioner's argument that the Governor or Attorney General would not execute their duties is a "startling accusation [that] flies in the face of the presumption that public officials can be trusted to exercise their official duties").

The varying presumptions of 'good-faith,' 'regularity,' or 'constitutionality' of legislative acts all flow from due respect for a

legislator's oath of office. As the California Supreme Court long ago stated, "[i]f the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and, by a resort to evidence, undertake to ascertain whether the legislature, in its enactment, observed the restrictions which the constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office." *Stevenson v. Colgan*, 27 P. 1089, 1090 (Cal. 1891); *see also Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 11 (2024) (Courts presume "legislative good faith" based on "due respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution.").

Senator Regier's arguments below simply reflect this unerring principle. He presumptively acts in good-faith according to his oath. Plaintiffs must show "objective evidence … supporting invidious intent," not mere allegation, to overcome that presumption. (Doc. 48 at 15.) The district court correctly respected this principle. ((Doc. 153 at 31) ("Questioning the veracity of a senior elected member of a coordinate branch of government is a serious matter that should not be determined cavalierly.").)

CONCLUSION

The district court correctly quashed the subpoena directed at Senator Regier because it sought information and testimony privileged under Article V, Section 8 of the Montana Constitution. This Court should affirm.

DATED this 5th day of August 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,894 words, excluding certificate of service and certificate of compliance.

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