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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20130011
Burleigh County Case No. 08-2012-CV-00309

Empower the Taxpayer, on behalf of itself and the 28,000 + North Dakotans who signed the Petition, Charlene Nelson, and Robert Hale,	)	
Plaintiffs and Appellants	)	
v.	)	**APPELLANTS' BRIEF**
State Tax Commissioner Cory Fong, Senator Dwight Cook, Senator David Oehlke, Representative Charles Damschen, Representative Lonnie Winrich, Divide County Commissioner Doug Graupe, Cass County Commissioner Scott Wagner, Wahpeton Finance Director Darcie Huwe, Williams County Auditor Beth Innis, North Dakota Association of Counties, North Dakota Association of County Commissioners, North Dakota League of Cities, North Dakota Weed Control Association, North Dakota School Board Association,	)	
Defendants and Appellees	)	

Appeal of the Order for Partial Sanctions dated August 30, 2012, and the Order Denying Motion to Reconsider Partial Sanctions Under Rule 11 dated November 27, 2012 of the Honorable Bruce A. Romanick, District Court Judge, South Central Judicial District

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¶1 III. ISSUES PRESENTED

¶2 1. Whether the district court improperly concluded the action was frivolous and ordered sanctions under Rule 11 a) where the issue of standing to enforce both statutes civilly was an open question of law, b) where the Supreme Court did not reach the merits on the case relating to the interpretation of the statutes at issue and merely answered the standing issue, c) where none of the defendants raised the issue of the constitutionality of the statutes at issue, d) where the court considered only one of the statutes raised by Empower and ignoring the other statute raised and the application of the attorney general opinions that prohibit the statements made by the county defendants.

¶3 2. Whether the district court's order requiring the Petitioners to file and publish at their own expense a public retraction "withdrawing" the claim against the four county off (a claim that has already been dismissed) is superfluous, an abuse of discretion, and violates their First Amendment rights.

¶4 3. Whether the lower court erred in failing to provide a hearing, due process, and abused its discretion in the amount of sanctions allowed.

¶5 V. STATEMENT OF FACTS

¶6 This action relates to the election franchise. Over 28,000 North Dakotans signed a petition requesting a vote on whether to abolish property taxes. The vote on Measure 2 will occur on June 5, 2012. The Defendants, all public officials, public entities, or entities receiving public monies, have been distributing false and misleading information about the effect of Measure 2, in some situations blatantly asserting that Measure 2 will do the exact opposite of what the text of Measure 2 provides.

¶7 The Plaintiffs filed this action on February 14, 2012 [A.8-79], requesting that the defendants comply with the North Dakota Corrupt Practices Act Chapter 16.1-10 and, as public officials, not distribute to the public false, or misleading statements or take a position on the Measure, all of which is prohibited under the Corrupt Practices Act; the Plaintiffs also asked the lower court to require the defendants to comply with the Attorney General opinions that prohibit the same and even more misconduct relating

to fair elections. Plaintiffs made a motion for temporary restraining order [Doc. No. 9-11].

¶8 As shown in Charlene Nelson's detailed affidavit and the attachments thereto, Empower asserted the documentary evidence that each of the defendants in this case, including the county defendants, 1) have publicly taken a position on Measure 2 and 2) have publicly distributed false and misleading information, all in violation of the corrupt practices act. Doc. No. 19-32.

¶9 On February 21, 2012, the district court refused to consider issuing the requested TRO solely because an affidavit in support had not yet been filed [Doc. No. 14]. The affidavit of Charlene Nelson was filed on February 23, 2012 [Doc. No. 19-32], showing irreparable harm to the plaintiffs. On March 6, 2012, the state and county defendants made separate motions to dismiss or in the alternative summary judgment [doc. No. 40-50]. On March 7, 2012, the county defendants made a motion to strike the Plaintiff's affidavit [Doc. No. 51-55]. On March 16, 2012, *before* the defendants had even received Empower's responsive brief to the defendant's motion to dismiss, the county defendants served a motion for Rule 11 sanctions [A. 82-100, Doc. No. 113].

Empower responded to the motions to dismiss on March 20, 2012 [Doc. No. 66].

¶10 A hearing was held on Tuesday, April 3, 2012. The lower court, instead of issuing a temporary restraining order to prevent the misconduct, took the matter under advisement.

¶11 On April 11, 2012, before any issue had been decided by the lower court, the County Defendants filed their motion for Rule 11 sanctions [A. 82-102].

¶12 On April 12, 2012 [A.103-107], the district court issued a decision as a matter of law, concluding 1) that the act is criminal in nature and that the plaintiffs did not have standing unless "the criminal acts are unconnected with a violation of legal rights" [A. 105]; 2) that no legal right or common law right existed and therefore the Plaintiffs had no standing to bring a claim under the Corrupt Practices Act. The lower court then addressed the issue of an implied private cause of action, placing the presumption of no private cause of action instead of a presumption of a private cause of action, as asserted by Empower. The lower court concluded that although the Corrupt Practices Act "may create a right in favor of Nelson and Hale" [A. 106], the legislative history did not indicate

(either way) an intent that a private cause of action existed and further concluded that the underlying legislative scheme was inconsistent with a private cause of action because "citizens cannot prosecute criminal laws" [A. 107].

¶13 The matter was immediately appealed, on the same day the Order had been issued. A. 108-109, Doc. No. 117-119. Empower filed its response to the county defendants' motion for Rule 11 sanctions. A. 110-118, Doc. 126. Attached as an Exhibit to Empower's response to the motion for attorney fees was the Empower's Appellants' Brief that was submitted to the North Dakota Supreme Court in Sup. Ct. File No. 20120191 [A. 119-166, Doc. No. 128]. The county defendants filed a reply brief. [A. 167-171, Doc. No. 131.]

¶14 Following this Court's ruling on July 2, 2012, affirming the dismissal of the case ***for lack of standing*** AND NOT REACHING THE OTHER ISSUES RAISED, Empower the Taxpayer v. Fong, 2012 ND 119, 817 N.W.2d 381 [A. 172-179, Doc. No. 135], the district court on August 30, 2012, awarded Rule 11 sanctions of *as yet undetermined amount* of attorney fees against the Plaintiffs Empower the Taxpayer (hereinafter "Empower") and ordered that the

group be required *to file with the lower court a retraction of the claim* against the four county defendants and at Empower's expense publish such retraction throughout the state [A. 180-185, Doc. No. 136].

¶15 The lower court ordered the county defendants to submit billing (*without* providing Empower an opportunity to respond or contest the billing submitted), leaving it to the person submitting the billing "to attempt to apportion the fees and the costs between the named individuals and the two associations." A. 184. At the same time the lower court ordered Empower to submit its retraction of its previous (and now dismissed) claim against the county defendants:

> "Empower the Taxpayer is further ordered to prepare a written retraction of the allegations of corruption and allegations of alleged impropriety for anyone expressing their opinions against Measure 2, for state-wide publication at the expense of Empower the Taxpayer. This written retraction will be presented to the Court and the affected Defendant's for review prior to publishing in the major papers in ND.

A. 185. *The order issued from the lower court despite the fact that any issue relating to the constitutionality of the sections at issue of the Corrupt Practices Act, or for that matter any constitutional right of the defendants to express such opinions in contravention of the sections of the Corrupt Practices Act that Empower was attempting to enforce through its action.*

¶16 In accordance with the lower court's order, the county defendants submitted a billing listing all of the time incurred for all the defendants ($45,160 in fees and $1444.65 in costs) and divided the seven total defendants by the four county defendants, employing a pro rate or a percentage of the county defendants (57.1429%) to reach his requested amount of $25,805.73 in attorney fees and $825.51 in costs for a total of $26,631.24 [A. 186-187].

¶17 Prior to the Court *selecting an amount to be paid or receiving the required retraction*, on September 14, 2012, Empower made a motion (entitled as one for reconsideration" **specifically asking the lower court to "vacate or rescind" its order** [A. 248] asserting in its brief that the issues presented were open questions of law, supported by the language of the statutes at issue and the legislative history as well as binding attorney general opinions and asking the lower court to "deny the request for sanctions." A. 226-247, quoted language at 246. The county defendants responded to Empower's motion, asserting that the ruling had basis in law and fact. A. 250-259.

¶18 Empower provided a reply brief, detailing its view that the lower court's requirement of a retraction violated Empower's first amendment rights. A. 262-273.

¶19 On November 27, 2012, the lower court issued a two-page Order denying Empower's motion to reconsider and awarding $25,805.73 in attorney fees and $825.51 in costs (the exact amount submitted by Attorney Bakke) "for the portion of fees attributable to the representation of the four county officials." A. 274-275. The lower court also provided a deadline of 20 days after issuance of the Order for Empower to submit "a proposed retraction for publication." A. 275.

¶20 Empower filed a motion for a writ of supervision asserting that the lower court could not legally or properly impose these sanctions on Empower, which was denied on December 19, 2012. A. 276.

¶21 On January 10, 2013, Empower filed an appeal of the "Order Granting Partial Sanctions Under Rule 11" dated August 30, 2012, and "Order Denying Motion to Reconsider Partial Sanctions Under Rule 11" dated November 27, 2012, noting that no notice of entry of Order of Notice of Entry of Judgment has been entered in regards to either Order. A. 277-278.

¶22 STATEMENT OF THE FACTS

¶23 The following facts or statements are all undisputed:

¶24. The issue of a private entity or private person's standing to enforce the Corrupt Practices Act provisions was an open question when Empower brought the action.

¶25. Although a public official may provide factual information "solely for the purpose of educating voters" Section 16.1-10-02, by its own terms, makes it illegal for any public official to expend money *or services* to "advocate for or against or otherwise reflect a position on the adoption or rejection of the ballot question."

¶26. This language supports Empower's action as non-frivolous attempt to enforce Section 16.1-10-02 against the defendants.

¶27. Section 16.1-10-04, by its own terms *and without any reference to the expenditure of money* by that public official, makes it illegal for a public official to state an opinion on an initiated measure.

¶28. This language supports Empower's action as non-frivolous attempt to enforce Section 16.1-10-04 against the defendants.

¶29. The legislative history includes statements that support Empower's position that the defendants were violating the statutes themselves and the intent of the legislature in passing those provisions.

¶30. Portions of the legislative history supports Empower's action as non-frivolous attempt to enforce both Section Section 16.1-10-02 *and* 16.1-10-04 against the defendants.

¶31. Numerous Attorney General Opinions, which apply to the actions of all state and county employees, prohibit public employees from expending public funds in regards to an initiated measure.

¶32. Numerous Attorney General Opinions, which apply to the actions of all state and county employees, prohibit public employees from using his or her office to articulate a position on an initiated measure.

¶33. As alleged in Paragraph 39 of the Complaint and never contested, **Divide County Commissioner Doug Graupe** and

North Dakota County Commissioners Association (NDCCA) President, in an article titled, "Keep it Local," published in the North Dakota County Commissioners Association's publication, stated the following:

> "I just returned from a state commissioner board meeting. At that meeting we spent a considerable amount of time discussing Measure 2. Several months ago our board asked Mark and Terry to form a coalition with the League of Cities, School Boards Association and any other groups impacted by the passage of this measure. I feel that we need to educate the people of our state about the probable impact the successful passage of this measure would have. With education I am confident the voters will defeat the measure as I said in my last column. I am opposed to measure 2. I think our slogan should be "Keep It Local". After all we are the government closest to the people. Every county is unique and our local citizens should be the decision makers. The proponents of this measure seem to be comfortable that spending decisions for local government will be made in Bismarck.
>
> "Two examples of local decision-making in our county are: We formed a Divide County Hospital District that provides a levy to support our hospital and asked the voters of the county if we should increase the Farm to Market levy from 10 mills to 20 mills. It was approved with approximately 2/3 voting in favor. These two decisions made by local taxpayers would not be possible if Measure 2 passes.

¶34. As alleged in Paragraph 40 of the Complaint and never contested, **Cass County Commissioner Scott Wagner** has publicly stated opposition to North Dakota Property Tax

Amendment, Measure 2 in violation of Section 16.1-10-02 *and* Section 16.1-10-04:

> My fear is we will not lower the cost of government with this measure. We will either shift the cost to the state, and if there's not the capacity to raise that revenue, you have state and local government fighting for the same pool of money. . . . If this passes, property taxes will be decided by the state. And how do you reconcile what that does -- flipping representative government upside down, on its head? . . .
>
> Once again, what I think this measure inevitably will do, it will pit state and local spending priorities against one another for a narrow amount of revenue given the needs, and the locally elected officials that have been elected by the citizens to meet those needs don't have a vote. What we become is nothing more than elected lobbyists.
>
> Now, that's not going to help and that's not going to give more control to the citizens.

¶35. As alleged in Paragraph 41 of the Complaint and never contested, **Wahpeton Finance Director Darcie Huwe** has publicly stated opposition to **North Dakota Property Tax Amendment, Measure 2** in violation of Section 16-10-02 *and* Section 16.1-10-04**:**

> "This will be monumental. Property tax is one way for local governments to kind of control their destiny, with their ability to raise bulk revenue to provide local services. And if we lose that ability or diminish that ability to raise local revenue that provides local services, I think you end up with a disconnect between funding

> and priorities." If property taxes were eliminated as a source of revenue, local governments would have to depend on the state to replace the source, said Huwe. "In what form and how would it come and would it be the same amount and what would control how much that amount would be... a lot of big unknowns that aren't necessarily defined in the proposed legislation," she said.

¶36. As alleged in Paragraph 42 of the Complaint and never contested, **Williams County Auditor Beth Innis** has publicly stated opposition to **North Dakota Property Tax Amendment, Measure 2** in violation of Section 16-10-02 *and* Section 16.1-10-04**:**

> Williams County Auditor Beth Innis said eliminating property taxes would have a serious impact on the services provided to the public.
> Innis said abolishing the taxes would most likely require a sharp increase in either sales tax or income tax to compensate for the revenue loss. She explained that this would impact people with low or fixed incomes, or if they receive different tax breaks such as the homestead credit. If a way to make up the lost revenue weren't put into place, Innis said people would have to make cuts in essential services.
> "What part of government do you want to eliminate? County, city government, townships, schools, are funded in part by this. Your libraries, airport, fire districts, vector districts. What don't you need?" said Innis.
> Williston Herald May 24, 2010
> http://www.willistonherald.com/articles/2010/05/24/news/doc4bfaaa470c855721961830.txt

¶37. Although all the defendants in this case had the option of doing so, not one of them raised the issue of constitutionality of

the sections of the Corrupt Practices Act that Empower was attempting to enforce.

¶38. The North Dakota Supreme Court, in its decision on the merits, addressed only the issue of whether Empower had standing and did not address the interpretation of the statutes at issue or the constitutionality of applying those statutes to the defendants.

¶39. The district court concluded that the action against the county defendants was frivolous based on the view that an action against the county defendants could only be brought relating to their use of public funds.

¶40. The district court applied Section 16.1-10-02 as being raised by Empower while entirely ignoring Empower's raising Section 16.1-10-04 or the numerous attorney General Opinions which do not require the use of public funds and make distribution of false and misleading information illegal.

¶41. The lower court failed to analyze or apply Empower's assertion that Section 16.1-10-04 is being violated by the defendants, a statute which does not require the use of public

funds and makes distribution of false and misleading information illegal.

¶42. The district court failed to analyze separately the attorney fees billings submitted by the defendants or limit itself to the actual additional time incurred by the addition of the four county defendants.

¶43. The district court simply applied the pro rata distribution of the attorney fees and costs suggested by the defendants.

¶44. The district court's has used "the sanction may include nonmonetary directives" of Rule 11 as a basis for requiring Empower to submit a retraction for court approval and then require Empower to pay for such retraction to be published in newspapers throughout North Dakota.

¶45. This language contained in Rule 11 ("the sanction may include nonmonetary directives") has never been used or interpreted by this Court to require a retraction by a person found to have violated Rule 11.

¶46 VII. ARGUMENT

¶47 Issue 1: The Action Relating to the County Defendants Was Not Frivolous

¶48 The lower court based its decision on the following:

> Empower the Taxpayer named Divide County Commissioner Doug Gaupe, Cass County Commissioner Scott Wagner, Wahpeton Finance Director Darcie Huwe, and Williams County Auditor Beth Innis in the complaint. However, the complaint only alleges that these 4 individuals publically stated opposition to the initiated measure 2. The complaint does not allege that government funds or property were used when making these statements. Even if Empower the Taxpayer had standing, they did not state a claim against the individuals named above under the Corrupt Practices Act. Empower the Taxpayer's lawsuit against those individuals is frivolous because a competent attorney, after a reasonable inquiry into the law, would not believe that a cause of action existed merely for a public official to publically state his or her opposition to initiated measure 2.

Each of the statements of fact made by the Court and conclusions reached by the lower court are incorrect. We will first briefly go over each statement and provide a summary of why each statement and conclusion is incorrect, and then provide the Court a more in depth discussion of each incorrect statement of fact made by the lower court and each incorrect conclusion reached by the lower court.

¶49 First Incorrect Fact Assert by Court: "the complaint only alleges that these individuals publicly stated opposition to the

initiated measure 2." Court's Order Granting Partial Sanction at page 5.

Response: The complaint at Paragraphs 39, 40, 41, and 42 explicitly allege more than just opposition; these complaints allege that these four individual public officials not only declared a position but also provided false and misleading information (as clearly shown by an actual review of these paragraphs). In addition, the statute at issue clearly provided that advocacy of a position by public officials is illegal: "Factual information may be presented regarding a ballot question solely for the purpose of educating voters if the information does not advocate for or against or otherwise reflect a position on the adoption or rejection of the ballot question." Section 16.1-10-02. Empower properly and reasonably considered this provision as applying to the four individual public officials and indeed under the language of the statute these individuals could not advocate a position.

¶50 **Second Incorrect and Irrelevant Statement Made by the Court:** "The complaint does not allege that government funds or property were used when making these statements."

Response: Section 16.1-10-02 relates to more than just the use of public funds; it also applies to services, which applies to all four defendants. The complaint alleged a violation of this relating to "Services" which "includes the use of employees during regular working hours for which such employees have not taken annual or sick leave or other compensatory leave." Complaint Paragraph 25. In addition, the Complaint alleges not only a violation of 16.1-10-02 by these four individual public officials, but also a violation of another statute, 16.1-10-04, and a violation of numerous Attorney General Opinions.

¶51 **Third Incorrect Statement of Fact:** The Court incorrectly states that "Empower . . . did not state a claim against the individuals named above under the Corrupt Practices Act."

Response: Empower did state a claim against the four individual defendants, asserting use of services, use of regular working hours, AND a violation of Section 16.1-10-04 and a violation of numerous Attorney General Opinions by providing false and misleading information.

¶52 **Fourth Incorrect Statement of Fact:** "Empower the Taxpayer's lawsuit against those individuals is frivolous because a competent attorney, after a reasonable inquiry into the law, would not believe that a cause of action existed merely for a public official to publically state his or her opposition to initiated measure 2."

Response: The Court once again ignores the language of the statute and the legislative history that provides public official cannot take a position (and such statute was not argued by the defendants as being unconstitutional); in addition, the lower court once again asserts incorrectly that the allegation against the four individuals was based "merely" on those individuals taking a position. As clearly alleged in the Complaint, each of the four individual public officials did more than merely advocate a

position; these individuals also provided false and misleading information in contravention of Section 16.1-1-04.

Instead of reviewing the actual Complaint, it appears that the Court merely read Mr. Bakke's misrepresentation of the facts and Mr. Bakke's argument based on this mischaracterization of what the Complaint alleged and reached its conclusion based merely on Mr. Bakke's incorrect statements.

¶53 The issue resolved by the Supreme Court related only to standing and whether the statute at issue can only be enforced through criminal enforcement. This issue was an open question at the time the matter was filed and the Supreme Court answered ONLY the standing issue. **The Supreme Court did not reach the interpretation of the statute relating to the issue of advocacy by these individuals under the statute OR the Attorney General opinions.** This issue remains an open question under North Dakota law. Most importantly, in regards to the four individual defendants the application of the Attorney General opinions – that clearly prohibit the actions alleged in the complaint, regardless of the use of any property or money – was

not reached and on its own serve as a proper legal basis for suing the four individual defendants.

¶54 The lower court has improperly awarded sanctions in this case based on the incorrect interpretation that the individual defendants could be sued under the statute **ONLY** if an expenditure of money was involved and improperly concluded that the statute and expenditure of money by these defendants was the **ONLY** basis for suing the individual defendants. This assumption is incorrect.

¶55 The lower court unfortunately "bought into" County assertion that "All of plaintiffs' claims are grounded upon alleged violations of the Act [Chap. 16.1-10]." As BY THE Complaint itself and throughout the briefing in response to the motion s to dismiss and in response to the motion for sanctions, Section 16.1-10-01 involves not only the use of property, but also services and non-property issues:

Section 16.1-10-02 provides at **subdivision 1** that "[n]o person may use any property belonging to or leased by**, or any service which is provided to or carried on by, either directly or by contract, the state or any agency, department, bureau, board, commission, or political subdivision thereof, for any political purpose**."

The statute specifically refers not only to the use of property, but also to "any service" directly or indirectly, for political purposes. The next section specifically prohibits advocacy. This interpretation of the

statute is not frivolous and is a reasonable application of the language in the statute along with the intent of the framers and the legislature when it amended this statute to prohibit advocacy by elected and appointed officials relating to initiated measures.

¶56 Moreover, the language relating to the definition of political purpose can – and was – reasonably interpreted as prohibiting appointed and elected officials from advocating a position:

> Factual information may be presented regarding a ballot question solely for the purpose of educating voters if the information does not advocate for or against or otherwise reflect a position on the adoption or rejection of the ballot question.

Section 16.1-10-02, subdivision 2 (a).

¶57 The lower court next provides a basis for the sanctions by incorporating Mr. Bakke's cherry-picking of the legislative history and ignores the legislative history that supports Empower's view of the statutes and can be read as intending the statute to prevent city and county officials from advocating a position or providing false and misleading information. Yes, there are references to public officials not using funds for advocacy, but there are also references and basis to Empower's position that Section 16.1-10-04 clearly prohibits public officials from advocating a view on an initiated measure and

that a city(and other government officials) shouldn't be telling people how to vote and education of the voters should not be used as a veil to sway their vote: that "There shouldn't be any city telling the citizens how to vote" and "they can educate the public but they were doing so to sway their vote."

> Dustin Gawrylow: . . . **There shouldn't be any city telling the citizens how to vote. It is a far cry from advocating it; taxpayers shouldn't be fighting their own money. Even if it passes the minority of the voters has had the tax dollars used against their interest and that is just morally objectionable.**
> Page 2
> **Under current law government property or services should not be used for advocacy. Using taxpayer dollars to campaign or persuade people is not an effective use of government time.**
> Page 3
> Robert Harms: . . . **Again, they can educate the public <u>but they were doing so to sway their vote.</u>** . . . **They could then use state resources to get a measure passed and do so under the veil of educating the public.**
> Page 16
> Rep. Kim Koppelman: . . . **The key is an official of government or an agency of government should not be using your tax dollars to convince you how to vote.** . . . **The intent of this bill is really about a statewide initiated measure where you have state office holders** . . . **using state funds to say don't vote for this.** . . . **you can't use state resources to say vote no or vote yes.**
> Pages 25-26

Thus, position taken by Empower was supported by the language of both statutes, the attorney general opinions, *and portions of the legislative history*. Suing the individual defendants was not frivolous.

¶58 The lower court also completely ignores the fact that *the county defendants were also sued under Section 16.1-10-04* for distribution of **false and misleading information**:

> **16.1-10-04. Publication of false information in political advertisements - Penalty.** A person is guilty of a class A misdemeanor if that person knowingly, or with reckless disregard for its truth or falsity, publishes any political advertisement or news release that contains any assertion, representation, or statement of fact, . . . which is untrue, deceptive, or misleading, whether on behalf of or in opposition to any candidate for public office, initiated measure . . . .

The statute employed by the Plaintiffs and ignored by the Court – Section 16.1-10-04 – clearly prohibits the distribution of false or misleading information relating to an initiated measure. The statute is employed by the Plaintiffs; the only issue is whether the Plaintiffs can bring a private action under this statute, which again was an open question until the Supreme Court resolved that issue. Thus, the Plaintiffs did **not** bring a frivolous action against the individual defendants. The Plaintiffs asserts with basis of fact that the four individual defendants present false and misleading information

regarding the initiated measure, something clearly prohibited under Section 16.1-10-04.

¶59 The individual defendants were also sued because a reasonable reading of the Attorney General Opinions that apply directly to those individual defendants prohibited those persons from advocating a position.

¶60 **Attorney General Opinion 2009-L-11** at 2 specifically provides that "that a **state agency or entity** may not use state funds or resources to advocate for or against a ballot measure, absent a constitutional or statutory provision permitting it." Emphasis added. [A]bsent clear and explicit legislative authorization, a public agency may not expend public funds to promote a position in an election campaign. "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions."

¶61 **Attorney General Opinion 2004-L-55** specifically provides that "while a school district may provide the public with neutral factual information, it may not, absent a statute, expend public funds to advocate school board's position on a ballot measure." Attorney

General Opinion 2009-L-11, note 1. The Attorney General went on to state that "Although a fact-finder conceivably could reach a contrary conclusion, it is apparent to me that no fair minded reading of the newspaper insert could lead to a conclusion other than the overall intent and purpose of the newspaper insert was to promote passage of the bond issue, and not to provide a fair and balanced presentation of the issues before the voters."

¶62 Each Attorney General Opinion is issued pursuant to N.D.C.C. § 54-12-01 governs the actions of public officials.

¶63 The Plaintiffs sued the individual defendants not only because of the language contained in Section 16.1-10-02 and 16.1-10-04, but also because of the language contained in Attorney General Opinions **2002-L-61, 2004-L-55, and 2009-L-11.** Reliance on these attorney general opinions is not and was not frivolous.

¶64 As shown above, the arguments presented by Empower are bona fide arguments, with basis in law and fact. Rule 11 explicitly provides that it does not apply to situations where the party is not presenting the argument for any improper purpose, where the claims are warranted under existing law or nonfrivolous argument to extend or modify or reverse existing law, or where the factual contentions

"have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 11.

¶65 Empower has filed its action to enforce the terms of Chapter 16.1-10, employing BOTH Section 16.2-10-02 AND Section 16.1-10-04. The Plaintiffs presented a non-frivolous argument that the provisions and requirements contained in Chapter 16.1-10 should be enforced civilly. This was an open question under North Dakota law. Asking public officials to comply with the law and attorney general opinions that prohibit the conduct is not an improper purpose. Empower is not raising frivolous and unsupported arguments.

¶66 Empower, Robert Hale, and Charlene Nelson have a First Amendment right to make the statement they have made. The defendants in this case asserted a first amendment right to lie and mislead the public. The Plaintiffs certainly have a First Amendment right to object and state their objections to public officials violating the law. But since the case was thrown out on standing grounds, the issue of whether these public officials were indeed lying and misleading the public was not determined. Since it was not determined, there can be no basis for the district court to conclude

something not decided and then based on that unfounded conclusion award sanctions and demand a retraction.

¶67 The defendants, *before even receiving Plaintiff's responsive briefs to the defendants' motions to dismiss*, made a motion under Rule 11 asserting that the action is frivolous. The briefs and arguments submitted by counsel on behalf of the Plaintiffs clearly demonstrated that the action is not frivolous and that the arguments being presented are appropriate attempts to apply present law and advocate for the modification of present law on those points in which the law is arguably not supportive of Plaintiffs' position; in addition, many of the issues are ones of first impression. The Plaintiffs have made bona fide arguments which have citation to underlying legal authority. The County did not bother to wait for the Plaintiffs' brief in response to its motion to dismiss and made a motion asserting no basis in law before Plaintiffs' had an opportunity to provide that basis in its responsive brief. Under these facts, Rule 11 sanctions should not be imposed.

¶68 The text of the law *and* the attorney general opinions clearly indicate that public officials cannot advocate a position. The defendants did more than just providing neutral factual information;

they advocated a position on Measure 2. The complaint alleges use of government funds and resources (i.e., not just money but services); it must be taken as true for the purposes of the motion to dismiss. The Tax Commissioner used his public office, his employees, and his computer to distribute false and misleading information; the county officials are using public funds to attends meetings and provide presentations about Measure 2 and are clearly advocating a position; the counties are funding various organizations that are also advocating a position. In short the Plaintiffs have asserted that the defendants are indeed misusing government property *and services* and are indeed distributing by public means untrue, deceptive, or misleading information.

¶69 Issue 2: Publication of Retraction/Apology

¶70 The lower court has no valid basis to require any retraction by the Empower group. First of all, the claim has already been "retracted" by its dismissal. As such, the only purpose for requiring a retraction is to force the members of the group to say something that they do not believe. The strongly believe that they had a right to suggest, by words and by a lawsuit properly made and with legal and

factual support, to question public officials, their conduct and the use of public funds, public services, and attempt to enforce several laws and attorney general opinions that were not being enforced.

¶71 In addition, there was no decision on the merits; the ONLY issue decided by the Supreme Court was the issue of standing. The Court did not determine or rule on the merits of the Plaintiffs' assertions. Nor did the defendants counter with a slander or libel suit. Empower refuses to provide a retraction because in their view the defendants did indeed violate the act at issue. The Supreme Court only decided that only a prosecutor can bring the action; it did not decide if a prosecutor brought the same action alleging the same facts whether the claim would have merit. Moreover, Empower's interpretation of the the act in question was not frivolous and was a reasonable interpretation of the act's own language and certain portions of the legislative history. Empower properly attempted to have the law applied to the defendants. The action was not frivolous and as such Rule 11 sanctions should not have been granted. T

¶72 There is simply no proper legal basis for the lower court to require a retraction from the Plaintiffs when there has been no suit brought by the defendants based on law and a remedy allowed under

that law. There was no decision relating to whether or not the information provided by the individual defendants was false or misleading. Discovery was stayed by the district court, an act which prevented the Plaintiffs from further investigating whether any funding was indeed used, or whether the individual defendants were "on the clock" when they made their false and misleading statements. And as shown above, the issue of funding is **not** essential to the claims made. It seems incredulous to counsel that the same court that prohibited discovery to further determine the use of funds or public money by use of services or that person's time is now claiming we did not assert funding or services and we did not prove it – in part due to the Court's refusal to require the individual defendants to answer the short and specific requests for admissions.

¶73 The Court, by ordering a retraction has thrown the First Amendment into the trash heap. In determining the balance of ordered liberty, the scales of justice should tip not in favor of the government or its agents who are arguably presenting lies or misleading statement to deceive the populous but should instead protect and weigh in on the side of the citizens who have the duty and indeed the constitutional right to question government and its

representative, elected or appointed. Indeed, under our democratic and constitutional system, all citizens have a nearly absolute right to call their representatives liars or pervertors of the truth if they believe they are so doing.

¶74 Only through a civil action for libel and slander (and a proper application of *New York Times v. Sullivan*) can a public official have the right to request any type of retraction, and the law related to statements made about public officials sides not on those government officials but on the side of liberty – liberty of thought, liberty of action, and especially liberty of political speech.

¶75 Citizens have a Constitutional right to present grievances to their government, by direct petition or even by bringing the matter before the judicial branch. This Court has no more right to require a citizen to speak or retract a statement that public officials are presenting false information than it has to issue a prior restraint on any such statements.

¶76 Not only is this Court allowing a Rule relating to frivolous actions (we again assert this was not a frivolous action) to be used to ignore the First Amendment rights of Empower and its members, this Court is actually allowing these public officials to use an attorney

paid by government funds (NDIRF) to silence the critics of these public officials. If these public officials believe that the statements made by Empower the Taxpayer – either verbal or written – are slanderous or libelous, they are free to hire their own lawyer and proceed accordingly. (They are hereby advised that I am authorized to receive service of any such action against them – we look forward to having an opportunity to delve into the truth, without a court terminating any discovery as to the truth before a decision.)

¶77 The Defendants failed to provide the lower court any valid support for its demand for a retraction. The slight legal basis provided by the Defendants for turning the First Amendment on its head is merely a few words contained in Rule 11, that is that "the sanction may include nonmonetary directives." Quoting Rule 11. Although a retraction can be used to prevent or preclude a defamation lawsuit under Section 32-43-03, counsel for Empower can find no basis in the defamation and libel law in North Dakota for the proposed remedy of a retraction or apology. One would think that if the remedy proposed is not even allowed under defamation or libel law, then it certainly cannot be imposed though the application of Rule 11. It should also be noted that the members of Empower may very well have absolute

or qualified immunity under Section 14-02-05 in regards to the statements made: A vote on an initiated measure is a proceeding authorized by law. And of course truth is an absolute defense, and until there is a hearing on the merits, what is the truth has not been determined.

¶78 One would think that the framers of Rule 11 did not intend it to supersede the rights contained in the federal and state constitution. The First Amendment law is clear, as indicated in the Supreme Court's summary of the purpose and effect of the **New York Times v. Sullivan** decision rendered in 1964:

> In *New York Times Co. v. Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, 376 U.S., at 271, 84 S.Ct., at 721**. Noting that "freedom of expression *upon public questions* is secured by the First Amendment**," *id.*, at 269, 84 S.Ct., at 720 (emphasis added), **and that "debate *on public issues* should be uninhibited, robust, and wide-open,"** *id.*, at 270, 84 S.Ct., at 721 (emphasis added), **the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with " 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not,"** *id.*, at 280, 84 S.Ct., at 726. In later cases, all involving public issues, **the Court extended this same constitutional protection to libels of public figures,** *e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094

> (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820, 29 L.Ed.2d 296 (1971) (opinion of BRENNAN, J.).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755, 105 S.Ct. 2939, 2943, 86 L.Ed.2d 593 (1985)(emphasis added).

¶79 The same rule, or an even *higher* burden, should apply to a court, at the behest of a public official, awarding attorney fees of ordering a retraction or apology. Indeed, we can look to a North Dakota example that went to the United States Supreme Court as a comparison and clearly demonstrates that this Court has no right to demand an apology or retraction. If a lawyer, an officer of the court, can write a letter to the Eighth Circuit criticizing the administration of the Criminal Justice Act (as Robert Snyder did in 1984 or so), then most certainly a citizen and a citizen group has the right to question public officials, both elected and appointed, and assert that the information being distributed by those public officials is false or misleading. See **In re Snyder**, 472 U.S. 634, 105 S.Ct. 2874 (1985).

¶80 Issue 3: Amount of Attorney Fee and Costs

¶81 In accordance with the lower court's order, the county defendants submitted a billing listing all of the time incurred for all the defendants ($45,160 in fees and $1444.65 in costs) and instead of determining what time was actually incurred that related to any ***added*** time relating to the county defendants, Attorney Bakke employed a facile calculation, that is he divided the seven total defendants by the four county defendants, employed a pro rate or a percentage of the county defendants (57.1429%) to reach his requested amount of $25,805.73 in attorney fees and $825.51 in costs for a total of $26,631.24 [A. 186-187].

¶82 As can be seen from the actual review of the billings themselves, most of the time incurred related to time that would be spent for the non-country defendants and the addition of these four additional defendants did not increase Mr. Bakke's bill significantly. In other words, as shown by the actual bills, very little of the time incurred related the county defendants themselves but to the main case, issues that no one has asserted to be frivolous and required to be incurred in the main case. A. 188-225.

¶83 Empower reviewed the billings and asserted to the lower court various arguments, including a listing of those portions of the bill that

actually apply to the county defendants which would have resulted in attorney fees (if allowed) only in the amount of $299 [A. 226-246, esp. 244].

¶84 On November 27, 2012, the lower court issued a two-page Order denying Empower's motion to reconsider and awarding $25,805.73 in attorney fees and $825.51 in costs (the exact amount submitted by Attorney Bakke) "for the portion of fees attributable to the representation of the four county officials." A. 274-275.

¶85 The lower court denied Empower due process by not having a hearing in regards to the amount of the sanction or the calculation employed by Mr. Bakke and adopted by the lower court. Nor did the lower court apply any factual basis or analysis in regards to the portion of Mr. Bakke's fees and costs that were actually attributable only to county defendants. And as shown by a review of the billing itself, the lower court abused its discretion in awarding any amount over the $299 that the billings refer to the county defendants. The rest of the time would have been necessary in order to defend the case, regardless of whether the four county defendants had been sued or not.

¶86 Conclusion

¶87 The action brought by the Plaintiffs against the four individual defendants was not frivolous. There is a basis in law (two statutes, three attorney general opinions, and the legislative history of the recent change in the statutes) and in fact (false and misleading statement made by the four public officials). It is improper under the facts and law of this case for the lower court to require a retraction. My client believes that the Court's order allowing sanctions is clearly for the purpose of trying to make a political statement relating to the group and is an attempt to silence the group and its attorney – and unlike the defendants, who have lied and misled the public, the Plaintiffs are being punished for telling the truth, trying to enforce the law (which no one else is willing to enforce), and acting as true citizens. When the Courts allow appointed and elected officials to lie and mislead the public, there is no law.

¶88 VIII. CERTIFICATE OF COMPLIANCE ON WORD COUNT

¶89 I hereby certify that this brief complies with FRAP 32(a)(7)(A); the word count is 7851 (8371 less 520 caption, table of contents and table of authorities).

¶90 IX. CERTIFICATE OF WORD PROCESSING PROGRAM

¶91 The word-processing program is Microsoft Office Word 2003.

Dated this 1st day of April, 2013.

__/s/ Lynn M. Boughey_____
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 201230011
Burleigh County Case No. 08-2012-CV-00309

Empower the Taxpayer, on behalf of itself and the 28,000 + North Dakotans who signed the Petition, Charlene Nelson, Robert Hale Appellants, vs. State Tax Commissioner Cory Fong, Senator Dwight Cook, Senator David Oehlke, Representative Charles Damschen, Representative Lonnie Winrich, Divide County Commissioner Doug Graupe, Cass County Commissioner Scott Wagner, Wahpeton Finance Director Darcie Huwe, Williams County Auditor Beth Innis, North Dakota Association of Counties, North Dakota Association of County Commissioners, North Dakota League of Cities, North Dakota Weed Control Association, North Dakota School Board Association, Appellees.	)	**CERTIFICATE OF SERVICE**

I hereby certify that on Monday, April 1st, 2013, the following document(s):

1. **Appellants' Brief**
2. **Appellants' Appendix (6 parts)**

Was filed electronically with the clerk of court via email and served electronically via email to defendants by and through their Attorneys as follows:

Attorney for Defendants State Tax Commissioner Cory Fong, Senator Dwight Cook, Senator David Oehlke, Representative Charles Damschen, and Representative Lonny Winrich to the following:

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Attorney for Defendants Divide County Commissioner Doug Graupe, Wahpeton Finance Director Darcie Huwe, Williams County Auditor Beth Innis, North Dakota Association of Counties, North Dakota League of Cities, North Dakota School Board Association, Cass County Commissioner Scott Wagner to the following:

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Will be served on Becky Schroeder who is the Executive Secretary for the North Dakota Weed Association by regular mail by mailing true and correct copies to:

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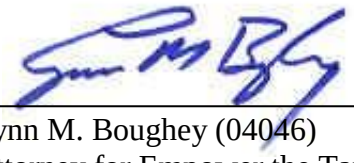
Valley City, ND 58072-9418

Dated this 1st day of April, 2013.



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I hereby certify that on Monday, April 8th, 2013, the following document(s):

1. **Appellants' Brief**

Was filed electronically with the clerk of court via email and served electronically via email to defendants by and through their Attorneys as follows:

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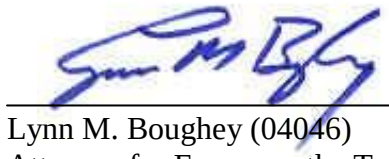
Dated this 8th day of April, 2013.



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