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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.

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

APPELLANTS' REPLY BRIEF

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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II. TABLE OF CITATIONS

North Dakota Century Code

N.D.C.C. § 16.1-10-02. . . . ¶3, ¶10

N.D.C.C. § 16.1-10-04. . . . ¶10, ¶12

Rules of Civil Procedure

Rule 11 . . . . . ¶14, ¶15

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¶1 **I. ARGUMENT**

¶2 The county and city officials make numerous statements in their brief that are simply incorrect.

¶3 **First**, the public officials assert that Empower "even allege[] use of government property or services" as to the public officials. Appellees' Brief at ¶4. Empower specifically alleged use of county funds and services at ¶55 of the complaint. **A. 46**: "The defendants have used public funds to publish or attend meetings" in which they made statements in violation of both statutes. The public officials are paid a salary and are acting as public officials when they made the statements and received reimbursement for any travel expenses to attend the meetings. Moreover, the requests for admissions, which the lower court prevented the receipt of any answers, specifically asked the public officials to admit the use of public funds or services. Doc. 88-91. Interestingly, the public officials assert that they are exempt from the statute (and apparently all other laws and attorney general opinions) because they are public officials "in the performance of public office." Appellees' Brief Para. 12. They can't have it both ways: if the activities at issue were in the performance of public

office, and they are being paid to be there, then public funds are being used. In addition, Section 16.1-10-02(2)(a) provides that "Services" includes the use of employees during regular working hours for which such employees have not taken annual or sick leave or other compensatory leave.

¶4 **Second**, the public officials assert that the conduct alleged in the Complaint only was the official's opinion, not facts. As can easily be seen by reading Paragraphs 39-42 of the Complaint [A. 35-37], each public officials made statements of fact that Empower asserted were false or misleading or otherwise in violation of the two statutes.

¶5 Doug Graupe stated that passage would result in spending decisions for local government will not be made by local decision-makers but will be made in Bismarck, and that the recent levy approved by voters "would not be possible if Measure 2 passes" A. 35-36. Both of these statement are statements of fact, and false.

¶6 Scott Wagner stated that "property taxes will be decided by the state" and that if the measure passes "the locally elected officials . . . don't have a vote." A. 36. Again, this is a statement of fact, and by the way is false; there will be no property taxes, and the local officials

will "have a vote" and decide where the reimbursed money will be spent.

¶7 Darcie Howe stated that "we would lose the ability to raise bulk revenue" and that "local government would have to depend on the state to replace the source and that the amount sent by the state is an unknown" A. 37. These are statements of fact, and the public entity would still have other way to generate revenue (as indicated in the Legislative Council Report) and the state under Measure 2 had no choice but to replace the money. A. 10, 13-14, 14-15.

¶8 Beth Innis stated that passage "would have a serious impact on the services provided" and that "people would have to make cuts in essential services." A. 37. These are statements of fact, and are not true; the funds by the terms of the measure would have to be replaced, and moreover the measure required the state to fully and properly fund the legally imposed obligations" of the counties and cities. A. 10, 13, 14.

¶9 **Third**, the public officials assert that the conduct Empower alleged "did not implicate the misuse of any property or services. Appellees' Brief Para. 1. The public officials then assert that the use of public funds is the gravamen of Empower's case against the public

officials and if no public funds (or services) then no case can be properly brought against the public officials. Appellees' Brief Para. 12. As noted above, Empower asserted at Paragraph 55 of the Complaint public funds and services were used. A. 10. But such use of funds only relates to Section 16.1-10-02; Empower also raised the Section 16.1-10-04 AND several Attorney General Opinions that preclude what the public officials were doing without needing to show use of public funds or services.

¶10 **Fourth**, as to two of the public officials, the public officials assert that the case against two of the officials was frivolous because Section 16.1-10-02 had not yet been amended to include initiated measures. Appellees' Brief Para. 12. The public officials fail to mention that the action involved not only Section 16.1-10-02, but also 16.1-10-04 and the Attorney General Opinions that specifically prohibited the conduct at issue. Moreover, the action was also brought against the defendants for injunctive relief, which would be for the purpose of preventing these two defendants from making such comments in the future, and as such bringing the action against public officials who have made such statements is appropriate.

¶11 **<u>Fifth</u>,** the public officials assert that once public money reaches an allegedly private entity (such as the Association of Counties), those funds are no longer public money but private money. Appellees' Brief Para. 18. This issue was not reached below and is not properly before this Court. Nonetheless, Empower properly asserted in the Complaint that both associations receive funds paid for by county commissioners through county funds and receive "funding in whole or in part from public entities and therefore receive public funds." A. 39. Empower asserts that just as in the area of public records, if the funds used are derived from public funds and as such the statutes apply.

¶12 **<u>Sixth</u>,** the public officials assert that the the conduct prohibited by section 16.1-10-04 only apply if the conduct is contained in a political advertisement of a news release. Appellees' Brief Para. 19. In our view, providing written or verbal information to the press and the public is properly considered a news release, particularly given the intent of the statute to make elections fair. However, even if this statute is limited as the public officials assert, the other statutes and the attorney general opinions do apply to the conduct at issue, regardless of whether the information is is contained in a political advertisement of a news release.

¶13 **Seventh**, like it or not, the statute at issue and the applicable Attorney General Opinions specifically directs public officials not to advocate for or against an initiated measure. The public officials assert that Empower should have realized that the statute – passed by the legislature and signed into law – is blatantly unconstitutional under the First Amendment of the United States Constitution. Appellees' Brief Para. 32. Perhaps the defendants should have properly raised any issue of constitutionality of the statute and the Attorney General Opinions, but they did not. As stated by the Attorney General,

> One leading case has held that a state official lacks authority to expend public funds to support a state bond issue enhancing state and local facilities because, absent 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."** (Footnote 4 and 5 omitted.)

Attorney General Opinion 2009-L-11 at page 2. And this would include stating an opinion. This is a statute passed by the legislature and signed into law; it is presumed to be constitutional and none of the defendants raised the issue of constitutionality in this case. Empower had the right to assume constitutionality of the statutes as

well in bringing this action to enforce the provisions not being enforced by those charged with enforcing the laws.

¶14 **Eighth,** as to using Rule 11, Empower again argues that the case had substantial merit, but as noted by the public officials it need only have "some merit" and if so Rule 11 sanctions are not allowed. Appellees' Brief Para. 10. Much of what was raised by Empower were issues of first impression. The text of the statutes themselves, the clear intent of those statutes derived from the text themselves, the Attorney General Opinions (particularly the one quoted above) and the legislative history provided substantial support for Empower's interpretation of the statutes and provide sufficient basis for the action.

¶15 **Ninth,** the issue of lack of standing was an open question and resolved by the Supreme Court. The fact that the Defendants asserted this position and prevailed on it does not make the action frivolous. The language of Rule 11 itself demonstrates that Rule 11 sanctions should not have been applied because "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Rule 11(b)(2).

¶16 **<u>Tenth</u>**, Empower tried to resolve this issue without the need of a lawsuit, having a state representative ask for an attorney general opinion (which got lost) and asking those with authority to enforce the statute to do so (which they did not). Empower's motive was to stop false statements and demand compliance with the law, which included a provision that public officials could not state an opinion. Empower didn't write the law; the legislature did, and until someone (like the defendants) raises the issue of constitutionality, Empower has the right to assume these provisions were and are constitutional.

¶17 **<u>Eleventh,</u>** we note that the public officials have not, in their brief, cited to any case in the entire United States that allowed the phrase "non-monetary directives" to be used to require a retraction. And under North Dakota law, a retraction is a remedy only following a successful libel or slander suit.

¶18 **<u>Twelfth,</u>** the public officials did not raise any first amendment issue until the sanctions issue was raised; by failing to do so they waived that issue. Empower, on the other hand, has properly raised the first amendment issue because the Court is – by ordering a retraction – forcing Empower to say something, in violation of their first amendment rights.

¶19 **Lastly,** the public officials assert that Mr. Hale is a "serial filer of lawsuits against the government." Appellees' Brief Para. 39, note 4. Mr. Hale has indeed questioned, through proper legal means, certain government actions. In one such action, Mr. Hale succeeded in requiring the City of Minot to put back approximately $1,000,000 into the NAWS fund – where the city had blatantly ignored the requirement that any funds derived from the NAWS fund, including the interest, had to be placed into the NAWS fund. Although disappointed that this Court has not ruled in his favor in every appeal, Mr. Hale has brought substantive claims and reasonable interpretations of the law. Mr. Hale would prefer to be deemed a "serial citizen."

¶20 VIII. CERTIFICATE OF COMPLIANCE ON WORD COUNT

¶21 I hereby certify that this brief complies with FRAP 32(a)(7)(A); the word count is 1893 (2191 less 298 caption, table of contents and table of authorities).

¶22 IX. CERTIFICATE OF WORD PROCESSING PROGRAM

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

¶24 Dated this 3rd day of May, 2013.

¶25 __/s/ Lynn M. Boughey________
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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, 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, Defendants. -- 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:

1. **Appellants' Reply Brief**

on Friday, May 3rd, 2013, **Appellants' Reply 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:

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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on Monday, May 6th, 2013, **Appellants' Reply Brief** was served on Mark A Johnson pro se on behalf of the North Dakota Association of County Commissioners by regular mail by mailing true and correct copies:

Mark A Johnson
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on Monday, May 6th, 2013, **Appellants' Reply Brief** was 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:

Merlin Leithold
Executive Secretary for the ND Weed Control Association
6135 Hwy 49
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Dated this 6th day of May, 2013.

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