**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NORTH DAKOTA**
**NORTHWEST DIVISION**

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| MARK SPLONSKOWSKI,<br><br>Plaintiff,<br><br>v.<br><br>ERIKA WHITE, in her capacity as State Election Director of North Dakota,<br><br>Defendant. | ) | Case No. 1:23-cv-00123-DMT-CRH |

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**PLAINTIFF MARK SPLONSKOWSKI'S ADDITIONAL BRIEFING**

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The Court has asked the Parties to address "whether the Complaint should be dismissed because [Mr.] Splonskowski lacks approval from the Burleigh County Commission to initiate this lawsuit in his official capacity as Burleigh County Auditor." (Doc. 22.) The answer to that question is "no." Mr. Splonskowski is pursuing this action in his personal capacity notwithstanding that his injuries stem from his official obligations. Under its plain meaning, the statute giving the Burleigh County Board of Commissioners (the "Board") authority to pursue civil actions, N.D.C.C. § 11-11-14(1), is not exclusive and reaches only actions brought "for and on behalf of the county and in its name." In other words, the Board has no power to institute or prosecute this action on Mr. Splonskowski's behalf, even if he asked it to. Simply put, this action may escape review if the complaint is dismissed under Section 11-11-14(1).

Mr. Splonskowski, not the Board, will face penalties for acting contrary to state law. He is the only party in interest and under ordinary standing principles, he may pursue this action in his individual capacity to protect his individual liberties.

## I. The Legislature Gave the Board Limited Authority to Pursue Civil Actions Only "For And On Behalf of the County and In Its Name."

"The interpretation of a statute is a question of law[.]" *N. X-Ray Co. v. State by & Through Hanson*, 542 N.W.2d 733, 735 (N.D. 1996). When interpreting a statute, "the "primary goal in construing a statute is to discover the intent of the legislature." *Id*. "Words in a statute are given their plain, ordinary and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." *Indus. Contractors, Inc. v. Taylor*, 2017 ND 183, ¶ 11, 899 N.W.2d 680, 684 (N.D. 2017). "If a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute. *N. X-Ray Co.*, 542 N.W.2d at 735. The North Dakota Supreme Court has "consistently recognized that it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed." *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 12, 829 N.W.2d 453, 456 (N.D. 2013).



Section 11-11-14(1) provides, "The board of county commissioners shall have the following powers: … 1. To institute and prosecute civil actions for and on behalf of the county and in its name[.]" The text and plain meaning of the statute confines the Board's authority to bringing actions filed for *and* on behalf of the county *and* in the county's name. This action meets none of those requirements.

Nearly 100 years ago, in *Murphy v. Swanson*, 50 N.D. 788, 198 N.W. 116 (1924), the North Dakota Supreme Court explained that the powers of County Commissioners are strictly limited by the statute's text. In *Murphy*, the Board of County Commissioners of Burleigh County adopted a resolution employing a private attorney to assist the state's attorney with investigations of tax delinquents. *Id*. at 792. Residents and taxpayers of Burleigh County challenged the resolution on the grounds that it was "wholly beyond and outside of the authority of the board." *Id*. at 794.

The relevant statute made the "attorney general, his assistants and the state's attorney the only public prosecutors in *all cases* civil and criminal wherein the state or county is a party to the action[]," but contained an exception allowing the county commissioners to employ additional counsel "*in cases of public importance*[.]" *Id*. at 795 (emphasis in original). Burleigh County argued that its employment of the private attorney was within the scope of this statutory exception. *Id*. The court disagreed, finding that the legislature's use of the word "cases" meant "causes at law," and could not be read to include "matters of public importance" or "affairs of public importance." *Id*. at 796.

> Had it been the purpose of the legislature to empower the county commissioners to employ special counsel to advise them in matters where no suits were pending or in contemplation, or where such suits were only more or less remote possibilities, we think that other language would surely have been used to express such purpose.

*Id*. Because the private attorney was employed to assist with more than "cases of public importance," the Supreme Court found that "it is plain that the provision relied upon confers no express authority upon the board to make the contract here complained of by the respondent." *Id*. The Supreme Court also found that the private attorney's employment was "beyond the implied power of the county board," *id*. at 798, even though the "the board as a board is charged with the superintendence of the fiscal affairs of the county and is, therefore, interested in the collection of taxes," *id*. at 797.



Simliarly, the statute giving the Board authority to pursue civil actions must be read to mean what is "plainly expressed." *Gilstad*, 2013 ND 50, ¶ 12. It says that the Board may "institute and prosecute civil actions for and on behalf of the county and in its name[.]" N.D.C.C. § 11-11-14(1). Thus, the Board does not, for example, have the authority to institute civil actions for, on behalf of, or in the name of private citizens or elected officials like Mr. Splonskowski. As in *Murphy*, so here: if the legislature had intended to give the Board the power to control all civil

actions for the county *and* for all elected officials who are personally affected by the operation of the law, "other language would surely have been used to express such purpose." *Murphy*, 50 N.D. at 796.

To be sure, Mr. Splonskowski's injuries depend on his obligations as Burleigh County Auditor. Those injuries do not impact his office or the Board, they impact him personally. The relief he seeks is exclusive to him. Under the plain language of Section 11-11-14(1), the North Dakota Legislature did not deprive him of the ability to do that.

## II. Several Other Factors and Considerations Counsel Against Reading a Broader, Implied Power Into Section 11-11-14(1).

For several additional reasons, the Court should decline to read a broader, implied power into Section 11-11-14(1). First, the legislature did not say that the power to institute civil actions is *exclusive* to the Board, only that the Board shall have such a power. The statute therefore cannot be read to *preclude* this action. Indeed, neither Section 11-11-14(1) nor any other statute that undersigned counsel could locate *prohibits* a county official from instituting an action in his own name to remedy personal injuries.



Second, finding an implied power to preempt this action would contravene *Murphy*, where the North Dakota Supreme Court explained that "[t]he board of county commissioners is charged with the supervision of the conduct of the county officials, but it has no right to perform their duties or to exercise their prerogatives, and it has no right to delegate to others authority which it cannot itself exercise." *Murphy*, 50 N.D. at 797. The duties and prerogatives that form the basis of this action are exclusive to Mr. Splonskowski as Burleigh County Auditor. The Board has no right or standing to pursue relief for Mr. Splonskowski under these circumstances. Furthermore, Mr. Splonskowski alleges that he will face criminal penalties if he chooses to follow federal Election Day statutes over North Dakota's Ballot Receipt Deadline. (Doc. 1, ¶¶ 8, 31-34, 41-43.) His alleged

injuries are exclusive to him because only he has the responsibilities of the Burleigh County Auditor (Doc. 1, ¶ 13), and only he will face repercussions because of his choice. Mr. Splonskowski's standing here is thus stronger than the Board's standing could ever be because the Board, as a body, cannot be prosecuted or put in jail for failure to follow the law, especially laws it has no duty or authority to execute.

Third, a requirement that Mr. Splonskowski seek permission from the Board to initiate legal action to safeguard his liberties would likely be unconstitutional because it would give the Board veto power over an individual's right to petition the federal government for redress of grievances, U.S. Amend. I., which includes a right to petition a court to remedy a perceived wrong, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 612 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."); *see also Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012) (recognizing that the First Amendment "has long been made applicable to the states").



## CONCLUSION

The intent of Section 11-11-14(1) is "clear on the face of the statute." *N. X-Ray Co.*, 542 N.W.2d at 735. The Board may pursue civil actions for itself and in its name. The Board may not pursue Mr. Splonskowski's cause of action for him. Nor may the Board prohibit his action or require Mr. Splonskowski to seek its permission. This action should therefore proceed for disposition under Federal Rule of Civil Procedure 12.

Dated: September 29, 2023.

Respectfully submitted,

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**Admitted Pro Hac Vice*