IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Charles Walen, an individual; and Paul Henderson, an individual, Plaintiffs vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota; Alvin Jaeger, in his official capacity as Secretary of the State of North Dakota, Defendants and The Mandan, Hidatsa and Arikara Nation; Lisa DeVille, an individual; and Cesareo Alvarez, Jr., an individual. Defendants-Intervenors	)	CIVIL NO: 1:22-CV-00031 **DEFENDANTS' APPEAL OF MAGISTRATE JUDGE ORDER REGARDING DISCOVERY DISPUTE (DOC. 77)**

*** *** ***

(1.) Pursuant to Federal Rule of Civil Procedure 72(a) and Civil Local Rule 72(D)(2), Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota and Alvin Jaeger, in his official capacity as Secretary of the State of North Dakota[1] ("Defendants") hereby appeal from Magistrate Judge Senechal's *Order Regarding Discovery Dispute* filed January 3, 2023 (doc. 77) ("Order") requiring Defendants to produce transcripts to Plaintiff Charles Walen, an individual, and Paul Henderson, an individual ("Plaintiffs"), which transcripts were claimed to be and are protected as trial preparation materials under the Rules of Civil

[1] As the Court may be aware, Alvin Jaeger is no longer the North Dakota Secretary of State, having served out his last term which expired on December 31, 2022. The current North Dakota Secretary of State is Michael Howe, who assumed the office on January 1, 2023. Pursuant to Fed. R. Civ. P. 25(d) Michael Howe is automatically substituted as the Defendant in this case.

Procedure. Because all of the facts demonstrate the transcripts were prepared in anticipation of litigation or for trial, the Magistrate Judge clearly erred in determining otherwise and by applying a legal standard other than the controlling legal standard. The Magistrate Judge further clearly erred in determining Plaintiffs had demonstrated entitlement to the transcripts based purely on their status as "private citizens" with constitutional claims. Lastly, the Magistrate Judge clearly erred in denying Defendants' alternative relief of requiring Plaintiffs to pay one-half the cost of transcripts they wish to receive.

I. LEGAL STANDARD – APPEAL OF MAGISTRATE JUDGE ORDER

(2.) Pursuant to Federal Rule of Civil Procedure 72(a) and District of North Dakota Local Rule 72.1(D), the Article III Judge may reverse the Magistrate Judge's Order insofar as it is "clearly erroneous" or "contrary to law". This Court has held:

> A magistrate judge's finding is clearly erroneous when, although there may be some evidence to support it, the reviewing court, after considering the entirety of the evidence, is "left with the definite and firm conviction that a mistake has been committed." *Dixon v. Crete Med. Clinic, P.C.*, 498 F.3d 837, 847 (8th Cir. 2007) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The burden of showing a ruling is clearly erroneous or contrary to law rests with the party filing the appeal. *Marks v. Struble*, 347 F. Supp. 2d 136, 149 (D.N.J. 2004).

USI Insurance Services, LLC v. Bentz, etl al. (Case No. 1:18-cv-255) at Docket Number ("doc.") 180.

II. APPEAL ISSUES

(3.) The Magistrate Judge clearly erred and/or ruled contrary to law as follows:

1. Order at 7-8: "The recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings [. . .] In this court's opinion, the transcripts are not protected from disclosure under the work product doctrine."

Defendants' Response: There is no evidence or argument to suggest the transcripts were created to memorialize public proceedings; all of the evidence shows they were created solely in anticipation of litigation or for use at trial and not in the "ordinary course The Magistrate Judge also determined in a clearly erroneous fashion that the lack of attorney mental impressions in the transcripts was fatal to their protection

under the Rule, a standard that contradicts the Rule itself and the Eighth Circuit's controlling case law that protects both kinds of work product: "ordinary" work product and "opinion" work product.

2. Order at 8: "Even if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions."

   Defendants' Response: Plaintiffs provided no evidence to support their Rule 26(b)(3)(A) showing of all three essential elements to obtain work product: (1) substantial need, (2) undue hardship, and (3) inability to "obtain their substantial equivalent by other means".

3. Order at 9: "In this court's opinion, defendants have not shown sufficient reason to require that plaintiffs share in the costs of preparation of the transcripts. [. . .] Defendants have not provided information about the number of pages in the transcripts or the cost of reproducing them and so have not shown good cause to require plaintiffs to bear those costs."

   Defendants' Response: Defendants presented the Magistrate Judge with sufficient reason to require cost sharing under Rule 26(c)(1)(B) and provided detailed information about the costs of transcript preparation.

III. FACTS RELEVANT TO THE ISSUES

(4.) As the Court is aware, this lawsuit concerns Plaintiffs' claims against the Defendants in which they contend the North Dakota Legislative Assembly (and the Defendants herein) violated their Federal Constitutional rights by creating legislative Sub-Districts (4B and 9B) within other North Dakota legislative Districts (Districts 4 and 9). *See generally* Complaint (doc. 1). Specifically, Plaintiffs contend the creation and enforcement of the challenged Sub-Districts constitutes racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Complaint was filed on February 16, 2022. *Id.* Service on Defendants was effectuated on February 23, 2022 (doc. 7) and the same day then-Solicitor General of the North Dakota Office of Attorney General, Matthew Sagsveen, noticed his appearance as counsel of record on behalf of the Defendants. Notice of Appearance (doc. 6); Declaration of Matt Sagsveen ("Sagsveen Decl.") (doc. 81).

(5.) Attorney Sagsveen made the decision after litigation had been initiated to hire third-

party court reporting services to transcribe the audio-video links that were then and remain available at the North Dakota Legislature's website, which contain committee hearings and House and Senate floor sessions from August and September of 2021 that dealt with the challenged Sub-Districts. Sagsveen Decl. (doc. 81) at ¶¶ 5-6. Attorney Sagsveen's rationale for creating the transcripts was "in anticipation of litigation or for use at trial". Id. at ¶ 7. The transcripts themselves (Sagsveen Decl. ***Exhibit 1*** [doc. 81-1]) were paid for "out of a special fund of the North Dakota Attorney General earmarked only for litigation expenses" and those invoices were paid in full, totaling $24,181.45. Sagsveen Decl. at ¶¶ 8-10. The facts presented to the Magistrate Judge confirm the transcripts were not made contemporaneously with the hearings and sessions they captured, but rather were only created approximately six (6) months later by use of the audio-video files found at the Legislature's website. Sagsveen Decl. at ¶ 6.

(6.) Plaintiff Charles Walen alleges he is an individual who resides in District 4. *Complaint* (doc. 1) at ¶ 11. Plaintiff Paul Henderson alleges he is an individual who resides in District 9. *Id.* at ¶ 12. No other information about Plaintiffs or their respective financial situations has been presented to the Magistrate Judge.

(7.) On December 1, 2022, Defendants responded to Plaintiffs' written discovery requests seeking the transcripts. *Defendants Doug Burgum And Alvin Jaeger's Answers To Plaintiffs' Interrogatories And Requests For Production Of Documents And Admissions* (doc. 69-3) at Response to Request No. 2, pdf page no. 34. Included in Defendants' Response is the following relevant language expressly claiming trial preparation protection for the transcripts:

> This request is objected to as requesting trial preparation material, which is not discoverable under Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure, which is not otherwise discoverable under Rule 26(b)(1), and Plaintiffs do not have a substantial need for the materials to prepare their case and can, without undue hardship, obtain their substantial equivalent by other means. All of the transcripts listed below were created through fee-based litigation transcription / court reporting

> services at the direction of Defendants' legal counsel of record, after the commencement of this lawsuit, as part of the cost of defense, and for use at trial in this case. [. . . .]

Id. The parties to this dispute met and conferred, and then at the direction of the Magistrate Judge, filed *informal* letter position papers. *See* Letter Position Papers (docs. 69-1, 69-2, 73, & 74). The Magistrate Judge also held a telephone hearing on December 20, 2022 at which hearing the parties argued their respective positions. (doc. 68). The Magistrate Judge thereafter issued the *Order* that is the subject of this appeal. (doc.77). Defendants then filed a motion, brief and supporting affidavit (docs. 79, 80, & 81) requesting the Magistrate Judge stay her order requiring production of the transcripts by January 13, 2023. Plaintiffs responded to the stay motion with their own briefing (doc. 82), and the Magistrate Judge issued a second Order (doc. 83) staying the deadline to provide the transcripts to Plaintiffs. At the time of this filing, the order concerning the stay motion has not yet been issued by the Magistrate Judge.

III. ANALYSIS

A. Trial Preparation (A/K/A Work Product) – Legal Standard

(8.) "The management of discovery is committed to the sound discretion of the trial court." In re Missouri Dep't of Nat. Res., 105 F.3d 434, 435 (8th Cir. 1997) *(citing Bunting v. Sea Ray, Inc.,* 99 F.3d 887, 890 (8th Cir.1996)). In diversity cases, the Court applies state law to questions touching on privilege and federal law to questions touching on work product protections. Baker v. Gen. Motors Corp., 209 F.3d 1051, 1053 (8th Cir. 2000) (citation omitted). The work product doctrine is found in Rule 26(b)(3), which provides in relevant part:

> **(3)** ***Trial Preparation: Materials.***
> **(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
> **(i)** they are otherwise discoverable under Rule 26(b)(1); and

> **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Fed. R. Civ. P. 26(b)(3). The Rule further identifies what is required to claim the protection for trial-preparation materials as follows:

> **(5) *Claiming Privilege or Protecting Trial-Preparation Materials.***
> **(A)** *Information Withheld.* **<u>When a party withholds information otherwise discoverable</u>** by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> **(i)** expressly make the claim; and
> **(ii)** describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5) (emphasis added).

(9.) The following standard applies to claims of work product / trial preparation material protection under Rule 26[2]:

> The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation. Fed.R.Civ.P. 26(b)(3); [] Our determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination:
>
> > [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.
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> 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198–99 (1970) []. The advisory committee's notes to Rule 26(b)(3) affirm the validity of the Wright and Miller test: "Materials assembled in the ordinary course of business or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed.R.Civ.P. 26(b)(3) advisory committee notes.

<u>Simon v. G.D. Searle & Co.</u>, 816 F.2d 397, 401 (8th Cir. 1987) (cleaned up). The United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) recognized

[2] As in the case law, Defendants and the Magistrate Judge have used the terms "work product protection" and "trial preparation material protection" interchangeably to mean the materials protected by Federal Rule of Civil Procedure 26(b)(3).

the strong public policy underlying the protections afforded to work product, especially with respect to materials that contain an attorney's mental impressions and litigation strategy. Those "strong public policy" protections were "substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)." Upjohn Co. v. United States, 449 U.S. 383, 397–98, 101 S. Ct. 677, 686–87, 66 L. Ed. 2d 584 (1981); *see also* Simon v. G.D. Searle & Co., 816 F.2d at 400-401.

(10.) Notwithstanding the main justification for the Rule to protect attorney mental impressions, etc., the Federal Rule itself and the Eighth Circuit Court of Appeals recognize protections accorded even to work product materials that do not contain attorney mental impressions, which is known as "ordinary" work product. The following discussion illustrates this point:

> There are two kinds of work product—ordinary work product and opinion work product. Ordinary work product includes raw factual information. *See Gundacker v. Unisys Corp.,* 151 F.3d 842, 848 n. 4 (8th Cir.1998). Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. *See id.* at n. 5. Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. *See* Fed.R.Civ.P. 26(b)(3). In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud. *See In re Murphy,* 560 F.2d 326, 336 (8th Cir.1977). Initially, we note that these documents were prepared in anticipation of litigation and that there are no special circumstances.

Baker v. Gen. Motors Corp., 209 F.3d at 1054 (footnote omitted). "The work product privilege is designed to promote the operation of the adversary system by ensuring that a party cannot obtain materials that his opponent has prepared in anticipation of litigation." Pittman v. Frazer, 129 F.3d 983, 988 (8th Cir. 1997) (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir.1991)).

(11.) In Pittman, a wrongful death case, one of the defendants, Union Pacific, hired an investigator to photograph and measure the railway crossing where the accident occurred. Pittman v. Frazer, 129 F.3d 983, 987 (8th Cir. 1997). Although previously withheld from discovery as its work product, Union Pacific later used some of the photographs and measurements from the investigator's file at trial in the defense of the case. *Id.* at 988. Following a verdict in favor of the defendants, the plaintiffs argued Union Pacific had waived any work product protection for the other investigative materials. *Id.* The Pittman Court determined the remainder of the materials in the investigative file "constitutes ordinary work product." *Id.* The Pittman Court ultimately disagreed with the plaintiffs' position that the remainder of the file was work product or that it should have been produced in discovery, holding: the voluntary disclosure of some work product protected documents in the investigative file does not serve to waive the protections as to the remainder of the investigative file. *Id.*

B. There Was Never Any Evidence Or Other Showing To Suggest The Transcripts "Were Created To Memorialize Public Proceedings."

(12.) As indicated above, the Magistrate Judge clearly erred by determining against all of the evidence that the transcripts are not work product ("The recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." Order at 7). The foregoing conclusion finds no evidentiary support at all.

(13.) For example, the Declaration of Matthew Sagsveen (doc. 81) demonstrates the timing of the decision to order transcripts (after litigation had commenced), who ordered the transcripts (Defendants' counsel of record), the purpose for such transcripts (in anticipation of litigation or for use at trial), and the payment for the transcripts (out of the AG's special litigation expense fund). The decision to order transcripts was made in late February of 2022 after

commencement of the litigation and nearly six (6) months after the legislative committee hearings and House and Senate Sessions took place (in August and September of 2021). Sagsveen Declaration; Defendants' First Letter to Judge Senechal (Doc. 69-2). The evidentiary holding by the Magistrate Judge was also directly contradicted by the argument contained in both of Defendants' informal letter position statements they submitted, which stated in part:

> The transcripts at issue relate to committee hearings and legislative floor sessions during North Dakota's last legislative special session in late 2021. The transcripts were not prepared live, but rather were prepared after-the-fact by transcriptionists and court reporters reviewing video recordings of those hearings and floor sessions. The transcripts were prepared at substantial cost to the Defendants, paid for out of a special fund earmarked for litigation purposes, and were prepared expressly at the direction of Defendants' legal counsel of record *after* Plaintiffs had commenced this litigation.

Defendants' First Letter to Judge Senechal dated December 19, 2022 (Doc. 69-2).[3]

(14.) On the other hand, Plaintiffs provided to the Magistrate Judge absolutely no evidence or other showing to contradict the foregoing facts concerning the creation of the transcripts. There is simply no basis at all for the Magistrate Judge's conclusion that the transcripts were "created to memorialize public proceedings" when all of the evidence before the Court was and is otherwise. Being supported by no evidence, the Magistrate Judge's conclusion about the transcripts being created to memorialize public proceedings was clearly erroneous.

C. The Magistrate Judge Applied The Incorrect Legal Standard From Other Circuits That Allow Work Product Protection Only For Materials Containing Attorney Mental Impressions, Which Is Contrary To The Rule And Contrary To The Eighth Circuit's Legal Standard.

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[3] The Second Letter stated similar facts as follows:

> The facts surrounding the creation of the transcripts at issue here further confirm they were not created in the ordinary course of business, the preparation was directed by Defendants' legal counsel (including which hearings and floor sessions to transcribe), the transcripts remain and have at all times remained in the possession of Defendants' legal counsel, they were paid for by a special litigation fund of the AG's office, and the transcripts were created only because of the prospect of litigation (which at that time had already been instituted).

Second Letter to Judge Senechal, dated December 23, 2022.

(15.) The Magistrate Judge further applied a clearly erroneous legal standard, essentially holding the lack of attorney mental impressions in the transcripts was fatal to their protection as trial preparation materials under the Rule. The Court thus clearly erred by applying a work product legal standard that contradicts the language contained in the Rule itself and in the Eighth Circuit's own controlling legal standard. The Rule provides:

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3).

(16.) As is apparent, the Rule itself suggests the two kinds of work product that can be protected; to the extent the court orders discovery of "those materials", meaning materials prepared in anticipation of litigation or for trial, the attorney's mental impressions, etc., must still be protected from disclosure to the moving party. Case law clarifies the Rule drafters' intention to protect both "opinion" and "ordinary" work product. *E.g.*, Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) (recognizing "ordinary work product," which is composed of "raw factual information" that may be protected provided it is prepared because of the "reasonable prospect of litigation" and not prepared in the ordinary course of business); *accord* Gulf Grp. Gen.

Enterprises Co. W.L.L. v. United States, 96 Fed. Cl. 64, 68 (2011) (the Rules accord protections for both "ordinary work product" and "opinion work product").

(17.) Pittman, previously cited above, is illustrative to the issues in the case at bar and illustrates the Magistrate Judge's clear error in failing to protect ordinary work product. The factual background here demonstrates beyond doubt the transcripts were prepared in anticipation of litigation just as the investigative file in Pittman was so prepared. Pittman demonstrates the transcripts should be protected as ordinary work product. Rather than applying the plain language of the Rule, the Court applied the legal standard from other circuits and a sister district court that only protected materials as work product if they contained mental impressions of the attorney. *See* Order at 6-8 (citing and applying the standard in Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994); H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 108 F.R.D. 686, 687-88 (S.D.N.Y. 1985); and Biben v. Card, 119 F.R.D. 421, 424 (W.D. Mo. 1987).

(18.) Had the Magistrate Judge applied the clear language of the Rule and the controlling legal standard to the undisputed facts in this case, it would have determined the transcripts were not prepared "in the ordinary course" and they were "obtained because of the prospect of litigation." Simon, 816 F.2d at 400-401; Pittman, 129 F.3d at 987.

D. The Magistrate Judge Clearly Erred in Determining Plaintiffs Met Their Burden Of Showing: (1) Substantial Need, (2) Undue Hardship, And (3) An Inability To "Obtain Their Substantial Equivalent By Other Means".

(19.) In addition to the clear evidentiary and legal errors, the Magistrate Judge also clearly erred in her finding that Plaintiffs had demonstrated "substantial burden" under Rule 26(b)(3) ("Even if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions." Order at 8). While

the Plaintiffs initially argued in their letters and at the telephone hearing[4] they did not need to make the required Rule 26(b)(3) showing of undue burden, substantial need, and an inability to obtain the transcripts by alternative means, they re-tooled and changed their arguments in their last position statement arguing undue burden, substantial need, etc. Plaintiffs' Letter to Judge Senechal, dated December 28, 2022 (doc. 73). Although the Magistrate Judge clearly gave credence to Plaintiffs' arguments about substantial need and undue burden, those findings were devoid of any factual support whatsoever. Moreover, the Magistrate Judge did not even consider Plaintiffs' ability to "obtain [the transcripts'] substantial equivalent by other means".

(20.) As pointed out in Defendants' letters to the Court, in the Sagsveen Declaration, and in Defendants' stay briefing (doc. 80) the videos have been and remain publicly available, including to the Plaintiffs or to anyone else. Sagsveen Declaration (doc. 81); Defendants' First & Second Letters to Judge Senechal (Docs. 69-2 & 74). Indeed, Defendants provided in written discovery responses the links to all of the relevant committee and Senate and House videos applicable to the redistricting issues in this case. Exhibit 1 (Doc. 69-3) at pdf pages 6-9.

(21.) But regardless of Defendants pointing out the precise location of videos to the Plaintiffs, Plaintiffs and their legal counsel had the ability to check the public record themselves as soon as the legislative recordings became available in August and September of 2021. In fact, in their Spring 2022 briefing in support of their motion for temporary restraining order which this Court later denied, Plaintiffs cited numerous times to the legislative materials linked at the ND Legislature's website, including citing to the video links of the committee hearings, and Senate

[4] *See* Plaintiffs' First Letter to Judge Senechal, dated December 19, 2022 (Doc. 69-1) (no mention of undue burden, substantial need, et cetera). Attorney Sanderson on behalf of Plaintiffs argued during the Court's telephone conference on December 20, 2022 that Plaintiffs were not claiming and did not need to show undue burden, substantial need, and an inability to obtain the transcripts by alternative means.

and House sessions. *Memorandum of Law In Support of Plaintiff's Motion for a Preliminary Injunction []*, dated March 4, 2022 (Doc. 12); *Plaintiffs' Reply In Support of Motion for Preliminary Injunction*, dated April 18, 2022 (Doc. 30) at FN. 1 & 2. All of this illustrates the fact Plaintiffs have had and continue to have the ability to obtain the substantial equivalent of the transcripts without any undue burden and in actuality there is no "substantial need" for the transcripts when the evidence itself is clearly available. The Magistrate Judge's Order never analyzed these facts or these issues at all.

(22.) This case is also factually distinguishable from than the foreign and sister district court cases the Magistrate Judge relied on in ordering production of the transcripts. Those cases concerned materials that were <u>not</u> publicly available to the moving party seeking same and thus those moving parties in those cases had no ability to obtain their substantial equivalent. <u>Riddell</u>, 158 F.R.D. at 558 (disputed tape recordings and unredacted transcripts in the possession of non-moving plaintiff's counsel); <u>H.L. Hayden</u>, 108 F.R.D. at 688 (disputed tape recordings in possession of non-moving plaintiff's counsel); <u>Biben v. Card</u>, 119 F.R.D. 421, 425 (W.D. Mo. 1987) (non-public SEC deposition transcripts in the possession of non-moving objecting defendants). Since August/September of 2021, almost a year and a half ago, Plaintiffs have continually had full opportunity to access the videos in order to prepare transcripts of the materials they believed they would need to support their claims.

(23.) The Magistrate Judge furthermore clearly erred concerning the undue burden element of Rule 26(b)(3). Other than the cost Defendants paid to undertake that task themselves, Plaintiffs have not offered any evidence to show an <u>in</u>ability to obtain their own transcripts. None of that type of showing was made or even attempted. The finding that the two individual Plaintiffs ("two private citizens claiming a violation of their constitutional rights") cannot afford the cost of

transcripts and thus they are "substantially" or "unduly" burdened is not a finding or conclusion based on any real evidence, for example, the Plaintiffs' respective financial situations. The status of the Plaintiffs as just "private citizens" is not evidence and does not support the Magistrate Judge's undue burden conclusion. And because Plaintiffs essentially "sat on their hands" since August/September of 2021 when they could have prepared transcripts themselves, any undue burden was of their own making.

E. Defendants Presented The Court With Abundant Evidence And Reason To Require Cost Sharing Under Rule 26(C)(1)(B).

(24.) The Magistrate Judge further clearly erred in denying Defendants' alternative request that Plaintiffs be required to share in the costs of the transcripts to the extent the Magistrate Judge determined they must be produced based on "substantial need, etc.". ("In this court's opinion, defendants have not shown sufficient reason to require that plaintiffs share in the costs of preparation of the transcripts. [. . .] Defendants have not provided information about the number of pages in the transcripts or the cost of reproducing them and so have not shown good cause to require plaintiffs to bear those costs." Order at 9). Rule 26 allowed the Magistrate Judge to order Plaintiffs to share in the costs of the transcripts and Defendants satisfied their Rule 26(c) showing. Rule 26(c) provides in relevant part as follows:

> (c) Protective Orders.
>
> (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending [.] The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (. . . .)
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery[.]
>
> Fed. R. Civ. P. 26(c)(1)(

Id.

(25.) Contrary to the above conclusion there was no evidence or information submitted about the transcripts to allow for cost sharing, Defendants actually provided detailed information to the Plaintiffs and to the Magistrate Judge about such matters. In their first informal letter to the Magistrate Judge, Defendants provided a chart showing each of the transcripts by invoice number, hearing date(s), amount of each transcript, the court reporting service for each transcript, and the total cost of all transcripts. Defendants' First Letter to Judge Senechal (Doc. 69-2). As part of the Sagsveen Declaration (doc. 81), Defendants have provided essentially the same chart as well as the invoices themselves, which provides all 13 of the invoices paid by the North Dakota Attorney General's Office. Sagsveen Decl. Exhibit 1 (doc. 81-1). Each of the invoices references the legislative/committee video(s) that have been transcribed. *Id.* The evidence the Defendants presented to the Magistrate Judge should have compelled the court to order cost sharing under Rule 26(c).

(26.) The Order concerning cost sharing is also clearly erroneous as it assumes without any evidence whatsoever that the Defendants can afford to incur the entire cost of the transcripts themselves simply because they happen to represent the interests of the State. It would not have been inequitable or unduly burdensome for the Magistrate Judges to have ordered Plaintiffs to share in the costs of only those transcripts they really need for summary judgment or trial purposes. But again, as it stands, the Court assumed Plaintiffs as "private individuals" cannot afford to do so and the State can afford to bear the entire cost. Indeed, to the extent Plaintiffs are successful in their claims, which Defendants completely dispute, the rules allow them to obtain their costs and expenses of litigation, which ostensibly would include transcription costs. Thompson v. Wal-Mart Stores, Inc., 472 F.3d 515, 517 (8th Cir. 2006) (stating: "Rule 54(d)(1) provides 'costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise

directs.' A prevailing party is presumptively entitled to recover all of its costs." (internal citations and quotations omitted)). There should have been no presumption by the Magistrate Judge about costs until such time as there really is a prevailing party in this case. The court's presumptions that are not based on evidence are clearly erroneous.

IV. CONCLUSION

(27.) For the foregoing reasons, Defendants respectfully request the Court reverse the Order of the Magistrate Judge, and order the transcripts be protected from disclosure to Plaintiffs as Defendants' work product / trial preparation material. Alternatively, to the extent the Court determines the transcripts are not protected or that Plaintiffs have met their burden under Rule 26(b)(3) ("substantial need, etc."), Defendants request the Court order Plaintiffs to share in the transcripts costs pursuant to Rule 26(c).

Dated this 17th day of January, 2023.

By: *_/s/ Bradley N. Wiederholt_*

David R. Phillips (# 06116)
Bradley N. Wiederholt (#06354)
Special Assistant Attorney General
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
dphillips@bgwattorneys.com
bwiederholt@bgwattorneys.com

Attorney for Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota; Alvin Jaeger, in his official capacity as Secretary of State of the State North Dakota

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' APPEAL OF MAGISTRATE JUDGE ORDER REGARDING DISCOVERY DISPUTE (DOC. 77)** was on the 17th day of January, 2023 filed electronically with the Clerk of Court through ECF:

Paul Sanderson (#05830)
Ryan Joyce (#09549)
Evenson Sanderson PC
1100 College Drive, Suite 5
Bismarck, ND 58501
psanderson@esattorneys.com
rjoyce@esattorneys.com

Robert Harms (#03666)
815 N. Mandan St.
Bismarck, ND 58501
robert@harmsgroup.net

Mark P. Gaber (DC Bar No. 988077)
Molly Danahy
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
mdanahy@campaignlegalcenter.org

Michael S. Carter, OK No. 31961
Matthew Lee Campbell
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80301
carter@narf.org
mcampbell@narf.org

Bryan L. Sells
PO BOX 5493
Atlanta, GA 31107-0493
bryan@bryansellslaw.com

Samantha Blencke Kelty
Native American Rights Fund
1514 P Street NW, Suite D
Washington, DC 20005
kelty@narf.org

By: */s/ Bradley N. Wiederholt*
BRADLEY N. WIEDERHOLT