UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA by and through the NORTH DAKOTA DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff, vs. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	**STATE OF NORTH DAKOTA'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS** **Case No. 1:24-cv-00256**

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INTRODUCTION

[¶1] The State of North Dakota, by and through the North Dakota Department of Environmental Quality (the "State" or "DEQ"), filed a complaint asking this court to enjoin the United States Department of Labor ("USDOL") from forcing the State to appear and defend itself in a suit commenced through a complaint filed under the whistleblower statutes related to the Safe Drinking Water Act by Joshua Seerup ("Seerup"), a private party and former employee of DEQ. The Federal Defendants moved to dismiss, arguing the State's complaint fails to state a claim upon which relief can be granted and alleges this court lacks subject matter jurisdiction. ECF No. 14. Seerup joined in the motion. ECF No. 12.[1] While the Federal Defendants' brief takes the position that the USDOL's presence as a prosecuting party on its own is enough to completely bypass the State's claim of Eleventh Amendment immunity, such a position ignores the finer points. At bottom, is that this case stems from a written warning the DEQ issued to Seerup for various performance and behavioral issues. More than one performance and behavioral deficiency is addressed in the written warning and they are outside the scope of the complaint, investigation, and power of the Secretary. However, the Secretary has proceeded to facilitate the litigation of this matter by a private party to seek relief that violates state law and categorically goes beyond its authority.

[1] Seerup joined in the Federal Defendants' brief and does not make any separate substantive arguments. This brief responds to both motions to dismiss at ECF No. 12 and 14.

[¶2] The Secretary's election of party status must be substantive and facilitate federal interests and cannot be used as mere façade for representation of a private party seeking personal relief, fundamentally identical to providing a forum for the pursuit of private remedies contrary to the Eleventh Amendment. While the Federal Defendants' brief would have this court believe this is wholly appropriate and does not violate the sovereign immunity the state is entitled to, precedent and an understanding of the underlying facts within that precedent must frame this court's review of the motion to dismiss, and this case as a whole. The Court should deny the Federal Defendants and Seerup's motion to dismiss.

FACTUAL BACKGROUND

[¶3] Seerup was employed by the North Dakota Department of Environmental Quality beginning December 15, 2014, through his voluntary resignation on September 4, 2024. On or about July 1, 2022, Seerup received a written warning to address his performance and behavioral concerns stemming from two separate issues: Seerup's failure to complete and provide a presentation as directed by his supervisor and Seerup's inappropriate behavior in sending emails that were reported to the DEQ by the Environmental Protection Agency ("EPA") as being inappropriate. Ex. 1.

[¶4] First, the written warning addressed the history of Seerup's behavioral issues and failure to follow the directives of his supervisor stemming from his disagreement with DEQ's decision to participate in the Annual North Dakota Water Pollution Control Conference and his supervisors request that Seerup prepare and provide a presentation at the conference. Ex. 1. In July 2021, Greg Wavra ("Wavra"), Seerup's supervisor, requested Seerup prepare a presentation for the conference. *Id*. On September 14, 2021, Seerup notified Wavra that he refused to attend the conference to provide the presentation. *Id*. Seerup provided the presentation he had worked on to Wavra on September 15, 2021, and it was not completed as directed. *Id*. Seerup's failure to follow the directives of his supervisor and complete work as assigned were addressed in the written warning. *Id*.

[¶5] Second, the written warning addressed Seerup's inappropriate behavior in email exchanges

beginning in January of 2022 between Seerup and Nara Jirik ("Jirik"), EPA Region 8 coordinator for the State of North Dakota. In January of 2022, DEQ was in the process of working through a program audit of drinking water systems with the EPA. After an introductory meeting on January 18, 2022, between DEQ and Jirik, Seerup emailed Jirik for the first time. Ex. 2. Jirik briefly responded the same day. *Id*. Seerup followed up asking additional questions. *Id*. Jirik did not respond. *Id*. Seerup emailed Jirik again on March 29, 2022, and April 4, 2022. *Id*. Jirik did not respond to either email. *Id*. Instead, Jirik verbally reported the emails to Wavra on or about March 31, 2022, because the emails were presenting piecemeal information on areas in the audit Seerup was not aligned with and doing so was unprofessional and complicated the audit process. Ex. 5. Wavra offered for Jirik to respond to Seerup, but Jirik declined to respond to Seerup stating his emails were suggestive, contained the undertone of opinion, and were not transparent. Ex. 2.

[¶6] Seerup filed a complaint with USDOL alleging reprisal under the Safe Drinking Water Act ("SDWA"). Ex. 3. Seerup alleged he was retaliated against for his emails to Jirik and his refusal to attend a work conference. *Id*. OSHA investigated the complaint and the DEQ participated in the investigation providing a written response. *See* Ex. 1, 2, 5. DEQ specifically asserted that by participation in the investigation it was not waiving its sovereign immunity and affirmatively reserved its right to raise its immunity as a defense or bar to any action related to Seerup's complaint or subsequent litigation. Ex. 5.

[¶7] Throughout the investigation, the parties engaged in discussions to resolve Seerup's complaint. On June 7, 2023, the undersigned counsel met with Crystal Smith, the investigator assigned to investigate Seerup's complaint, an attorney for the USDOL, and former Assistant Attorney General Margaret Olson, then DEQ General Counsel. During that discussion, Smith represented that one particular sentence in the written warning may give rise to an alleged violation and offered the DEQ could redact that sentence to resolve the complaint. The undersigned counsel sent a follow-up email requesting the specific sentence or language Smith was referring to, in order to continue to facilitate negotiations. Ex. 7. Despite this representation from Smith about the extent of the purported violation from the USDOL's standpoint, Seerup then offered he would only settle

in exchange for monetary relief, complete removal of the written warning from his personnel file, and an agreement that DEQ would provide a neutral reference in any future position. Ex. 6. The DEQ did not respond to the offer of settlement as it had already communicated that the terms were without merit and exceeded the scope of the investigation and alleged violation. *See* Ex. 7.

[¶8] On August 14, 2023, the Regional Administrator for OSHA Region VIII, Jennifer Rous, issued the Secretary's Findings and Order ("Secretary's Order"). ECF No. 14-1. The Secretary's Order found that Seerup had engaged in protected activity, such activity was "a contributing factor in the issuance of a disciplinary letter", and there was reasonable cause to believe the State violated the SDWA. *Id*. The Secretary's Order purported to direct the State to:

1. remove the written warning *in its entirety*;
2. modify or destroy records containing "any reference to Complainant's protected activities or correspondence with the EPA";
3. provide all employees with a copy of the SDWA Fact Sheet; and
4. not retaliate or discriminate against complainants for engaging in activities covered by the SDWA.

Id. (emphasis added). The terms offered by the Secretary's Order were in line with Seerup's last request for relief, save the request for compensation.

[¶9] The parties were given 30 days to file an objection and request a hearing after issuance of the Secretary's Order. *Id*. If objections are not filed, the Secretary's Order becomes final. *Id*. The Secretary's Order further provided in explicit terms that the USDOL "does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence de novo for the record." *Id*. The administrative proceeding provides a forum for a private litigant to pursue his complaint and seek remedies against his employer, including a state entity.

[¶10] DEQ timely objected to the Secretary's Order again raising its Eleventh Amendment immunity from suit by a private party. Ex. 4. DEQ also objected to the Secretary's Order on the

grounds that the directive to remove the written warning *in its entirety*, and the Secretary's Order to destroy and modify records of a government entity violated state law and went beyond OSHA's authority to order relief. *Id*. DEQ was required to file an objection and request a hearing before the USDOL's Office of Administrative Law Judges ("OALJ") to avoid the Secretary's Order from becoming final.

[¶11] On September 19, 2023, the OALJ issued notice that the case had been docketed as Case No. 2023-SDW-00003 (the "Seerup OALJ Case"). ECF No. 14-2. On September 25, 2023, the Secretary of Labor filed notice of its election of party status in the Seerup OALJ Case but did not identify the federal relief sought, leaving simply the prior party order. ECF No. 14-4. On September 9, 2024, the OALJ issued a Notice of Hearing of Pre-hearing Order. ECF No. 14-3. On September 20, 2024, the undersigned counsel met by telephone with counsel for the USDOL to meet and confer pursuant to the Notice of Hearing and Pre-hearing Order that requires all parties to meet and confer; Seerup did not attend the discussion. During the undersigned counsel's discussion with counsel for the USDOL, the issue of potential resolution of the case was addressed. Counsel for the State explained that as discussed in June 2023, the State would consider the potential limited redactions of a sentence or specific language as offered by Smith. Counsel for the USDOL suggested that if Seerup would agree to that offer, that would resolve the concerns of the USDOL. However, Seerup demanded the written warning and now performance evaluations be removed and destroyed in their entirety. Ex. 8. The DEQ did not agree to do so as it would violate state law to destroy public records. Importantly, Seerup's request to modify performance evaluations and wholly destroy public records went far beyond the purported scope of the violation as those representations were made to undersigned counsel from Smith and USDOL counsel.

[¶12] The State filed a complaint seeking a declaratory judgment and permanent injunctive relief from the Seerup OALJ Case because requiring the State to litigate against a private party, regardless of the forum, violates the State's sovereign immunity. *See* ECF No. 1. The Federal Defendants, and Seerup by joining the Federal Defendants' Motion to Dismiss, take the position that the mere election of party status acts as a workaround to the State's sovereign immunity and

allows for Seerup to hale the State into court to litigate these claims. Such a position ignores precedent, and this Court must deny the Motion to Dismiss.

LAW AND ARGUMENT

[¶13] The Federal Defendants seek dismissal of the State's Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 12(b)(1), (6). A motion under Rule 12(b)(1) attacks a court's subject-matter jurisdiction. *See* Fed.R.Civ.P. 8. A Rule 12(b)(6) motion tests the sufficiency of a complaint under Rule 8 of the Federal Rules of Civil Procedure which requires a short and plain statement showing the State is entitled to relief. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009); *see also* Fed.R.Civ.P. 8. In assessing a Rule 12(b)(6) motion, the deciding court must take the factual allegations as true and the allegations are to be viewed in totality. *Id*. The Federal Defendants do not argue that the Complaint lacks sufficient factual assertions but rather argues the State's Complaint should be dismissed because it does not state a plausible claim for relief as a matter of law.

[¶14] The Federal Defendants address injunctive relief from the investigation completed by OSHA under both 12(b)(1) and 12(b)(6). ECF No. 15 at 6-8; 12-15. Then, they proceed to seek dismissal under 12(b)(6) for the State's claim of declaratory and injunctive relief from the underlying Seerup OALJ Case. *Id*. at 8-12. The State will first address the arguments concerning the investigation under both Rules 12(b)(1) and 12(b)(6) and then proceed to address dismissal under Rule 12(b)(6) regarding the Seerup OALJ Case.

I. The State complied with OSHA's investigation and seeks permanent injunctive relief from the Seerup OALJ Case.

[¶15] The Federal Defendants first seek dismissal of the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction alleging that because the investigation has already concluded, there is no relief to provide. ECF No. 15 at 6-8. Separately, the Federal Defendants seek dismissal under 12(b)(6) for failure to state a claim because the State does not have immunity from OSHA's investigation into alleged whistleblower activity under the SDWA. *Id*. at 12-15.

[¶16] The State does not dispute that OSHA has the authority to conduct an investigation into a

whistleblower complaint under the SDWA received pursuant to 24 C.F.R. §§ 29.103-104. *See* 42 U.S.C. § 300j-9. And, the State clearly complied in good faith with OSHA's investigation, and is fully committed to complying with the anti-retaliation provisions of the SDWA. As for the mootness argument, the State clarifies that it does not seek injunctive relief from this Court from the investigation, which the State agrees is already completed. The State seeks declaratory and injunctive relief from the resulting administrative adjudication in the Seerup OALJ Case.

[¶17] However, despite the Federal Defendants assertion that its investigation does not provide a forum for the complainant to gather evidence in support of his claim, it would be wholly without logic to pretend that the investigation does not have the purpose and effect of subjecting the State to a suit or adjudication of claims by or against a private individual wherein OSHA is effectively gathering the discoverable evidence for the complainant. *See* ECF No. 15 at 12. During the investigation, the investigator "will provide to the complainant . . . a copy of all of the respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint." 29 C.F.R. § 24.104(c). At the end of the investigation, the Assistant Secretary of the USDOL will issue an order that includes relief for the complainant including ordering compensation, reinstatement, compensatory damages, costs and expenses of the complainant, and potentially exemplary damages under the SDWA. 29 C.F.R. § 24.105(a)(1). The Order also allows for either the complainant or the respondent to object and request a hearing. *Id*. at (b). The Assistant Secretary is not a party unless it elects party status. 29 C.F.R. § 24.108(a)(1). While the investigation may be conducted to determine whether a violation of the applicable statutes has occurred, the end result is such that an adjudicatory forum is provided for a private litigant to adjudicate his claims against a state entity. Thus, it is imperative upon the State to continuously raise and affirmatively reserve its right to raise its sovereign immunity from an adjudicatory proceeding in a forum in which it has not waived its right to sovereign immunity.

II. The Secretary's election of party status does not circumvent the State's sovereign immunity because the case is not truly brought on behalf of the United States and the relief is wholly for Seerup's personal benefit.

[¶18] The Federal Defendants move for dismissal of the State's Complaint seeking injunctive

relief from the Seerup OALJ Case under Rule 12(b)(6) alleging that the Secretary's election of party status circumvents the State's claim of sovereign immunity. ECF No. 15 at 8-12. A complaint will survive a Rule 12(b)(6) motion to dismiss if the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (internal quotations omitted). "The plausibility standard requires a plaintiff to show at the pleadings stage that success on the merits is more than a sheer possibility." *Id*. The State can show that it has a plausible claim for relief.

[¶19] At the outset, the Federal Defendants and the State agree on a few legal principles. First, the State is entitled to sovereign immunity and has not waived it. Second, Congress has not validly abrogated the State's sovereign immunity with respect to the SDWA and related whistleblower laws. Last, the State's sovereign immunity bars a private citizen from bringing suit against the State, regardless of the forum. The Federal Defendants take the position, however, that the bar to suit by a private individual against a State can be bypassed so long as a federal actor simply appears as a "nominal" party, thus curing any infringement upon sovereign immunity. The State disagrees.

[¶20] It is well settled that Seerup, a private litigant, cannot maintain a claim against the State under the environmental whistleblower statutes. *State of Ohio E.P.A. v. U.S. Dep't of Lab.*, 121 F. Supp. 2d 1155, 1163 (S.D. Ohio 2000); *Florida v. U.S.*, 133 F. Supp. 2d 1280, 1290 (N.D. Fla. 2001). It is also true that the State does not have sovereign immunity from actions brought by the United States vindicating federal interests. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934); *Florida v. U.S.*, 133 F. Supp. 2d at 1284-85. But whether an action has been brought by the United States or is substantively an action brought by a private party in a federal agency forum is what determines whether a suit can be maintained to avoid a state's sovereign immunity.

> The difference between a suit by the United States on behalf of . . . employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; . . . States have consented to suits of the first kind but not the second.

Rhode Island v. U.S., 115 F. Supp. 2d 269, 273 (D.R.I. 2000) (quoting *Alden v. Maine*, 527 U.S. 706, 760 (1999); *aff'd as modified sub nom. Rhode Island Dep't of Env't Mgmt. v. U.S.*, 304 F.3d

31 (1st Cir. 2002). "The distinction is one between an action by the United States to enforce federal law in which a private party derives an incidental benefit and an action by, or on behalf of, the private party, the objection of which is to obtain damages or other relief claimed by that party." *Id*.; *see also Florida v. U.S.*, 133 F. Supp. 2d 1280, 1289 (asserting that after determining sovereign immunity applies to administrative proceedings the court must address whether the "administrative complaint is the functional equivalent of an action commenced and prosecuted . . . individually . . . or . . . the equivalent of an . . . administrative proceeding commenced and prosecuted by, the Department of Labor itself"). Ascertainment of the manner in which the suit is brought is paramount because the distinction goes to the heart of state sovereign immunity:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extra legal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, *a control which is absent from a broad delegation to private persons to sue nonconsenting States*.

Alden v. Maine, 527 U.S. at 756 (emphasis added).

[¶21] Seerup filed a complaint with the USDOL. The USDOL, through OSHA, investigated Seerup's complaint and the State complied with that investigation. During the investigation, Smith, the investigator for the USDOL, advised the DEQ that she believed a particular sentence or specific language related to the email exchanges between Seerup and Jirik provided the source of the alleged violation. The relief thereafter purportedly sought by Seerup far differed from that offered by Smith. Ex. 6, 7. Yet when the Secretary's Order was issued, it went far beyond the USDOL's earlier representation and simply mirrored the request made by Seerup. ECF No. 14-1; Ex. 6. In short, the USDOL effectively ceded its duty to exercise political responsibility in favor of the wishes of a private party. After the Secretary's Order was issued, the State filed its objections and requested a hearing. The State will effectively be in the position of "prosecuting" the matter because a finding has already been made against it and it is in the position of having to defend or

suffer the legal consequences if it allows an adverse finding to go into effect. Seerup commenced the action and the State was forced to defend itself from the Secretary's Order by requesting further adjudicative proceedings be held in the federal administrative forum. Moreover, the complete divergence in the type of relief sought based on the purported violation indicates that political responsibility is not being exercised with respect to the pursuit of this case and it is truly a façade for advancing a private party suit in a federal agency forum against the State.

[¶22] While the cases relied on by the State and cited by the Federal Defendants address the issue of whether a private party may maintain an action against a nonconsenting state in a federal adjudicative forum because those were the procedural postures presented for review, significantly less analysis is given to the procedural propriety of the USDOL's involvement when such involvement is done purely to advance and benefit a private party and is substantively identical to a private party suit in a federal agency forum. The State observes that while it does not have immunity against the United States for suits it commences and prosecutes to vindicate federal interests, the facts here suggest that the USDOL's status as a party is nominal at best and not in line with its stated reasonable cause findings.

[¶23] And while it is true that the intervention of the United States can indirectly allow a private party to receive some benefit to an action, this requires the exact same relief is sought by both the United States and the private litigant. *See Rhode Island Dep't of Env't Mgmt. v. U.S.*, 304 F.3d 31, 53 (1st Cir. 2002) ("Generally speaking, if the United States joins a suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit."); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904 (8th Cir. 1997) ("because the Band and the United States seek the same relief in this action, Minnesota's sovereign immunity is not compromised."). But here, the relief sought is not the same and cannot be the same given the Secretary's power particularly viewed in light of the underlying facts of this matter.

[¶24] Here, the action has not been pursued, and the Federal Defendants have not elected "party

status", in an effort to enforce federal laws to seek relief that merely incidentally affects Seerup; rather, the action here is done by and on behalf of Seerup to obtain the specific relief claimed by him. This is made obvious from the dialogue between the State and the USDOL wherein the USDOL has articulated to the State that it believes the scope of the alleged violation exists in one sentence within the written warning. The USDOL has on two occasions communicated that its concerns would be addressed by a mere redaction of that specific language. However, the USDOL has elected party status to now seek the wholesale destruction of a written warning that it admits contains issues that do not fall under its jurisdiction (ECF No. 14-1 n.2) and which addresses valid disciplinary measures for performance and behavioral concerns that are not at issue in this case. Seeking such relief clearly is not just incidental to Seerup, rather it is wholly for his benefit. The precedent allowing such cases to continue despite sovereign immunity as long as the United States is involved are predicated on the idea that "The Department of Labor will presumably exercise some judgment in deciding whether and how far to pursue an action against a sovereign state." *Florida v. U.S.*, 133 F. Supp. 2d at 1290. Here, that could not be further from the case.

[¶25] This is also made apparent by the relief requested by the USDOL for the State to "modify or destroy records containing any reference to Complainant's protected activities or correspondence with the EPA". ECF No. 14-1. At no time during the investigation did the USDOL inquire as to whether there were other documents that may contain references to the so-called protected conduct. At no time did the State provide documents beyond the response, written warning, and emails between Seerup and Jirik (that again Jirik reported as inappropriate to the DEQ) that referenced the so-called protected conduct. Rather, what is extremely evident is that the relief sought to remove the written warning in its entirety and modify or destroy records containing any reference to Complainant's protected activities or correspondence with the EPA are done solely for the benefit of Seerup rather than to further any purported federal relief particularly when the USDOL believed that only a sentence provided the alleged basis for the violation and fixing that sentence would address its concerns.

[¶26] The relief actually sought by the USDOL, is to simply provide an administrative forum for

Seerup contrary to the Eleventh Amendment, by simply enchanting "party status." This has been repeatedly demonstrated by its own assertions on resolution which is far different from that pursued by Seerup and clearly it is done for his personal benefit. The mere election of "party status" to substantively provide nothing more than an administrative forum for a private party does not abrogate the State's sovereign immunity.

III. The Secretary has exceeded authority in the relief sought and the State has stated a claim for relief

[¶27] Although not directly addressed by the Federal Defendants in the Motion to Dismiss, the State sought injunctive relief because the relief sought by Seerup and the Federal Defendants exceeded the scope of its authority under 29 C.F.R. § 24.105(a)(1) in ordering the State to destroy documents and remove the written warning which addressed performance and behavioral issues that occurred from July 2021 through September 2021. These behavioral and performance issues were not addressed by the Secretary's Order and not found to be the basis for the alleged violation. ECF No. 14-1. The Secretary's Order identifies Seerup's protected activities as occurring between January 18, 2022, through April 4, 2022, related to the emails he sent to Jirik. *Id*. These alleged protected activities are the basis for the administrative hearing. The Secretary, if a reasonable cause finding has occurred, can only order the following relief:

> a requirement that the respondent abate the violation; reinstate the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; pay compensatory damages; and, under the Toxic Substances Control Act and the Safe Drinking Water Act, pay exemplary damages, where appropriate. At the complainant's request the order shall also assess against the respondent the complainant's costs and expenses (including attorney's fees) reasonably incurred in connection with the filing of the complaint.

29 C.F.R. § 24.105(a)(1).

[¶28] In the Secretary's Order, it affirmatively states it does not have jurisdiction over the events occurring in September 2021. *Id*. at n.2. Clearly, actions that do not fall within OSHA's jurisdiction to investigate cannot serve as the basis for a hearing, in whole or in part. And, OSHA could not elect party status to adjudicate claims it has no jurisdiction over. Moreover, to the extent 29 C.F.R. Part 24 allows for such a proceeding, it would be considered unconstitutional for the Federal

Defendants to offer an OALJ hearing that would violate the State's sovereign immunity by allowing a private party to seek relief in its forum on issues it has no jurisdiction over. *See State of Ohio E.P.A. v. U.S. Dep't of Labor*, 121 F. Supp. 2d at 1167 (S.D. Ohio 2000).

[¶29] The Secretary's purported relief also would require the State to violate its own laws. Under the North Dakota Constitution all records of a public or governmental body are public records, subject to open records. N.D. Const. art. XI, § 6. North Dakota has codified this constitutional provision under various statutes, including N.D. Cent. Code § 44-04-18 (addressing open records) and ch. 54-46 (management and retention of records). Section 54-46-07 dictates that "[a]ll records made or received by or under the authority of . . . public officials of this state in the course of their public duties are the property of the state and may not be mutilated, destroyed, transferred, removed, sold, or otherwise damaged or disposed of, in whole or in part, except as provided by law." N.D. Cent. Code § 54-46-07. The State seeks injunctive relief from the Secretary's Order requiring the State to destroy public, governmental records.

CONCLUSION

[¶30] Based on the foregoing, the State respectfully requests this Court deny the Federal Defendants and Seerup's motion to dismiss.

Dated this 12th day of May, 2025.

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CERTIFICATE OF SERVICE

CASE NO. 1:24-cv-00256

[¶1] I hereby certify that on May 12, 2025, the following document: **STATE OF NORTH DAKOTA'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS** and **EXHIBITS 1-8** were filed electronically with the Clerk of Court through ECF.

[¶2] I further certify that the foregoing documents were served upon Josh Seerup by emailing a true and correct copy thereof as follows:

Josh Seerup at joshseerup@gmail.com

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