SPECIFIC CONCERNS COMMENTS ON PROPOSED CONFLICT OF INTEREST RULES

(Received after January 26, 2022 Meeting)

Members of the Commission:

I have lived in North Dakota my entire life and have almost 40 years of practicing Professional Engineering in this and other states. I currently serve as a member on the Board of Ethical Review (BER) for the National Society of Professional Engineers (NSPE). The BER is made up of 8 individuals from around the country. It addresses ethical issues for engineering practices both domestically and internationally when this country's professional engineers work in foreign countries. As a member of the BER, I have personally been involved several times in drafting opinions on Conflict of Interest Cases. In fact, the BER has addressed Conflict of Interest issues many times resulting in over 130 separate opinions. I believe this unique experience gives me a knowledgeable perspective on your Draft Rule.

Firstly, I find the Draft Rule too subjective. It has been my experience that one of the most significant issues we face on the BER on difficult determinations is that our Code of Ethics is not objective enough. For the Draft Rule, this can lead to abuse of its intent.

An example of this can be seen in 115-04-01-01. 1. There is no definition of "Substantial". This is a subjective term that can be interpreted in a very wide range and, therefore, would be impossible to regulate. Another example of this can be seen in 115-04-01-01. 2. b. There is no definition of "Significant". This subjective term can again be interpreted in a very wide range and would be impossible to regulate. Does 115-04-01-01. 8. try to address this? My interpretation of this rule would be that this establishes a very low bar. In this case, the use of the word "Significant" is misleading as ***any*** increase in financial interest would be considered Significant. Additionally, the question of "is this financial interest need to be direct or indirect?" is not addressed, but should be. An argument may be made that 115-04-01-01. 1. uses the word "direct", yet an indirect interest can result in significant financial gains however significant or substantial is defined.

Both "must" and "shall" are used in the Draft Rule. Do these terms have mutual meaning? Also, there is the use of "reasonable person" in the Draft Rule. Again, this is very subjective.

I believe the definition of "Immediate Family" needs to be broader. Family influences can be easily made beyond the members of the family listed and don't necessarily need to come from a blood line.

Section 115-04-01-02. 2. is difficult to comprehend in the manner it is written. What are the circumstances that the Public Official is not permitted or is unable to abstain from action? Could one of those circumstances be to obtain a quorum? If so, there should be another means of addressing this situation rather than discarding the ethicality trying to be established by the Draft Rule. This portion of the Draft Rule could also be used to override the ethicality by defining the circumstance as time sensitive when, in reality, it is not or should not have been.

Section 115-04-01-02. 3. is also difficult to comprehend, especially with the use of the words “make take” on the fourth line. Additionally, if the Public Official voluntarily recuses himself (Note: The Rule should be drafted to be gender neutral.), why would there need to be a Neutral Decisionmaker action? The Public Official has made a decision that should be respected. The Neutral Decisionmaker should not be allowed to override the decision of the individual.

Finally, in accordance with Item 3. of your *Guidance for Comments on the Draft Rule,* the designation of the “Neutral Decisionmaker” will most likely be problematic. In many cases, the “Neutral Decisionmaker” may not be neutral or, more importantly, not independent. For example, the designation would allow the “Neutral Decisionmaker” to have a close, personal relationship with the Public Official, may be his boss, or may be his employer. In each of these instances, the independence of the “Neutral Decisionmaker” can be called into question. Whether the decisions made by the “Neutral Decisionmaker” are with all honesty and integrity, the public perception can be powerfully negative. There needs to be public trust in the process which cannot be achieved without the independence of the “Neutral Decisionmaker”. Alternatives to have an independent “Neutral Decisionmaker” would be that the Commission act in this capacity, a subcommittee of the Commission, regional subcommittees, or other means.

Therefore, I strongly urge the Commission consider correcting the subjectiveness and the independence of the “Neutral Decisionmaker”, as well as the other issues, of the Draft Rule.

The opinions expressed are my own and may not reflect the opinions of the BER. Thank you for your consideration.

Hugh Veit

Member/Board of Ethical Review (NSPE)

North Dakotans for Public Integrity, Inc.

TO: North Dakota Ethics Commission
Ethicscommission@nd.gov
FROM: Dina Butcher, Chair, Board of Directors
North Dakotans for Public Integrity
Dina.wtba@midconetwork.com
DATE: February 15, 2022
RE: Further Comments on the Draft Conflict of Interest Rules 115-04-01

North Dakotans for Public Integrity (NDPI) sponsored Article XIV, which includes Section 2(5) addressing conflict of interest in quasi-judicial decisions. NDPI appreciates that the Commissioners are also addressing general conflict of interest in the draft rules.

NDPI's interest in the work of the Ethics Commission is to ensure that Article XIV is properly implemented and to assist the Commission in doing so. Since Article XIV does not address general conflict, all our comments in that domain are suggestions based on our long-standing interest in public integrity.

Thank you for this opportunity to comment and for defining your questions so that the public can address them directly.

1. Comment on the Commission's Question 2.a: Should campaign contributions be included in the general policy section?

Article XIV Interpretation: The Ethics Amendment addresses campaign contributions in the context of quasi-judicial decisions, not general decisions. The commission's definition of quasi-judicial is appropriate at the policy/rule level, but implementation also requires a procedure to clarify the term with criteria and examples. Article XIV is silent on general conflict of interest.

NDPI suggestion: The general-decision question needs more study. Dealing with quasi-judicial decisions is more urgent. Guidance to public officials on the new rule should provide more information, criteria, and examples to assist them in recognizing quasi-judicial decisions, and it should clearly note that some individual public officials (not just high-profile commissions) make quasi-judicial decisions within their general duties.

2. Comment on the Commission's Question 2.b: Do other states include campaign donations as a basis for disqualification in general?

NDPI suggestion: We are a small nonpartisan, nonprofit group of North Dakotans with extensive state government experience who successfully identified a set of ethics issues that concerned most of our fellow citizens. We do not have the resources to conduct a 50-state policy review.

3. Comment on the Commission's Question 2.c: Do other states include campaign donations as a basis for disqualification in connection with quasi-judicial proceedings?

Article XIV: NDPI wrote this policy for North Dakota without reference any other state's policy. We concur with United States District Court Judge Daniel Hovland, who said that Public Service Commissioners accepting donations from companies they regulate is "ill-advised, devoid of common sense, and raises legitimate questions as to the appearance of impropriety."[1]

NDPI suggestion: The Ethics Commission is a constitutional body. You have or should acquire sufficient resources from other state agencies, the legislature, or independent experts to access information and expertise on any matter within your jurisdiction, especially when it comes to implementing the Constitution.

4. Comment on the Commission's Question 2.d: (a) Are there any suggestions regarding the identified factors a Neutral Decisionmaker should consider in 115-04-01-04(5)? (b) Should there be a "bright line" to help standardize evaluations? If so, what is it? (c) What sources address these matters?

Article XIV interpretation: (a) **NDPI's position is that you are fiduciaries of your mission**. Neutral
Decisionmakers must consider criteria that represent the Commission's mission [Section 3(1)] to "strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government…."

Regarding (b) and (c), NDPI suggests the Commission develop a clear, specific rationale for whatever decision it makes on bright lines after researching and considering their impact on ethical decisions and outcomes. Potential sources include the US Office of Government Ethics, the Markkula Center for Applied Ethics at Santa Clara University, and the Council on Government Ethics Laws.

[1] Dacotah Chapter of Sierra Club and Dakota Resource Council v. Secretary of the Interior and North Dakota Public Service Commission, USDC, North Dakota, Case No. 1:12-cv-00065, Order of October 22, 2013. page 20, footnote .

5. Comment on the Commission's Question 3: Does 115-04-01-01(5) appropriately identify who can be the neutral decisionmaker in a general or quasi-judicial matter?

In a word, no.

Article XIV: The draft policy's manner of designating Neutral Decisionmakers for quasi-judicial decisions is fraught with risk, including inconsistent application, undisclosed sources of bias, and fear of reprisal. NDPI urges the Commission to focus on objectivity, independence, and the following key points in Article XIV:

1. What approach will best fulfill your fiduciary responsibility as defined in Section 3(1)?
2. Neutral Decisionmakers must focus their decisions on the "appearance of bias" (Section 2(5). The appearance of bias is far across the spectrum from the more familiar evidencebased quid pro quo, which state law requires for bribery. Neutral Decisionmakers will need standards for that.

Citizen confidence and the absence of an appearance of bias are essential principles for properly implementing all elements of Section 2(5). We have several ideas about ways to ensure that these significant, legally vulnerable decisions start with a proper decisionmaker, but for the time being the best course might be to name the Commission itself or Administrative Law Judges.

Finally, NDPI recognizes that Commissioners and staff have worked long and hard to establish the Commission and address its constitutional requirements. We believe that the current effort is showing all of us that the Commission needs additional staffing and expertise in applied ethics, communication, and education. Your budget is far less than the Governor's 2019 request, which itself was much less than our estimated needs-based budget. NDPI will support your efforts to secure a proper budget any way we can. The increasing public interest and support for the Commission could be helpful in that regard.

As the U.S. Office of Government Ethics points out:

> Well-trained ethics officials help agency leaders and employees manage risks every day. Ethics officials must have the knowledge, skills, and abilities necessary to provide expert counsel, identify and resolve conflicts of interest, deliver quality training, and manage effective programs, making their ongoing professional development vital to the strength of the ethics program. OGE [read "the North Dakota Ethics Commission"] has a responsibility to support this important effort.

Again, thank you for your commitment and hard work to ensure ethical state government.

February 18, 2022

Dave Thiele, Executive Director
North Dakota Ethics Commission
101 Slate Dr., Suite #4
Bismarck, ND 58503

(*submitted via* ethicscommission@nd.gov)

Dear Mr. Thiele:

Campaign Legal Center ("CLC") respectfully submits these written comments to the North Dakota Ethics Commission ("Commission") regarding the Commission's draft conflict of interest rule.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening American democracy across all levels of government. We work toward a more transparent, accountable and inclusive democracy that is responsive to the people. In furtherance of that goal, we work to ensure ethics laws across the country adequately protect the public's confidence in the integrity of democratic institutions.

Our comments are intended to ensure the Commission promulgates a rule with meaningful safeguards for the public's trust in North Dakota's government. We provide the Commission with suggestions to incorporate in whatever manner it sees fit. The comments contained herein focus on Question 3 of the Commission's guidance for comments on the draft rule regarding the use of a neutral decisionmaker. Attached as an appendix to these comments are our in-text suggestions for the rule.

I. Section 115-04-01-01: Definitions of Conflicts of Interest and Neutral Decisionmaker

The proposed definitions of conflict of interest and neutral decisionmaker, as contemplated, allow for unnecessary loopholes that could hinder effective enforcement of the rule. First, the wording of the definition of "disqualifying conflict of interest" is ambiguous as to who is determining that a conflict of interest exists. The definition as written states "a determination by a public official that a conflict of interest exists and recuses himself or herself and abstains from further action in the matter…"[2] This wording suggests the official themselves is making the determination of the conflict, not a separate, neutral decisionmaker as contemplated by the rest of the rule.

Second, the neutral decisionmaker as defined will lead to inconsistent and questionable determinations about possible conflicts of interest. For example, allowing the other members of a legislative body or commission to determine possible conflicts for a colleague is akin to a system of self-policing, and could indirectly incentivize rulings that will advance the interests of others in the group. Additionally, allowing for a vote on the matter has a high probability of tie votes, partisan votes, and votes by individuals who may have other or similar conflicts. If a supervisor or appointing official is permitted to make a conflict determination about a subordinate, the decision may be biased by whether the supervisor hired that employee or the quality of work the employee has done for the supervisor.

CLC recommends limiting the neutral decisionmaker to a career public servant—not an elected or appointed official— as designated by the bodies in 115-04-01-01(5)(e). The definition would therefore use the following language (additions bolded):

> "'Neutral Decisionmaker' means individuals who do not have a Potential Conflict of Interest. An agency, legislative body, board, **bureau, department**, commission or committee ~~may~~ **must** by rule or policy designate a Neutral Decisionmaker(s) to receive disclosures and evaluate and decide on the potential recusal and disqualification. **The Neutral Decisionmaker shall not be an appointed or elected official.**

This language tracks the federal structure of Designated Agency Ethics Officials ("DAEOs") who are responsible for implementing the federal executive branch ethics rules for their respective agencies. The DAEOs' decisions are informed by formal and informal guidance from the executive branch's central ethics agency, the U.S. Office of Government Ethics ("OGE"). The Commission can fulfill the role of OGE to the Neutral Decisionmakers' role of DAEO.

[2] Draft Rule, Section 115-04-01-01(1).

II. 115-04-01-03: Neutral Decisionmaker Review of Potential Conflict Disclosures, Decision and Action

Section 115-04-01-03 explains the process for how the government proceeds when an official is recused. The draft rule allows actions or decisions to be made by either the Neutral Decisionmaker or another public official as designated by rule or law. However, as written, 115-04-01-03 will not be able to responsibly provide a precise framework for who fills in for the recused public official. The Neutral Decisionmaker should be a career ethics official, who will not necessarily have the specialized knowledge needed to replace the recused person.

Additionally, the proposed structure could poison the process for determining whether an official has a disqualifying conflict of interest: if the Neutral Decisionmaker could step into the shoes of a public official, it could also incentivize or disincentivize the Neutral Decisionmaker to disqualify the official. Further, the recused public official should not be permitted to be replaced by a supervisor or agency head. In the event the supervisory or agency head is a high-ranking political official like the Secretary of State or the Speaker of the House, and the recused official is a career employee, it could lead to inappropriate politicization of government functions.

CLC suggests limiting the person who takes over for the recused official to be provided for in the agency's rules or in law.

CLC also recommends including the following disclosure provision to then end of Section 115-04-01-03:

> "The Neutral Decisionmaker must send the Public Official's disclosure of a Potential Conflict of Interest and the Neutral Decisionmaker's conclusion to the Ethics Commission within 7 calendar days of communicating the conclusion to the Public Official pursuant to 11504-01-03(2). The Ethics Commission shall publish the information on its website within 7 calendar days of receipt in a searchable, sortable, and downloadable format."

It is critical that the disclosures be available to the public in a searchable, sortable, and downloadable format. Without the full transparency that this will provide, the public will not have confidence that conflicts of interest are properly avoided.

Under the standards and guidance section of 115-04-01-03, we suggest adding "Any guidance issued by the Ethics Commission, including informal guidance, formal guidance, rules, standards, and precedent." Ethics

commission guidance will help bring consistency and reliability to conflicts of interest determinations.

III. Additional Recommendations

CLC also offers additional recommendations that are better viewed in the attached text, but are summarized here:

- **115-04-01-01(6)**: Consider excluding the Governor and Lt. Governor from the definition of "Public Official" to ensure that the continuity of state government is not at risk.
- **115-04-01-01(8)**: The exception to the definition of "Significant Financial Interest" should be broad enough to cover other investments that do not generally cause conflicts of interest, like exchange traded funds. The language we suggested in-text is based on federal law as interpreted by Congress.
- **115-04-01-02(2)**: Clarify the deadline using "7 **calendar** days."
- **115-04-01-03(4)**: The reference to the Neutral Decisionmaker as a group should be stricken; the Neutral Decisionmaker should not be a group.
- **115-04-01-04(5)**: Add as a letter (f), "Any guidance issued by the Ethics Commission, including informal guidance, formal guidance, rules, standards, and precedent" to promote consistency and reliability to conflicts of interest determinations in quasi-judicial proceedings.

IV. Conclusion

CLC respectfully urges the North Dakota Ethics Commission to consider these recommendations for the new conflicts of interest rule. We appreciate having the opportunity to participate in this important process, and CLC would be glad to answer any questions that the Executive Director has regarding our comments.

Sincerely,

_____/s/_____
Kedric L. Payne
Vice President, General Counsel and
Senior Director, Ethics

_____/s/_____
Delaney N. Marsco
Senior Legal Counsel, Ethics

_____/s/_____
Danielle Caputo
Legal Counsel, Ethics

APPENDIX A

CLC MARKUP OF TITLE 115

CLC additions are in green; CLC deletions are tracked in ~~light blue~~.

115-04-01-01. Definitions

1. "Disqualifying Conflict of Interest" means a determination by a public official that a conflict of interest exists and recuses himself or herself and abstains from further action in the matter or that

a Potential Conflict of Interest disclosed pursuant to this rule which the Neutral Decisionmaker has determined constitutes a direct and substantial personal or pecuniary interest.[1]

2. A "Potential Conflict of Interest" means a Public Official as part of the Public Official's duties must make a decision or take action in a matter in which the Public Official has:
    a. Received a Gift;
    b. A Significant Financial Interest; or
    c. A Relationship in Private Capacity.
3. "Gift" means a gift not otherwise permitted under Article XIV of the North Dakota Constitution, N.D.C.C. Chapter 54-66, or N.D.A.C. Chapter 115-03-01.
4. "Immediate Family" means a Public Official's parent, sibling, spouse, grandparent, grandchild, or child by blood or adoption or a step-child.
5. "Neutral Decisionmaker" means individuals who do not have a Potential Conflict of Interest ~~as follows:~~.
    a. ~~If a Public Official with a Potential Conflict of Interest is a member of a legislative body, board, commission or committee, the remaining individuals who are members of the legislative body, board, commission or committee may be considered as the Neutral Decisionmaker(s);~~[3]
    b. ~~If a Public Official with a Potential Conflict of Interest is an employee of the legislature, the Public Official's supervisor may be considered as the Neutral Decisionmaker(s);~~[4]

[3] Allowing a group of individuals to vote on the matter has a high probability of tie votes, partisan votes, and votes by individuals who also have conflicts.

[4] The supervisor may be biased or overlook conflicts based on whether the supervisor hired or appointed the employee or based on the work performed for the supervisor.

c. ~~If a Public Official with a Potential Conflict of Interest is a member of the Governor's cabinet, the Governor's designated ethics officer may be considered as the Neutral~~

[1] This wording, added here in red, suggests the public official with the conflict of interest is the person who determines the conflict, not the Neutral Decisionmaker. This language should clarify what the disqualifying conflict actually is and who decides.

~~Decisionmaker(s); or~~[4]

~~d. If the Public Official with a Potential Conflict of Interest is an appointed Public Official, the appointing official may be considered as the Neutral Decisionmaker(s).~~[5]

An agency, legislative body, board, bureau, department, commission or committee ~~may~~ must by rule or policy designate a Neutral Decisionmaker(s) to receive disclosures and evaluate and decide on the potential recusal and disqualification. The Neutral Decision Maker shall be not be an appointed or elected official.[6]

6. "Public Official" means any elected or appointed official of the North Dakota executive or legislative branches, including members of the Ethics Commission, members of the Governor's cabinet and employees of the legislative branch. "Public Official" does not include the Governor or Lieutenant Governor.[7]

7. "Relationship in a Private Capacity" means a commitment, interest or relationship of the Public Official in a matter involving the Public Official's immediate family, individual's residing in the Public Official's household, the Public Official's employer or employer of the Public Official's immediate family, or individuals with whom the Public Official has a substantial and continuous business relationship.

8. "Significant Financial Interest" means an in-kind or monetary interest, or its equivalent, not shared by the general public, however, does not include investments in a widely held, investment fund,

such as ~~diversified~~ mutual funds, exchange-traded funds, or participation in a public employee benefits plan.[5]

[4] The designated ethics officer should be a career public servant, not an elected or appointed official. [5] *See supra* note 3.

[6] This is based on federal structure of Designated Agency Ethics Officials who are responsible for implementing the executive branch ethics rules for their respective agencies. The DAEOs decisions are informed by formal and informal guidance from the central ethics agency, Office of Government Ethics. The ND ethics commission can provide such guidance for the Neutral Decisionmakers

[7] Consider excluding the Governor and Lt. Governor to ensure that continuity of state government is not at risk.

115-04-01-02 Disclosure of Potential Conflict of Interests

1. When a matter comes before a Public Official and the Public Official has a Potential Conflict of Interest, the Public Official must disclose the Potential Conflict of Interest to the appropriate Neutral Decisionmaker. The disclosure of Potential Conflict of Interest must be made prior to the Public Official taking any action or making any decision in the matter. The disclosure must provide sufficient information concerning the matter and the Public Official's Potential Conflict of Interest. The Neutral Decisionmaker shall determine if the disclosure shall be made verbally or in writing. The public Official shall take no action in the matter until the Neutral Decisionmaker has made a determination on the Potential Conflict of Interest.
2. In an emergency or other exigent circumstances where time is of the essence, and a Public Official is not permitted or is otherwise unable to abstain from action in connection with the matter, the Public Official must disclose the Potential Conflict of Interest and the action with the Neutral Decisionmaker in the manner requested by the Neutral Decisionmaker. The disclosure must occur within 7 calendar days of the Public Official's action in the matter.[6]

[5] This exception should be broad enough to cover other investments that do not generally cause conflicts of interests,

[6] Clarify the deadline—calendar days is more precise.

3. Upon the completion of the required disclosure of a Potential Conflict of Interest, the Public Official may voluntarily recuse himself and abstain from further action in the matter. If the Public Official voluntarily recuses himself and abstains from further action in the matter, the Neutral Decisionmaker shall make take the decision or take action in the matter or designate an alternative Public Official to take action in the matter.

115-04-01-03 Neutral Decisionmaker(s) Review of Potential Conflict Disclosures, Decision and Action

1. Upon receipt of a Public Official's disclosure of a Potential Conflict of Interest, the Neutral

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such as ETFs. This language is based on federal law as interpreted by Congress

Decisionmaker shall review the disclosure, may request further information from the Public Official regarding the disclosure, and shall determine if the disclosed Potential Conflict of Interest constitutes a Disqualifying Conflict of Interest.

2. Upon completion of the review of the Potential Conflict of Interest, the Neutral Decisionmaker shall communicate to the Public Official one of the following:
    a. If the Neutral Decisionmaker concludes that the Potential Conflict of Interest does not constitute a Disqualifying Conflict of Interest, the Public Official may participate in the matter.
    b. If the Neutral Decisionmaker concludes that the Potential Conflict of Interest does constitutes a Disqualifying Conflict of Interest, the Public Official shall recuse himself and abstain from participating in the matter.
3. ~~If under this rule, a Public Official is required to recuse himself and abstain from further action in a matter, further action or decisions in the matter shall be made by the appropriate Neutral~~ 4.3. ~~Decisionmaker unless a different procedure is required by applicable law or rule in which case the decision or action shall be~~ If under this rule, a Public Official is required to recuse himself and

abstain from further action in a matter, further action or decisions in the matter shall be taken by the Public Official, agency, commission, board or committee designated by law or rule.[7]

~~5.~~4. The Neutral Decisionmaker shall comply with the requirements of the open meetings laws in their consideration and review of the Potential Conflict of Interest. During any discussion of a Potential Conflict of Interest, upon request by the Neutral Decisionmaker, the Public Official may provide additional information regarding the Potential Conflict of Interest and the matter in question. Where the North Dakota open meetings laws and regulations apply, the Public Official may not be asked to leave the discussion of the Potential Conflict of Interest, however, the disclosing Public Official may voluntarily leave the meeting at which the discussion occurs. ~~If the Neutral Decisionmaker is a group of individuals in which the Public Official is a member, the Public Official may not vote on the issue of whether a Potential Conflict of Interest constitutes a Disqualifying Conflict of Interest. The Public Official may not be counted for purposes of determining whether a quorum is present. Any quorum requirement established under statute, ordinance or rule shall be reduced as though the Public Official were not a member of the group of individuals that constitutes the Neutral Decisionmaker.~~[8]

5. The Neutral Decisionmaker must send the Public Official's disclosure of a Potential Conflict of Interest and the Neutral Decisionmaker's conclusion to the Ethics Commission within 7 calendar days of communicating the conclusion to the Public Official pursuant to 115-04-0103(2). The

[7] See our written comments, section II, for further explanation for this change.
[8] The Neutral Decisionmaker should not be a group.

Ethics Commission shall publish the information on its website within 7 calendar days of receipt in a searchable, sortable, and downloadable format. [9]

6. The following standards shall guide the review and decision of the Neutral Decisionmaker with respect to any Public Official's Potential Conflict of Interest:

   a. Appropriate weight and proper deference must be given to the requirement that a Public Official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the Public Official has properly disclosed the Potential Conflict of Interest as required by this rule.

   b. A decision that requires a Public Official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgement of a reasonable person in the Public Official's situation would be materially affected by the disclosed Potential Conflict of Interest.

   c. The review of a Potential Conflict of Interest and any decision that would require a Public Official to recuse himself or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the Public Official from recusal or abstention in the matter.

   d. It is presumed that a Public Official does not have a Disqualifying Conflict of Interest if the Public Official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.

[9] This full transparency is necessary. Without it, the public will not have confidence that conflicts of interest are being properly avoided.

~~d.~~e. Any guidance issued by the Ethics Commission, including informal guidance, formal guidance, rules, standards, and precedent.[10]

115-04-01-04 Quasi-Judicial Proceedings

1. Article XIV, Section 2(5) of the North Dakota Constitution establishes a requirement that Public Officials who are directors, officers, commissioners, heads, or other executives of agencies avoid the appearance of bias in any Quasi-Judicial proceeding. This section 115-04-01-04 is applicable to Public Officials who are involved in Quasi-Judicial proceedings.
2. Definitions applicable to Quasi-Judicial Proceedings:
    a. Definitions set forth in Section 115-04-01-01 are applicable to this section unless a different defined term is set forth in this section.
    b. "Appearance of bias to a reasonable person" means that the interest in question would create in reasonable minds a perception that the Public Official's ability to carry out Quasi-Judicial responsibilities impartially and without bias is impaired.
    c. "Campaign Monetary or In-Kind Support" means all campaign contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the Public Official's campaign or donated to any other person or entity for the purpose of supporting the Public Official's election to any office.
    d. "Quasi-Judicial" means the Public Official is called upon to perform a judicial act when the Public Official is not a member of the North Dakota judiciary. This includes administrative hearings, generally, and administrative hearings conducted pursuant to N.D.C.C. Chapter 28-32 where the final decisionmaker is the Public Official.

[10] Ethics commission guidance will bring consistency and reliability to these determinations.

3. When a matter comes before a Public Official as part of a Quasi-Judicial proceeding, the Public Official must disclose any Potential Conflict of Interest and Campaign Monetary or In-Kind Support. The disclosure must be made to a Neutral Decisionmaker prior to the Public Official having any further involvement in a Quasi-Judicial proceeding. The Public Official shall have no involvement or take any further action in a Quasi-Judicial proceeding until a decision has been made by the Neutral Decisionmaker. In addition, the Public Official must disclose the Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support to the parties to the Quasi-Judicial proceeding.
4. The Public Official shall disclose the Potential Conflict of Interest and any Campaign Monetary or In-Kind Support to a Neutral Decisionmaker in the manner required by Section 115-04-01-02(1)(a). As provided in Section 115-04-01-02(3), the Public Official may voluntarily recuse himself from any further involvement in a Quasi-Judicial proceeding.
5. The Neutral Decisionmaker shall follow the procedures set forth in Section 115-04-01-03 in the review of any Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support. In addition, with respect to the review of any Campaign or In-Kind Support, the Neutral Decisionmaker, the following factors should be considered to determine whether Campaign Monetary or In-Kind Support creates an appearance of bias to a reasonable person:
    a. The size of the contribution;
    b. The degree of involvement in the campaign;
    c. Whether the contribution is within the current or immediately preceding election cycle;
    d. The issues involved in the Quasi-Judicial proceeding; and,
    e. Other factors known to the Public Official that creates an appearance of bias to a reasonable person.

~~e.~~f. Any guidance issued by the Ethics Commission, including informal guidance, formal guidance, rules, standards, and precedent.[11]

6. Upon completion of the review of Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support, the Neutral Decisionmaker shall communicate to the Public Official one of the following:

    a. If the Neutral Decisionmaker concludes that the Public Official has a Disqualifying Conflict of Interest or has received Campaign Monetary or In-Kind Support that creates the appearance of bias to a reasonable person, the Public Official shall recuse himself from any further involvement in the Quasi-Judicial proceeding.

    b. If the Neutral Decisionmaker concludes that the Public Official does not have a Disqualifying Conflict of Interest or has not received a Campaign Monetary or In-Kind Support that creates the appearance of bias to a reasonable person, the Public Official may participate in the Quasi-Judicial proceeding.

    c. After disclosure to the parties involved in a Quasi-Judicial proceeding of a Public Official's Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support, all parties to the Quasi-Judicial proceeding may voluntarily consent, in writing, to the Public Official's continued involvement in the Quasi-Judicial proceeding. The written consent must be provided to the Neutral Decisionmaker to whom the disclosure was made. Notwithstanding the written consent of the parties, the Neutral Decisionmaker may conclude that the Public Official must still recuse himself and abstain from any further involvement in the Quasi-Judicial proceeding.

[11] Ethics commission guidance will bring consistency and reliability to these determinations.

7. In Quasi-Judicial proceedings in which a Public Official is recused or must abstain from further involvement in the proceeding, the department, agency, board, commission or other public entity involved in the Quasi-Judicial proceeding shall determine whether a substitute is required to act in the place of the Public Official. The procedure to assign a substitute for the Public Official shall be determined by North Dakota law or rule. In the absence of applicable North Dakota law or rule, the department, agency, board, commission or public entity may adopt policies consistent with this rule to address vacancies caused by a Public Officials recusal or abstention in any Quasi-Judicial proceeding.

115-04-01-05 Adoption of More Restrictive Rules

Any agency, office, commission, board, or entity subject to these rules may adopt conflict of interest rules that are more restrictive but may not adopt conflict of interest rules that are less restrictive.

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February 21, 2022

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ND 58503
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RE: Greater North Dakota Chamber Written Opposition to Proposed Conflict of Interest Rule 115-04

Dear Chair Goodman:

I am writing on behalf of the Greater North Dakota Chamber of Commerce ("GNDC") as to the proposed rules for article 115-04—Conflict of Interest. To be clear, it is not lost on GNDC that the creation of rules is a process that includes many varying views and positions being presented to the Commission. While the GNDC is critical of the draft rules, its criticisms are made in good faith with the intent of ensuring our state's constitution is upheld. It is not the role of GNDC, the Commission, the Legislative Assembly, or anyone to add, subtract, or presume that which is clearly stated in article XIV of our constitution. While the courts may one day interpret article XIV, it is the duty of the Commission to ensure any such rules adopted are consistent with the Commission's authority that is provided for in our constitution.

Article XIV explicitly provides what "[d]irectors, officers, commissioners, heads, or other executives of agencies shall" do to "avoid the appearance of bias": they "shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to the person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission," which "creates an appearance of bias to a reasonable person." N.D. CONST. art. XIV, § 2(5). Our state constitution provides that our "legislative assembly *and* the ethics commission shall *enforce* this provision by appropriate legislation and rules, respectively." *Id.* (emphasis added). Our state constitution does not provide that our Legislative Assembly and Ethics Commission shall re-define "this provision" by adopting legislation and rules to follow the subjective, and varying, "spirit" of the black letter words contained in our constitution. Indeed, if the proponents of article XIV had wanted "this provision" stated differently, they could have crafted it in such a way: they did not. What has been proposed in the draft rules is beyond that which the

citizens of this state approved when article XIV was enacted. Specifically, the following proposed rules are contrary to article XIV as a matter of law:

- Creation of a "Neutral Decisionmaker" paradigm in the proposed rules is contrary to our constitution. Our state constitution plainly puts any decision of disqualification from a "quasi-judicial proceeding" on the public official and the public official alone. Our constitution explicitly provides "[d]irectors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify *themselves* in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person." N.D. CONST. art. XIV, § 2(5) (emphasis added). There is no "neutral decisionmaker" who supplants public officials from disqualifying "themselves" from statutorily or constitutionally created duties—duties upon which they have been duly elected to administer. Plain constitutional construction applies here. While the Commission (and Legislative Assembly) are charged with *enforcing* the provision with appropriate legislation and rules, our constitution does not permit the Commission (or Legislative Assembly) from usurping public officials' constitutional rights to determine for themselves whether to disqualify from a "quasi-judicial proceeding."

  The Commission can provide rules for enforcement, but our constitution puts the ultimate decision of disqualification on the individual. Indeed, such is consistent with the judicial canons—it is the judge that decides to recuse and not some "neutral." *See* N.D.CODE.JUDICIAL.CONDUCT Canon 2. The draft rules overstep the Commission's authority by going beyond that which our constitution provides for the Ethics Commission and Legislative Assembly to do. Again, the ultimate decision to disqualify is for the public official. The goal of the Commission with respect to a decision on whether public officials should disqualify themselves from a "quasi-judicial proceeding" should be to highlight the fact our constitution provides for the public official to decide and not a "neutral" thirdperson, which is found nowhere in our constitution. If the drafters of our constitution had seen it fit to include provisions for third-parties to make decisions for elected officials presiding over a "quasi-judicial proceeding" they would have done so.[12] All references in the proposed rules related to a neutral decisionmaker should be removed.

- "Quasi-judicial" does not mean "quasi-legislative." Our constitution includes the term "quasi-judicial," but does not define it. The draft rules provide that "quasi-judicial" "means the Public Official is called upon to perform a judicial act when the Public Official is not a member of the North Dakota judiciary. This includes administrative hearings, generally,

[12] The Commission has already received guidance from the North Dakota Office of Attorney General, which issued an opinion replete with references to public officials disqualifying *themselves*. N.D.O.A.G. Letter Op. 2021-L-04. The Letter Opinion cited *State v. Stockert*, 2004 ND 146, 684 N.W.2d 605, for the proposition of using it to set rules (standards) for selfdisqualification. Such can be done, so long as the framework developed by the Commission allows public officials to make the decision to disqualify themselves and is consistent with our constitution. Stated plainly: the Commission can develop the parameters (as Judicial Canon 2 does), but our constitution places the ultimate decision to disqualify with the public official alone (just as Judicial Canon 2 does for judges).

and administrative hearings conducted pursuant to N.D.C.C. Chapter 28-32 where the final decisionmaker is the Public Official." 115-04-01-04(5)(d).[13] But rules implemented by boards, commissions, or agencies, presided over by whom our laws prescribe, and pursuant to N.D.C.C. Ch. 28-32, are not "quasi-judicial" functions; neither are they a "judicial act." Instead, the implementation of administrative rules is naturally a quasi-*legislative* proceeding. *See, e.g.,* N.D.C.C. § 28-32-02(1) (noting the authority to "adopt administrative rules is authority delegated by the legislative assembly."). Article XIV does not limit the duties of elected officials to participate in the rulemaking process under N.D.C.C. Ch. 28-32 because it is not a "quasi-judicial proceeding." The current draft definition of "quasi-judicial" should be refined to reflect it pertains only to adjudicative proceedings, as defined at N.D.C.C. § 28-32-01, and not rulemaking proceedings, which are a quasi-*legislative* function.

Moreover, how can it even be possible for anyone not a "member of the North Dakota judiciary" to "perform a judicial act?" It goes without saying that *anyone* not elected as a judge, or hired by the judiciary as a judicial referee, cannot perform judicial acts. Officials elected to perform government functions under our constitution and laws perform constitutionally and legislatively authorized acts—not "judicial acts." While it is fair to describe administrative hearings of agencies conducted under N.D.C.C. ch. 28-32 as "quasi-judicial proceedings," or adjudicative proceedings, the authority to perform these duties is found in the legislative and executive branches of government, not the judicial branch of government. But the proposed rules confuse the branches of government—tying a phrase in our constitution—"quasi-judicial proceeding"—to a completely separate concept in our American system of government. A "judicial act" is necessarily an act performed by a member of the judicial branch. Executive and legislative branch elected individuals are not members of the judicial branch and the Commission should not confuse the roles our constitution provides for each branch of government. Members of the executive and legislative branch may perform quasi-judicial acts when their duties as a public official is to oversee a board, commission, or agency. But they do not perform judicial acts as this is something reserved for elected judges. Our constitution does not support a rule requiring "[d]irectors, officers, commissioners, heads, or other executives of agencies" to "disqualify themselves in any" quasi-legislative proceeding. *See* N.D. CONST. art. XIV, § 2(5). Of course, nothing prevents such individuals from deciding for themselves to disqualify—it is just that this Commission has no authority under our constitution to enforce quasi-legislative proceedings and its proposed rule is contrary to the constitution.

- <u>The determination of what "appearance of bias to a reasonable person" is not for the Commission to decide</u>. Our constitution provides that a "campaign contribution" is not a

[13] "Public Official" is defined in the draft rules at 115-04-01-01(6). The Commission is reminded that the constitution set forth who is governed by "this provision" as to a "quasi-judicial proceeding": "[d]irectors, officers, commissioners, heads, or other executives of agencies" are those subject to art. XIV, § 2(5) and no one else. The proposed definition of "Public Official" as the term is used for a "quasi-judicial proceeding" is contrary to our constitution.

"gift" and it does not "prohibit any person from making a campaign contribution or from encouraging others to make a campaign contribution or to otherwise support or oppose a candidate." N.D. CONST. art. XIV, § 2(1)-(2). It logically flows that receipt of a "campaign contribution," permitted under our constitution, does not necessarily create an appearance of bias to a reasonable person that would require public officials to disqualify themselves from a quasi-judicial proceeding. Our constitution sets the "reasonable person" standard as the parameter for the "monetary or in-kind support" to a person's election to any office. *Id.* at § 2(5). While the drafters of the constitutional amendment could have defined the term, the "reasonable person" standard is not defined by our constitution. *See, e.g.*, *Teegarden v. N.D. Workmen's Comp. Bur.*, 313 N.W.2d 716, 718 (N.D. 1981) (noting "[t]he expression, 'a reasonable person' is not defined by statute and accordingly it is to be understood in its ordinary sense. NDCC § 1-02-02. The word 'reasonable' as defined in Webster's dictionary means 'being in agreement with like thinking or right judgment, not conflicting with reason, not absurd, not ridiculous,' etc."). "Reasonable person" is defined as "[a] hypothetical person used as a legal standard, especially to determine whether someone acted with negligence. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions." BLACK'S LAW DICTIONARY 584 (2d Pocket Ed. 2001). And because our constitution specifically adopts the "reasonable person" standard, this is the standard the Commission must apply in providing guidance to those officials who decide whether to disqualify "themselves" from a "quasijudicial proceeding."

It is for the Commission to provide guidance, based upon our constitution, as to what the parameters are under our constitution—nothing more, nothing less. And if the Commission goes beyond this, as the draft rules do, the Commission has stepped beyond the authority granted by our constitution. Neutral decisionmakers do not determine reasonableness. The Ethics Commission does not determine reasonableness. The Legislative Assembly does not determine reasonableness. The decision of reasonableness, at least at the outset, rests with the "[d]irectors, officers, commissioners, heads, or other executives of agencies" who "shall disqualify *themselves* in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person." N.D. CONST. art. XIV, § 2(5) (emphasis added).

The drafters of the amendment chose the reasonable person standard—which is a legal standard that is most often determined on a case-by-case basis and often by a fact-finder (jury). Indeed, a set framework of what actually "creates an appearance of bias" could have been inserted had the drafters wanted. A choice was made not to. While article XIV provides for the "legislative assembly *and* the ethics commission" to "enforce this provision by appropriate legislation *and* rules, respectively[,]" it does not define "reasonable person" and explicitly allows officials to "disqualify themselves" when a scenario creating an "appearance of bias to a reasonable person" occurs. *Id.* (emphasis added). Different scenarios would likely mean different conclusions for a reasonable person. Again, the

Commission and Legislative Assembly *enforce* the constitutional provisions—they do not change, alter, increase, amend, or decrease from our constitution.

As to a "gift"—the ultimate decisionmaker on whether the "reasonable person" standard is initially met are the "[d]irectors, officers, commissioners, heads, or other executives of agencies" who "shall disqualify *themselves*. . . ." *Id.* (emphasis added). Ultimately, for example, if a director accepted a campaign contribution of, say $1,000,000, from a donor who later appeared before a "quasi-judicial proceeding" where the director was a member and the director did not disqualify themself, enforcement of the constitutional provision is ripe for consideration of whether the "appearance of bias to a reasonable person" has occurred or not for this hypothetical elected official. This is the area of law that the Commission and Legislative Assembly need to develop rules for enforcement. The subject is enforcement—not implementation. Because our constitution has *already* implemented the requirements for a "quasi-judicial proceeding" involving "[d]irectors, officers, commissioners, heads, or other executives of agencies" who "shall disqualify *themselves*" under the constitutionally provided standards. *Id*. (emphasis added). Rather than focusing on "neutral decisionmakers" to step on the constitutional and statutory duties of officials in deciding whether to disqualify themselves in a "quasi-judicial proceeding," the Commission (and Legislative Assembly) are charged with enforcing "this provision by appropriate legislation and rules. . . . ." *Id.*[14]

- Quorum authority is not implicated in article XIV. Article XIV does not authorize the Commission to interfere with established quorum requirements—whether they are set by our constitution or the Century Code or not set at all. While the Commission (and Legislative Assembly) is instructed to "enforce" article XIV, § 2(5), the "provision" in that subsection speaks for itself and cannot be expanded to conflate the intrusion of the Commission on the constitutional and/or statutory duties of public officials unrelated to the "provision." For example, if a member of the North Dakota Industrial Commission disqualified themself from a matter, article XIV does not permit the Commission to dictate by rule what the Industrial Commission should do. Any rules related to purported quorum authority of the Commission are inappropriate and should not be adopted because our constitution does not allow such to be done.

Public officials should make the decisions they were elected to do within the confines of the law. Article XIV places specific duties upon public officials while performing the people's work. This

[14] A real constitutional crisis will arise *if* the Commission and Legislative Assembly develop countering views on enforcement of this provision—as our constitution provides *both* "shall enforce this provision. . . ." N.D. CONST. art. XIV, § 2(5). Unless the Commission and Legislative Assembly work together on developing a framework that is consistent with enforcement of this provision, as well as the roles of both the Commission and Legislative Assembly as provided in this provision, the North Dakota Supreme Court very well may conclude any conflicting rules or laws developed for "this provision" are ineffectual altogether (which would put us back to what is actually written in our constitution). And this is not a result that would be good for anyone—as uncertainty in law erodes the public trust even further. The Commission owes it to itself, the constitution, and the people of North Dakota to ensure consistency prevails over inconsistency. And, *like it or not*, this *requires* coordination with the Legislative Assembly to ensure consistency prevails.

should be encouraged at all levels. At the same time, expanding article XIV to pursue its "spirit" is contrary to law. Instead of setting up a matrix of processes and required subjective considerations, the Commission should simply require elected officials to err on the side of disclosure and transparency—consistent with North Dakota's heritage of open and transparent government. The Commission should adopt appropriate rules to enforce the constitutional provision that "[d]irectors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person." N.D. CONST. art. XIV, § 2(5).

The Commission must reject the notion it is a sort of "ethics legislature" authorized to enact laws relating to transparency, corruption, elections, and lobbying. Our constitution authorized the Commission to "adopt ethics rules" related to transparency, corruption, elections, and lobbying. N.D. CONST. art. XIV, § III(2). "Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article." *Id.* at § 4(1). The Commission does not enact laws—that is our Legislative Assembly's role. *See id.*, at art. IV, § 13. The Commission's role is limited to implementing ethics rules consistent with, and within the confines of, article XIV.

The Commission owes it to itself to adopt a rulemaking process. It is not apparent from the Commission's website what procedural process it is following—or whether this is a hearing on a proposed rule or a "discussion" of the proposed rule. Objections to the process cannot even be made—there is no written process to object to (and if that is the objection to be made, then it is made). The rulemaking process for state administrative agencies has long been performed by adherence to our state's Administrative Agencies Practices Act, N.D.C.C. Ch. 28-32 (particularly N.D.C.C. §§ 28-32-10 to 28-32-20). Indeed, it would seem an Ethics Commission would have established rules to ensure its proposed rules receive proper review. Procedurally, the Commission owes it to itself, and the citizens who enacted article XIV (as well as those citizens who opposed it), to establish a set rulemaking process to ensure due process is achieved at the rule making stage—or in the very least, a process that is available for all to see (transparency) so those citizen wishing to participate will at least know the rules. Has the Commission accepted that it will follow the rulemaking process set out at N.D.C.C. ch. 28-32? If so, it should state that. And, if not, it should establish a written rulemaking process. From the standpoint of a Commission that will potentially have whatever rules it adopts challenged, maybe from all sides, providing how its rulemaking process actually works must be established. A playing field, with established rules on how the rules are to be made, must be established before substantive rules are adopted.

Much debate will occur on the *intent* or the *spirit* of article XIV. Yet article XIV speaks for itself. There is no ability of the Commission to make article XIV "stronger." It is not the role of the Commission to do anything outside the confines of our constitution. Such would be contrary to our constitution. The phrase "conflict of interest" does not even appear in article XIV. This was intentional. Because if the drafters of the article had wanted it included, they would have. They chose not to. And the voters of our state voted to adopt a constitutional amendment that did not contain the phrase "conflict of interest." Now, the Commission seeks to enact an entire section of

its rules on a phrase that is not contained in article XIV. The Commission has overstepped its constitutional authority by proposing rules that are inconsistent with the article the voters of our state adopted. Transparency for public officials? Always. Oversight of public officials? Of course. Usurping duties of elected public officials? This is not permitted by article XIV. For it is the electorate of this state that ultimately decides the fate of our elected officials. Our established way of government, with three branches equally providing balance to the others, works. The citizens of our state created the Ethics Commission to "adopt ethics rules related to transparency, corruption, elections, and lobbying" as stated in our constitution. The conflict of interest proposed rules overstep what article XIV provides.

While GNDC has limited this testimony to the draft rules on Conflicts of Interest, GNDC certainly reserves the right to make additional arguments both within the confines of the proposed rules as well as article XIV.

Thank you.

Sincerely,

PEARCE DURICK PLLC

/s/ Zachary E. Pelham

ZACHARY E. PELHAM

David,
Thank you. I have reviewed the proposed rules and have edits or concerns with these rules.

I do have a suggestion though. If not covered elsewhere, I believe it will be important to include a requirement that all “Neutral Decision Makers” provide a report to the Ethics Committee, that details the issues/questions they have considered and the decision they made for each of those considerations. Once presented to the Ethics Committee, those reports could/should be posted for public transparency.

Kirsten Baesler
State Superintendent
600 E. Boulevard Ave., Dept. 201
Bismarck, ND 58505-0440

2/22/2022

North Dakota Ethics Commission
Attn: Hon. Ronald Goodman, Chair
101 Slate Dr., Suite 4
Bismarck, ND 58503

RE: Written Opposition to Proposed Conflict of Interest Rule 115-04

Dear Chair Goodman:

I am writing to express opposition to the proposed rules for Article 115-04 - Conflict of Interest, on behalf of the Greater North Dakota Chamber of Commerce (GNDC), which is a member-funded organization created in 1924 to foster a favorable business climate for North Dakota and support the free enterprise system. GNDC members are businesses of all sizes and industries that operate across our great state.

GNDC supports campaign transparency and disclosure, which allow for confidence in elections and help citizens make informed decisions. We believe current statutes provide clear guidance. The proposed rules taken as a whole are unclear and could limit campaign contributions from the GNDC's Political Action
Committee (PAC), the PAC of a member organization, or individuals by creating concern that a contribution in any amount could result in a disqualifying conflict of interest causing an elected public official not to perform their constitutional duties depending on the issues before them.

The term "campaign contribution" is only found in Article 14 of the North Dakota Constitution. Section 2, Subsection 1 states that a campaign contribution is not a gift. Section 2, Subsection 3 further states, "This prohibition shall not be interpreted to prohibit any person from making a campaign contribution or from encouraging others to make a campaign contribution or to otherwise support or oppose a candidate." Campaign contributions are further defined and regulated in North Dakota Century Code 16.1-08.1, allowing associations, companies, and others to establish PACs to solicit individual contributions from member employees and make political expenditures with public disclosure requirements for both the PAC and candidates for public office.

While the draft conflict of interest rules do not explicitly prohibit campaign contributions, they certainly discourage them for public officials involved with a quasi-judicial proceeding, which is contrary to North
Dakota's Constitution. Rather than the term campaign contribution, 115-04-01-04 of the draft rules

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GNDC
Greater North Dakota Chambe

uses the term "campaign monetary or in-kind support" when considering conflicts of interest for officials involved in a quasi-judicial proceeding such as an administrative hearing. The fact that an elected official may not be able to perform their constitutional duties if accepting certain campaign contributions will have a chilling effect on campaign contributions.

GNDC's PAC does not make campaign contributions because there is a certainty of election or a known issue before a public official. When GNDC's PAC makes a campaign contribution, the supported candidate has expressed values shared by our organization. Over a two-year cycle, it is impossible to predict the issues that an elected public official may need to address.

Rarely does GNDC appear at administrative hearings but may stop contributions on the chance an issue may arise in which we need to appear at an administrative hearing. Further, if an individual contributor to our PAC were to have an issue come before an administrative hearing, would that result in a potential conflict of interest? This could create moments disqualifying a public official from performing their constitutional duties.

Since GNDC's PAC was established, it has followed all disclosure requirements under the penalty of law. This information is publicly available on the Secretary of State's Campaign Finance Disclosure website.

Again, GNDC supports campaign transparency and disclosure but opposes any effort to limit the rights of North Dakotans from participating in the political process. GNDC has additional concerns with the draft conflict of interest rules and has retained Zachary Pelham, Pearce Durick PPLC, to provide further comments and recommendations on our behalf. We thank the Ethics Commission for the opportunity to comment and hope you take our comments as constructive to developing ethics rules that are clear to those regulated by this Commission.

Sincerely,

Arik Spencer
President and CEO
Greater North Dakota Chamber of Commerce

Champions for Business

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Ms. Hicks:

Thank you for providing a copy of the conflict of interest and quasi-judicial conflict of interest rules. Due to the timing of the request, I have not had the opportunity to have a comprehensive discussion with the Commission. I have had discussions with some of the individual commissioners and agency executive staff (collectively the "PSC" or "Agency") and, at your request, I have attempted to summarize some of their thoughts and concerns. Please consider these in addition to their concerns that I have already passed along.

The Public Service Commission is a constitutional agency headed by three statewide elected officials, each elected to a six-year term and serving in a full-time capacity. The PSC has varying degrees of jurisdiction over economic regulation of electric and natural gas utilities, telecommunications companies, weights and measures, auctioneers and auction clerks, reclamation of mined lands and permitting, restoration of abandoned mine lands, siting of refinement and generation plants, electrical and pipeline transmission, intrastate pipeline safety enforcement, one-call enforcement, and railroad safety inspection. A single siting proceeding may involve hundreds of miles, thousands of acres, and a wide range of landowners and stakeholders. An economic rate case may impact up to tens of thousands of industrial, commercial, and residential customers. There is PSC regulation at every store, shop, and gas station with a commercial scale and the PSC's jurisdiction relates to nearly every energy market within the state.

The PSC Commissioners have been subject to existing conflict laws for quasi-judicial agencies, campaign finance and disclosure requirements, and the PSC has had its existing Conflict, Gifts, and Gratuities policy since January 26, 2000. Subject to self-regulation, the Commissioners have disclosed and recused themselves as they have become aware of conflicts that may call into the propriety of their participation in proceedings.

In general, the Agency recommends that the Ethics Commission draft rules that provide substantive certainty while avoiding over-prescribing procedural frameworks that may result in unworkable situations. This ethics framework is overlapping upon layers of existing legal and governmental compliance requirements. While there may be an aspirational goal to capture every possible scenario, unforeseeable legal and regulatory conflicts can impede public business. For this reason, the ability of an agency to retain the flexibility to address the issues while providing transparency in the process may be the best solution.

N.D. Admin. Code § 115-04-01-01. Definitions.

N.D. Admin. Code § 115-04-01-01(4): N.D. Admin Code § 115-04-01-01(4) provides that "Immediate Family" means a Public Official's parent, sibling, spouse, grandparent, grandchild, or child by blood or adoption or a step-child. As a result, these individuals are considered a "Relationship in Private Capacity." The rules appear to provide that a public official has a potential conflict of interest when, as part of the public official's duties, he/she must take action in a matter in which the public official has said relationship in private capacity. N.D. Admin. § 115-04-01-01(2). However, the rules are unclear on how they will be applied.

The rules do not clearly provide what type of arrangement with the "Immediate Family" a public official should be wary of. Does this include ownership, financial interest, employment, as a party, or another type of arrangement? Furthermore, potential conflicts with extended family such as parents, siblings, grandparents, grandchildren, and children were expressed as a concern. The Public Official may or may not have a good relationship with his/her grandparents, parents, brothers and sisters, and children

and step-children. Furthermore, family members may be reluctant to share their interests and finances. The ethics rules create a burden on the public official to know, in fact, what arrangements each of these extended family members have. This burden would exist without legal authority for the Public Official to obtain this information.

Based on the discussions, the Agency's recommendation is to limit the definition to the household.

N.D. Admin. Code § 115-04-01-01(5): N.D. Admin. Code § 115-04-01-01(5) defines "Neutral Decisionmaker." Assuming that (d) does not apply to an interim appointed PSC commissioner, (a) and (e) appear to apply to the PSC's conflict administration. While (a) may work with a larger board or committee, the Agency has already identified at least one circumstance that applying the drafted ethics rules as expressed may not be workable with a three-person commission. There are also a few other ways that this may result in an awkward process. This is likely due to the proposed rule's attempt to set one framework to apply to several very different types of government structures.

The Agency recommends, at least for a commission, that the policy or rule for designation of neutral decisionmakers and disclosures remain primarily with the commission. The PSC is better situated to understand the administration of the agency and the situations that arise within its practice and procedure and subject matter. It would also provide flexibility to change a policy as unforeseen situations arise rather than halting public business and operations to wait for the Ethics Commission to take corrective action through additional rulemaking.

N.D. Admin. Code. § 115-04-01-02. Disclosure of Potential Conflict of Interests

N.D. Admin. Code § 115-04-01-02(1): The October 18, 2021 draft of the administrative rules provided that a "known" conflict of interest must be disclosed. This has been removed from the current proposed rules. The Agency recommends that it be reinserted in the current draft.

N.D. Admin. Code § 115-04-01-03: Neutral Decisionmaker(s) Review of Potential Conflict Disclosures, Decision, and Action.

A circumstance or interest may result in a continuing potential conflict of interest. The PSC processes anywhere from 400 to 600 active cases per year, not including over 600 individual licenses and administrative decision-making that occurs outside of evidentiary proceedings. As a practical matter, this may create a tremendous amount of administrative work for the PSC if the expectation is to revisit the potential conflict of interest in every case or administrative decision. The Ethics Commission should allow the PSC to set forth, through policy or rule, the manner in which to address continuing potential conflicts with a neutral decisionmaker. If the Ethics Commission intends to address this issue itself, it should permit a singular decision by the neutral decisionmaker for a continuing potential conflict of interest until there is a request for the potential conflict to be revisited.

N.D. Admin. Code § 115-04-01-03(4): As a recommendation, remove the portion of the ethics rule requiring compliance with open meetings laws. The PSC and its public officials are already subject to open meetings laws, Attorney General opinions, remedies, and criminal and civil liabilities. These requirements for the agencies subject to them remain irrespective of the Ethics Commission and the proposed rules possibly create redundant ethics enforcement in addition to existing open meetings enforcement. Furthermore, this language may also create the false perception that the PSC is not currently obligated to follow open meetings laws.

115-04-01-04 Quasi-Judicial Proceedings.

N.D. Admin. Code § 115-04-01-04(2)(c) and N.D. Admin. Code § 115-04-01-04(3),(4): The proposed rules provide that the public official must disclose any "Potential Conflict of Interest" and "Campaign Monetary or In-Kind Support." Monetary and In-Kind support is defined as contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other forms of contribution, whether donated directly to the Public Official's campaign or donated to any other person or entity to support the Public Official's election to any office. The proposed rules require disclosure to the neutral decisionmaker, and the parties involved in the proceeding.

It has been expressed that this is an incredible ask, and it creates a heavy burden for the elected officials and an agency. The State does not provide appointed deputies for PSC Commissioners, and they generally do not have hired campaign staff. This would require each Commissioner to ferret out information about individual donors, donors to groups that support them, and individuals providing ancillary support through participation in normal civic engagement. Regardless of a minimal donation or contribution and privacy of the supporter, a PSC Commissioner would need to disclose the information to parties and the neutral decisionmaker.

Administratively, these requirements may not be cumbersome for small administrative boards or committees. However, given the extent of PSC administrative dockets and the nature of PSC agency actions, the steps necessary to gather and disclose information, decide upon actual bias or conflict, and resulting actions can foreseeably slow down public business, decision-making, and extend administrative litigation. It may also require staff dedicated to monitoring and compliance.

The Agency recommends minimizing the breadth of the definition. Some considerations may be providing a minimum threshold value for disclosure from an individual whose interests are a substantial issue of the case (e.g. $500 or existing reportable contribution thresholds) and limiting support to direct involvement in the campaign. To ease the administrative burden, the Agency recommends that the Ethics Commission should permit the PSC Commissioners to simply post the threshold donations within the past two years and include a current list of potential conflict of interests decided by a neutral decision-maker. If necessary, the Agency could also provide a general disclosure of where to locate the information in opened quasi-judicial dockets.

N.D. Admin. Code § 115-04-01-04(6) and (7): The PSC has been recognized as an entity that is granted deference by the courts in many of its matters due to its technical nature. To ensure the replacement is a person with attributes to provide quality deliberation in engineering, accounting, and market economics, the Agency submits that the Ethics Commission should ensure that the PSC is the one setting forth the substitute.

It is my understanding that one or more of the PSC Commissioners may attend to provide broader insight as a state-wide candidate. If there are any additional questions regarding agency resources or practices, feel free to contact me. I should be able to gather feedback in short order.

Sincerely,

/s/ John M. Schuh

February 22, 2022

North Dakota Ethics Commission
Attn: Hon. Ronald Goodman, Chair
101 Slate Dr., Suite 4 Bismarck,
ND 58503
ethicscommission@nd.gov

RE: Written Opposition to Proposed Conflict of Interest Rule 115-04

Dear Chair Goodman:

I am writing on behalf of the Lignite Energy Council (LEC) and its membership which consists of over 250 organizations that consist of electricity utilities, lignite coal mines and contractor/supplier members. Our overall mission and purpose are to provide the lignite industry workforce with a voice in legislative, regulatory and public affairs matters.

In a previous Ethics Commission hearing on December 15, 2021, there was reference to the coal industry's political action committee that was used as an example of how current campaign finance laws work. As a follow up to that discussion, LEC would like to add some more detail and clarification with how our CoalPAC activities are transparent and consistent with all campaign finance laws and rules as directed by the constitution and the Secretary of State's office, who has the legal oversight and enforcement of our state's campaign finance activities.

How Does CoalPAC Operate and Follow Current Law?

LEC staff manages the North Dakota Coal Political Action Committee, otherwise known as CoalPAC. The CoalPAC has been operating since May 5, 1982 and has complied with all state election and campaign laws since that time. In the past two-year election cycle ending in 2020, the CoalPAC treasurer transparently filed nearly fifteen quarterly and 48-hour reports with the Secretary of State's (SOS) office, under penalty of law, that list and detail every individual political donation received and candidate contribution that is made. This information is publicly available on the SOS website for anyone to review going back many years.

CoalPAC's fundraising comes from multiple events that occur each summer and fall that consist of golf tournaments, trap shooting events and motorcycle rides that are attended by people who work in the industry. The attendees are made up of machine operators, environmental managers, truck drivers, plant operations staff and those who service the mines and plants with either expertise or parts and supplies. Our golf tournaments take place at three separate golf courses and consist of over

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one hundred participants each year. The events are done in the much the same manner as any other industry related PAC that exists for farmers, teachers, businessmen, realtors, insurance agents, etc.

Disqualification of "Quasi-Judicial" Public Officials from Constitutional Proceedings

In the commission's draft rules there are proposed provisions regarding "quasi-judicial proceedings." LEC is concerned about the creation of a neutral decision maker. Our state constitution plainly puts any decision of disqualification from a "quasi-judicial proceeding" on the public official and the public official alone. Our constitution explicitly provides "directors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person." N.D. Const. art. XIV, § 2(5) (emphasis added).

When the CoalPAC committee makes a political contribution, it essentially makes a free speech decision on which political candidate has the perceived best experience, knowledge and personal views on issues related to the lignite industry. Just as any other PAC would choose to support candidates that support their political views, the individual donor has the freedom to choose where to invest their personal money in order to have a voice in the political process.

How does one draw a conflict-of-interest line from a coal miner who attends a political fundraiser and donates $200 to a perceived biased outcome at the Public Service Commission for a project that went through the legal process and was approved based on merit? Where does the line begin and end for any political donation that is received by a statewide elected official who serves their constitutional duties on a board or commission? The proposed rules as they are written do not answer this or many other constitutionally relevant questions.

In summary, LEC and CoalPAC already follows clear and consistent law found in the constitution and passed by the legislature as it pertains to campaign finance and current ethics related law as do the elected officials. LEC also believes that the current legal guidelines and practices that are adhered to by elected officials to identify and recuse themselves in a proceeding is working.

We respectfully request that the commission adopts a rulemaking process that is publicly posted that details what procedural process it is following to ensure that its proposed rules receive proper review and participation from the public.

Sincerely,
Jonathan Fortner
Vice President of Government Relations and External Affairs

Thank you for the opportunity to comment on your proposed Title 15 Administrative Rules. I am North Dakota Public Service Commissioner Randy Christmann. My goal is to point out some very significant concerns, with the expectation that another version will ultimately be brought forward for additional, more granular comments. If so, I believe the potential exists to come up with a reasonable set of rules without limiting the candidate pool to independently wealthy people.

My career has included five successful legislative campaigns for District 33 Senate and two successful statewide campaigns for the office of Public Service Commission. For those who have never been on a ballot, please understand the importance of clarity with ethics rules. Specific details cannot be left unresolved, assuming they will be clarified as complaints are filed. The "appearance of impropriety" can be enough to devastate a campaign. We cannot have vague ethics rules that allow people to file frivolous complaints shortly before an election leaving candidates who clearly did nothing unethical or illegal under the cloud of an investigation as voters are casting their ballots. Ideally, I believe this process should also include a process that provides consequences for people who file frivolous or unsubstantiated complaints.

I also want to point out a clear legal delineation between positions such as I hold and the Judiciary. I am elected by voters statewide in a partisan election process. The Judiciary is prohibited by NDCC 16.1-11-08 from even proclaiming a partisan affiliation, and are thus insulated from much of the election process.

Jumping to the specifics of the draft, the Definitions, 115-04-01-01, use the terms "substantial" (subsection 1) and "significant" (subsection 2) interest. More clarity is needed. I see no definition for "substantial" and the definition for "significant" in subsection 8 looks to me like it would include even a single dollar. Many people will have widely divergent opinions of the definitions of substantial and significant. Elected officials should not have to guess where the line is. While I find it offensive that anyone suggests that our decisions are for sale at any price, does anyone think we will be swayed by minimal amounts? Current law already requires disclosure of ALL campaign donations of over $200.

Subsection 4 of the Definitions does provide clarity but in doing so it goes way too far. I recommend that "immediate family" be defined as the official, their spouse, and their dependent minor children. Elected officials cannot be expected to know

the entire investment portfolio of grandparents, grandchildren, and siblings who may have very little or no communications with the official. Even parents and grown children are beyond the control of elected officials and candidates.

I read subsection 5 of the Definitions to allow the remaining members of the PSC to be the Neutral Decisionmakers in the case of a potential conflict or for the agency to designate a Neutral Decisionmaker through rule or policy. This is very important. Unlike an actual court, which prepares for cases knowing exactly who the participants are, we routinely take public testimony as part of our Hearings. If someone that we did not anticipate shows up to testify, and a decision needs to be made regarding an unexpected possible conflict of interest, reaching out to an outside Neutral Decisionmaker such as the Ethics Commission would bring the Hearing to a halt. It would mean scheduling a new Hearing, which is a significant time delay because of notice requirements, and often involves significant travel for the agency and for the public who showed up for the Hearing.

A previous version of 115-04-01-02 required officials to report "known" conflicts of interest, and the most recent version changes that to "potential" conflicts of interest. Especially if the impossibly broad definitions I just talked about are kept, officials should not be held responsible for conflicts they had no way of knowing even existed. Officials cannot possibly know where everyone works. We cannot possibly know where everyone invests. We cannot possibly know who might have had a sign in their yard or window. We cannot possibly know what supporters may have posted on social media during our campaigns. Without more clarity, all of these things could be interpreted as "In-Kind-Support."

I also have concerns about the Quasi-Judicial Proceedings section, 115-04-01-04. Subsection 3 begins the disclosure requirements. Please clarify exactly what you are expecting officials to disclose. I think we would all agree that contributions directly from a corporation, cooperative, or individual that is a party to a case would need to be disclosed. Do you expect disclosure of donations from a company employee PAC? Do you expect disclosure of donations from trade associations representing those involved in our cases? Do you expect disclosure of personal donations from company management? Do you expect disclosure of personal donations from board members? Do you expect disclosure of personal donations from mid-level employees? Do you expect disclosure of personal

donations from every single employee, investor, or member of entities involved in a case? Reasonableness and clarity are needed.

Over the years I have been blessed to receive financial or in-kind support from people who's respect and support I have earned over a lifetime, going back to school days, and including church, neighborhoods, civic organizations, and myriad other channels. I do not know where each and every one of them work, and I know even less about their investments.

It may be convenient to think of these Quasi-Judicial rules as affecting the actions of officials in cases with just a few large utility companies. But as you contemplate these rules, remember that our cases can also include many others, for example contractors who may be accused of not following "Call Before You Dig" requirements, as well as all the operators of all underground utilities. We have dozens of those cases each year. Our cases with the large utilities also commonly have a "Public Advocacy" side, making the public a party to the case. This would essentially require disclosure of any support we have received from the public at large.

Finally, I want to point out some personal experiences for your consideration. During the course of both Senate and PSC campaigns I have had numerous people offer support, but inquire about reporting because they felt intimidated by their supervisors or even co-workers. I simply explained the disclosure law and many contributed, exercising their right to free speech, but at an amount others would not find out about. I also had one person seeking to help my campaign but asked the same question about disclosure, but in this case it was because of a family member who felt differently and intimidated that potential donor.

Current law requires us to report contributions exceeding $200, but it seems fundamentally wrong to me to report every single donation. Doing so essentially excludes people who may feel intimidated by someone at their work or by a relative. It excludes them from any participation in the political process except their vote, and frankly it robs them of their right to political free speech guaranteed by the Constitution of the United States of America.

February 23, 2022

North Dakota Ethics Commission
Attn: Hon. Ronald Goodman, Chair
101 Slate Drive, Suite 4
Bismarck, ND 58503
ethicscommission@nd.gov

VIA E-MAIL

RE: North Dakota Petroleum Council Written Comments to Proposed Conflict of Interest Rule 115-04

Dear Chair Goodman:

The North Dakota Petroleum Council (NDPC) appreciates the opportunity to submit comments as the North Dakota Ethics Commission (Commission) considers the proposed rules for N.D.A.C. Article 115-04 – Conflict of Interest. Established in 1952, the NDPC is a trade association that represents more than 600 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, South Dakota, and the Rocky Mountain Region.

As the trade association representing the public policy interests of one of the largest industries within North Dakota, NDPC has taken a significant interest in Commission rulemaking. The draft rules proposed for Article 115-04 concerning conflicts of interest are of particular importance due to the dramatic potential impact enforcement of the proposed rules may have on the policy and decision-making process. NDPC appreciates the efforts members of the Commission and Commission staff have put forth in fulfilling the Commission's constitutional mandate to "strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government [. . .]." N.D. CONST. art. XIV, § 3(1). However, NDPC has significant concern regarding the extent the proposed Article 115-04 rules go in attempting to fulfill that obligation.

NDPC stands strongly opposed to proposed rule language that attempts to alter what is explicitly provided for in the North Dakota constitution. Among the many provisions in the proposed rules are stipulations on how general conflicts of interest are identified, disclosed, and reviewed. However, the phrase "conflict of interest" is not to be found anywhere in the article of our state constitution that gives the Commission its authority. NDPC encourages the Commission to center its conflict of interest rulemaking solely on the language that *is* found in the constitution, particularly on the requirements specified in our constitution. Our constitution explicitly provides "[d]irectors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which

monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person." N.D. CONST. art. XIV, § 2(5). We urge the Commission to keep to the black letter of the language contained in our constitution.

Regarding the proposed rules related to a "neutral decisionmaker," NDPC likewise stands strongly opposed. Public officials elected or appointed to positions where constitutionally or statutorily created duties involve participating in quasi-judicial proceedings should have the discretion and authority to disqualify themselves from those proceedings in the event an appearance of bias is created by any situation. As proposed, the rules before you effectively strip public officials of that authority and place it instead on a "neutral" third party. Our state elected leaders are accountable to the people of North Dakota who elected them. Allowing elected officials to independently determine when a potential conflict of interest they have identified may present an appearance of bias not only preserves the integrity of the duties they have been called to perform, but is also in their own best interests. NDPC therefore strongly recommends the removal of all references in the proposed rules related to a "neutral decisionmaker."

NDPC also has a strong interest in preserving the ability of members of the public to participate in their government. Commission consideration of including campaign contributions as a factor in determining whether recusal of a public official involved in quasi-judicial proceedings is a direct assault on this important ability and right. Discussion on the rules as proposed also seems to indicate the potential for limiting participation by either capping campaign contributions with a "bright line" rule or otherwise stifling campaign assistance to elected public officials. NDPC views advancing any rule with such a chilling effect on public participation in government to be a grave attack on the freedoms guaranteed by our U.S. Constitution.

Furthermore, if transparency is a true goal of this rulemaking, tools and accountability mechanisms do exist for that goal to be realized as it relates to campaign contributions. Campaign contributions are defined and regulated under N.D.C.C. ch. 16.1-08.1. Under this chapter, campaign contribution statements indicating contributions received and expenditures made are required of all state candidates, candidate committees, multicandidate committees, political parties, and political committees. These are public records preserved by the Secretary of State for ten (10) years and are required to be open to public inspection. As a practical matter, any person wishing to view a list of contributors to an elected official's campaign and the amounts contributed has every opportunity to do so. The same is true of contributions received and expenditures made of political action committees.

NDPC takes special exception to the potential of the proposed rules discouraging campaign contributions in any way. NDPC itself operates a political action committee (PAC), the ND Oil PAC. The PAC serves as a useful vessel with which those interested in supporting business-friendly and oil and gas industry-friendly candidates to office may channel financial support. Contributors

to the ND Oil PAC come from all walks of life, though the majority have some connection to the oil and gas industry and are North Dakota citizens. One in five people within North Dakota are employed either directly or indirectly to the oil and gas industry, and this does not include the vast array of mineral royalty owners that can number as high as 1,500 per spacing unit. With this many interested in fair and consistent regulation on and general wellbeing of the oil and gas industry, it follows logically that a high interest in supporting industry-friendly candidates exists. Chilling the impact of individuals wishing to independently support those candidates is an affront to their rights as citizens. Further, the ND Oil PAC allows those individuals to participate in their government by leveraging their contributions toward supporting candidates who reflect their values, and ND Oil PAC contributors are provided the opportunity to determine those candidates themselves by participating in regular PAC director meetings. Restricting in any way the ability of elected public officials from making decisions on the very issues that are important to those who support them in their campaigns should not be condoned and rules to that effect have no place in the N.D.A.C.

Again, NDPC appreciates the work of the Commission and its staff in working to promote transparency in state government. We believe the tools to achieve that end already exist, and urge the Commission to remain cognizant of the potential and likely negative impacts the proposed rules may present should they be enacted as drafted.

We thank you for your time and consideration of these comments. Any questions may be directed to me via email at bpelton@ndoil.org or you may contact me via telephone at (701) 223-6380.

Sincerely,

Brady Pelton
Vice President & General Counsel
North Dakota Petroleum Council

Organization: North Dakota Watchdog Network
Registration: IRS Recognized 501(c)3
Contact: Dustin Gawrylow (701) 290-9331

Comments to the North Dakota Ethics Concerning Proposed Rules as of January 23rd, 2022

Mr. Chairman and Members of the Ethics Commission,

My name is Dustin Gawrylow, I am the Managing Director of the North Dakota Watchdog Network which is a 501(c)3 organization. I have been a registered lobbyist in the state of North Dakota since the 2007 Legislative session. For the purposes of full-disclosure, I am currently a candidate for the Burleigh County Commission, and I was an applicant for the Ethics Commission on the first round of appointments.

I would like to submit some general comments on the process you have before you, from the perspective of a lobbyist that tries to represent regular taxpaying citizens and does no cut checks to candidates or wine & dine public officials.

The most important question to consider any rule is: "will this be enforceable, and who will do the enforcement". We already have so many laws on the books that no one enforces.

For example: N.D.C.C. 16.1-10 "The Corrupt Practices Act", which prohibits public dollars from being spent to promote or defeat ballot measures at all levels.

But there are school districts that will hire construction & engineering firms prior to any bids being award, $40,000 in a small school district to "educate" the local voters on why a school bond is necessary. (This is an actual situation I am referencing.) The bond has not been approved, but the school district can pay the company that wants the job to "prime the pump" with voters. This clearly violates state law. But good luck finding any county states' attorney or state legal officials willing to take on the law. And why should a citizen pay a lawyer to file a lawsuit to force their own elected government officials to follow the law?

While I know that the Ethics Commission is constrained to the state level issues, the fact that we have actual legislatively approved laws against corrupt practices that go unenforced is a symptom of a greater problem. A problem this Ethics Commission should seek to resolve.

What good are laws and rules if there is no one to enforce the laws and rules?

This is a basic premise that must be resolved. Or else a lot of this is purely academic.

Thank you for you time and effort.

Dustin Gawrylow, Managing Director

North Dakota Watchdog Netwo

INSTITUTE FOR FREE SPEECH

March 9, 2022

ethicscommission@nd.gov

North Dakota Ethics Commission
101 Slate Drive, Suite #4
Bismarck, North Dakota 58503

RE: Comment on the Draft Conflict of Interest Rules

The Institute for Free Speech[15] submits these comments in response to the Draft Conflict of Interest Rules as of February 22, 2022 (the "Draft Rules").

I. Introduction

On November 6, 2018, North Dakotans approved Measure 1, a ballot initiative designed to amend the North Dakota Constitution by adding a new Article XIV to guarantee "transparency . . . sufficient to enable the people to make informed decisions and give proper weight to different speakers and messages." N.D. Const. art. XIV, § 1(1).[16] Specifically, Article XIV requires North Dakota to collect and publish information about "the source, quantity, timing, and nature of resources used to influence any statewide election, election for the legislative assembly, statewide ballot-issue election, and state government action." *Id.* To achieve these ends, Article XIV, *inter alia*, created the Ethics Commission, *see generally* N.D. Const. art. XIV, § 3, and vested it with authority to "adopt ethics rules related to transparency, corruption, elections, and lobbying to which any lobbyist, public official, or candidate for public office shall be subject," N.D. Const. art. XIV, § 3(2).

[15] The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government.

[16] The Institute for Free Speech previously expressed concerns about certain then-proposed provisions of Article XIV.

See generally ANALYSIS OF NOVEMBER 2018 NORTH DAKOTA CAMPAIGN FINANCE/LOBBYING INITIATED CONSTITUTIONAL AMENDMENT, INSTITUTE FOR FREE SPEECH (Aug. 2018), https://www.ifs.org/wpcontent/uploads/2018/08/2018-08-14_IFS-Analysis_ND_Campaign-Finance-Lobbying-Initiated-ConstitutionalAmendment.pdf.

Since the U.S. Supreme Court's decision in *Buckley v. Valeo*, campaign contributions have been recognized as forms of political speech and association that are entitled to at least some constitutional protection (*i.e.*, governments may not prohibit all campaign contributions without encroaching on rights of expression and association), but the law also recognizes that governments have compelling interests in preventing both actual and apparent *quid pro quo* ("this for that") corruption of elected officials—thus, campaign contributions may be limited without trampling fundamental rights. *See Buckley*, 424 U.S. 1, 19–22, 25–27 (1976) (*per curiam*). Moreover, in

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2010, the Court described disclosure as a reasonable regulation of campaign finance that does not run afoul of First Amendment concerns. *See Citizens United v. FEC*, 558 U.S. 310, 356–57, 371 (2010).

But nowhere has the U.S. Constitution permitted states, even in the pursuit of transparency or other so-called good government reforms, to effectively toss out, on a continuing, *ad hoc* basis, the results of a legitimate election in which voters cast their ballots with full knowledge of disclosed contributions—especially not where, as in North Dakota, the state constitution expressly reserves to the people themselves the power to recall elected officials for any reason. Moreover, although governments have compelling interests in regulating actual and apparent *quid pro quo* corruption, courts have repeatedly struck down laws that exceed constitutionally permissible scope. We are concerned that the Draft Rules, as currently written—although they were undoubtedly drafted with good intentions—stray from what federal constitutional law permits.

We have several specific concerns about the Draft Rules.

First, the Draft Rules could be read to require a conflict-of-interest and/or recusal determination for certain public officials if an official receives a campaign contribution from a person who has a stake in the outcome of a given decision. Such a reading would create a substantial number of practical problems and chill the exercise of constitutionally protected rights.

Second, the Draft Rules are too vague and not sufficiently narrowly tailored as to Quasi-Judicial proceedings.

That a person has made a campaign contribution to a candidate who later becomes a public official should not require either recusal or even automatic referral to a neutral decisionmaker for a conflict-of-interest determination. Given North Dakota's existing campaign finance laws, which impose no limits on campaign contributions, North Dakotans are presumptively aware of both the existence and amounts of campaign contributions and nevertheless elect candidates to public office. Presumably, voters would not want that public official to recuse, or someone else's judgment to be substituted, based on a decision by someone whom voters did not necessarily elect.

This is especially true because North Dakota law already provides for recall elections for any reason at all, making the Draft Rules redundant to the extent that they can be read to apply to contributions made in a prior election.

Third, although the Ethics Commission's organic statute purports to define "public official" broadly enough to include members of the legislative branch and their staffs, Article XIV vests the legislature and the Ethics Commission with authority to enforce the Disqualification Clause only as to "[d]irectors, officers, commissioners, heads, or other executives of agencies[.]" Yet the Draft Rules purport to disqualify a member of the "legislative branch" in certain circumstances. Thus, provisions that require disqualification or referral to a neutral decisionmaker of any member of the legislative branch appear to exceed the Ethics Commission's constitutional authority.

Finally, the Draft Rules lack standards in terms of, for example, either a nominal dollar amount or the percentage of total campaign contributions from a person with a stake in the outcome of a given decision, or a Quasi-Judicial proceeding, to a public official. The lack of guiding monetary thresholds invites subjectivity into conflict-of-interest determinations and makes the process ripe for abuse by biased complainants or referees, even though the Draft Rules nominally purport to define a "neutral decisionmaker." More broadly, without a clear threshold, donors will be deterred from giving to any highly qualified and ethical candidate if they think that they might, at some point in the future, have a matter that comes before that person.

For all of these reasons, the Ethics Commission should respect and protect voters' preferences and obviate the risk of abuse by explicitly stating that campaign contributions do not give rise to a potential conflict of interest in any circumstance other than a Quasi-Judicial proceeding in the executive branch.

But even in Quasi-Judicial proceedings, guidance on current election-cycle campaign contributions that may trigger a referral for conflict-of-interest determination and/or recusal must provide bright-line, reasonable, objective standards to avoid chilling the constitutionally protected right to make campaign contributions. We suggest disclosure of a potential conflict of interest in a Quasi-Judicial proceeding to a neutral decisionmaker only when a donor has made total contributions to a public official in excess of one two specified thresholds. We strongly recommend that the rule include a clear standard for contributions. Any fixed dollar amounts in a rule should be adjusted for inflation after any statewide election for any executive office.

Such standards would provide better clarity to donors, voters, public officials, and neutral decisionmakers alike than the Draft Rules currently offer. Clear standards also respect and protect voters' wishes, protect the constitutional right to donate to a candidate for public office, safeguard against abuse by biased decisionmakers, and provide administrative convenience.

Finally, the Draft Rules should also explicitly exclude independent expenditures from provisions that define what gives rise to potential conflicts of interest in Quasi-Judicial proceedings. Simply put, at no point during the last half-century has First Amendment law deemed independent expenditures a form of *quid pro quo* corruption. But, as written, the Draft Rules appear to contemplate that independent expenditures can create a disqualifying conflict of interest, which is not only contrary to the North Dakota Century Code's deliberately distinct definitions of "contribution" and "independent expenditure," but which may also chill constitutionally protected speech about North Dakota politics.

II. Discussion

A. The Draft Rules sweep too broadly and undermine voters' expressions of their preferences in electing a candidate.

The Draft Rules may be read to require conflict-of-interest determinations and/or recusal proceedings where a public official has received a campaign contribution from a person who appears before the public official. Although we commend the Ethics Commission for taking campaign contributions out of the ambit of the definition of "Gift" in the current version of the Draft Rules, *see* Draft Rules § 115-04-01-01.2(a) (cross-referencing, *inter alia*, Chapter 66 of Title 54 of the North Dakota Century Code); *see also* N.D. Cent. Code § 54-66-01(5)(b) (excepting "campaign contribution" from the definition of "Gift"), the Draft Rules' definition of "Significant Financial Interest" is arguably broad enough to include campaign contributions. *Compare* Draft Rules § 115-04-01-01.8 (defining "Significant Financial Interest" as "an in-kind or monetary interest, or its equivalent, not shared by the general public . . ."), *with, e.g.*, N.D. Cent. Code § 16.108.1-01.4 (defining "Contribution").

Since it appears that such an interpretation is not intended, we suggest that campaign contributions be expressly excluded from the definition of "Significant Financial Interest." The definition of that term could instead read as follows (suggested alterations in italics):

> 8. "Significant Financial Interest" means an in-kind or monetary interest, or its equivalent, not shared by the general public, *provided*, however, *that "Significant Financial Interest"* does not include investments in a diversified mutual fund, participation in a public employee benefits plan, *or a campaign contribution*.

That a person who comes before a public official has made a campaign contribution to that official's prior campaign should not require either recusal or even automatic disclosure to a neutral decisionmaker for a conflict-of-interest determination. Our concern here is animated by the fact that North Dakotans regularly cast their ballots fully aware of the campaign contributions made to public officials. *See* N.D. Cent. Code. § 16.1-08.1-02.3 (requiring the filing of contributions reports at certain intervals); *see also North Dakota Campaign Finance Online*, N.D. SEC'Y OF STATE, https://cf.sos.nd.gov/search/cfsearch.aspx (last visited Feb. 21, 2022). With and notwithstanding voters' knowledge of disclosed campaign contributions, which are not limited by statute in North Dakota, voters regularly decide to put candidates into office to do particular jobs. Presumably, voters would not want that public official to recuse, or someone else's judgment to be substituted, based on a decision by someone whom voters did *not* necessarily elect. *See* Draft Rules § 115-0401-01.5(a)–(e) (broadly defining "Neutral Decisionmaker").

Our concerns are augmented where, as here, North Dakota law already provides for recall elections, making the Draft Rules redundant if not directly contradictory to existing provisions of the law. To wit, the North Dakota Constitution expressly provides that "the people"—not a neutral decisionmaker as defined by the Ethics Commission—"reserve the power to . . . recall certain elected officials," including "[a]ny elected official of the state, of any county or of any legislative

or county commissioner district." N.D. Const. art. III, §§ 1, 10; *see also generally* N.D. Cent. Code. §§ 16.1-01-09.1 (governing recall petitions and elections), 44-08-21 (same).

Therefore, we urge the Ethics Commission to consider expressly clarifying that campaign contributions do *not* give rise to a potential conflict of interest anywhere but in a Quasi-Judicial proceeding, which would better respect and protect voters' informed preferences than the current draft language.

B. The Draft Rules' provisions regarding whether or when members of the legislative branch must disclose a potential conflict of interest and/or recuse appear to exceed the Ethics Commission's constitutional authority under Article XIV's Disqualification Clause.

The Draft Rules appear to require that members of the legislative branch or their staff must, in some cases, disclose potential conflicts of interest to a neutral decisionmaker for a conflict-ofinterest determination. *See, e.g.*, Draft Rules § 115-04-01-01(5)(a) ("If a Public Official with a Potential Conflict of Interest is *a member of a legislative body* . . . ."); *see also* Draft Rules § 11504-01-01(5)(b) ("If a Public Official with a Potential Conflict of Interest is *an employee of the legislature* . . . ."); Draft Rules § 115-04-01-01(6) (defining a "Public Official" as, *inter alia*, "any elected . . . official of the North Dakota . . . legislative branch[] . . . and employees of the legislative branch"). But these provisions of the Draft Rules appear to exceed the Ethics Commission's permissible constitutional scope under Article XIV's Disqualification Clause.

The legislature enacted the Ethics Commission's organic statute in 2019 and defined "Public Official" to include "an elected . . . official of the state's . . . legislative branch . . . and employees of the legislative branch." *See generally* 2019 N.D. Laws 472, § 25 (codified at N.D. Cent. Code § 54-66-01(9)). But the Disqualification Clause, which vests the "legislative assembly and the ethics commission" with authority—indeed, provides a mandate—to "enforce this provision by appropriate legislation and rules, respectively," addresses only "[d]irectors, officers, commissioners, heads, or other executives of agencies[.]" N.D. Const. art. XIV, § 2(5). Thus, the Draft Rules appear to exceed the Disqualification Clause's authority.

Since it appears that the Ethics Commission has no authority to require disqualification of an elected member of the legislative branch, Draft Rules § 115-04-01-02(1) could instead read as follows (suggested alterations in italics):

> 1. When a matter comes before a Public Official, *other than a Public Official who is an elected member of the legislative branch or an employee of the legislative branch*, and the Public Official has a Potential Conflict of Interest, the Public Official must disclose the Potential Conflict of Interest to the appropriate Neutral Decisionmaker. The disclosure of Potential Conflict of Interest must be made prior to the Public Official taking any action or making any decision in the matter.

Furthermore, the Ethics Commission could excise members of the legislative assembly and their staff from the definitional provisions of the Draft Rules.

These suggested modifications would bring the current iteration of the Draft Rules within the proper scope of the Ethics Commission's constitutional mandate.

C. The Draft Rules lack standards by which a neutral decisionmaker could objectively evaluate potential *quid pro quo* corruption in a Quasi-Judicial proceeding, *i.e.*, the Draft Rules fail to specify a threshold contribution amount, expressed in either nominal dollars or as a percentage of a public official's overall contributions accepted, and thus invite subjectivity into conflict-of-interest determinations.

We applaud the Ethics Commission for outlining factors that a neutral decisionmaker must consider when determining whether a public official's potential conflict of interest rises to the level of a disqualifying conflict of interest. *See* Draft Rules § 115-04-01-03.5(a)–(d).[17] Conspicuously absent from this list of factors, however, is any overt reference to money, the influence of which Article XIV was designed to regulate. *See* N.D. Const. art. I, § 1(1) (requiring "transparency sufficient to enable the people . . . to know in a timely manner the source, quantity, timing, and nature of *resources used to influence* any statewide election, election for the legislative assembly, statewide ballot-issue election, and state government action" (emphasis added)).

Although North Dakota laudably does not limit campaign contributions, North Dakota law imposes standards on contribution thresholds in other ways. Indeed, Article XIV itself contains such a provision. *See* N.D. Const. art. I, § 1(2) (requiring the Legislative Assembly to enact statutes "that require prompt, electronically accessible, plainly comprehensible, public disclosure of the ultimate and true source of funds spent in any medium, *in an amount greater than two hundred dollars, adjusted for inflation*, to influence . . ." (emphasis added)). Similarly, the Legislative Assembly has directed candidates to make campaign finance disclosures over $200 and has further directed the Secretary of State to make annual inflation-based adjustments to campaign contribution reporting thresholds. *See* N.D. Cent. Code §§ 16.1-08.1-02.3, 16.1-08.1-06.2. Thus, we are concerned that the Ethics Commission has not yet chosen to adopt clear monetary threshold standards.

The absence of clear standards is a recipe for abuse. To wit, although a neutral decisionmaker may be nominally "neutral" in the sense with which the Draft Rules employ that term, *see* Draft Rules § 115-04-01-01(5), the absence of a defined "potential conflict of interest" in a "neutral decisionmaker" does not mean that the decisionmaker will render a decision from a neutral (in the ordinary sense of that word) posture. Indeed, governmental actors often vie for partisan control of certain processes that are neutral by design to weaponize the law against political opponents. *Cf.*

[17] This is not to say, however, that the espoused standards are free of any infirmities. For example, the first standard, requiring that a neutral decisionmaker give "[a]ppropriate weight and proper deference" to requirements that a public official actually do the job that voters elected him or her to do, is so vague as to be meaningless. *See* Draft Rules § 115-04-01-03.5(a). In North Dakota, "[a] law is void for vagueness if it . . . requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *City of Fargo v. Salsman*, 760 N.W.2d 123, 129 (N.D. 2009) (internal quotation marks and citation omitted). The Institute for Free Speech wonders whether any person of common intelligence would know—or would have to guess—what "[a]ppropriate weight and proper deference" means in this context.

generally, e.g., *Analysis: H.R. 1 Would Create a Speech Czar and Enable Partisan Enforcement of Campaign Finance Laws*, INST. FOR FREE SPEECH (Jan. 31, 2019) (critiquing federal legislation that would transform the Federal Election Commission from a six-member bipartisan body to five-member body that could be controlled by a single party and its president), https://www.ifs.org/news/analysis-h-r-1-would-create-a-speech-czar-and-enable-partisan-enforcement-of-campaign-finance-laws/. Although North Dakotans adopted Article XIV to pursue government reform, the Draft Rules, as written, risk inviting biased actors to besmirch or tie the hands of their political opponents in potentially time-consuming and expensive ancillary proceedings for reasons that have nothing to do with preventing *quid pro quo* corruption.

In addition, without clear standards, donors may be deterred from giving to highly qualified and ethical candidates if the donors think that they may have a matter come before a public official in the future. Without financial support going to these highly qualified and ethical candidates, less qualified and less ethical candidates may enjoy more electoral parity than they deserve, and some may take office.

To cure these concerns, the Ethics Commission should respect and protect voters' preferences and obviate the risk of abuse by explicitly stating that campaign contributions do not give rise to a potential conflict of interest in any circumstance other than a Quasi-Judicial proceeding. But even in Quasi-Judicial proceedings, guidance on current-election-cycle campaign contributions that may trigger a referral for conflict-of-interest determination and/or recusal must provide brightline, reasonable, objective standards to avoid chilling the exercise of the constitutionally protected right to make campaign contributions.

We suggest the rule include a safe harbor provision so that there would be no disqualification requirement in a Quasi-Judicial proceeding (or disclosure of a potential conflict of interest) if a donor who is a party in a Quasi-Judicial proceeding has made total contributions to a public official who is a candidate for any public office at or below the following two thresholds:

- the greater of $10,000 or 25% of the total campaign contributions received as of the date of the contribution; or

- $1,000 from a party to a Quasi-Judicial proceeding to a Public Official who is involved in the Quasi-Judicial proceeding for all contributions made between the date when the matter first comes before the Public Official until the conclusion of the proceeding. However, a Public Official may refuse or refund any contribution over $1,000 from a party within 15 calendar days of the contribution and prior to any further involvement or taking any further action at a Quasi-Judicial proceeding by the Public Official and still qualify for the safe harbor provision.

We suggest a different and more liberal rule for campaign contributions made during the immediately preceding election for a public official. Such contributions are much less likely to result in corruption or its appearance, as these contributions were disclosed to the voters in the prior

election, and the voters chose the candidate most suitable for the office. We recommend the following threshold, for example:

- the greater of $25,000 or 25% of the total campaign contributions received by the public official in the most recent election to that office.

Any fixed dollar amounts in a rule should be adjusted for inflation after any statewide election for any executive office.
Depending on other facts and circumstances, amounts donated over these thresholds would not necessarily trigger disqualification from a Quasi-Judicial proceeding.

Such standards would provide better clarity to donors, voters, public officials, and neutral decisionmakers alike than the Draft Rules currently offer. Clear standards also respect and protect voters' wishes, protect the constitutional right to donate to a candidate for public office, safeguard against abuse by biased (nominally "neutral") decisionmakers, and provide administrative convenience.

D. The Draft Rules appear to require conflict-of-interest determinations where a party to a Quasi-Judicial proceeding has made an independent expenditure, but, under the First Amendment, independent expenditures do not trigger concerns about *quid pro quo* corruption.

The Draft Rules' definition of "Campaign Monetary or In-Kind Support" is so broad that it can be read to encompass independent expenditures in support of a public official's candidacy or against a public official's former opponent. *See* Draft Rules § 115-04-01-04(2)(c) ("all campaign contributions of every kind and type whatsoever . . . and whether donated directly to the Public Official's campaign *or donated to any other person or entity for the purpose of supporting the Public Official's election to any office* . . ." (emphasis added)). In defining "Campaign Monetary or In-Kind Support" in this way, we are concerned that the Draft Rules run afoul of longstanding First Amendment law in exceeding the parameters of the *Buckley* framework.

Although it espoused the prevailing framework for regulating actual and apparent *quid pro quo* corruption, the *Buckley* Court expressly excepted independent expenditures from its concerns. In a *per curiam* opinion, seven of the eight Justices who participated in the case agreed that concerns over "this for that" corruption do not exist when it comes to independent expenditures:

> . . . [Q]uite apart from the shortcomings of [the Federal Election Campaign Act of 1971 as amended in 1974 ("FECA")] in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by [FECA] does not presently appear to pose real or apparent corruption comparable to those identified with large campaign contributions. The parties defending [FECA] contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign

> might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. [FECA's] contribution ceilings rather than [its] independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, [FECA's other provisions] limit[] expenditures for express advocacy of candidates *made totally independently of the candidate and his campaign*. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. *The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate*.

Buckley, 424 U.S. at 45–47 (emphasis added). In addition, the Supreme Court has repeatedly reaffirmed the principle that truly independent expenditures are, as a matter of law, inherently *not* corrupting. *See generally, e.g.*, *Citizens United*, 558 U.S. at 345–66 (discussing, *inter alia*, *Buckley*'s anti-corruption rationale and ruling that the Bipartisan Campaign Reform Act of 2002's provisions prohibiting corporation-funded independent expenditures failed strict scrutiny); *see also, e.g.*, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613–19 (1996) (concluding that there is no risk of *quid pro quo* corruption when a political party makes an independent expenditure against one of its members' election opponents); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251–63 (1986); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate."); *cf. also Speechnow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow"), *cert. denied sub. nom. Keating v. FEC*, 562 U.S. 1003.

It is a fundamental tenet of our federal republican system of government that, although states may provide their citizens with *more* protections of civil liberties than the United States Constitution offers, the federal Constitution provides a floor beneath which States may not wander. In this respect, the Draft Rules' treatment of independent expenditures as a basis for triggering disclosure of a potential conflict of interest in a Quasi-Judicial proceeding, which could lead to the recusal of a duly elected public official, gives rise to strong First Amendment concerns.

In addition, North Dakota law distinguishes between a "contribution" and an "independent expenditure." *Compare* N.D. Cent. Code § 16.1-08.1-01(4) (defining "contribution"); *with* N.D. Cent. Code § 16.1-08.1-01(7) (defining "independent expenditure"). After North Dakotans adopted Article XIV in 2018, the North Dakota legislature had two opportunities to reconsider the definitions of these terms, both times leaving undisturbed these distinct categories. *See generally* 2021 N.D. Laws 164, § 45; 2019 N.D. Laws 472, § 1. For the Ethics Commission to now conflate the two when Article XIV does not require it, *see* N.D. Const. art. XIV, § 5, brings the Ethics

Commission and the Draft Rules into intragovernmental conflict with the legislature and longstanding campaign-finance laws that North Dakotans have declined to alter.

Therefore, to ameliorate First Amendment concerns and harmonize the Draft Rules with existing North Dakotan campaign-finance law, we suggest that independent expenditures be specifically excluded from the definition of the term "Campaign Monetary or In-Kind Support." The definition could instead read (suggested alterations in italics):

> c. "Campaign Monetary or In-Kind Support" means all campaign contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the Public Official's campaign or donated to any other person or entity for the purpose of supporting the Public Official's election to any office within the current or immediately preceding election cycle. No campaign contribution of any kind received prior to January 5, 2022, *nor any independent expenditure as defined in N.D. Cent. Code § 16.1-08.1-01(7),* shall be included in this definition.

This suggested revision would bring the Draft Rules into compliance with current federal constitutional law regarding independent expenditures as well as avoid conflict with longstanding current North Dakota statutes that voters and their legislative representatives have left undisturbed since 2018.

III. Conclusion

North Dakotans, in their wisdom, adopted Article XIV by ballot initiative in 2018 to guarantee themselves and their posterity a certain level of transparency about funding for candidate campaigns, measures, and a whole host of state governmental actions and proceedings. These provisions reflect the constitutionally permissible purposes of preventing *quid pro quo* corruption through disclosure under current law.

However, not every law designed with these purposes in mind is a good one, albeit wellintentioned. We sincerely appreciate the opportunity to provide this commentary on behalf of the Institute for Free Speech, and we encourage the Ethics Commission to reconsider and modify the February 22, 2022 version of the Draft Rules with our comments in mind. We also welcome any questions you may have about our specific concerns and proposals.

Respectfully submitted,

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