LETTER OPINION
2021-L-04

Mr. Ron Goodman, Chairman
Ethics Commission
101 Slate Drive #4
Bismarck, ND 58503

Dear Mr. Goodman:

Thank you for your letter requesting an opinion on whether Article XIV, § 2(5) of the North Dakota State Constitution is an unconstitutional restriction of the First Amendment's freedom of association. For the reasons indicated below, it is my opinion that if a court were to rule on this matter, it likely would determine that N.D. Const. art XIV, § 2(5) is facially constitutional under the First Amendment.

ANALYSIS

In 2018, the voters passed initiated measure 1, which had the effect of amending the North Dakota Constitution to add article XIV. Article XIV, N.D. Const., creates the N.D. Ethics Commission (the "Commission") and makes the Commission responsible for adopting "rules related to corruption, elections, and lobbying and for reporting and investigating alleged violations of those rules and related state laws."[1] It further provides for "prohibitions for lobbyists related to gift giving and delivery of campaign contributions and prohibitions for public officials against lobbying, use of campaign contributions, and conflicts of interest in certain proceedings."[2] Section 2(5), art. XIV, N.D. Const.,[3] states, in part:

> 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. . . . So as to allow for the

[1] 2018 I.M. No. 1, § 1 – Ballot Title.
[2] *Id.*
[3] Hereinafter referred to as "Section 2(5)".

> adoption of such legislation or rules, this subsection shall take effect three years after the effective date of this article.[4]

The Commission states that it has reservations about adopting rules to implement Section 2(5), which is self-executing,[5] based upon the United States Supreme Court decisions in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) and *Americans for Prosperity Found. v. Bonta*, 594 U.S. _____ (2021). The Commission's concerns are that Section 2(5) may violate the First Amendment of the U.S. Constitution, because of its "restriction on campaign contributions." Because no specific set of circumstances has been posed to this office for examination of the application of Section 2(5), the question raised is one of facial constitutionality.

This office is reluctant to issue opinions addressing the constitutionality of state law or whether the North Dakota Constitution violates the United States Constitution because it is ordinarily the Attorney General's role to defend the North Dakota Constitution. In N.D.A.G. 2004-L-61, I explained:

> The North Dakota Attorney General's office has long recognized that North Dakota's statutes are presumed to be constitutional until declared to be otherwise by a court having competent jurisdiction, and only where a statute is *clearly and patently unconstitutional* will this office deviate from this presumption of constitutionality. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Tangedahl (Apr. 15, 1980). Further, the Attorney General owes a duty to uphold and defend both the North Dakota Constitution and the United States Constitution. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Adams (Oct. 28, 1983). Therefore, when it is alleged that a section of the North Dakota Constitution violates the United States Constitution, this office will defend the North Dakota Constitution unless the challenged provision is *manifestly contrary* to the federal constitution and it is *beyond a reasonable doubt* that the state constitutional provision will be declared void by a court of competent jurisdiction. Accordingly, any analysis of your question must be tempered by a strong presumption of constitutionality. N.D.A.G. 2003-L-54.[6]

Based upon this standard, Section 2(5) must be "manifestly contrary to the federal constitution and beyond a reasonable doubt that the state constitutional provision will

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[4] N.D. Const. art XIV, § 2(5).
[5] N.D. Const. art XIV, § 4(1).
[6] N.D.A.G. 2004-L-61 (emphasis added).

be declared void by a court of competent jurisdiction," [7] with a strong presumption of constitutionality.

As briefly introduced above, Section 2(5) has two requirements. The first requires directors, officers, commissioners, heads or other executives of agencies ("public officials") to avoid the appearance of bias. The second requires that a public official disqualify themselves from any quasi-judicial proceeding where "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."[8] Facially, Section 2(5) does not limit or ban all or a portion of any party's political speech and thus raises no facial constitutional concerns regarding the First Amendment. To that end, the concerns expressed in the request for the opinion regarding the constitutionality of Section 2(5) as it relates to the First Amendment are misplaced.

While "quasi-judicial proceeding" is not defined in N.D. Const. art. XIV or in N.D.C.C. ch. 54-66, Black's Law Dictionary defines it as "[a] hearing, inquiry, investigation, or trial before an administrative agency, usually adjudicatory in nature."[9] "Public official" is defined by N.D. Const. art XIV, § 4(2), as "any elected or appointed office or official of the state's executive or legislative branch, including members of the ethics commission, or members of the governor's cabinet, or employees of the legislative branch."[10] There is no case law or Attorney General's opinion directly on point regarding the legality of a law requiring the recusal of a public official in a quasi-judicial matter. It is understood that there are inherent differences between public officials of the executive and legislative branch and elected members of the judiciary[11], however, given the lack of authority directly on point, it is helpful to review the United States Supreme Court's treatment of judicial recusal provisions and the Court's rationale for upholding such provisions before addressing whether Section 2(5) is manifestly contrary to the First Amendment of the federal Constitution.[12]

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[7] *Id.*
[8] N.D. Const. art. XIV, § 2(5).
[9] Black's Law Dictionary (11th ed. 2019).
[10] N.D. Const. art XIV, § 4(2).
[11] Elected public officials and elected members of the judiciary differ in the way they campaign and collect campaign contributions, and in their expected function. *See* N.D. Code of Jud. Conduct Canon 4.
[12] This is not to say that all rules of judicial conduct are applicable to public officials in quasi-judicial roles, however, it is instructive for the limited purpose of a legal analysis of the legality of laws regarding recusal.

Judicial recusal provisions have historically been affirmed and upheld by Courts.[13] Recently, in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the U.S. Supreme Court addressed whether a judge's refusal to recuse himself after receiving campaign contributions "in an extraordinary amount" from a party to a lawsuit violated the Due Process Clause of the 14th Amendment. The Court found that due process required recusal because under the Supreme Court's precedents "there are objective standards that require recusal 'when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[14]

The Court directly addressed whether a recusal requirement violates the First Amendment in *Citizens United.*[15] In *Citizens United*, the Supreme Court held that a federal law prohibiting corporate independent expenditures was unconstitutional as an impermissible restriction on corporations' First Amendment right to freedom of speech.[16] Justice Kennedy, writing for the majority, states:

> [*Caperton*] is not to the contrary [to the holding in *Citizens United*]. *Caperton* held that a judge was required to recuse himself 'when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. . . . The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. . . . *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.[17]

The Court in *Citizens United* indicated that a requirement of recusal based upon campaign contributions to the judge by a party does not amount to a restriction on the litigant's ability to engage in political speech.[18] This is precisely what Section 2(5) does; it requires recusal of a public official in a quasi-judicial role where there is an appearance of bias to a reasonable person in order to provide a fair tribunal for adjudication of the issue. It does not restrict the political speech of a party to the proceeding. Because Section 2(5) requires recusal, and does not limit political speech,

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[13] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), *Mayberry v. Pa.*, 400 U.S. 455, 466 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).
[14] *Caperton*, 556 U.S. 868 at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).
[15] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
[16] *Id.*
[17] *Id.* at 360.
[18] *Id.*

it is not manifestly contrary to the federal constitution and therefore, likely to be upheld by a court of competent jurisdiction.[19]

Caperton also provides a framework for the analysis of whether a financial interest, including a campaign contribution, requires recusal of a judge or decisionmaker:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[20]

Section 2(5) addresses the concern that the Court expressed in *Caperton* and attempts to ensure a fair tribunal in which quasi-judicial decisions are made. The Ethics Commission is then tasked with specifying the inquiry to be made by public officials and the parameters by which the Section operates by adopting rules. Section 2(5) does not require actual bias as was required in *Caperton*, however, it provides that quasi-judicial decisionmakers recuse themselves when there is a monetary interest, presumably including campaign contributions, which creates an appearance of bias to a reasonable person, which is to be defined by the Ethics Commission. Section 2(5) would likely be found facially constitutional by a court as a quasi-judicial conduct provision that operates to protect and provide fair tribunals in quasi-judicial proceedings.

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[19] *Americans For Prosperity Found. v. Bonta*, 594 U.S. ____ (2021), which is also mentioned in the opinion request, dealt with a disclosure law in California which required charitable organizations to disclose the identities of their major donors to the California Attorney General's Office. The opinion held the compelled disclosure law at issue was unconstitutional because the law was not narrowly tailored to the government's interest and, therefore, had a chilling effect on a person's beliefs and associations, violating the First Amendment's freedom of association. *Bonta* is inapplicable to the analysis of Section 2(5), and is, therefore, not addressed by this opinion.

[20] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

North Dakota's own courts have also addressed the actual or appearance of bias created by financial interests, lending legitimacy to the recusal requirement of Section 2(5). Rule 2.11 of the North Dakota Code of Judicial Conduct states as follows:

> A. A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances: . . . (3) The judge knows that the judge, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.[21]

Comment [4] to the rule states

> The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or publicly supported the judge in the judge's election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge's impartiality under paragraph (A).[22]

In applying these canons of judicial conduct, the Court has advised that "[w]hen deciding whether or not to recuse, a judge must determine 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'"[23] The Court has adopted the following analysis for determination of recusal due to alleged impartiality or bias:

> [I]n deciding whether a judge should be disqualified because of a person's involvement in a judicial campaign, the relevant factors include:
> 1. The significance of the person's campaign involvement.

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[21] Rule 2.11, N.D. Code Jud. Conduct.
[22] *Id.* at note 4.
[23] *State v. Stockert*, 684 N.W.2d 605, 613 (N.D. 2004), citing N.D.Code Jud. Conduct Canon 2(A), Commentary; *see also Farm Credit Bank of St. Paul v. Brakke*, 512 N.W.2d 718, 721 (N.D. 1994).

2. Whether the campaign is underway or how recently it ended.[24]
3. Whether there is an ongoing relationship between the person and the judge.
4. The significance of the person's involvement in the current case, including the closeness or remoteness of the involved individual to the case.
5. Whether the issue was promptly raised.
6. Evidence of judicial bias.[25]

These rules of judicial conduct seek to prevent the same appearance of bias referred to in Section 2(5) and set forth a framework for analysis similar to the analysis that will need to be performed by public officials in quasi-judicial proceedings. Although not precisely on point, the guidance provided by the U.S. Supreme Court and by the Rules of Judicial Conduct, along with the rigorous standard of review required by this office, bolster the presumption of constitutionality of Section 2(5).

Because Section 2(5) does not limit political speech on its face, this issue would only be addressed upon request after it arises in a specific factual circumstance. Provisions of law limiting political speech are subject to varying levels of scrutiny which are highly fact dependent. Therefore, I will not opine on the outcome of an "as-applied" analysis of constitutionality without specific facts.

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[24] A time limitation preemptively exists as Section 2(5) likely cannot be retroactively applied. "Generally, the language of an initiated measure is interpreted and understood in its ordinary sense." N.D.A.G. 2004-L-59. The basic rules of statutory construction apply with equal force to legislation enacted by the people through the initiative process or by referendum. *Id.* (citing 42 Am. Jur. 2d *Initiative and Referendum* § 49 (2000). The effective date of Section 2(5) is not ambiguous or unclear. It is three years after the effective date of the measure, January 5, 2022. Applying the general rules of statutory construction to this constitutional initiative, it should be noted that "[g]enerally, the law is what the Legislature says, not what is unsaid." *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993). If the wording of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. Because Section 2(5)'s effective date is January 5, 2022, the law should not apply retroactively and should be only applicable to any monetary or in-kind interest given after the effective date, to give public officials a timely opportunity to reject the monetary or in-kind interest in order to prevent a requirement for recusal at a later time.

[25] *Stockert*, 684 N.W. 2d at 613.

It is my opinion, that, if examined by the courts, N.D. Const. art XIV, § 2(5) would likely be found to be constitutional under the First Amendment of the federal Constitution. Next steps might include development of rules by the Ethics Commission which may take into account an analysis similar to those set forth by the N.D. Supreme Court in *State v. Stockert*[26] and the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*[27]

My office will continue to be available to assist the Commission as it adopts rules in order to avoid, in so far as is possible, any "as applied" constitutional issues.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[28]

[26] *State v. Stockert*, 684 N.W.2d 605 (N.D. 2004).
[27] *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009).
[28] *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).