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September 25, 2018

Transparency on the Ballot: North Dakota's Initiative for the Disclosure of Money in Politics

Measure One on North Dakota's ballot in 2018 would increase the transparency of spending in state elections, reduce the undue influence of lobbyists, limit the misuse of campaign funds, and establish a state ethics commission. Regarding transparency, Section 1 of Measure One would add a new article to the state constitution to ensure the disclosure of money spent to influence state elections and government decision-making.

The first paragraph of Section 1 would make explicit that North Dakotans have a constitutional right to know who is spending money to influence state elections and government action. To ensure that this constitutional guarantee is meaningfully implemented, the second paragraph of Section 1 would direct the North Dakota legislature to enact specific disclosure laws within three years. The initiative would task the state assembly with writing laws requiring the "prompt, electronically accessible, plainly 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 any statewide election, election for the state legislative assembly, statewide ballot-issue election, or to lobby or otherwise influence state government action." The initiative would also require the state legislature to designate an executive branch officer or agency to implement, interpret, and enforce voters' right to know. And if the state government were to fail to comply with its constitutional obligations, the initiative would give North Dakotans the ability to sue to enforce their rights.

As described below, the rights that would be codified by Section 1 of Measure One are consistent in every respect with the First Amendment to the U.S. Constitution. Indeed, Section 1 would further the same interests that the U.S. Supreme Court has embraced for decades as the core First Amendment benefits of disclosure of spending on candidate campaigns, ballot measures, and lobbying.

I. Consistent with the First Amendment to the U.S. Constitution, Section 1 of Measure One gives voters the right to public disclosure of spending intended to influence state elections and government action.

Section 1 recognizes that voters have the right to certain information about the political messages they receive—including information about who pays for them. Knowing who is funding a campaign or influencing government decision-making helps voters determine who supports which positions and why. This allows voters to weigh the political messages they hear and read and make informed choices at the ballot box. As the Supreme Court has repeatedly recognized, in decades of decisions upholding campaign finance disclosure provisions:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[1]

Section 1 would permanently protect the voters' constitutional right to this information and direct the state legislature to enact laws requiring the disclosure of funds spent to influence state elections and government action. In so doing, the initiative is a part of a long-running constitutional tradition. Disclosure of the sources of funding for election-related speech has been a feature of American campaign finance law for more than a century, and the

[1] *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam) (internal quotation marks and footnote omitted). In *Buckley*, the Supreme Court articulated the constitutional standard for disclosure laws and upheld federal disclosure requirements, explaining that disclosure served three important purposes: "providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (listing the "important state interests" identified in *Buckley*), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The first of these, the public's informational interest, is "alone sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369.

Supreme Court has consistently rejected challenges to such laws, repeatedly emphasizing their constitutional validity.[2]

Specifically, by making information about political spending available to voters, disclosure helps prevent special interests from secretly funding advertising for or against political campaigns and government action. The history of campaign finance is replete with examples of groups that participate in elections "while hiding behind dubious and misleading names" to disguise their funding sources."[3] Indeed, some of these groups have acknowledged that it can be "much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'"[4] But this sort of masked messaging impairs democratic debate and decision-making. As the Supreme Court has said, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[5]

In fact, the Supreme Court has recognized that disclosure does not meaningfully inhibit First Amendment interests; rather, disclosure *advances* those interests.[6] One of the primary purposes of the First Amendment is to preserve "uninhibited, robust, and wide-open" public debate.[7] Disclosure equips voters with information about who is supporting the messages, candidates, and ballot measures in an election, enabling people to participate in the kind of public debate that is necessary for effective self-governance. This is why, time and again, the Supreme Court has upheld financial disclosure regimes as constitutional,[8] noting that disclosure requirements

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[2] *See* Federal Corrupt Practices Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 823-24 (1910); *Buckley*, 424 U.S. at 64-68 (upholding Federal Election Campaign Act disclosure requirements); *McConnell*, 540 U.S. at 194-99 (upholding McCain-Feingold Act's federal disclosure requirements); *Citizens United*, 558 U.S. at 366-71 (same); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (expressing approval of disclosure in the ballot initiative context); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 & n.32 (1978) (striking down corporate expenditure ban in part because disclosure sufficed to enable "the people . . . to evaluate the arguments to which they are being subjected").

[3] *McConnell*, 540 U.S. at 197.

[4] *Id.* at 128 n.23 (citation omitted).

[5] *Citizens United*, 558 U.S. at 339.

[6] *See id.*

[7] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[8] *See Citizens United*, 558 U.S. at 366-71; *McConnell*, 540 U.S. at 194-99; *id.* at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part). Because disclosure does not prevent speech, the Court has consistently applied a less demanding standard of scrutiny to disclosure laws than it has to other forms of campaign finance regulation.

"'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'"[9]

By ensuring voters have the information needed to hold elected officials accountable, disclosure also ensures that officeholders remain responsive to the public. As the Supreme Court has observed, "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[10] The Court has also recognized that ensuring the accountability of public officials and enabling self-governance are core First Amendment interests, which are furthered by robust disclosure regimes.[11]

Critically, disclosure is important not only in the candidate election context, but also in the context of ballot measures. "Identification of the source of advertising" for ballot measures enables the public "to evaluate the arguments to which they are being subjected."[12] Indeed, the Court has long recognized the validity of this justification for political disclosure laws not just for candidate elections but also for other kinds of issue-related disclosure.[13]

Corporations, lobbyists, and other special interests who want to conceal their political involvement have long exploited legal ambiguities to do so. Section 1 of Measure One would remove such ambiguity, giving North Dakotans the

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Citizens United, 558 U.S. at 366. While restrictions on election-related expenditures are subject to "strict scrutiny," disclosure laws are constitutional so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 340, 366-67.

[9] *Id.* at 366 (citation omitted).

[10] *Id.* at 370; *see also Buckley*, 424 U.S. at 67 ("A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.").

[11] *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); *see also Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 533 (9th Cir. 2015) (en banc) ("[T]he initiative system is, at its core, a mechanism to ensure that the people, rather than corporations or special interests, maintain control of their government.").

[12] *Bellotti*, 435 U.S. at 792 n.32; *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . . [and] will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" (second alteration in original)); *Citizens Against Rent Control*, 454 U.S. at 299 ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified . . . .").

[13] *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding federal lobbying disclosure statute).

explicit and affirmative right to know who is influencing their elections and how far that influence carries into government decisions.

II. Section 1 would preserve the North Dakota legislature's prerogative to craft specific laws defining disclosure requirements.

Section 1 would direct the North Dakota legislature to enact specific laws detailing public disclosure requirements. Even so, the initiative would not prescribe exactly what these disclosure laws must say. Instead, it would preserve the legislature's authority to decide what information must be disclosed to vindicate the voters' right to know.

This flexibility within Measure One is consistent with the vast majority of federal and state constitutional provisions, which describe constitutional guarantees in general terms and defer to legislators on the details. Written this way, the provision affords the state legislature the freedom to write laws tailored to North Dakota's political practices and needs. Lawmakers would be well-suited to hold hearings, gather evidence, solicit public input, and decide what kind of disclosure regime works best for North Dakota. This would include deciding what information must be disclosed, how often it should be disclosed, and how it should be disclosed. Section 1 would give the state assembly three years to work out these details, enact the necessary laws, and then delegate the task of implementing, interpreting, and enforcing these laws to officials or agencies in North Dakota's executive branch of government. Additionally, to prevent special interests from creating new loopholes or exploiting new forms of spending, Section 1 would require legislators to keep the laws on the books up-to-date as technology and political practices change over time.

Because the implementation of Section 1 would be in the hands of the North Dakota legislature, lawmakers would be able to design laws that require the proper level of disclosure without intruding into other activity. For example, the legislature would be able to craft protections in law to ensure that certain activity for which mandatory disclosure might be unwarranted—such as news media reports, messages from religious organizations to their members, and unpaid advocacy by individual citizens—would not be subject to disclosure requirements. Such protections have been written into federal law and the laws of many states,[14] and Section 1 would preserve the North Dakota legislature's prerogative to follow suit.

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[14] *See, e.g.*, 52 U.S.C. § 30101(9)(B)(i) (federal statutory exemption for news stories, commentaries, and editorials); Cal. Political Reform Act § 86300(b), (c) (state exemptions for media entities and "church or religious societ[ies]"); 11 C.F.R. § 100.74 (federal regulatory exemption for unpaid volunteer activities).

III. Section 1 of Measure One would allow voters to vindicate their rights in court, much as federal campaign finance law does.

If the government of North Dakota were to fail to comply with its obligation to make spending information available to voters, Section 1 would give North Dakotans the ability to sue to enforce their right to know. As the text of the measure explicitly states, these citizen suits would be unnecessary so long as sufficient disclosure laws were enacted and enforced. Otherwise, pursuant to Section 1, North Dakota voters would be able to seek a declaration from a state court that the nondisclosure (or insufficient disclosure) violates their rights, and the court could order the state to remedy the violation.

In many ways, the proposed citizen-suit provision resembles longstanding federal law. Under that law, a voter can sue in federal district court for an order requiring the Federal Election Commission—the federal agency tasked with implementing and enforcing federal campaign finance law—to do its job. For instance, someone can sue because the agency's regulations are inconsistent with laws passed by Congress,[15] or because the agency is not adequately enforcing the law.[16] If the plaintiff prevails, the court can order the agency to comply with the law and direct the agency to do so within thirty days.[17]

The proposed amendment to the North Dakota Constitution is an improved version of these federal law provisions. Measure One would give North Dakotans an affirmative constitutional right to know who is influencing state government and how. This would mean that a North Dakota voter would be able to bring a lawsuit if legislators failed to set up an adequate disclosure system. In other words, voters would not be constrained to suing only when statutes or rules are violated: they would have standing to sue if lawmakers failed to write effective disclosure laws as well.

The specific scope of the citizen-suit provision would be determined and refined by North Dakota courts over time. Whether voters would be required to seek administrative relief before filing suit, whom voters could bring suits

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[15] *See* 5 U.S.C. § 706.

[16] *See* 52 U.S.C. § 30109(a)(8). In *Holland v. Williams*, No. 16-cv-00138-RM-MLC, 2018 WL 2938320, at *11 (D. Colo. June 12, 2018), a district court invalidated a Colorado statute, seemingly unique among states, that "outsourc[ed]" enforcement of campaign finance law entirely to private citizen suits. There is no reason to believe the North Dakota legislature would establish such a system here, and in any event the *Holland* decision is not binding on any state or federal court in North Dakota.

[17] 52 U.S.C. § 30109(a)(8).

against, and what kinds of relief would be available would be questions for the courts to address as individual cases arise. This process of establishing the contours of the claims has been employed at the federal and state courts for centuries in the context of other constitutional guarantees.[18] Courts are experienced in deciding these questions and well-equipped to do so.

[18] *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (discussing federal court jurisdiction over constitutional claims); *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016) (construing requirements for campaign finance citizen-suit provision at 52 U.S.C. § 30110 note); *Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013) (per curiam) (construing requirements for campaign finance citizen-suit provision now codified at 52 U.S.C. § 30110); *see also, e.g.*, *Vogel v. Marathon Oil Co.*, 879 N.W.2d 471, 480 (N.D. 2016) (discussing citizen-suit provision in North Dakota's Environmental Law Enforcement Act of 1975, which allows "a person aggrieved by an alleged violation of an environmental statute" to bring suit).