

**Testimony of Erin Chlopak
on Behalf of North Dakotans for Public Integrity
Regarding Legislative Implementation of Article XIV¹**

November 13, 2019

Chairman Klemin, Vice Chair Hanson, and Members of the Judiciary Committee:

Good afternoon. Thank you for the opportunity to appear here today to testify about Article XIV of the North Dakota Constitution, which codifies North Dakota citizens' right to know who is spending money to fund North Dakota state elections.

My name is Erin Chlopak. I am Director of Campaign Finance Strategy of the Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law.

Before joining Campaign Legal Center, I served as Acting Associate General Counsel of the Federal Election Commission from 2017 to 2018, and prior to that in a number of other nonpartisan legal positions within the agency.

I am here today on behalf of North Dakotans for Public Integrity, a bipartisan group of North Dakota citizens committed to transparency and accountability in North Dakota elections and government. NDPI sponsored Measure 1, the ballot measure that North Dakota voters passed in November 2018, which resulted in new Article XIV to the North Dakota Constitution.

North Dakota's adoption of Article XIV marked an important step in addressing one of the most significant problems in campaign finance law today: undisclosed, secret political spending that leaves voters in the dark about who is trying to influence elections.

Just last month, the United States Department of Justice indicted four men on criminal campaign finance violations that included funneling hundreds of thousands of dollars in political donations through a shell corporation to conceal the true source of the funds. These individuals' donations even included foreign-sourced money that they used to support candidates for state office in Nevada. As described in the indictment, the defendants made these political donations to advance their own personal financial interests and the political interests of at least one foreign government official. The indictment illustrates one of the most common ways that secret money is injected into American political campaigns: funneling the money through one or more entities that disguise the true source of the funds.

¹ This testimony is based on the more comprehensive Statement of North Dakotans for Public Integrity Regarding Legislative Implementation of Article XIV, which was also submitted to the Judiciary Committee during the November 13, 2019 meeting, and which includes extensive citations and additional resources as attachments.

Article XIV of the North Dakota Constitution addresses that problem head-on by establishing a constitutional right to know “the ultimate and true source” of election-related spending in amounts greater than \$200.

In my testimony today, I’d like to address three issues:

First, I’ll discuss how transparency requirements like those in Article XIV are an important means to protect the rights guaranteed by the First Amendment to the United States Constitution.

Second, I’ll describe how gaps in federal and state transparency laws have made it easy for wealthy special interests to secretly pour millions of dollars into federal, state, and local elections—including in North Dakota—while citizens are left in the dark—*or affirmatively misled*—about the true sources of this money.

Third and finally, I’ll identify some key legislative features that are crucial to informing that the public about who is spending money to influence state elections, and I’ll address concerns that have been expressed about the potential impact of Article XIV’s transparency mandate on certain activities.

I. Transparency Requirements Are Constitutional

Providing citizens with information about sources of money spent to influence elections not only is permissible under our federal constitution; it is foundational to the American democratic system of self-government. Citizens cannot fully and effectively participate in the political process unless they have access to information about who supports which positions and why. Access to that information is also necessary to hold elected official accountable, and to ensure officeholders remain responsive to public.

In the 2010 decision *Citizens United v. FEC*, the United States Supreme Court explained that “[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.” This principle has been key to a number of U.S. Supreme Court decisions in which the Court concluded that laws requiring transparency about the sources of election-related spending promote First Amendment interests by protecting citizens’ rights to make informed choices in the political marketplace.

First, in the 1970s, the Supreme Court issued an opinion in a case called *Buckley v. Valeo*. The *Buckley* case was a sweeping challenge to the federal campaign finance laws passed in the wake of the Watergate scandal. The decision established the constitutional standards for analyzing several different types of campaign finance laws. Most importantly for our discussion today, the Court held that requiring disclosure of election-related spending is consistent with the First Amendment to the U.S. Constitution.

The Court explained that disclosure laws “impose no ceiling on campaign-related activities” and “do not prevent anyone from speaking.” And it recognized that requiring transparency about election spending promotes at least three important government interests: providing voters with information necessary to evaluate candidates and make informed decisions on election day; helping to deter corruption and the appearance of

corruption by shining a light on political contributions and spending; and providing information necessary to identify and enforce violations of other campaign finance laws, such as the ban on foreign spending on American federal and state elections.

In the decades since deciding *Buckley*, the U.S. Supreme Court has continued to embrace transparency requirements for election spending. In the late 1970s and early 1980s, the Court endorsed disclosure rules in ballot initiative elections, recognizing voters' need for information about who is behind ads advocating for or against a measure to properly evaluate "the arguments to which they are being subjected."

More recently, in two separate decisions issued in 2003 and 2010, the Supreme Court issued nearly unanimous decisions agreeing that Congress could require transparency for pre-election ads that mention candidates, even when those ads don't explicitly advocate for or against a particular candidate or party. In one case, the record included admissions that running an ad under a name like "*Coalition to Make Our Voices Heard*" is more effective than saying, for example, "paid for by the men and women of the AFL-CIO." The Supreme Court recognized that this sort of messaging under the guise of a misleading sponsor name impairs democratic debate and decision-making.

Notably, in upholding transparency requirements for election-related advocacy, the U.S. Supreme Court analogized to federal registration and reporting requirements for lobbyists, which the Court has, for over 60 years, recognized as permissible and appropriate under the First Amendment. In the lobbying context, the Supreme Court has explained that the "full realization of the American ideal of government by elected representatives depends to no small extent" on the ability to properly evaluate "the myriad pressures" to which legislators are regularly subjected. "Otherwise, the voice of the people may all too easily be drowned out by the voice of special interests."

II. Existing laws Are Failing to Prevent Dark Money Spending

So if transparency requirements are both constitutional and endorsed by the U.S. Supreme Court as promoting First Amendment interests, why is dark money a problem in our elections?

One reason is that laws at the federal and state level have failed to keep up with the creative ways that wealthy special interests find to direct secret money into our political process. For example, because nonprofit entities such as section 501(c)(4) organizations, are legally allowed to spend large amounts of money on political advocacy, but are *not* subject to federal or state PAC reporting rules, they are frequently used as vehicles to disguise the true sources of millions of dollars of election-related spending. Our written statement describes many examples; I'll highlight just a few:

In the 2018 federal mid-term elections, millions of dollars were spent to influence highly contested Senate races through a Democratic Party-aligned dark money group called Majority Forward. As a section 501(c)(4), Majority Forward is not required to disclose its donors. So we don't know the source of the more than \$8 million it spent on the 2018 Tennessee Senate race, the \$7 million it spent in Arizona, the \$4.2 million it spent on the Montana Senate race, or the \$9 million it spent on the Indiana and Florida Senate races.

Majority Forward also targeted the 2018 U.S. Senate Race in North Dakota. But it would have been hard for people to know that because it added another layer of secrecy to its spending—running ads under a Facebook page called “The Tax Scam.” Some of the ads praised then-Senator Heitkamp or attacked her opponent Kevin Cramer and ran shortly before the North Dakota primary. But Majority Forward hid its identity from the North Dakota voters whose electoral decisions it was trying to sway. In other words, North Dakotans not only were prevented from knowing where the money to pay for these ads *originally* came from; they were even left in the dark about the fact that Majority Forward was the entity that purchased the ads.

Secret spending is pervasive at the state and local level too. And the lack of transparency in state election spending can be especially problematic because contests for offices like attorney general, local utility boards, and judges are more likely to wield power directly over a particular matter that may concern a particular special interest. For examples of secret spending on state elections we don’t have to look very far.

North Dakota Measure 1, the ballot measure North Dakota voters approved in 2018 that led to the adoption of Article XIV, was influenced by an out-of-state trade association’s undisclosed spending in opposition to the measure.

In 2016, North Dakotans approved a ballot measure to legalize medical marijuana. Nearly 70 percent of the money spent in support of the measure—more than \$22,000 of the approximately \$32,000 spent in support of the measure—came from two out-of-state, section 501(c)(4) groups, the New York-based Drug Policy Action and Washington, D.C.-based Marijuana Policy Project. We still don’t know who provided those groups with the more than \$22,000 that they spent on the North Dakota ballot measure, or why they believed it was important to invest so much money to influence North Dakota’s marijuana policies.

In both of these ballot measure elections, North Dakota voters were deprived of fundamental and essential info about the true sources of substantial amounts of money, often from out-of-state special interests, spent to influence their votes on matters directly affecting their lives. As these and the other examples described in our full written statement illustrate, secret election spending is a problem that transcends partisan lines.

III. Key Features of Effective Transparency Rules

So what can be done? Passing Article XIV was an important first step. Fully implementing its transparency mandate must be next.

Effective legislation should include a number of important features, most crucial is avoiding loopholes that will reduce the transparency now guaranteed as a constitutional right.

For example, the Federal Election Commission limited the reporting requirements for non-PAC groups that pay for election ads, requiring disclosure only of donors whose contributions were earmarked “for the purpose of furthering” specific advertisements. The earmarking qualification allowed spenders to avoid disclosing any donors—regardless of the size of their contributions—absent evidence of their intent to pay for a specific ad. That

standard made it easy for sophisticated donors to finance a group's election spending in secret and contributed to the rise of secret spending on federal campaigns.

In August of last year, a federal district court invalidated the FEC's rule, concluding that it impermissibly narrowed the transparency that Congress had mandated.

Legislation in some states address this problem by requiring disclosure of inter-organizational transfers. For example, in Minnesota, a group not registered with the state campaign finance board that donates money for independent expenditures above \$200 must provide a donor disclosure statement to the recipient. In Rhode Island, disclosure requirements for election-related spending apply to "covered transfers," which include transfers or payments of more than \$1,000 between individuals and groups where the circumstances indicate that the money will be used for election spending. The City of Austin, Texas has a similar ordinance.

Requirements like these enhance transparency by making it harder to hide the ultimate and true source of political spending by funneling the money through one or more intermediary entities.

The Century Code, as amended by HB 1521, interprets Article XIV's "ultimate and true source" requirements as "the person that knowingly contributed over two hundred dollars solely to influence a statewide election or an election for the legislative assembly." Those narrowing qualifications are in tension with the broad original source transparency mandated by Article XIV. For example, if only funds that are contributed "solely" to influence elections are covered, would that mean a person could knowingly donate a million dollars to a group that spends money on elections and shield its donation from disclosure by earmarking \$100 of the million dollars for non-election expenses?

To be clear, we appreciate and understand concerns about individuals who do not want their donations to be used for election spending. But those donors' interests can be protected without depriving North Dakota voters of their right to know the true sources of money being spent to influence their election decisions. Other states have passed legislation that strikes this balance.

The Rhode Island law that I mentioned earlier allows a group and its donor to agree that the donor's funds will not be used for political spending; in such circumstances, the donor is not disclosed. Similarly in New Mexico, groups that make independent expenditures are not required to disclose donors who opt their funds out of political spending.

Ultimately, Article XIV leaves implementation of its transparency mandate in the hands of the Legislative Assembly. That includes allowing legislators the discretion to exempt activities that do not implicate the concerns underlying Article XIV—activities like news reporting, nonpartisan voluntary activities, bona fide commercial transactions, and religious activities. There is no reason that legislation cannot both protect those activities while ensuring North Dakotans are able to make fully informed decisions at the ballot box.

Thank you again for the opportunity to speak today.

I would be happy to answer any questions you may have.