

To: Chris Joseph, General Counsel

From: Reed Johnson

Date: February 19, 2025

Re: Testimony in Opposition for HB 1360

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Good morning, Chairman Schauer, Vice-Chairman Satrom, members of the House Government & Veteran Affairs committee. My name is Chris Joseph, and I am general counsel for the office of the Governor. Today I am testifying in opposition to HB 1360. Before I begin, I would like to take a moment to pay my respects and offer condolences to Representative Josh Christy and his family. The governor's office and I are keeping his family in our prayers as they grieve. I also want to make it crystal-clear the governor's office does not oppose the Ethics Commission, the executive director of the Ethics Commission, nor does the governor's office oppose the will of the people of North Dakota in passing the referendum that established Article XIV of the North Dakota Constitution. Our office has met with and will continue to meet with the Ethics Commission to align on policy language moving forward. As written, however, HB 1360 is overbroad and there are unintended consequences our office believes will occur if this bill passes. I will begin going section by section on HB 1360.

Section 1 of HB 1360 makes several language changes to the way the Ethics Commission receives complaints and issues recommendations. At first these language swaps appear to be direct substitutions, such as "respondent" for "accused individual" and "relevant information" for "complaint". It is good the Ethics Commission is striking language they find inflammatory with softer language. The changes did not stop here, however, and in our office's view go a step further by defining "enforcement action" and other steps of their investigation and enforcement process, such as "alleged violation", "ethical violation", and "final commission order." Our office does not

dispute the Ethics Commission's ability to adopt rules to help further their ability to *investigate* alleged violations relating to *transparency, corruption, elections, and lobbying*, but disagrees in their ability to *enforce* these rules via civil sanctions or criminal penalties. In fact, Section 2 of Article XIV squarely places the responsibility on the Legislative Assembly to provide "appropriate civil and criminal sanctions" for violations relating to gifting, lobbying, and campaign contributions. The only subsection where the Ethics Commission is granted the ability to enforce alongside the Legislative Assembly is in regard to quasi-judicial proceedings (Art. XIV, § 2, subsection 4). "Enforce" or "enforcement" is used 5 times in Article XIV, but not used in Section 3 which gives the Ethics Commission the authority to adopt rules and investigate alleged violations. So the ultimate question here is how do we interpret an ambiguous provision of law, do we take a textualist and pragmatic approach and trust that the framers of Article 14 wrote the exact words intended to be used or do we take a more expansive reading of the section and authorize powers not explicitly granted in the section.

The authority to proceed with an "enforcement action" requires more thought and diligence from various stakeholders and the governor cautions against granting this language. The Ethics Commission may contend this is a simple language change, as the plain text of the bill defines enforcement action as an "investigation and proceeding before the commission." Defining enforcement in this way is misleading, as it implies authority beyond investigating and proceeding, but also doling out appropriate punishments as well. There is not a similar entity with this broad authority to define, execute, and interpret its own rules. The three co-equal branches of government exist so one branch creates (legislative), one branch executes (executive) and one branch interprets (judiciary). By allowing the enforcement action language and new enforcement process, the ethics commission is defining, executing, and interpreting its own rules and deriving it all from a single

subsection of Article XIV. Our office is not saying the Ethics Commission as it is composed currently would ever attempt to use this procedural loophole to its own benefit, but the fact it exists at all should be very concerning for the legislature. Each constitutional entity has checks on the other. For the Ethics Commission to define themselves as a separate constitutional branch whose rules are not subject to the Legislative Assembly's admin rules committee is alarming at best. The Legislative Assembly must have a broader conversation regarding the scope of the Commission's ability to enforce, but the language contained today in HB 1360 may in fact make the cure worse than the perceived disease.

Section 2 states any portion of the new enforcement action procedure (including formal and informal investigations) is considered a closed meeting. This section includes technical corrections consistent with name changes.

Section 3 removes several procedural safeguards put in place by the Legislative Assembly to govern the informal resolution process set forth by the Ethics Commission, instead replacing these safeguards with "the commission may adopt rules of pleading, practice, and procedure the commission deems necessary for an enforcement action." Regarding my previous analysis, granting broad authority to the Ethics Commission to adopt rules of pleading, practice, and procedure is not inconsistent with their constitutional charge to "adopt rules and investigate." It is up to the legislature, however, to set forth the appropriate sanctions and criminal penalties as a result of these investigations. Because of a lack of checks and balances on the Ethics Commission, the Commission may choose to adopt rules and procedures to be as formal or informal as they see fit, so long as they meet the minimum procedural due process requirements in the US Constitution (notice and an opportunity to be heard). Outside of those minimum protections, if HB 1360 passes as written, the Legislative Assembly is delegating the *how* of a complaint without any meaningful

input into that process. Again, the governor's office is *not* suggesting the current individuals who make up the Ethics Commission would act nefariously and take advantage of this delegation, but if the language and legal schema of an entity allows an opportunity for abuse, it is something the Legislative Assembly and Executive Branch should take extremely seriously. Keep in mind any rules from the Ethics Commission are not subject to the normal admin rules committee oversight, so long as they comply with the minimum constitutional procedural safeguards addressed moments ago.

Section 4 changes the informal resolution process that exists in current day, replacing it again with a broad delegation to the Ethics Commission to adopt rules and procedures consistent with their own definitions. Section 4 also references Section 54-66-08 of the North Dakota Century Code. In 54-66-08(3), the Legislative Assembly in the 2021 session authorized a subpoena power to the Ethics Commission to allow them to procure the testimony of a witness or the production of a record. This is what the law currently allows, but our office does not know of similar investigative entities with the seriousness of the ethics commission that also have their own subpoena power. Of course, the Ethics Commission cannot do its job properly if they do not have this ability, but it is still an example of a system that is ripe for misuse and a broad delegation of this power without guardrails ought to be examined carefully by the Legislative Assembly.

Section 5 allows the respondent to appeal a final commission order to the district court of the county where the respondent resides, or the district court in Burleigh County, or the district court of the county in which a substantial part of the subject matter of the violation occurred. Each of these appeals must be made within 30 days. The governor's office does not have an issue with this language as written, but it is still problematic conceptually. Section 5, although a "check" on the Ethics Commission's ability to adopt rules and investigate, still does not address the flaws

inherent in a branch of government that allows for defining, executing, and interpreting its own rules. For example, if an Ethics Commission formal investigation finds an ethical violation occurred and issues a sanction or formal reprimand, the accused individual may appeal that to the relevant district court. The district court may interpret that ruling favorably or unfavorably to the Ethics Commission. If unfavorable to the Ethics Commission, they may appeal the ruling to the North Dakota Supreme Court. Once appealed, the Supreme Court may simply look back to the vague Constitutional language in Article XIV and determine the Ethics Commission was acting in its authorized capacity – which would be akin to legislating from the bench. The “check” is hardly a check at all. Again, our office recommends the Legislative Assembly addresses these systemic issues seriously and does not grant broad authorizations without thinking through all possible and probable scenarios.

Section 6 amends what is a confidential record under the proposed enforcement process. Unless the commission has issued a final commission order that has been affirmed by the courts, records throughout the enforcement and investigation process shall remain confidential. This also includes the identity of the individual who provided the “relevant information” to the commission (complainant). Further, the information deemed confidential may be disclosed by the complainant or respondent and the commission if the respondent agrees to the disclosure. According to the original testimony, this was done to allow the respondent an opportunity to defend the allegations publicly. The governor’s office does not oppose these language changes.

Lastly, section 7 repeals three sections of chapter 54-66. The governor’s office supports the removal of these sections.

Overall, HB 1360 points out the flaws with an entity that can define, execute, and interpret its own rules. Any broadening of this authority enables a system in which a bad actor could

persecute individuals under a broad reading of its own definitions. To be clear for a third time, the governor's office DOES NOT believe the current commissioners, nor the staff of the Ethics Commission believe this way or want to take advantage of the vagueness of Article XIV. As it stands, however, HB 1360 furthers a system that needs to be addressed with more thoughtfulness and particularity.

Thank you for your time and I stand for any questions.