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LETTER OPINION
2025-L-03

The Honorable Michael Howe
Secretary of State
600 E. Boulevard Avenue, Dept. 108
Bismarck, ND 58505-0500

Dear Secretary of State Howe:

Thank you for your letter raising several questions about how the powers granted to the Secretary of State through the Constitution of North Dakota and applicable state statutes, particularly those related to elections and campaign finance, interact with advisory opinions and administrative rules issued by the North Dakota Ethics Commission (Commission). You specifically ask whether the Commission's Advisory Opinion 25-01 (AO 25-01) complied with N.D.C.C. § 54-66-04.2(4) and, if the opinion reaches outside of the Commission's scope of authority, what effect that has on the immunity that may be available under N.D.C.C. § 54-66-04.2(4). You also ask what your obligation is to follow rules promulgated by the Commission when those rules venture to narrow, expand, or contradict current statutes.

It is my opinion that AO 25-01 exceeded the Commission's legislatively defined authority in N.D.C.C. § 54-66-04.2 to issue advisory opinions on specified facts or conduct. Instead of complying with the requirements of N.D.C.C. § 54-66-04.2, the Commission made unauthorized and expansive legal conclusions in AO 25-01 without legal authority to do so. The Constitution and laws of North Dakota do not vest the Commission with authority to issue legal opinions on general questions of law, as it attempted to do in AO 25-01, nor to provide legal advice. As a result of the Commission's attempt to exercise authority that the Constitution and laws of North Dakota have not granted it, AO 25-01 is void.

It is also my opinion that any irreconcilable conflict between a Commission rule and a duly enacted state statute regarding election administration must be resolved in favor of the state statute. Statutes are adopted by the people's representatives in the Legislative Assembly and signed by the Governor pursuant to their respective powers under Articles IV and V of the Constitution of North Dakota. The Commission's rules do not supersede laws made through this constitutionally mandated process of bicameralism and presentment. Furthermore, the checks and balances among the three branches of government in the Constitution of North Dakota prohibit the Commission from exercising the Legislative Assembly's lawmaking authority. A contrary conclusion would lead to the absurd result that a simple majority of an unelected, five-person commission could

subvert the robust lawmaking process set forth in Articles IV and V of the Constitution of North Dakota.

The ethics provisions that were added to the Constitution of North Dakota in 2018 and which are now codified as Article XIV gave the Legislative Assembly new mandates and specific authority, prohibited certain actions by public officials and lobbyists, and established the Commission, which was given some investigative and rulemaking authority as well as a mandate to maintain a hotline. It is clear that Article XIV did not supplant the people’s tripartite system of representative government that has been firmly rooted in North Dakota since statehood and which exists in every other state and our federal government. The people amended our state constitution in 2018; they did not repeal and replace it. The authority of the Commission, therefore, must be understood within the context of the constitutional checks and balances that exist to protect the rights and liberties of North Dakotans. By recognizing that statutes supersede conflicting rules, Article XIV can be seamlessly harmonized with the entirety of the of the Constitution to which it was amended.

BACKGROUND

On June 25, 2025, the Commission issued AO 25-01 in response to questions from a state senator.¹ The opinion included a statement that it was issued pursuant to N.D.C.C. § 54-66-04.2.² The questions addressed in AO 25-01 are:

1. Are caregiving expenses—defined as direct care, protection, and supervision of a child or other person with a disability or a medical condition for which a candidate has direct caregiving responsibility—incurred as a direct result of campaign activity or holding public office deemed a permissible campaign expenditure in the state of North Dakota?
2. Are security expenses—defined as non-structural security devices; structural security devices; professional security personnel and services; and cybersecurity software, devices, and services—incurred as a direct result of campaign activity or holding public office deemed a permissible campaign expenditure in the state of North Dakota?³

The Commission concluded in AO 25-01 that: (1) “in some instances” it is permissible to use campaign funds to pay for caregiving expenses if the candidate or public official can reasonably show the expenses resulted from campaign or officeholder activities and pays fair market value for them; and (2) “[d]ue to the general threat environment,” it is permissible to use campaign funds to pay for non-structural security devices, cybersecurity software, and security personnel when incurred as a

¹ Advisory Op. No. 25-01, N.D. Ethics Comm’n.

² *Id.*

³ *Id.*

result of campaign activity and holding public office as long as fair market value is paid for them.⁴ The Commission went on to propound in AO 25-01 that “[u]ntil and unless subsequent developments in the law occur, criminal and civil penalties may not be imposed upon an individual for an action taken in accordance with this advisory opinion when: (1) the individual acts in good faith; and (2) the material facts surrounding the action taken are substantially the same as the conduct presented in the opinion.”⁵

The conclusions in AO 25-01 conflict with your interpretation of the statute prohibiting the personal use of campaign contributions for a personal benefit to the candidate or another person, for a loan to another person, to knowingly pay for more than the fair market value for goods or services purchased for the campaign, or to pay a criminal fine or civil penalty.⁶ Your Constitutional office and criminal prosecutors have the legal responsibility to enforce this statute. Specifically, your office has the duty to provide instructions, conduct training, and “promot[e] uniform application of campaign finance and disclosure requirements and the uniform filing of statements, registrations, or reports according to [N.D.C.C. ch. 16.1-08.1].”⁷ Campaign finance contributions and expenditure statements are filed with your office,⁸ and it is your responsibility to audit any filed campaign finance statements that have a substantial irregularity.⁹ Additionally, the Legislative Assembly made violations of the law prohibiting the personal use of campaign funds class A misdemeanors, giving prosecutors the authority to enforce the statute.¹⁰ If AO 25-01 were a lawfully authorized and valid opinion, it would place you and your office in the position of having to choose between following the laws of North Dakota that you are charged with administering or opting instead to recognize the Ethics Commission’s attempted grant of immunity to individuals who violate those laws as you interpret them.

ANALYSIS

AO 25-01 Exceeded the Commission’s Authority to Issue Advisory Opinions.

As the Commission noted in AO 25-01, the authority of the Commission to issue an advisory opinion originates from statute and not from the Constitution of North Dakota. Article XIV of the Constitution of North Dakota, which established the Commission, does not mention advisory opinions. Nor does it authorize the Commission to grant legal immunity, as provided in N.D.C.C. § 54-66-04.2. When issuing advisory opinions, the Commission is bound by the limits set forth by the Legislative Assembly in N.D.C.C. § 54-66-04.2, which states:

⁴ *Id.* at 12-13.

⁵ *Id.* at 13.

⁶ *See* N.D.C.C. § 16.1-08.1-04.1.

⁷ N.D.C.C. § 16.1-08.1-06.2.

⁸ *See* N.D.C.C. § 16.1-08.1-06.

⁹ *See* N.D.C.C. § 16.1-08.1-05.

¹⁰ *See* N.D.C.C. § 16.1-08.1-07.

1. In response to a request from a public official,¹¹ candidate for elected office, or lobbyist, the ethics commission may provide a written advisory opinion regarding the application of the following to *specified hypothetical facts or prospective conduct*:
 - a. Article XIV of the Constitution of North Dakota; or
 - b. State statutes and ethics commission rules related to transparency, corruption, elections, and lobbying.
2. Within fourteen days after receiving a request for a written advisory opinion, the ethics commission shall notify the requester whether the commission will provide an opinion.
3. Within ninety days after notifying a requester a written advisory opinion will be provided, the ethics commission shall issue the opinion.
4. Criminal and civil penalties may not be imposed upon an individual for an action taken in accordance with an opinion issued under this section if:
 - a. The individual acts in good faith; and
 - b. The material facts surrounding the action taken are substantially the same as the conduct presented in the opinion.
5. Opinions and requests for opinions under this section are open records, except names of persons in the opinions and requests are exempt records.
6. The ethics commission shall publish all written advisory opinions issued under this section on a website that is accessible to the public.¹²

Under subsection 1, any question addressed by a Commission advisory opinion must be limited to “specified hypothetical facts or prospective conduct.”¹³ In AO 25-01, the Commission correctly cited to N.D.C.C. § 54-66-04.2 for the Commission’s authority to issue advisory opinions, but, when quoting the statute, the Commission inexplicably excluded the language requiring advisory opinions to be limited to “specified” hypothetical facts or prospective conduct. Instead, the Commission incorrectly stated that the opinion need only “relate to hypothetical facts or prospective conduct.”¹⁴ This omission is much more than a mere technicality. Rather, it is a critical error in applying long-standing rules of statutory interpretation set forth by the North Dakota Supreme Court, and it has the effect of misleading those it seeks to inform.

In defining statutory terms, words are given their plain, ordinary, and commonly understood meaning, and consideration should be given to the ordinary sense of statutory words, the context

¹¹ The Advisory Opinion was requested by State Senator Joshua Boschee, who, by definition, is a public official under N.D.C.C. § 54-66-01(8).

¹² N.D.C.C. § 54-66-04.2 (emphasis added).

¹³ N.D.C.C. § 54-66-04.2(1).

¹⁴ Advisory Op. No. 25-01, N.D. Ethics Comm’n, at 3.

in which they are used, and the purpose which prompted their enactment.¹⁵ Additionally, North Dakota courts “interpret statutes to give meaning and effect to every word, phrase, and sentence, and do not adopt a construction which would render part of the statute mere surplusage.”¹⁶ Our courts also assume the Legislative Assembly did not intend “absurd or ludicrous result[s] or unjust consequences” and will “construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.”¹⁷

The word “specified” in the statute modifies both “hypothetical facts” and “prospective conduct.” The plain, commonly understood meaning of the word “specified” is “to name or state explicitly or in detail.”¹⁸ The questions and opinions set forth in AO 25-01, however, are not related to any “explicit” or “detailed” facts or conduct. Instead, the underlying questions and resultant conclusions are open-ended and generally applicable to individuals engaged in an expansive array of activities.

The Commission uses the undefined, statutory terms “campaign activity” and “officeholder activity” in its description of when caregiving or security expenses may be covered by campaign funds.¹⁹ This does not give readers any meaningful understanding of the conduct to be protected by the advisory opinion. The opinion includes a few examples or “scenarios” created by the Commission for illustration, but even the scenarios are generalized and incorporate broad concepts. For example, in one scenario, the Commission concludes that simply needing a regularly scheduled caregiver after running for—or serving in—office when an individual did not need the caregiver before, is sufficient to show that the caregiving expenses “resulted from the campaign and holding public office,” and therefore using campaign funds for the caregiver “is permitted.”²⁰ The scenario addresses only the timing of—not the specific reason for—hiring the caregiver, leading readers to assume that the timing is sufficient for the grant of immunity normally provided by an advisory opinion, regardless of any other facts. Another example in AO 25-01 simply states that an individual who needs to participate in evening and weekend campaign events or public duties can use campaign funds for caregivers, without providing additional facts or

¹⁵ *City of West Fargo v. Maring*, 458 N.W.2d 318, 320 (N.D. 1990), citing *Peterson v. Heitkamp*, 442 N.W.2d 219, 221 (N.D.1989).

¹⁶ *State v. Enriquez*, 2024 ND 164, ¶ 17, 10 N.W.3d 777; cf. N.D.C.C. § 1-02-38 (“In enacting a statute, it is presumed that: 1. Compliance with the constitutions of the state and of the United States is intended. 2. The entire statute is intended to be effective. 3. A just and reasonable result is intended. 4. A result feasible of execution is intended. 5. Public interest is favored over any private interest.”).

¹⁷ *State v. Meador*, 2010 ND 139, ¶ 11, 785 N.W.2d 886, quoting *State v. Brown*, 2009 ND 150, ¶ 15, 771 N.W.2d 267, quoting *In re M.W.*, 2009 N.D. 55, ¶ 6, 764 N.W.2d 185.

¹⁸ “Specify.” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/specify> (last visited Dec. 12, 2025).

¹⁹ Much of AO 25-01 may be read as a tautology stating that caregiving and security expenses are allowed if they satisfy the statutory requirements to be allowable.

²⁰ Advisory Op. No. 25-01, N.D. Ethics Comm’n, at 10.

circumstances.²¹ Even if it were appropriate for the Commission, rather than the requester, to pose the factual scenarios for the advisory opinion, the Commission did not confine the advisory opinion to the general scenarios it created. Instead, the Commission made its conclusions and its asserted grant of immunity applicable to an even broader range of actions subject to expansive interpretation.

The need for specificity in the Commission’s advisory opinions is essential to “give meaning and effect” to the word “specified” in N.D.C.C. § 54-66-04.2 and to ensure the statute as a whole is given meaning and effect, is applied “in a practical manner,” and is read to avoid an “absurd or ludicrous result.” Subsection 4 of the statute provides criminal and civil immunity to “an individual for an action taken in accordance with an opinion issued under N.D.C.C. § 54-66-04.2 if the individual acts in good faith and *the material facts surrounding the action taken are substantially the same as the conduct presented in the opinion.*”²² When the question and advisory opinion lack specificity, the “material facts”²³ surrounding an individual’s actions cannot be meaningfully compared to any conduct in the opinion. The conduct is simply not defined well enough to determine whether the “material facts” are “substantially the same.”²⁴ This scenario undermines the foresight of the Legislative Assembly when it established a prerequisite for clarity in the Commission’s advisory opinions. Because ignoring the word “specified” leads to an absurd result, or at the very least, does not give effect to the full statutory text, it violates the well-established rules of statutory construction. As a result, an advisory opinion issued by the Commission that lacks specificity is outside of the authority delegated to the Commission by the Legislative Assembly.

It is my opinion that the Commission exceeded its statutory authority when it issued AO 25-01 because the questions and answers in that advisory opinion do not meet the clearly stated requirements of N.D.C.C. § 54-66-04.2. The Commission has no authority to issue an opinion based on general questions of law or to provide legal advice to the Secretary of State.²⁵ As a result, AO 25-01 has no legal effect.

²¹ *Id.*

²² N.D.C.C. § 54-66-04.2(4) (emphasis added).

²³ “Material” facts are facts that “hav[e] real importance or great consequences” or fact that are “of or relat[e] to the subject matter of reasoning.” “Material.” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/material> (last visited Dec. 12, 2025).

²⁴ *Cf., e.g., J.E.B. v. Danks*, 785 N.W.2d 741, 752 (Minn. 2010) (applying statutory immunity “narrowly”).

²⁵ The authority for these actions rests with the Office of the Attorney General. *See* N.D.C.C. § 54-12-01. *See also State v. Hagerty*, 1998 ND 122, ¶ 19, 580 N.W.2d 139 (“The Attorney General is a constitutional officer. He is the law officer of the state and the head of its legal department.”) (quoting *State v. Heiser*, 127 N.W. 72, 76 (N.D. 1910) (reported as *State v. Heidt* in 20 N.D. 357, 127 N.W. 72)).

Commission Rules Cannot Supersede State Statutes Enacted by the Legislative Assembly through Bicameralism and Presentment.

You also ask whether you must follow rules promulgated by the Commission that attempt to narrow, expand, or contradict state statutes. Essentially, this question is whether a simple majority of the five, unelected members of the Commission, through their rulemaking authority, can effectively amend or repeal the laws adopted by the Legislative Assembly and signed by the Governor. It is my opinion that they cannot as there is an insufficient legal basis for them to do so. Further, it is my opinion that, because the Commission, through its rulemaking authority, cannot effectively amend or repeal the laws adopted by the Legislative Assembly and signed by the Governor, a public official does not have to follow rules promulgated by the Commission that conflict with state statutes. To the extent that conclusion is in tension with prior Attorney General Opinion 2020-L-09, this opinion replaces and supersedes the analysis and conclusion set forth there.

The Commission’s rulemaking authority stems from Article XIV of the Constitution of North Dakota and from statutes. It is well-settled law that any rules promulgated pursuant to a statute cannot exceed the authority delegated by the Legislative Assembly in that statute,²⁶ and the Legislative Assembly cannot delegate its lawmaking authority.²⁷ As a result, rules authorized by statute cannot supersede statutes.²⁸ This opinion will therefore address only the Commission’s rulemaking authority under the Constitution—rulemaking authority that is explicit though also limited.

Article IV of the Constitution provides that “[n]o law may be enacted except by a bill passed by both houses . . .” and “[t]he legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution.”²⁹ Article V provides that “[e]very bill passed by the legislative assembly must be presented to the governor for the governor’s signature,” and “[i]f the governor signs the bill, it becomes law.”³⁰ Article V also empowers the governor to “veto a bill” or an item “in an appropriations bill.”³¹

²⁶ See *Little v. Traynor*, 1997 ND 128 ¶ 30, 565 N.W.2d 766; see also *Moore v. N.D. Workmen’s Comp. Bureau*, 374 N.W.2d 71, 74 (N.D. 1985) (“[A]n administrative regulation may not exceed statutory authority or supersede a statute, and . . . a regulation which goes beyond what the Legislature has authorized is void”, citing *Steele v. N. D. Workmen’s Comp. Bureau*, 273 N.W.2d 692, 701 (N.D.1978); *Med. Props. v. N.D. Bd of Pharmacy*, 80 N.W.2d 87, 89 (N.D.1956)).

²⁷ See *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 46, 916 N.W.2d 83.

²⁸ See *Reile v. State by & through Workforce Safety & Ins.*, 2025 ND 6, ¶ 21, 16 N.W.3d 212 (“[E]ven when the legislature delegates authority to promulgate rules on a specific topic, the regulation cannot substantively alter statutory law”).

²⁹ N.D. Const. art. IV, § 13.

³⁰ N.D. Const. art. V, § 9.

³¹ *Id.*

“The power to make a law is legislative,”³² and actions are effectively lawmaking when they “alter the legal rights, duties and relations of persons . . . outside the legislative branch.”³³ Or, as Justice Clarence Thomas stated, lawmaking is the “formulation of generally applicable rules of private conduct.”³⁴ Both the United States Supreme Court³⁵ and the North Dakota Supreme Court have held that, to be effective, a law must be adopted by both chambers of the legislature (“bicameralism”) and presented to the head of the executive branch to sign or veto (“presentment”).³⁶

The procedures governing the enactment of statutes set forth in the text of Article I [of the United States Constitution] were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may *only* “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”³⁷

Or, as Justice Alito has stated, “[o]ur Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints.”³⁸ Those checkpoints, including bicameralism and presentment, “make lawmaking difficult *by design*.”³⁹ The “inefficiency” inherent in the lawmaking process “‘serves a valuable’ liberty-preserving ‘function,’”⁴⁰ even if it comes at the expense of “righting every wrong.”⁴¹ Because the

³² *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 51, 916 N.W.2d 83 (internal citations omitted).

³³ *INS v. Chadha*, 462 US 919, 952 (1983).

³⁴ *DOT v. Ass’n of Am. R.R.s.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring) (describing centuries of English and American law that adhere to this principle).

³⁵ The North Dakota Supreme Court is “not bound by the separation of powers decisions of the U.S. Supreme Court when considering analogous issues presented under the state constitution. Rather, [it] consider[s] these decisions as persuasive authority on principles of separation of powers, mindful that such principles are fundamental to the American system of government.” *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 43, 916 N.W.2d 83.

³⁶ *E.g.*, *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton v. City of New York*, 524 U.S. 417 (1998); *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, 916 N.W.2d 83.

³⁷ *Clinton v. City of New York*, 524 U.S. 417, 439 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)) (emphasis added).

³⁸ *DOT v. Ass’n of Am. R.R.s.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

³⁹ *Id.* (emphasis in original), *citing* John Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 202 (2007) (*citing, inter alia*, *The Federalist* No. 62, p. 378 (J. Madison), and No. 63, at 443-444 (A. Hamilton)).

⁴⁰ *U.S. v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting).

⁴¹ *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting); *see also DOT v. Ass’n of Am. R.R.s.*, 575 U.S. 43, 55 (2015) (“[T]he structural principles secured by the separation of powers protect the individual as well” as protecting the three branches of government from encroachment

consequences of bypassing the “single, finely wrought and exhaustively considered, procedure” for lawmaking can be dire, the Framers of the Constitution zealously protected the power to make law from the executive branch, which issues rules without bicameralism and presentment.⁴²

The North Dakota Supreme Court also has emphasized the importance of the “constitutionally mandated procedures” for lawmaking “including a recorded vote of a majority of the members elected to each house followed by presentment to the governor for signature.”⁴³ Failing to follow these processes when making laws “would violate the separation of powers” under the Constitution of North Dakota.⁴⁴

Contrast the constitutionally required process for lawmaking with the Commission’s rulemaking process. Before finalizing its rules, the Commission simply provides notice of its proposed rules and reviews any comments on those proposed rules that are submitted to the Commission. Then, as long as a simple majority (three members) vote in favor of a proposed rule, it is adopted. This process is neither “finely wrought” nor “exhaustively considered.” It lacks the necessary “accountability checkpoints” for lawmaking.

If the Commission’s rules were allowed to supersede statutes adopted by the legislature and signed by the Governor, then three, unelected individuals who are not accountable to the public *could, in effect, make laws* while bypassing the intentionally difficult, “liberty-preserving” process of lawmaking.⁴⁵ This result would be diametrically opposed to the protections for individuals that form the basis for the separation of powers.

This analysis does not, and is not intended to, ignore the constitutional authority of the Commission to make certain rules. Article XIV specifically grants circumscribed rulemaking authority to the Commission. However, that authority, like all government authority, is limited for the protection of individual liberties and exists as part of a balance of powers that has been enshrined in America’s and North Dakota’s laws from their beginning.

of each other.) (internal citations omitted) (Thomas, J., concurring) (“At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.” *Id.* At 76).

⁴² *INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁴³ *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 59, 916 N.W.2d 83, *citing* N.D. Const. art. IV, § 13; N.D. Const. art. V, § 9.

⁴⁴ *Id.*

⁴⁵ Under this scenario, the judicial branch would still have the authority to determine that a rule violates the Constitution if a proper action is litigated. However, the pre-enactment protections and accountability checkpoints would not exist.

Had the people of North Dakota wished it, the constitutional amendment creating the Commission could have included language giving Commission rules equal standing to legislatively enacted laws, but that amendment did not. For example, the Oklahoma Ethics Commission's rules, unlike the Commission's rules in North Dakota, are subject to the checks and balances of bicameralism and presentment. Each rule promulgated by the Oklahoma Ethics Commission must be "presented to each House of the Legislature and to the Governor on the second day of each legislative session," and, only "[i]f these rules are not disapproved by joint resolution, subject to veto by the Governor," will they become effective.⁴⁶ Repeals and modifications of ethics rules in Oklahoma are subject to the same procedure.⁴⁷ Moreover, the Oklahoma legislature may repeal and modify ethics commission rules, although they may not completely supplant the ethics commission's role in regulating state government ethics.⁴⁸ The Oklahoma Supreme Court has therefore held that the constitutionally authorized rules of the Oklahoma Ethics Commission have "no less weight" than statutes adopted by the Oklahoma legislature.⁴⁹ Oklahoma's constitutional provision governing ethics rules was adopted in 1990. Similar processes could have been—but were not—built into North Dakota's 2018 constitutional amendment that established the Commission. Authority for the Commission to make laws cannot be read into the Constitution of North Dakota retroactively when the necessary constitutional language was omitted from the ballot measure considered by the public.

This office also is aware of nonbinding advisory opinions that were issued by the Rhode Island Supreme Court to the Rhode Island Governor regarding the authority of that state's ethics commission. In the 1999 advisory opinion, the Rhode Island ethics commission's prohibition against legislators serving on public boards was invalidated.⁵⁰ However, based on a 1992 advisory opinion, the judges also stated that, while the Rhode Island legislature has concurrent jurisdiction to make substantive laws regarding ethical conduct, it could not make laws that contradict the ethics commission's code of conduct.⁵¹ Since 1992, Rhode Island courts have recognized more limitations on the ethics commission's powers.⁵² Moreover, the 1992 and 1999 advisory opinions

⁴⁶ Okla. Const. art. XXIX, § 3.

⁴⁷ *Id.*

⁴⁸ *Id.*; see also *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶¶ 17-22, 850 P.2d 1069.

⁴⁹ *Ethics Comm'n v. Keating*, 1998 OK 36, ¶ 32, 958 P.2d 1250.

⁵⁰ *In re Advisory Op. to the Governor*, 732 A.2d 55, 68-69, 70-71 (R.I. 1999).

⁵¹ *Id.* (citing *In re Advisory Op. to the Governor*, 612 A.2d 1 (R.I. 1992)). Notably, the court declined to answer two of the Governor's questions concerning the separation of powers, and by doing so, the court refrained from endorsing its 1992 analysis of that issue. In 2009, the Rhode Island Supreme Court declined to follow the 1992 advisory opinion in *Irons v. R.I. Ethics Comm'n*, 973 A.2d 1124 (R.I. 2009)).

⁵² See, e.g., *Irons v. R.I. Ethics Comm'n*, 973 A.2d 1124, 1132 (R.I. 2009); *In re Advisory Op. to the Governor*, 732 A.2d 55, 68-71, (R.I. 1999) (E.g., "[W]e disagree with the commission's assertion that article 3, section 8, allows it to reach any conflict of interest." "Nor may the commission interpret the constitution and enforce its interpretation via regulation." "The commission, for example, may

are outliers to the long line of federal and state cases requiring bicameralism and presentment for lawmaking.⁵³

Critically, the Rhode Island court's conclusion is also based on a very different constitutional grant of authority to an ethics commission from the one in the Constitution of North Dakota. For example, instead of providing general rulemaking authority, the Rhode Island Constitution requires the ethics commission to adopt a code of conduct—by a two-thirds vote of its members—that applies only to public officeholders and public employees.⁵⁴ The Rhode Island Constitution also explicitly grants the ethics commission the power to “impose penalties” and remove officials from office.⁵⁵ The Constitution of North Dakota does not grant these vast powers to the Commission. Due to the context of the Rhode Island Supreme Court's statements about that state's code of conduct and the many substantive distinctions between the Constitutions of Rhode Island and North Dakota, I do not find the Rhode Island advisory opinions to be persuasive authority for determining whether the Commission can supersede North Dakota's laws.

not create regulations that seriously impinge upon the executive or the legislative branch's ability to perform their duties or ‘assume powers that are central or essential to the operation of the Governor's office or of the General Assembly.’” (internal citations omitted)); *Gaschen v. R.I. Ethics Comm'n*, No. 00-4673, 2001 WL 506821, *2 (Super. Ct. R.I. Apr. 16, 2001) (enjoining the ethics commission from releasing unredacted documents contrary to a state statute because “the Rhode Island Ethics Commission, like all other agencies of the state is subject to enacted statutory law which is presumed to be valid.” *citing Doe v. R.I. Ethics Comm'n*, 707 A.2d 625 (R.I.1998)); *Lewis v. R.I. Ethics Comm'n*, No. 97-1209, 2000 WL 276815 (Super. Ct. R.I. Mar. 7, 2000) (Ethics Commission failed to comply with a statutory deadline for its investigation and therefore had to dismiss a pending action.).

⁵³ *Cf.*, Samuel D. Zurier, Esq., *Pruning the Tree: The Supreme Court Clips the Power of the Rhode Island Ethics Commission*, R.I. Bar J., Feb. 2000, at 5, 7 (“The Rhode Island Supreme Court's ruling was also significant nationally because it conferred upon Rhode Island's Ethics Commission a *power shared by none other in the country*--namely, the power to write its own code of ethical prohibitions without any check whatsoever by the elected branches of government. In all of the other States, those political branches possess, at a minimum, the power to veto ethical prohibitions enacted by the unelected Commission.”) (emphasis added).

⁵⁴ R.I. Const. art. III, § 8.

⁵⁵ “All elected and appointed officials and employees of state and local government, of boards, commissions and agencies shall be subject to the code of ethics.” R.I. Const. art. III, § 8. In a later opinion, the Rhode Island Supreme Court also noted that the ethics committee was created in the wake of “widespread breaches of trust, cronyism, impropriety, and other violations of ethics standards [which] decimated the public's trust in government” in that state. *Iron v. Rhode Island Ethics Comm'n*, 973 A.2d 1124, 1132 (R.I. 2009), *citing In re Advisory Op. to Governor (Ethics Comm'n)*, 612 A.2d 1, 2 (R.I. 1992).

Also, N.D.A.G. 2020-L-09, a previous opinion from this office that concluded that two definitions adopted by the Commission in rule expanded and superseded narrower statutory definitions, is hereby overruled. The previous opinion failed to address the constitutional issue of bicameralism and presentment and the legal requirement to harmonize constitutional provisions to ensure each is given full effect. This office has reexamined the questions addressed in the prior opinion more fully with these legal principles in mind, as set forth herein. The resultant analysis is clear that the Constitution of North Dakota does not permit the Commission to step into the shoes of the Legislative Assembly to make law.⁵⁶

Article XIV Does Not Empower the Commission to Ignore Constitutional Checks and Balances, including Bicameralism and Presentment, and Did Not Create a Fourth Branch of Government.

In some of its public statements, the Commission has asserted that Article XIV of the Constitution of North Dakota created the Commission as a fourth branch of government that exists outside or above the other three branches of government.⁵⁷ These statements imply the Commission is not subject to the separation of powers and to the requirement for bicameralism and presentment when making laws. However, the Commission does not exist outside the three branches of North Dakota's government. Nor does it have the authority to discard our tripartite framework for state government by issuing rules that narrow, expand, or contradict statutes. Even the Rhode Island Supreme Court—dealing with a much more expansive grant of authority to a state ethics commission—cautioned that the “[Rhode Island] Constitution in no manner empowers or authorizes the ethics commission to restructure and reorganize the constitutional framework of our state government.”⁵⁸ “The ethics commission simply lacks constitutional authority to modify the structure of Rhode Island’s government. . . . We are of the opinion that the people of this state in adopting the 1986 Constitution had no intention of creating a body so limitless in its power as to constitute a paramount fourth branch of government.”⁵⁹ The Florida Supreme Court reached the same conclusion when that state’s ethics commission wrongly asserted that “it possesse[d]

⁵⁶ Additionally, a law may ultimately be deemed unconstitutional only by a vote of four of the five justices on the North Dakota Supreme Court. If the Commission’s rules could supersede laws, three members of the Commission (a simple majority) could effectively strike down a law by adopting a contrary rule. This would give three unelected members of the Commission more authority than three duly appointed or elected Supreme Court justices.

⁵⁷ See, e.g., N.D. Ethics Comm’n website “Frequently Asked Questions,” <https://www.ethicscommission.nd.gov/frequently-asked-questions> (last accessed Dec. 12, 2025). In response to a question about which of the three branches of government the Commission is part of, the Commission answers: “None! The Ethics Commission is an independent constitutional entity and is not part of any of the three branches of our state government.”

⁵⁸ *In re Advisory Op. to the Governor*, 732 A.2d 55, 68 (R.I. 1999).

⁵⁹ *Id.* at 62, 68.

constitutional status separate and independent from the other branches of Florida government.”⁶⁰ Moreover, the Commission’s asserted powers invite exacting scrutiny because, “when an agency construes its own enabling act, it is subject to increased scrutiny inasmuch as ‘government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.’”⁶¹

In analyzing the authority of the Commission, this office adheres to the time-honored rules of constitutional construction put forth by the North Dakota Supreme Court:

When interpreting constitutional provisions, we apply general principles of statutory construction. We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. We presume the people do not intend absurd or ludicrous results in adopting constitutional provisions, and we therefore construe such provisions to avoid those results.⁶²

Article XI of the Constitution of North Dakota states that the “legislative, executive, and judicial branches” of government are “coequal.”⁶³ There is no language in Article XIV that alters this fundamental balance of power among the three branches of state government; that amends the process for lawmaking in the Constitution; that subtracts from the constitutional powers allocated to other state entities; or that establishes a fourth branch of government. Nor is this Office aware of any contemporaneous evidence indicating that the people of North Dakota intended such results when they ratified Article XIV.

Absent an explicit declaration of intent or clear constitutional language to the contrary, we should not jettison our longstanding, tripartite system of government and the finely tuned process of lawmaking with its attendant checks and balances. Such a monumental change to the foundations of state government would require more than a tacit inference.

Article XIV does include a statement that “[i]n any case of a conflict between any provision of this article and any other provision contained in this constitution, the provisions of this article shall

⁶⁰ *Comm’n on Ethics v. Sullivan*, 489 So.2d 10, 12 (Fla. 1986) (finding the commission to be part of the legislative branch—although it has no rulemaking authority except when the legislature delegates that authority to the commission through statute—because the Florida legislative branch includes similar investigative entities such as the Public Service Commission, Auditor General, Office of the Public Counsel, and similar entities).

⁶¹ *In re Advisory Op. to the Governor*, 732 A.2d 55, 60 (R.I. 1999), citing *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981).

⁶² *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (internal citations omitted).

⁶³ N.D. Const. art. XI, § 26.

control.”⁶⁴ However, under that provision’s plain language, there must be an actual conflict between Article XIV and another part of the Constitution before it would have any effect. And under the standard rules of constitutional construction all attempts to reconcile even seemingly inconsistent provisions must be made, as conflicts are disfavored. So it is reasonable to assume that this provision will be used sparingly.⁶⁵

Further, it is imperative to keep in mind that the provision in Article XIV regarding conflicts is limited on its face to conflicts that are deemed to exist between the language of Article XIV and other parts of the Constitution. It does not apply to conflicts between the Commission’s rules and the Constitution or to conflicts between the Commission’s rules and a statute. References to Article XIV in the Constitution are not synonymous with references to the Commission’s rules.

Fortunately, Article XIV’s grant of rulemaking authority to the Commission can be readily harmonized with the many other parts of the Constitution that address the lawmaking authority of the legislative branch and the need for bicameralism and presentment in the lawmaking process. Mindful that our system of government does not permit rules to supplant statutes, we must uphold the constitutional process of bicameralism and presentment for lawmaking while still giving effect to the Commission’s rulemaking provisions in Article XIV. The harmonization in this opinion is consistent with the many provisions in Article XIV that mandate or authorize the Legislative Assembly to make laws on specified topics and to otherwise “facilitate, safeguard, and expand” Article XIV.⁶⁶ To the extent the Legislative Assembly may someday encroach against the prohibition on enacting laws that “hamper, restrict, or impair” Article XIV,⁶⁷ the judicial branch is authorized to make that determination and hold the law invalid in accordance with the Constitution.

To interpret the rulemaking language in Article XIV otherwise would make three of the five unelected members of the Commission the ultimate law-making body for the state. They would effectively be able to make and amend laws without the open, public debates to which legislation is subjected, without the votes of the people’s elected representatives, and without the opportunity for the Governor to sign or veto their pronouncements. Such would be a power greater than any other government entity, including the judicial branch, which is unable to amend statutes and ultimately can declare statutes invalid only if four of the five Supreme Court justices hold that they violate the constitution. Accordingly, it is my opinion that if you are presented with a rule

⁶⁴ N.D. Const. art. XIV, § 4, cl. 3.

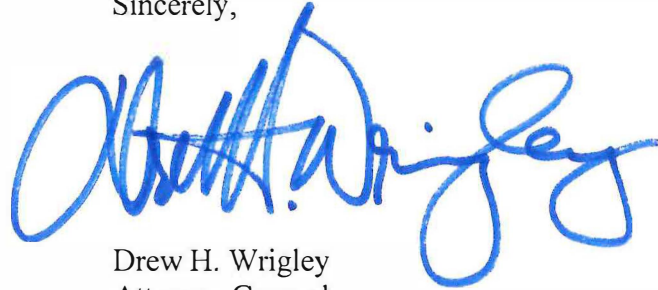
⁶⁵ For example, it is unclear whether the North Dakota Supreme Court would interpret this provision to abrogate individual rights and liberties in the Constitution if those rights and liberties were found to be inconsistent with Article XIV. But while the scope of the provision presumably has limits, we do not need to explore its outer edges for purposes of this opinion.

⁶⁶ N.D. Const. art. XIV, § 4, cl. 1.

⁶⁷ *Id.*

promulgated by the Commission that conflicts with a state statute and cannot be reconciled with that statute, you are obligated to follow the properly enacted state statute.

Sincerely,



Drew H. Wrigley
Attorney General

CJN/mjh

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.⁶⁸

⁶⁸ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).