

# 2020 North Dakota Law Review Symposium

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Evolution of the Initiated Measure Process by Constitutional Amendment

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# 1889 ND Constitution

- Adopted the federal model of “republican” government—legislative power exercised through elected representatives of legislative assembly.
- Followed federal constitution and eschewed direct democracy as the “mischiefs of faction.” *The Federalist No. 10* (James Madison).
- 1914 amendment to state constitution “reserve[d]” to North Dakota citizens power to engage in direct democracy through the initiative and referendum process. ND Const. art. I, § 1.



# Initiative History well documented

- In US, initiative and referendum gained acceptance through Populist Party.
- Initial focus of Populists was primarily agrarian, rural, and directed against emerging corporate power within legislative bodies.
- Source: David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money*, 26-27 (2000); Richard J. Ellis, *Democratic Delusions: The Initiative Process in America*, 30. (2002).



# Background of Initiated Measures and Constitutional Amendments

All states have constitutions; not all states permit constitutional amendment by Initiated Measure



# Some Useful Background terms

- **“Initiative” or “Initiated Measure”** is a process by which citizens propose statutory law or constitutional amendment by petitioning to have proposal placed on ballot for popular vote. *N.D. Const. art. III, § 1.*
- **Referendum** is a process by which citizens veto a **recent** statutory law passed by the legislature and signed by the governor. *ND Const. art. III § 5 (90 days).*
- **Direct v. Indirect Initiative:** Direct Initiatives go directly on ballot for popular vote; Indirect Initiatives require consideration by state legislature, generally going on ballot if legislature approves or modifies proposal.

<https://www.ncsl.org/research/elections-and-campaigns/task-force-report.aspx#AppA>

# Petition circulators

- Circulating petitions involves “core political speech” protected by the first amendment of US Const. *Meyer v. Grant*, 486 U.S. 414, 421-22.
- ND state political subdivisions may place reasonable restrictions on signature gathering on public property.  
*Bolinske v. ND State Fair Ass’n*, 522 N.W. 2d 426,437 (N.D. 1994) (State Fair may restrict soliciting signatures to booths rented to users).



# The Initiative States: 24. 21 Statutory; 18 constitutional (Maryland & New Mexico referendum only)

<https://www.ncsl.org/research/elections-and-campaigns/task-force-report.aspx#AppA>

	Statutory Initiative	Constitutional Initiative
Alaska	D*	None
Arizona	D	D
Arkansas	D	D
California	D	D
Colorado	D	D
Florida	None	D
Idaho	D	None
Illinois	None	D
Maine	I	None
Massachusetts	I	I
Michigan	I	D
Mississippi	None	I
Missouri	D	D
Montana	D	D
Nebraska	D	D
Nevada	I	D
North Dakota	D	D
Ohio	I	D
Oklahoma	D	D
Oregon	D	D
South Dakota	D	D
Utah	D&I	None
Washington	D&I	None
Wyoming	D*	None

# States with Indirect Initiative Process

	Constitutional Amendments	Statutory Initiatives
Maine		X
Massachusetts	X	X
Michigan		X
Mississippi	X	
Nevada		X
Ohio		X
Utah*		X
Washington*		X

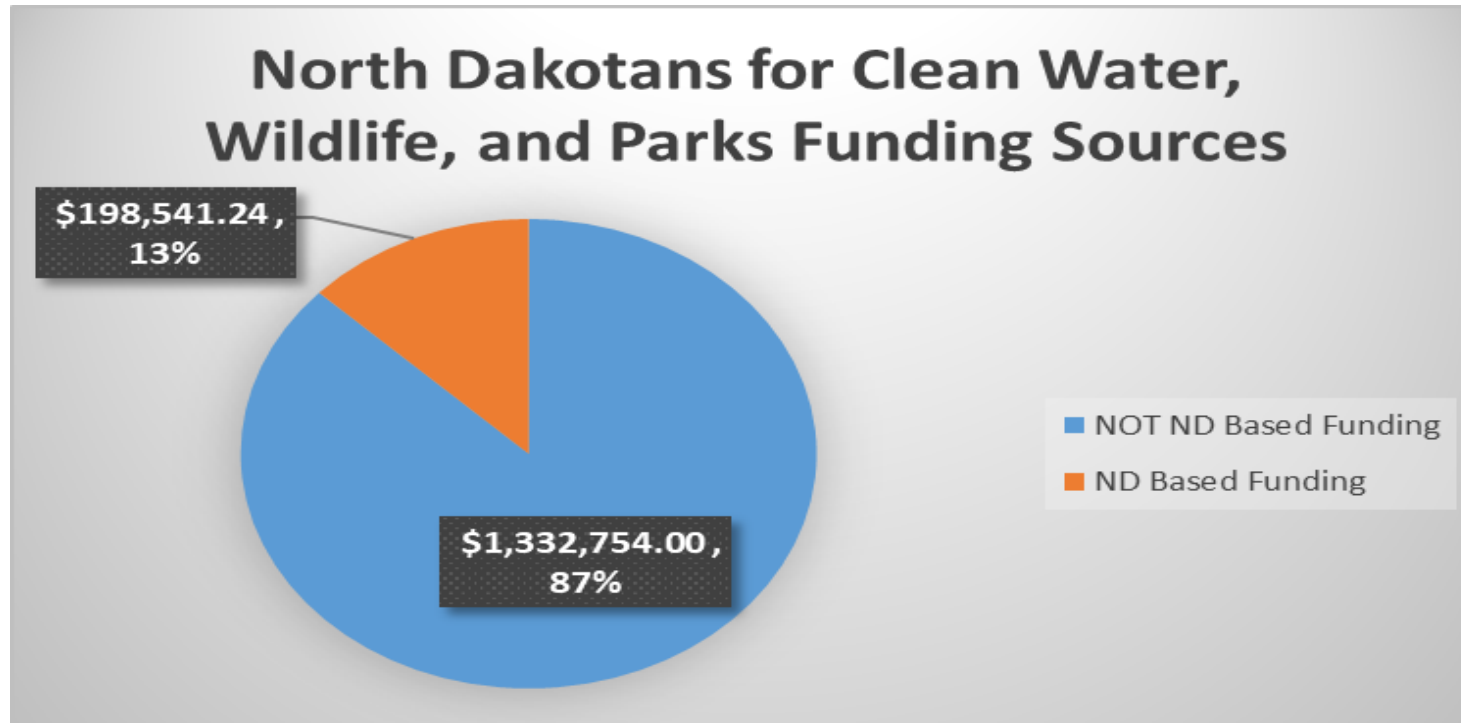


# Are state constitutions the playground of the rich and famous?

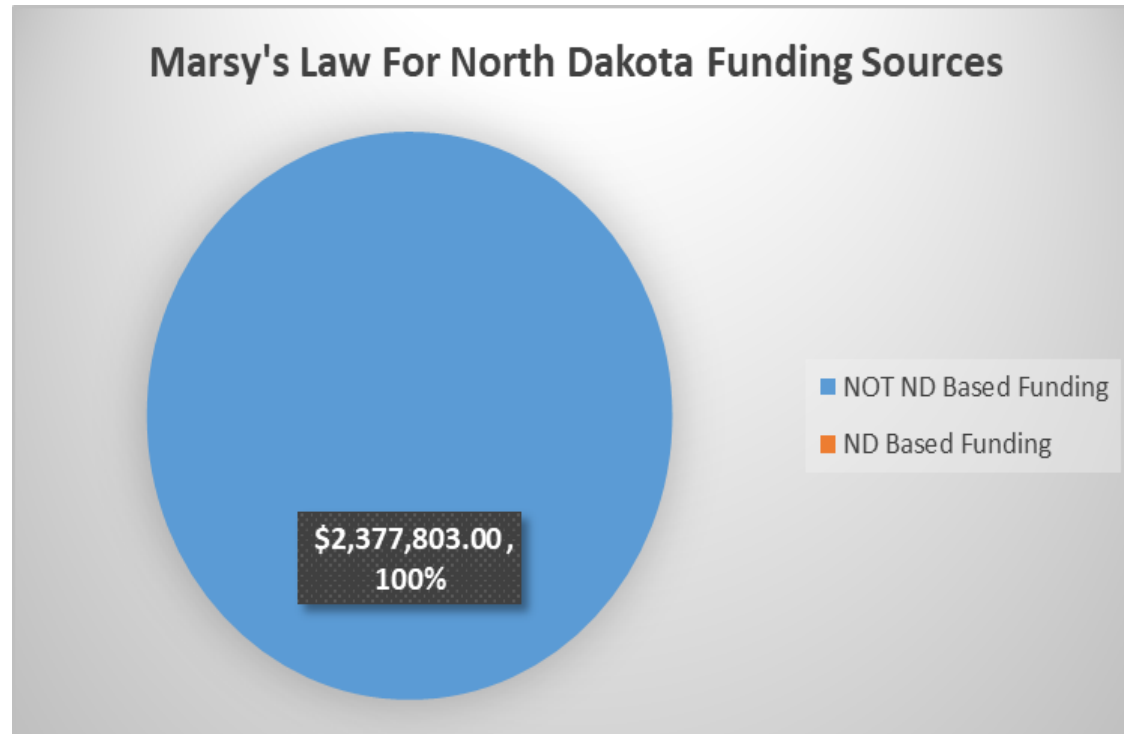
- Recently, the answer is “Yes” for those states with direct constitutional amendment authority.
- Consider the following previous constitutional proposals in ND.



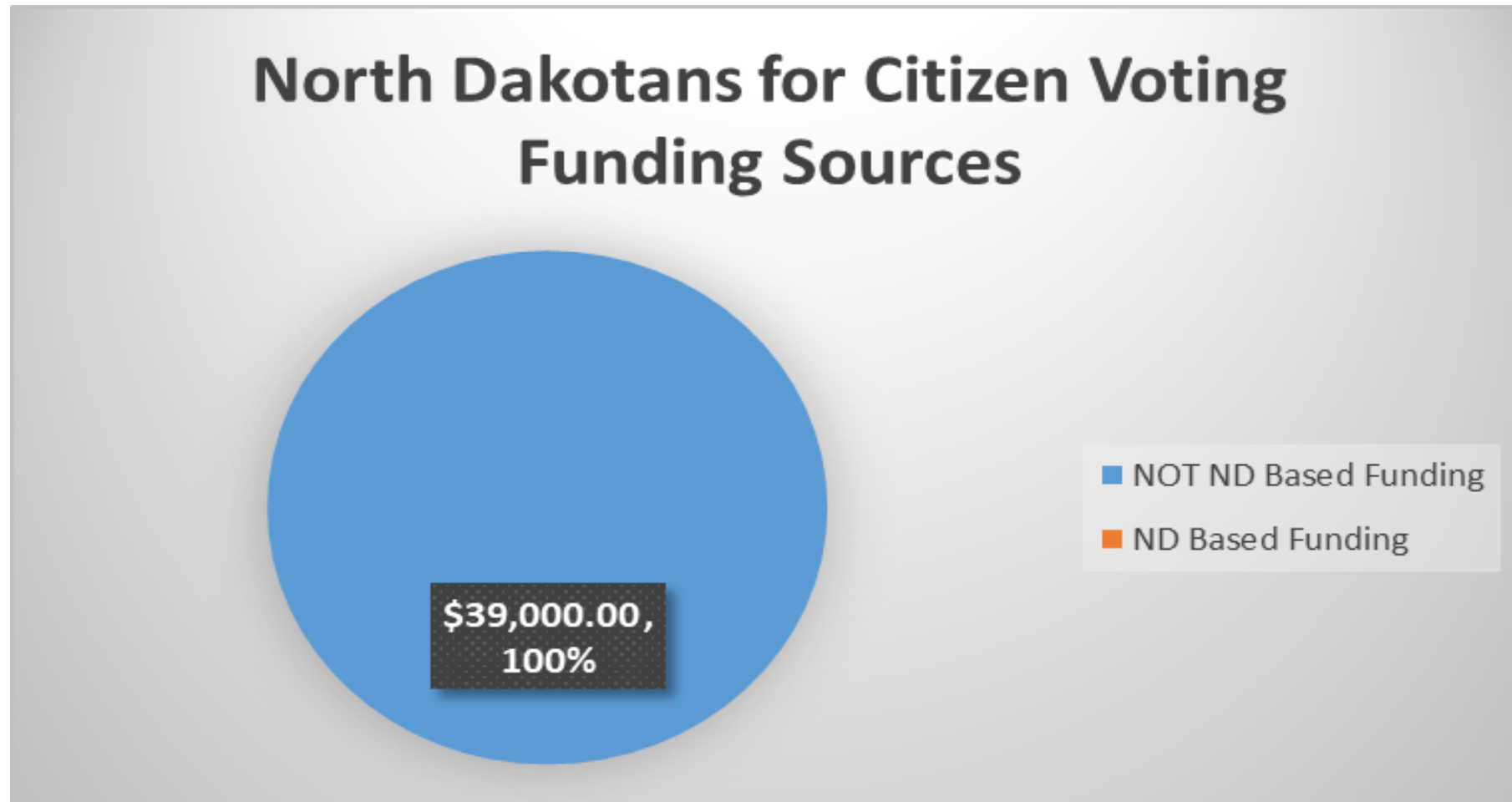
2014 measure to create environmental/outdoor fund and a separate board to manage fund



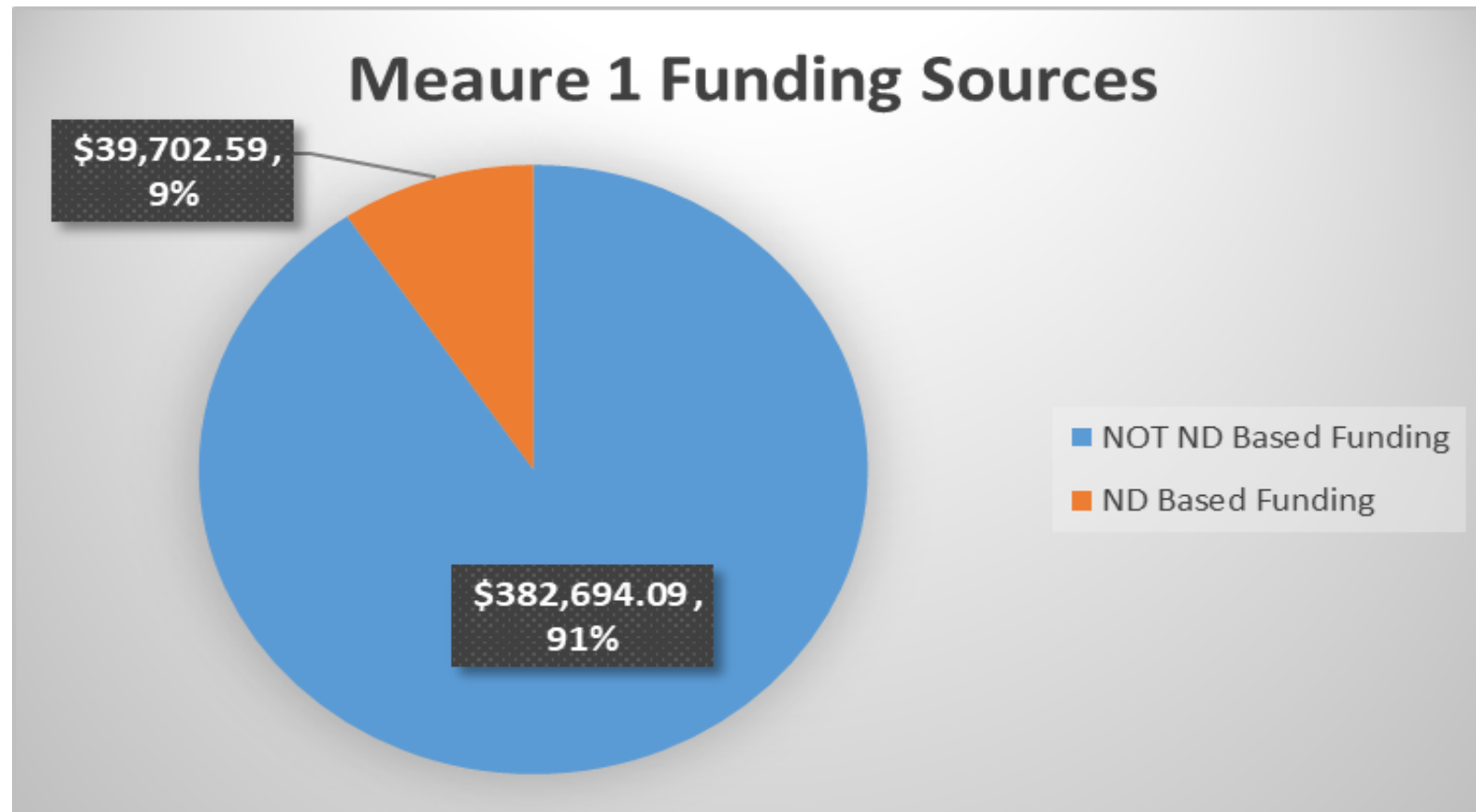
# 2016 Victims' rights measure



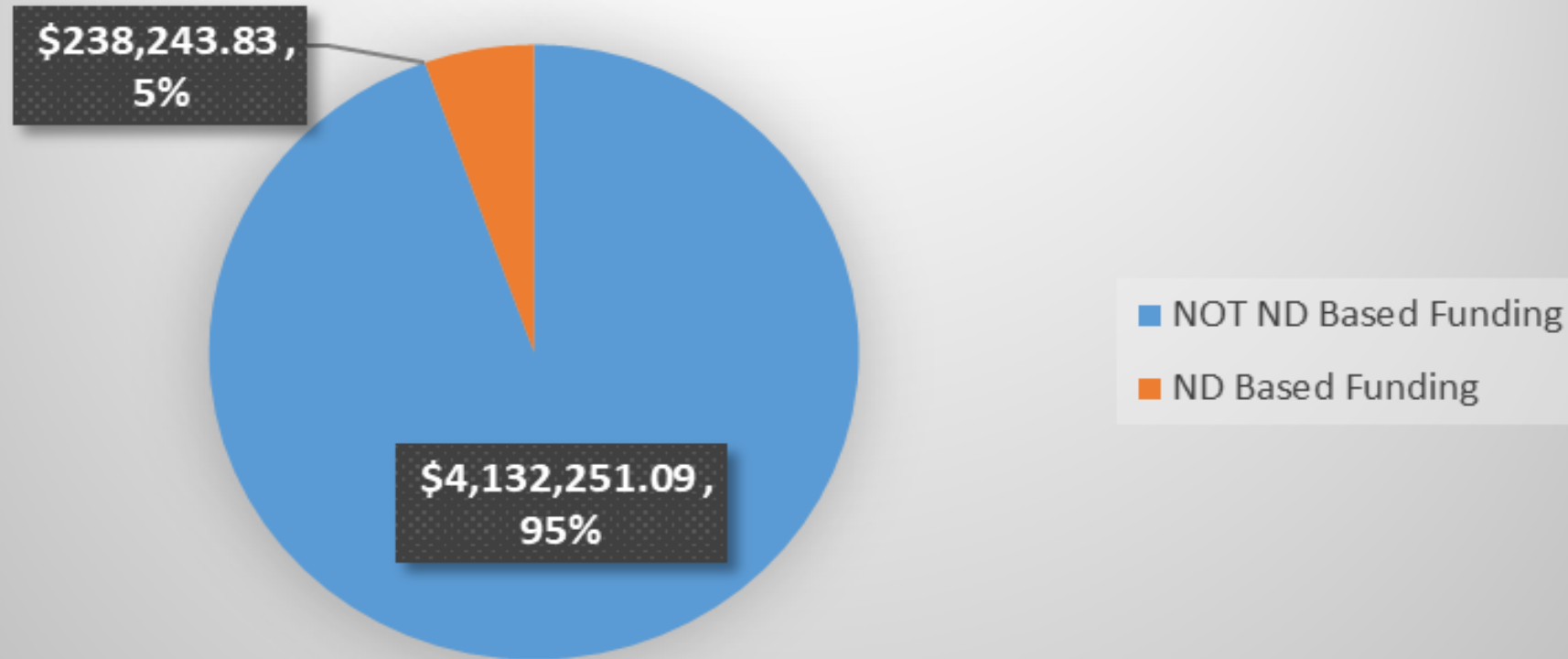
# 2018 citizens only vote



# 2018 Ethics Measure and Ethics Commission



## Total of Last Four Constitutional Initiated Measure Funding Sources




# 2020 Measure 3 to overhaul voting process


## Selected Statement Details

[Export Statement](#)[Print Preview](#)

	Date Filed	Starting Balance	Ending Balance	Total of all contributions received of \$100 or less	Total of all expenditures made of \$100 or less	Total of all contributions received greater than \$100	Total of all expenditures made greater than \$100
Circulating	07/06/20	\$113,769.55	\$174,123.91	\$60.67	\$199.87	\$650,077.41	\$424,821.77

### Contributions

 Indicates an amended transaction. Click to view the original transaction.

Name		Address	Date	Amount 	In-Kind	Amended Date
<a href="#">Action Now Initiative, LLC</a>		1717 West Loop S Houston, TX 77027	06/11/20	\$450,000.00	<input type="checkbox"/>	
<a href="#">Campaign Legal Center</a>		125 Cambridgepark Drive Suite 301 Cambridge, MA 02140	06/30/20	\$126,736.45	<input checked="" type="checkbox"/>	
<a href="#">RepresentUS</a>		P.O. Box 6008 Florence, MA 01062	07/06/20	\$73,340.96	<input checked="" type="checkbox"/>	

# Measure 3's record pace of signature gathering

Date that Secretary of State approved petition for circulation	<b>Thursday, April 30, 2020</b>
Deadline for submitting petition signatures to the Secretary of State (120 days before the election at which the measure is to appear on the ballot <u>or</u> one year from the date the petition is approved for circulation)	<b>2020 General Election – Prior to midnight on, July 6, 2020</b>  <b>One year from date petition was approved for circulation – April 30, 2021</b>
Number of signatures needed to place measure on ballot.	<b>26,904</b>



# Results based analysis of money and measures

- Thomas Cronin, author of *Direct Democracy* notes:
  - Money has decisive influence on the outcome of ballot measures;
  - Corporate backed sponsors win 80% of ballot initiatives;
  - When “big money” opposes poorly funded ballot measure, “evidence suggests that the wealthier side has about a seventy-five percent or better chance of defeating” measure.
- Source: Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, 109 (1999).

# North Dakota's original constitutional language

- Only the legislative assembly could propose constitutional amendments;
- Proposed amendment must be passed by two successive legislative assemblies;
- After two affirmative votes by legislature, measure must be submitted to people for approval.
- If voters approve, the constitutional amendment is adopted.



## ARTICLE XV.

### FUTURE AMENDMENTS.

§ 202. Any amendment or amendments to this Constitution may be proposed in either house of the Legislative Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the Legislative Assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if the Legislative Assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be

the duty of the Legislative Assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the Legislative Assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the Legislative Assembly voting thereon, such amendment or amendments shall become a part of the Constitution of this State. If two or more amendments shall be submitted at the same time they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

# 1914 amendments to ND Constitution

- Power of initiated measure
- Statutory initiated measures required 10% of legal voters in majority of counties.
- Legislative assembly must take up measure and accept or reject without amendment.
- In case of passage or rejection by legislative assembly, submitted to people for final passage.
- Referendum required filing within 90 days of legislative enactment, which holds today.

# 1914 Amendments cont'd.

## Amend way constitution is amended

- Retains requirement that proposed constitutional amendments be passed by two successive legislative assemblies and passed by the electors.
- Adds an alternative way to amend constitution through initiated measure process.
  - File at least 6 months before general election with SoS;
  - Contain signatures of 25% of legal voters of majority of counties in state
  - If passed by the people, constitutional measure goes to legislative assembly for its approval
  - If legislative assembly approves, it becomes adopted; if rejected by legislative assembly, measure put to another vote of the people
  - Six year waiting period on failed measures

**SECOND:** Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the Secretary of State, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent. of the legal voters in each of not less than one-half of the counties of the state. When such petition has been properly filed the proposed amendment or amendments shall be published as the legislature may provide, for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly, and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving a majority of all the votes cast at the general election as herein provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments receive a majority of all the legal votes cast at such succeeding general election such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption as herein provided, shall not be again considered until the expiration of six years.

# 1918 changes to statutory and constitutional initiated measures

- Initiated measure signature requirement set at flat 10,000 electors;
- Referendums set at flat 7,000 electors;
- Adds provision prohibiting passage of law prohibiting the giving or receiving of compensation for circulating petition
- SoS must print and mail “publicity pamphlet” containing text of measure with citizens able to pay up to \$200 per page to publish arguments for or against measure.
- Legislature needs two thirds majority to override statutory initiated measure



# 1918 amendments cont'd.

- For constitutional amendments, only one vote of the legislative assembly required followed by a vote of the people.
- People initiated constitutional amendments requires flat 20,000 electors.

## ARTICLE XXVIII.

SECTION 202 IN ARTICLE 15 AS AMENDED BY ARTICLE 16 OF AMENDMENTS.) Any amendment or amendments to the Constitution of the State may be proposed in either house of the Legislature, and if the same shall be agreed to upon roll call by a majority of the members elected to each house it shall be submitted to the Electors and if a majority of the votes cast thereon are affirmative, such amendment shall be a part of this Constitution.

Amendments to the Constitution of the State may also be proposed by initiative petition of the Electors; such petition shall be signed by twenty thousand of the Electors at large and shall be filed with the Secretary of State at least one hundred twenty days prior to the election at which they are to be voted upon, and any amendment or amendments so proposed shall be submitted to the Electors and shall become a part of the Constitution, if a majority of the votes cast thereon are affirmative. All provisions of the Constitution relating to the submission and adoption of measures by initiative petition and on referendum petition, shall apply to the submission and adoption of amendments to the Constitution of the State.

Yes.....46,329

No.....33,572

# 1972 ND Constitutional Convention

- State's last constitutional convention features overhaul of Initiated measure, referral, and recall process.
- Voters reject comprehensive constitutional revisions by vote of 64,073 for adoption; 107,643 opposed.
- In 1977, Legislature passes proposed constitutional amendment that mirrors proposal from the 1972 constitutional convention
- People adopt in 1978 by vote of 102,182 for and 75,413 against.

Each elector signing a petition shall affix thereto the date of signing and his post office address. No law shall be enacted limiting the number of counterparts of a petition. Such counterparts shall become part of the original petition when filed.

**No person shall give or receive compensation for circulating a petition."**

DELEGATE WICKS: Mr. President.

PRESIDENT WENSTROM: Delegate Wicks.

DELEGATE WICKS: This section sets forth the context of circulating and signing a petition which it is not for the most part in our present Section 25. The first sentence says in effect that only qualified electors may circulate the petition, and that he must further witness the signing of the petition. This is in line with the thinking of the committee, that the circulation of the petition should be a responsible action of the concerned voters, as should the rest of the initiative and referendum process, and that this should not be delegated to someone who is a nonvoter, which would in this instance be maybe high school students under the age of eighteen or nonresidents of the state.

The next sentence which requires the date of signing and the post office address of the signer is intended to make the verification of the validity of the signatures easier to do.

The third sentence is similar to the present Section 25, which states: "No law shall be enacted limiting the number of copies of a petition which may be circulated."

But on the advice of our legal expert, Delegate Pearce, we have substituted the word "counterpart" for "copies" as being a more precise term, and then have spelled out in the next sentence that all of these counterparts are not separate petitions but merely a part of the same petition.

**The last sentence in this reads: "No person shall give or receive compensation for circulating a petition." While this sentence is supported in principle by the majority of our committee because we feel that responsible voters in circulating a petition should not have to be paid, nor should they have to give pay, I have been instructed by the committee to offer an amendment, and I will do so at the proper time, to delete this last line merely because we do not feel that it is enforceable.**

DELEGATE PAULSON: Mr. Chairman and Fellow Delegates:

(902)

I am one of the strong supporters of the proposal as originally written simply because I do not think that money should play a part in the law-making process. We are very restricted here on what a legislator may do for money. He may work for the state, but he cannot work for anybody else to get a law passed. And here we delete from a proposal the provision that would restrict the power of money in the initiative and referendum process. **Money ·by itself can abort this process and do evil with it. And I think if we have the original restriction in it as proposed by the committee we will keep the process for the people and not for the man with access to campaign money or whatever.**

DELEGATE SANSTEAD: Mr. President.

PRESIDENT WENSTROM: Delegate Sanstead.

**DELEGATE SANSTEAD:** Mr. President, members of the assembly:

I concur with Delegate Wicks that certainly the policing of this kind of a sentence would be almost impossible, if not impracticable totally. But I also agree totally I think with the statements just given by Delegate Paulson that at least the sentiment ought to be there that certainly the question of the affluent having enough influence to be able to purchase signatures without difficulty. That is the question before us. They have a great advantage now. I think under the payment of the circulators of petitions they have even possible greater advantage. And if it were a flagrant thing then at least the sentence should be there showing that it is flagrant, that it is illegal, and that they ought not to be paid. I realize we could not police the under-the-table operation or the payment in lieu of actual funds, et cetera. **But I think the sentiment is important and it ought to remain in the Constitution.**

DELEGATE SINNER Mr. President:  
As I said earlier, I don't believe in  
initiative and referral government.

# 1978 amendment creates present day Article III of ND Constitution

- Introduces concept of “sponsoring committee” containing 25 electors as sponsors.
- Vests with SoS power to authorize circulation upon the measure’s “approval as to proper form”. ND Const. art III, § 2.
- After submission of signatures, SoS “shall pass upon each petition” and determine whether petition is “insufficient”. Id., § 6.
- Petition circulated only by electors.

# 1978 amendment cont'd.

- Electors who sign must provide address and date of signature.
- Statutory measures require 2% of the resident population.
- Grants ND Supreme Court original jurisdiction to hear complaints re SoS's review of petitions.
- Constitutional measures require 4% of resident population



# 2004 Amendment to ND Constitution

- Grant to legislative assembly authority to determine “fiscal impact” of initiated measure.
- “The legislative assembly may provide by law for a procedure through which the legislative council may establish an appropriate method for determining the fiscal impact of an initiative measure and for making the information regarding the fiscal impact of the measure available to the public.” ND Const. art. III, § 2.

# 2013 Amendment regarding submission of petition

- Legislature proposes amendment requiring initiated statutory and constitutional measures be submitted to SoS 120 days before statewide election (90 days regarded as insufficient to review signatures, hear potential challenge, and get to printed on ballot). *Id.*, § 5.
- Challenges to SoS must be made to ND Supreme Court not less than 75 days before election.
- ND Supreme Court indecision means measure goes on ballot. *ND. Const. art. III, § 7.*

# Contemporary legal disputes re measures

## “Approval as to form”

- SoS has discretion to consider forgeries, bogus names; circulator unwilling to “reaffirm” that all signatures genuine.
- SoS may not count signatures where circulator affidavit does not comply.
- *Zaiser v. Jaeger*, 2012 ND 221, ¶ 26. (Medical marijuana measure contained forged signatures).

# Contemporary Issues cont'd.

- SoS discretion as to “approval as to form” has limits.
- SoS may not approve statement of intent. *Lips v. Meier* 336 N.W.2d 346, 347 (N.D. 1983) (referendum to repeal state control of three junior colleges).
- Circulated petitions must contain names and addresses of the 25 sponsors and full text of measure; absence of such information renders petition invalid.
  - *Thompson v. Jaeger* 2010 ND 174, ¶ 25. (Measure to permit non pharmacist ownership of pharmacies).

# “approval as to form” cont’d.

- SoS may reject petitions on basis of illegal objective.
  - *RecallND v. Jaeger* 2010 ND 250, ¶ 26. (State constitution does not authorize recall of elected US Senator; decision to keep recall petition off ballot upheld).



8/10/2020



# 66<sup>th</sup> Legislative Assembly Proposal

## Measure # 2 on November 2020 ballot

**SECTION 1. AMENDMENT.** Section 9 of article III of the Constitution of North Dakota is amended and reenacted as follows:

**Section 9.** A constitutional amendment may be proposed by initiative petition. If signed by electors equal in number to four percent of the resident population of the state at the last federal decennial census, the petition for a constitutional amendment may be submitted to the secretary of state. An initiative to amend the constitution may be placed on the ballot only at a general election. If electors approve an initiative for a constitutional amendment, the amendment must be submitted to the subsequent legislative assembly. If the initiative is approved by a majority of members of each house in the legislative assembly, the initiative is deemed enacted. If the legislative assembly does not approve the initiative, the initiative must be placed on the ballot at the next general election. If the majority of votes cast on the initiative are affirmative, the initiative is deemed enacted. All other provisions relating to initiative measures apply hereto initiative measures for constitutional amendments.

# Does Measure 2 look familiar?

- It's the 1914 amendment to ND Constitution except:
  - no requirement of obtaining 25% of signatures of voters in majority of counties.
  - no restriction on consideration of failed measures within 6 years.

# The 66<sup>th</sup> Legislative Assembly takes us back to the way we were

- <https://youtu.be/uBPQT2la8fU>





QUESTIONS