Testimony in opposition to House Bill 1410, relating to the exercise of religion within a correctional facility.

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This testimony is submitted in opposition to proposed additions to NDCC 12.44.1-14.

It seems readily clear that elements of this bill were inspired based upon restrictions that were put in place at various correctional facilities throughout North Dakota in response to the COVID pandemic.

Those temporary restrictions, on normally allowed activity, varied from facility to facility and were enacted based on what each facility and each administrator felt was a reasonable but necessary restriction to protect our inmate populations from a pandemic virus.

At my particular facility, upon analyzing what we could still safely allow, we ended up allowing non-contact clergy visits, but shut down our in person programming for all volunteers, including clergy who were previously coming in for scheduled services or individual counseling with inmates. To illustrate why we ultimately decided to shut down in person programming, including religious services, it was actually a about a week after the virus had begun spreading within Cass County. The final decision came when a clergy volunteer was signing in at our front desk to come in to run a religious service, and while signing in she was discussing with her co-clergy how fantastic her vacation was, having just returned the previous day from an overseas trip from an area where the COVID virus was already much more widespread.

At that very moment, I realized that there was no safe way to screen people coming into the facility when we had no way of knowing, at that time, whether or not they had been exposed or infected. An undetected infection could easily spread to inmates attending a program or religious service, and then spread to other inmates in the housing areas.

These restrictions enabled us to prevent an outbreak in our facility for nearly 9 months, and it wasn't until November, when Cass County was the epicenter of the state of ND virus spread, and ND was the epicenter of the world as far as the rate of infection and death from this particular virus, that we finally identified an outbreak among inmates in general population. Yet even while that was happening, there was still debate occurring in the community and from various local officials, as to risk of this virus, the efficacy or need for masks and business restrictions, and debate about the science behind this virus.

That debate occurred even when things were at their worst, which causes me concern that the language in this bill was inspired by COVID, and a belief among some that those restrictions were unnecessary and should not be allowed to occur under state law.

The evaluations that the Administrators and Sheriffs made, and the restrictions that were put in place both at county facilities and at state facilities, were because we determined that there indeed was such a risk. Yet those restrictions seem to have inspired this bill because of debate that the threshold was not significant enough to warrant those restrictions.

Protections for inmate religious activity already exist through federal standards, and through extensive case law from both state and federal courts. It is perhaps the most litigated topic as it relates to inmate rights in jail and prison facilities.

Page 2 (Section 1, clause 2(a)) is probably benign, and certainly redundant, because this requirement already exists under federal law.

Page 2, Section 1, clause 3, however, is a horribly damaging and dangerous requirement. This clause establishes that the only reason we could deny "clergy" access to an offender would be for "clear and convincing scientific evidences….(of an) extraordinary health risk…"

These clauses are repeated as they pertain specifically to the prison system as well, on Page 3, Section 2.

The circumstances under which we can deny access of anyone into a correctional facility, clergy or otherwise, are well established and regulated. Any access involving a constitutional right can only be restricted under a demonstrable compelling governmental interest. We already must show that we have used the least restrictive means of accomplishing that interest, and we are already liable for failing to do so. This standard applies to all rights established under the constitution – religion, speech, due process, mail, access to legal assistance, the list goes on.

Those restrictions have already been cited in Clause 2(a) under this bill, but Clause 3 in each section goes even further to provide unfettered access to clergy except for the very specific and limiting language related to an "clear and scientifically proven…extraordinary health risk". It appears to specifically eliminate any other "compelling government interest" as the basis to deny a clergy person the right to access a particular offender.

We simply must have more control over who is allowed in than what is narrowly defined by this bill. We need only that control that is already clearly established.

I do not want to limit the rights of inmates to exercise their religion any further than what is necessary to provide for safety and security, but I have an existing duty protect the other staff and inmates where accommodating a religious practice may create a safety or security concern. There are several reasons that I may have legitimate cause to deny an individual clergy person access to an offender, certainly

cause beyond the aforementioned “clear and convincing scientific evidence of an extraordinary health risk.”
I will close my testimony with one final thought. On multiple occasions last year, in accommodating in-person lawyer visits, I was notified by the Dept of Health, through contact tracing efforts, of inmates who met in person with lawyers who themselves had soon after tested positive. We were fortunate in those cases that the inmate did not become infected, but we still had to quarantine the inmate for two weeks, which led to additional restrictions on their other privileges and rights. We were emphatically encouraging lawyers to meet with clients in a non-contact setting, but some still insisted on meeting in person. In those two cases, the lawyers were unknowingly positive and contagious at the time they met with in person with their client.

We were fortunate. We were lucky. Many facilities throughout the country have not been nearly has fortunate, and many inmates have died because facilities did not take enough precautions or because the virus spread so rampantly once it got in. I am convinced that we were able to hold off an outbreak from happening sooner, from being much worse than it was, because of the compelling interest I had in restricting access as I did. And, I am equally convinced that I also prevented other serious problems in the past, in those rare but necessary instances where I have restricted a clergy person from access for reasons other than a health impact.

I thank you for your consideration of this testimony, and ask that you seriously consider elimination of these “Clergy Access Clauses” from both sections of this bill.