Chairman David Schaible & Members of the Committee
Senate Education Committee
North Dakota State Capitol
Bismarck, North Dakota

SUBJECT: HB 1503

Dear Chairman Schaible & Members of the Committee:

My name is Lance Kinzer, and I am the Policy Director for 1st Amendment Partnership where we are privileged to work with some of the nation's largest faith communities with respect to their common commitment to First Amendment freedoms. I am writing today in support of HB 1503, with particulate focus on paragraph 4h, on page 3 lines 24 – 28 of the bill, pertaining to discrimination against student organizations.

Across the country, public universities have attempted to prohibit student organizations from requiring that students who wish to lead a student club actually share that club's beliefs. Universities have largely enforced such limitations against faith-based groups, but not against other groups with selective leadership criteria, like sororities and fraternities. Unfortunately, as happened recently in Iowa before they passed a protective statute, this often results in divisive and expensive litigation between students and their own universities.[1]

Even when student groups win in court, as they did in Iowa, much of the damage to the impacted students' educational experience is already done. No judicial remedy can adequately address the harms that universities inflict when they target student organizations, and thus their members, based upon their religious beliefs. HB 1503 is designed to prevent such litigation from being necessary in the first place, by providing a clear legal standard that simply preserves the right of belief-based student groups to choose leaders who agree with their purpose and mission.

It is commonplace across society for belief-based organizations to require their leaders to affirm, and live consistently with, the principles around which such groups were formed. For decades, the right of student organizations to do just this was clear as a matter of constitutional law. A long line of United States Supreme Court cases held: that student groups can't be denied recognition by a public university merely because of their beliefs (*Healy v. James*, 1972); that belief-based student groups must be provided access to facilities under the same standards as

[1] https://www.becketlaw.org/case/blinc-v-university-iowa/ & https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-university-iowa/

other groups (*Widmar v. Vincent*, 1981), and; that student activity funds cannot be withheld from a group merely because they promote or manifest a particular belief system (*Rosenberger v. University of Virginia*, 1995).

Unfortunately, in more recent years many universities have attempted to take advantage of an ambiguity in this case law created by a U.S. Supreme Court decision, *Christian Legal Society v. Martinez, (2010)*. That case dealt with the very uncommon situation where a university adopts a policy that says no student clubs can have any standards whatsoever for who may serve as their leaders. For obvious reasons, such a standard is unworkable and so almost no university has adopted and applied a true "all-comers" policy. But attempts by universities to expand the scope of *Martinez*, have resulted in needless litigation that harms the very students that universities exist to serve. Students at North Dakota's public universities should never be forced to litigate against their own schools in order to exercise basic constitutional rights.

Fortunately, the *Martinez* case itself was clear that universities and state legislatures are free to adopt policies that safeguard the right of belief-based student organizations to choose leaders who agree with the club's mission and beliefs. Fourteen states[2] have already passed laws that provide this kind of protection to students attending public colleges and universities. This includes your neighboring state of South Dakota. Increasingly, support for such legislation has been bi-partisan, including in Louisiana where Governor John Bell Edwards (D), signed just such a bill into law.

The kind of protections offered to belief-based student organizations by HB 1503 are common place in analogous provisions of both federal and state law. The basic reasoning of the U.S. Supreme Court in the *Widmar* case referenced above was statutorily codified for public secondary schools in 1984 when Congress adopted the *Equal Access Act, 20 U.S.C. 4071*. This current federal law protects the right of public high school students to develop associations based on shared values and core convictions.

The U.S. Supreme Court upheld the *Equal Access Act* in a 9-0 decision in *Westside Community Schools v. Mergens, (1990)*. In that opinion, the Court was clear that by granting equal access for student associations to use school facilities, the state does not establish religion (nor endorse any viewpoint an organization may hold) – it merely upholds freedom. HB 1503 extends this basic idea, codified for public secondary schools for the last 37 years under the *Equal Access Act*, to public university campuses in North Dakota.

In another analogous context, federal and state[3] nondiscrimination law both typically recognize the right of religious organizations to choose leaders on the basis of their religious beliefs. At the federal level, by way of example, *Title VII* explicitly provides that religious associations may use

[2] See attachment, "Campus Religious Freedom" infographic for a map of states that have statutes protecting belief based student groups.

[3] In North Dakota, a religious employer can use religion as basis to refuse to hire where religion is a reasonably necessary bona fide occupational qualification. *N.D.C.C. § 14-02.4-08*.

religious criteria in hiring decisions. In three separate provisions, it exempts religious associations from its general provisions on religious discrimination:

1) *42. U.S.C. 2000e-1(a)* (Act does not apply to a religious association with respect to employment of an individual to perform work connected with carrying on the association's activities);

2) *42 U.S.C. 2000e-2(e)2)* (Act does not apply to a religious educational institution with respect to the employment of employees that share that institution's religious convictions, where the institution is directed toward the propagation of a particular religion);

3) *42 U.S.C. 2000e-2(e)(1)* (Any employer may hire on the basis of religion where religion is a bona fide occupational qualification).

These accommodations were upheld by the U.S. Supreme Court in *Corporation of Presiding Bishop v. Amos (1987)*. Moreover, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012),* the Court unanimously rejected the argument that federal nondiscrimination laws could be used to trump religious association leadership decisions. **As Justice Alito and Justice Kagan stressed, while nondiscrimination laws are "undoubtedly important", "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."**

HB 1503, merely seeks to codify these same kind of common sense accommodations for belief based student organizations at public colleges and universities. These institutions should welcome diverse student groups as part of a vibrant campus life. By creating a clear standard, HB 1503 promotes this important goal, avoids needless litigation, and makes it certain that university administrators cannot decide who is entitled to recognition as a student organization based upon which beliefs those administrators favor or disfavor.

Respectfully,

/s/ Lance Y. Kinzer
Lance Y. Kinzer
Director of Policy & Government Relations
1st Amendment Partnership

Enclosure