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Madam Chair Larson, Senators of the Senate Judiciary Committee,

Hello and thank you for the opportunity to speak to you today. My name is Dr. Jake Schmitz, and I am testifying in support of HB 1154. A fundamental right of license holders is the right to a hearing to defend against allegations or disputes. The hearing is done through the Office of Administrative Hearings. The mission statement of the Office of Administrative Hearings is *"To resolve administrative disputes through* ***holding fair and impartial hearings*** [emphasis added] *and issuing reasoned and timely decisions."* The mission is being subverted by state agencies through the motion for summary judgment.

In an adjudicative proceeding, either party can move for summary judgment. Summary judgment can be found in ND Rules of Civil Procedure Rule 56(c)(3), and it reads, ***"The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any declarations show that there is no genuine issue as to any material fact…"*** Plainly speaking, summary judgment is a way to expedite the proceeding by skipping the hearing and going straight to a judgment by the judge. It isn't appropriate, however, for administrative proceedings, unless the parties agree to the contrary. The Supreme Court was clear on this point.

Below is the highlight of Schmitz v. State Board of Chiropractic Examiners 2022 ND 113 from the Supreme Court website:

"A formal, evidentiary hearing is required whenever an administrative agency acts in a quasi-judicial capacity unless the parties either agree otherwise or there is no dispute of a material fact. A summary judgment is inappropriate if a fact-finder must draw inferences and make findings on disputed facts to support its decision. Even when facts are undisputed, a summary judgment may not be granted if reasonable differences of opinion exist as to the inferences to be drawn from those facts."

In all cases, a hearing is expected and should be guaranteed. This isn't happening. Tim Dawson, director of the OAH, said in his House testimony for this bill, **that agencies prevail 75-85% of the time in front of an ALJ.** The next question would be, how often do agencies move for summary judgment? Well, Jim Nicolai, the assistant solicitor general of the attorney general's office, in his testimony in the House in opposition to this bill said, **"The summary judgment process is utilized in almost every case that I've been involved with in the actual state court system."** Why wouldn't an agency simply move for summary judgment every time? They have no incentive not to.

The unfortunate reality of administrative cases is the deference argument agencies use with administrative law judges. If the "experts" on the board dictate there are no facts in dispute, that is typically the end of it. As it stands currently, administrative law judges grant deference to agencies, regardless of whether the license holder disagrees about the facts. I am grateful for this committee for passing SB 2296, which if it passes the House, will go a long way towards fixing the deference problem.

However, HB 1154 is still needed to guarantee due process is upheld through a hearing. This is important to me, and it has compelled me to be an advocate for others due to how much this issue has impacted me personally. In my case, I argued the facts were in dispute, and the administrative law judge

ruled in favor of the board, granting summary judgment to the chiropractic board. I had a weeklong hearing scheduled, but when the administrative law judge granted summary judgment, my hearing was canceled. I was not given a hearing, and 2 years, and $125,000 later the Supreme Court ruled this was inappropriate (the ruling was reversed and remanded).

A formal, evidentiary hearing is required; not briefs about summary judgment motions, not depositions, not pre-hearing conferences. Without having your "day in court" you are being deprived of due process. A hearing is when you can call experts to testify, present your evidence and get the opportunity to refute the opposition's evidence, and create your legal arguments. This happens in a hearing, not in briefs. The Supreme Court agrees with this position, which is the impetus for HB 1154. Everyone should be given the opportunity to present their evidence and defend themselves from any agency action in front of a judge. That isn't currently the case, as evidenced by both the assistant solicitor general and OAH director's testimony, and my personal experience.

This bill, as amended and adopted by the House, still allows for summary judgment motions, but prevents the granting of summary judgment if either party opposes it in writing. This bill is a simple remedy to prevent misuse of summary judgment motions by state agencies, and in line with the opinion of the Supreme Court from my case.

HB 1154 prevents another license holder from having to go through what I went through. I spent over $125,000.00 in pursuit of an opportunity for a hearing. I shouldn't have been required to appeal all the way to the Supreme Court for the chance to have a hearing. This bill should keep that from ever happening to another licensee.

Please vote a DO PASS for HB 1154. The right of license holders to defend their livelihood, their businesses, and their reputations depend on it.

Thank you for your time. I greatly appreciate the opportunity to testify in front of you today. I will welcome any questions you may have.

Maximum blessings,

Dr. Jake Schmitz