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March 8, 2023

North Dakota Senate Committee on Judiciary
Peace Garden Room
State Capitol
600 East Boulevard Ave
Bismarck, ND 58505-0360

RE: ND House Bill 1453

Dear Chairman Larson and Members of the North Dakota Senate Judiciary Committee:

I am writing to make suggestions on how to improve HB 1453. We of course agree with the idea of making the bail schedule more uniform. There are, however, a few issues that you may not have considered that we have come across while working on this issue in other states.

We do not believe the Supreme Court should be tasked with setting the uniform statewide bail schedule.

This derives from two specific concerns.

First, there has been extensive litigation over bail schedule procedures related to the appeals therefrom that has made it to State Supreme Courts (Nevada and California), and there is another pending case in Los Angeles Superior Court (*Urquidi*) in California as to the constitutionality of bail schedules that is very likely to end up in the California Supreme Court. The movement against bail schedules is indeed a national, well-funded litigation effort that could easily target North Dakota. Because we anticipate a reasonable possibility of the North Dakota Supreme Court having to decide cases on the constitutional contours of the use schedules, in particular or in general, we think it inappropriate for the court of last resort in the state to make discretionary district court level custodial decisions.

Second, we think the citizens have a right to have the local judges who preside over the criminal matters in their jurisdiction to directly set the bail schedule. We would direct you to a legislative concept in California last year, which unfortunately did not become law, which would have required the Judicial Council (the governing body of the state courts) to appoint a representative group of local judges to act as a commission in setting the statewide bail schedule, with the Council acting as staff of this commission.¹ We might call this the North Dakota Statewide Bail Commission. The Supreme Court, thus, under such an arrangement would be appropriately walled-off from an ethical perspective, and local judges would be tasked with setting the bail as an independent commission. Thus, we think there

¹ See: <https://openstates.org/ca/bills/20212022/AB38/> ("The Judicial Council shall appoint a group of judges, deemed line 9 by the council sufficient to adequately represent counties varying line 10 in size from throughout the state, to develop and approve the line 11 statewide bail schedule.").




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are important legal and constitutional concerns that warrant against the Supreme Court setting the bail schedule.

We would also recommend that the commission be tasked with an annual review of the schedule. It would also be wise to have some deviation reports, i.e., how often did judges adjust the bails up or down from the schedule. We would also suggest that the bail schedule be subject to a notice and comment period. We think groups such as prosecutors, defense counsel, victims' rights advocates, and even local judges should have the opportunity to comment to the commission (or Supreme Court) as to the appropriateness of the schedule and give the commission (or Supreme Court) the ability to then make adjustments to the schedule.

Thank you for your attention and thank you for your service to the People of North Dakota. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

DocuSigned by:

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