WRITTEN TESTIMONY IN OPPOSITION TO SB 2199

Senate Judiciary Committee on Senate Bill 2199

Date of Hearing: January 18, 2023

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My name is Debra Hoffarth. I am a lifelong resident of North Dakota and an attorney. I am a lifelong resident of North Dakota and an attorney. I am also a proud mother of a transgender child. This written testimony is presented in opposition to SB 2199, which outright discriminates against the transgender and nonbinary communities and is a violation of every North Dakotans' right to free speech. It is an overreach of government authority into the private matters of its citizens.

The current North Dakota Century Code § 1-01-34 is not controversial and was last visited by the Legislature in 1967, when it was simply reenacted in order to have uniform interpretation of legal terms.[1] This longstanding codification of legal terms should remain as is and these proposed changes should be rejected.

North Dakota Constitution Article I, Section 1 states: "*All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of* e*njoying and defending life and liberty*; acquiring, possessing and protecting property and reputation; *pursuing and obtaining safety and happiness*; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

North Dakota law and federal law prohibit discrimination based upon sex. The North Dakota Human Rights Act prohibits discrimination based upon sex.[2] Title VII of the Civil Rights Act prohibits discrimination based upon sex, this includes gender identity.[3] President Biden issued an executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."[4] This law requires individuals to violate federal law.

Further, this bill violates several federal and state constitutional rights of is citizenry. The United States Constitution and the State Constitution take precedent over any legislative actions.

The right to free speech belongs to every citizen of the State of North Dakota. Our Constitution states: "*Every man may freely write, speak and publish his opinions on all subjects*, being responsible for the abuse of that privilege."[5] The First Amendment prohibits the abrogation of free speech. Everyone has the right to speak freely, without repercussions, absent the language falling under hate speech, obscenity, child pornography, defamation, or incitement to violence and true threats of violence. Any restriction of free speech must be reasonable, content-neutral, viewpoint-neutral, and narrowly tailored to satisfy a significant institutional interest.[6]

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[1] January 11, 1967 Judiciary Committee Minutes – 1967 SB 72 Legislative History from North Dakota Legislative Council.

[2] NDCC 14-02.4-01.

[3] *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

[4] Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation | The White House- https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and- combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/

[5] Constitution of North Dakota, Article I Section 4

[6] NDCC 15-10.4-01(1)

This bill, by penalizing a person employed by or affiliated with any entity receiving state funding for simply using "words referring to an individual, person, employer, employee, contestant, participant, member, student, or juvenile" in ways that do not match the persons sex assigned at birth, is a clear violation of free speech. The bill is not narrowly tailored, and it is hard to see how such a bill furthers the interests of the citizens of North Dakota. Presumably, even a teacher giving a presentation who refers to a co-ed group as "you guys" would be subject to a $1500 penalty.

Determining a dispute about someone's gender identity also invokes the United States' Fourth Amendment and the North Dakota's Constitution protecting the right for any individual to be free from unwarranted searches and seizures[7] and the Fifth Amendment protections of remaining silent. Although this legislation falls short of declaring use of preferred pronouns as a crime, the penalty involved is penal and punitive. Transgender and nonbinary individuals are not criminals, and their medical information is private. I fail to see how any entity can force an individual to take a test to establish an individual's deoxyribonucleic acid, absent a court order. Involvement of a court would force an individual to undertake an unwanted and unnecessary medical procedure.

This proposal also violates the privileges and immunities clause. North Dakota Constitution. Article I, Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." This law allows privileges for straight and binary individuals, which transgender and nonbinary individuals are not allowed – participation in state funded facilities.

It also denies children their right to a free and appropriate education as it would make being mis-gendered a condition of their education, which is discriminatory, harmful, and intolerable.[8] Article VII, Section 1 of the North Dakota Constitution declares that a free education is necessary for all children of the State of North Dakota and must be "free from sectarian control." [9]

There are already free speech laws on the books in North Dakota that would conflict with this proposed legislation.[10] The State Board of Higher Education has a policy that allows students and faculty free speech.[11] Students cannot be sanctioned for speech unless "the speech or expression is unwelcome, targets the victim on a basis protected under federal, state, or local law, and is so severe, pervasive, and objectively offensive that a student effectively is denied equal access to educational opportunities or benefits provided by the institution."[12] Higher education institutions are to promote "a welcoming, inclusive environment."[13] This legislation flies in the face of existing North Dakota legislation allowing students and faculty to have free speech at institutions of higher education, which of course receive state funding. It will require these institutions and their faculties to potentially violate other state laws. It also makes the jobs of teachers everywhere more difficult. Teachers need support, not more legislation on what they can and cannot teach.

Furhtermore, North Dakota Administrative Code 75.5-02-06.1 prevents social workers, many of whom are school counselors, or therapists from engaging in conversion therapy. This law could very well

[7] Constitution of North Dakota, Article I Section 8
[8] Constitution of North Dakota, Article VIII Section 1
[9] Constitution of North Dakota, Article VIII Section 1
[10] NDCC 15-10.4, *et. seq.*
[11] NDCC 15-10.4-02
[12] NDCC 15-10.4-02(4)(a)(1)
[13] NDCC 15-10.4-02(4)(c)

cause social workers to violate their ethical duties as outlined in the administrative code.

There is no clear purpose for this legislation, other than to harass and further terrorize the transgender and nonbinary community in North Dakota, a community that already suffers from higher rates of suicide and harassment. Affirming individual's preferred pronouns lowers the risk of suicide and self-harming. This legislation will further marginalize transgender and nonbinary individuals, putting their mental and physical health at risk.

Transgender and nonbinary individuals need compassion and inclusion, not hatred and exclusion. You cannot erase the existence of transgender and nonbinary individuals via legislation. They have and will always exist. All people within the State of North Dakota deserve dignity and respect and to have their constitutional rights intact.

Please oppose SB2199.

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