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 Denise Ann Dykeman. I am a resident of North Dakota, a practicing attorney and a Lutheran. I am also a member of the bar of the Supreme Court of the United States of America. I have family members and close friends who are transgender, non-binary, and use preferred pronouns. This written testimony is presented in opposition to SB 2199, which plainly discriminates against the transgender and non-binary communities in North Dakota and is a violation of every North Dakotans' right to free speech. It also ignores the very existence of persons who are intersex, that is, persons whose biological sex is ambiguous. There are genetic, hormonal or anatomical variations that can make a person's sex ambiguous (e.g., Klinefelter Syndrome, Adrenal Hyperplasia). This bill is an overreach of government authority into the private matters of its citizens.

I write this testimony on January 16, 2023, Martin Luther King Jr. Day. King's Letter from a Birmingham Jail seems appropriate to quote here. "My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals. We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."

In this case, it is abundantly clear through this bill and others that the North Dakota Legislature seeks to oppress those in the LGBTQIA+ community. I demand freedom for our fellow 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, with no amendment.

The North Dakota Constitution in Article I, Section 1 states: "*All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying 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.

Both 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 as recently affirmed by the United States Supreme Court, and this includes gender identity.[3] President Biden issued Executive Order 13988 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] SB 2199

[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 | Executive Order 13988 The White House- https://www.whitehouse.gov/briefing-room/presidential-

requires individuals to violate federal law.

Further, this bill violates several federal and state constitutional rights of is citizenry. The United States and the North Dakota State Constitutions 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]

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" could be subject to a $1500 penalty. Also, how is one supposed to know?

Determining a dispute about someone's gender identity by conducting a test of the individual's deoxyribonucleic acid is not only absurd but 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 non-binary 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 be forcing an individual to undertake an unwanted and unnecessary medical procedure.

This proposal also violates the privileges and immunities clause. The ND 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]

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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)

[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

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 to potentially violate other state laws.

There is no clear purpose for this legislation, other than to harass and further terrorize the LGBTQIA+, transgender, and non-binary communities in North Dakota, communities that already suffer 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 health at risk. Moreover, this bill will discourage people from moving to or staying in North Dakota, and will further discourage businesses from wanting to invest in our state.

I believe all Americans should treat one another as they would want to be treated. As part of my Lutheran faith, I leaned about loving our neighbors, not discriminating against them. I understand not everyone holds the same religious beliefs that I do, however, I do know North Dakota is about building strong communities. Discrimination has no place in North Dakota. Transgender and non-binary individuals are beloved members of our community and need compassion and inclusion, not hatred and exclusion. All people within the State of North Dakota deserve dignity and respect and to have their constitutional rights intact.

Please oppose SB 2199.

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[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)