February 15, 2021

Committee on Judiciary
North Dakota House of Representatives
600 East Boulevard Avenue Room JW327B
Bismarck, North Dakota

Chairman Klemin, Vice Chair Karls, and distinguished Members of the Committee:

My name is Joe Cohn, and I am the Legislative and Policy Director at the Foundation for Individual Rights in Education (FIRE). FIRE is a national, nonpartisan, nonprofit organization dedicated to defending the free speech and due process rights of students and faculty at our nation's colleges and universities. FIRE writes today to supplement my verbal testimony in support of a substitute being prepared for HB 1503.[1]

In the last legislative session, the State of North Dakota enacted SB 2320, a flawed bill that sought to advance the cause of free speech on campus. HB 1503 will build on what was good in SB 2320 and correct the aspects of that legislation that are problematic.

The central focus of SB 2320 was that it allowed institutions of higher education to maintain reasonable time, place, and manner restrictions on expressive activities provided that they satisfy the Supreme Court of the United States' requirements set forth in *Ward v. Rock Against Racism*.[2] SB 2320 defined "Constitutional time, place, and manner restrictions" as:

> restrictions on the time, place, and manner of free speech which do not violate the First Amendment to the United States Constitution or section 4 of article I of the Constitution of North Dakota and which are reasonable, content- and viewpoint-neutral, and narrowly tailored to satisfy a significant institutional interest, and leave open alternative channels for the communication of the information or message.

While this is the proper standard for evaluating time, place, and manner restrictions in traditional and designated public forums, the problem with the way SB 2320 was crafted is that it also applied this standard in indoor spaces, which are typically not deemed traditional or designated public forums. HB 1503 would amend the statute by clarifying

[1] Throughout this testimony, the term "HB 1503" refers to the substitute version currently being prepared.
[2] 491 U.S. 781, 791 (1989).

that the standard applies in the "generally accessible, open, outdoor areas of the institution's campus."

SB 2320 also contained a flawed provision on academic freedom. It requires public institutions throughout the state to adopt a policy that "[p]rotects the academic freedom and free speech rights of faculty while adhering to guidelines established by the American association of university professors." The problem with this language is that it does not require these institutions to adopt policies consistent with a particular policy statement set forth by the American Association of University Professors (AAUP), but instead defers these issues to the AAUP. FIRE frequently works closely with the AAUP and cites to their various policy statements to inform FIRE's advocacy with respect to academic freedom. The problem with this statutory approach is that organizations and their policies can change over time. The HB 1503 amendment being prepared would replace the academic freedom provision of the current statute with concrete protections for faculty or at the very least anchor protections in the statute to the principles set forth in the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure by explicitly referencing the statement.

In addition to improving on what was established in 2019, HB 1503 would also:

- Allow institutions to adopt constitutional time, place and manner restrictions regulating expression on the open outdoor areas of campus generally accessible to the public, when those restrictions meet the test set forth by the Supreme Court of the United States in *Ward v. Rock Against Racism*. This language amends and improves upon the language from the 2019 statute by limiting its application to the open outdoor areas of campus generally accessible to the public and by expressly prohibiting institutions from limiting quarantining expression to misleadingly labelled free speech zones;
- Prohibit institutions from denying student activity fee funding to a student organization based on the viewpoints the student organization advocates;
- Prohibit institutions from charging students or student organizations security fees based on the content of the student's or student organization's speech, the content of the speech of guest speakers invited by students, or the anticipated reaction or opposition of listeners to the speech. Institutions will still be able to set security fees, consistent with the Supreme Court of the United States decision in *Forsyth v. Nationalist Movement*[3] by allowing institutions to "set forth empirical and objective criteria for calculating security fees";

[3] 505 U.S. 123 (1992).

- Ensure that institutions cannot force students, faculty, student organizations to rescind invitations to guest speakers because of those speakers' viewpoints;
- Safeguard freedom of association by allowing belief-based student organizations to require their voting members and leaders to adhere to the organizations' sincerely held beliefs;
- Protect the free speech and academic freedom rights of faculty by ensuring that faculty cannot be punished for classroom speech, unless it is not germane to the subject matter of the class, as broadly construed, and also takes up a substantial amount of classroom instruction;
- Require institutions to define student-on-student discriminatory harassment consistent with the standard set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*;[4] and
- Provide an effective cause of action that will ensure students have access to court when their free speech rights are violated, while capping institutional liability at $50,000, court costs, and attorneys fees.

The State of campus free speech in North Dakota

FIRE surveyed the written policies of all public institutions of higher education in North Dakota in anticipation of this legislation, including both four-year universities and community colleges. We reviewed the written policies to determine whether the institutions were in compliance with the requirements of SB 2320 and whether their harassment policies were consistent with Supreme Court precedent. Our audit revealed comprehensive failures,demonstrating the strong need for the legislature to enforce the First Amendment.

North Dakota institutions are not abiding by Supreme Court precedent on harassment

Institutions of higher education are legally and morally responsible for addressing discriminatory student-on-student harassment. But they also have a constitutional obligation to do so without infringing on the free speech rights of students. To balance these twin obligations, the Supreme Court of the United States carefully crafted a test to determine when speech crosses the line to unprotected discriminatory conduct. In *Davis v. Monroe County Board of Education*, the Court, in addressing when federal anti-

[4] 526 U.S. 629, 651 (1999).

discrimination law obligated institutions of higher education to intervene when students were harassing each other, defined student-on-student harassment as discriminatory conduct that is:

> so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.[5]

Not a single North Dakota institution consistently defines harassment in line with *Davis*. Slightly more than half of institutions apply a constitutional definition for Title IX cases, which are under the jurisdiction of federal government regulations explicitly requiring it. However, even when institutions do define harassment constitutionally in Title IX cases, they define harassment unconstitutionally in non-Title IX cases, creating a convoluted "dual-track system." North Dakota State College of Science maintains a particularly egregious definition for non-Title IX harassment, including any "unwelcome action," subjectively defined, that "interfere[s] with an individual's academic efforts, employment, personal safety, or participation in College sponsored co-curricular activities." Policies like this maintained by North Dakota institutions are in serious need of reform.

Enacting HB 1503 is important because overbroad anti-harassment policies are one of the most common forms of speech codes that are used to punish and sometimes even expel students who have engaged in protected speech.[6]

Institutions of higher education are already required by the federal government to use the *Davis* definition, at least with respect to defining student-on-student sexual harassment.[7] In 2020, the Department of Education concluded a lengthy public notice-and-comment period and adopted legally binding regulations requiring institutions to use this definition to define student-on-student sexual harassment.[8] Because the Department's jurisdiction in this regulatory process was limited to addressing sexual

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[5] *Davis* at 651.
[6] Greg Lukianoff and Catherine Sevcenko, *Four Key Points About Free Speech and the Feds' 'Blueprint'*, FIRE, (July 15, 2013), https://www.thefire.org/four-key-points-about-free-speech-and-the-feds-blueprint/.
[7] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[8] *Id.* at 2014.

harassment, the regulations do not require that same test be used by schools when defining other forms of discriminatory harassment. Courts have repeatedly applied the Davis standard to racial and other forms of harassment outside of Title IX.[9]

Enacting HB 1503 would harmonize North Dakota's efforts to combat all forms of discriminatory student-on-student harassment.

Courts regularly cite the *Davis* definition to protect students from censorship

Courts regularly protect students from censorship and punishment under university policies because the policies did not meet the requirements of *Davis*. *See, e.g., Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345, 366–67 (S.D.N.Y. 2017) (holding student accused of sexual assault could not invoke Title IX to "censor the use of the terms 'rapist' and 'rape'" by the alleged victim of the crime on the grounds that the accusation bred an environment of pervasive and severe sexual harassment for the accused student); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*,725 F.3d 293, 322–23 (3d Cir. 2013) (holding school district could not invoke Title IX to prohibit students from wearing "I <3 boobies" bracelets intended to increase breast cancer awareness).

Policies that fail to meet the elements of *Davis* have been consistently struck down on First Amendment grounds by federal courts for more than two decades, yet unconstitutional definitions of harassment remain widespread. *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court's invalidation of university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down sexual harassment policy reasoning that because the policy failed to require that speech in question "objectively" create a hostile environment, it provided "no shelter for core protected speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional). While *Dambrot* was issued before *Davis*, the Sixth Circuit's analysis incorporated similar elements.).

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[9] *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012) (applying *Davis* to Title VI claim and observing that "[a]lthough the harassment in *Davis*, and the "deliberate indifference" standard outlined by the Supreme Court, arose under Title IX, we have endorsed the *Davis* framework in cases of third-party harassment outside the scope of Title IX."); *Bryant v. Indep. Sch. Dist*. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (applying *Davis* to Title VI claim); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (acknowledging that *Davis* "applies equally" to harassment under Title VI or other federal anti-discrimination statutes).

The Davis standard successfully protects students from discriminatory harassment

Some argue that the *Davis* standard sets the bar too high, and posit that under this definition, students may harass each other with impunity. This isn't true. Courts routinely rule against schools for being deliberately indifferent to harassment that met the *Davis* standard. *See, e.g., Niesen v. Iowa St. Univ.*, 2017 U.S. Dist. LEXIS 221061 (S.D. Iowa Nov. 3, 2017) (denying motion to dismiss student's Title IX claim for retaliation that she experienced after reporting an alleged sexual assault because the university did not respond to her complaints about the retaliation); *S.K. v. N. Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 797–98 (W.D. Pa. 2016) (holding plaintiff adequately pled Title IX claim where bullying of plaintiff had grown to the point where it "was its own sport" and principal never punished the harassers); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 365 (S.D.N.Y. 2014)(denying school district's motion for summary judgment on students' Title VI claim for anti-Semitic harassment in part because a reasonable jury could find that a "handful of assemblies . . . could not have plausibly changed the anti-Semitic sentiments of the student harassers").

What these cases and many others like them demonstrate is that *Davis* has worked to protect students from harassment and to protect free speech rights.

North Dakota should join Alabama,[10] Arizona,[11] Arkansas,[12] Ohio,[13] Oklahoma,[14] and Tennessee[15] in requiring its public institutions to use a definition of discriminatory student-on-student harassment consistent with the *Davis* standard.

Two out of three North Dakota institutions charge potential speakers security fees in an unconstitutional manner

In *Forsyth County v. Nationalist Movement*,[16] the United States Supreme Court has said that the government cannot charge potential speakers security fees based on the anticipation of a negative reaction by some because to do so would create an

[10] Ala. Code § 16-68-3.
[11] Ariz. Rev. Stat. §15-1866.
[12] Ark. Code Ann. §§ 6-60-1001-1010.
[13] Ohio HB 40 (2020).
[14] Okla. Stat. Ann. tit. 70, § 2120.
[15] Tenn. Code. Ann. §§ 49-7-2401-2408.
[16] 505 U.S. 123 (1992).

unconstitutional "heckler's veto." In contradiction to the Supreme Court, almost two-thirds of North Dakota institutions apply security fees in this way for speakers invited by students and faculty. For example, North Dakota State University uses "historical protest activity at events of similar attendance" to determine security costs for event organizers, effectively imposing an unconstitutional tax on controversial speech.

Free speech on the open areas of campus

FIRE's survey revealed encouraging data for free expression in open areas of campus, which was addressed by the enactment of SB 2320 in 2019 by the North Dakota legislature. FIRE could not find a single institution in North Dakota that restricts campus expression to small areas of campus, called "free speech zones," or that requires speakers to receive the institution's permission before engaging in expression. Indeed, nearly four-out-of-five institutions affirmatively protect the open areas of campus as available for expression and almost three-quarters affirmatively state that students needn't receive university permission before engaging in constitutionally-protected expression. Despite the good outlook for student speech in the open outdoor areas, the HB 1503 provides much needed clarity that the time place and manner standard in the law applies only to the open outdoor areas of campus generally accessible to the public.

Conclusion

No North Dakota institution explicitly violates the First Amendment in the open areas of their campuses after the legislature's bill in 2019. Every North Dakota institution fails to enforce the First Amendment in their harassment policies in the absence of a bill like HB 1503. This extreme disparity demonstrates the effectiveness of state legislation to enforce the First Amendment and the need to pass this legislation.

Thank you for your attention to FIRE's perspective. I look forward to answering any questions you might have during the hearing.

Respectfully,

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