

HB1503

House Judiciary Committee

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Chair Klemin and members of the House Judiciary Committee: My name is Lisa Johnson, and I serve as the Vice Chancellor for Academic and Student Affairs of the North Dakota University System. I am here on behalf of the North Dakota University System, but not the SBHE, as the SBHE has not met in the week or so since this bill was filed, to provide testimony in opposition to H.B. 1503.

Last session, the North Dakota University System worked with the Legislative Assembly on S.B. 2320, which enacted N.D.C.C. Chapter 15-10.4, which required the SBHE and each institution to adopt a policy to protect student freedom of speech, assembly, and expression. As a result, the SBHE and each campus developed both systemwide and campus-specific policies implementing that Chapter before the statutory deadline of August 27, 2019. *See, e.g.,* [SBHE Policy 503.1 – Student Free Speech and Expression](#). On September 3, 2019, a copy of the SBHE Policy and each Campus Policy was sent to Legislative Management, evidencing that the SBHE and all campuses met the statutory deadline. Senator Holmberg, the lead sponsor of S.B. 2320, and SBHE Chair Nick Hacker were copied on that email. The North Dakota University System also provided the same policies to legislative management again in early December 2, 2020, in response to a November 30, 2020 request. NDUS prides itself on its responsiveness to legislative requests, and if it had received any additional requests for information, it would have provided that requested information as well. All of these policies are in the packets I provided to the committee.

Since these policies were implemented, neither the SBHE nor any of the institutions have received a single complaint asserting that their expressive rights were violated – either by the adopted policies or by someone violating the policies. Similarly, the NDUS has not heard from the Foundation for Individual Rights in Education (FIRE) since the adoption of those policies. One of the major concerns of S.B. 2320’s proponents was that NDSU’s free speech policies had been given a “yellow” rating by FIRE. However, after the policies required by S.B. 2320 were adopted, FIRE reviewed NDSU’s new policy on March 10, 2020, and gave it a “green” rating. *See* https://www.thefire.org/fire_speech-codes/ndsu-demonstrations/ and https://www.thefire.org/fire_speech-codes/ndsu-free-speech/. In fact, the NDUS has found no formal complaints of violations of free speech or freedom of expression at any NDUS campus during any of the last 12 years.

In addition, since the adoption of these student free speech policies, the SBHE, the NDUS, and the eleven campuses have taken several additional steps to enhance and protect the rights of students on campus. First, after the SBHE policy was put in place, the NDUS Office called a joint meeting of the systemwide Student Affairs Council and Academic Affairs Council to discuss the new policy and the creation of campus policies, which included a lengthy discussion and question-and-answer session with NDUS attorneys and UND’s Vice President for Student Affairs, who had previously

worked with FIRE to ensure that UND's policies met FIRE's guidelines. Additionally, working closely with the North Dakota Student Association (NDSA), the NDUS was one of the first University Systems nationwide to adopt a Student Data Privacy and Security Bill of Rights, giving students much broader visibility into how their data is used and providing the opportunity for students to opt out of the disclosure of their data, where possible. See [SBHE Policy 503.2](#). The SBHE also passed [SBHE Policy 503.3](#), which provides broad protections for student and student organization participation in political campaigns, events, and other political activities (with only a narrow limitation required by state law). The latter policy was devised with input from FIRE, and received the following positive feedback from FIRE's Azhar Majeed:

"This policy looks quite solid to me and my colleagues. We appreciate your willingness to consider our input and to adjust the policy accordingly. We likewise appreciate that the policy begins with the basic premise that students' speech rights, including political speech rights, are to be stringently protected, with only exceptions made pursuant to state law."

The NDUS was grateful for FIRE's assistance and recommendations in formulating that policy and additionally incorporated resources provided by FIRE when aiding the campuses in developing their campus specific policies in compliance with that of State Board Policy 503.1 prior to the implementation deadline of August 27, 2019.

Today, the NDUS is unsure as to the rationale for the introduction of H.B. 1503 last week. Not only is it redundant and unnecessary, it reintroduces many of the problematic elements of the earlier drafts of S.B. 2320 in 2019.

In order to demonstrate just how far NDUS has already come to meet the bill's purposes, and intends to go in the future, let's walk through the proposed changes, set out in Section 2 of the bill. Proposed Section 4(a) requires campuses to maintain the generally accessible, open, outdoor areas of campus as traditional public forums. Section 2(c)(i) of SBHE policy 503.1 already does just that:

i. Institutions shall maintain the generally accessible, open, outdoor areas of its campus as traditional public fora for free speech by students, faculty, student organizations, and members of the public, subject to reasonable and constitutional time, place, and manner restrictions. Institutions may require

By generally opening such areas of campus to expressive activity, the NDUS also complies with Proposed Section 4(b), which prohibits the restriction of student free speech to "free speech zones." As the NDUS made clear to the House Education Committee in 2019 (and in 2017), NDUS campuses do not, and have never, restricted student speech to free speech zones. NDUS's objection to using that term has always been one of definition – different people define "free speech zones" in different ways. It became clear during the 2019 testimony that some of the proponents of the bill objected to constitutional time, place, and manner restrictions and called the same "free speech zones," as opposed to the more normal definition: a broad restriction on controversial speech to a

small, sometimes inconvenient area of campus. NDUS agrees that such restrictions are unconstitutional, and has never imposed such a limitation.

Proposed Section 4(c) would prevent institutions from denying student activity fee funding to a student organization based on viewpoints the student organization advocates. To be clear, NDUS does not permit discriminating against student organizations based on their viewpoints, and enshrined this rule in Policy 503.3, Student Political Rights:

- 4. Student Organizations.** Student organizations shall be free to engage in civic engagement and political activities and advocacy without interference or restraint by the SBHE, NDUS, or any NDUS Institution, subject to the requirements and limitations of this policy.
- a. Student organizations shall be permitted to use any funding or resources provided by the institution or student government to provide educational or service-based events or experiences for members of the organization or campus community, such as (but not limited to) inviting speakers to campus, hosting debates or forums, or attending local, state, or national conferences or conventions, even if such events or experiences may be interpreted as “political” or “partisan” by an outside observer.

As a result of this and other non-discrimination provisions in SBHE and institution policies, NDUS institutions have never denied student activity fee funding to a student organization based on their viewpoint, and this requirement is unnecessary. If, however, the legislature would prefer that Policy 503.1 explicitly prohibit denying student activity fee funding to a student organization, NDUS has no objection to adding that to the policy – yet another example of a goal that could be accomplished without legislation.

Proposed Section 4(d) of the policy is also addressed by Section 2(e) of Policy 503.1, which provides that NDUS institutions may require permits only for the exclusive use of outdoor spaces. There is no permit requirement for spontaneous gatherings or assembly, and outdoor distribution of literature is only subject to constitutional time, place, and manner restrictions in institutional policies (i.e. not within a certain distance of an entrance or exit to a building).

Proposed Section 4(e), which regards security fees, of H.B. 1503 is already largely included in SBHE Policy 503.1. The only place where the current policy diverges from the proposed legislation is that the Policy permits the assessment of security fees based on anticipated security fees. This element of the policy was put in place due to budgetary concerns – the media is full of examples of campuses having to spend tens or hundreds of thousands of dollars to provide security for controversial speakers. Most or all NDUS institutions simply do not have the budget to pay for such security. However, based on federal litigation outside of North Dakota and guidance received over the last

two years, the NDUS has already begun the process to remove this allowance from the SBHE policy, and in fact campuses have long been instructed not to impose security fees based on expected protest activity without the approval of their campus attorney, so this provision has never been used. NDUS institutions have always done an excellent job facilitating the attendance of controversial speakers on campus, often without incurring additional expenses. However, should an NDUS institution incur security costs which exceed their budgetary means, it may well come to the legislature with a deficiency funding request during the next legislative session, and we hope the legislature will be amenable to reimbursing that expenditure. Again, this element of the policy could have been addressed by the proponents of H.B. simply by reaching out to the NDUS office – but no one did so.

Similarly, Proposed Sections 4(f) and 4(g) are also covered by SBHE Policy 503.1:

f. Students, faculty, and student organizations shall be permitted to invite guest speakers or groups to campus, and institutions may not prohibit or disinvite such guest speakers based on the anticipated content or viewpoint of their speech or expression.

Finally, SBHE Policy 503.1 does not currently address element 4(h) of H.B. 1503. This is for a good reason: the Supreme Court ruled in the case of *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) that institutions could require officially recognized student organizations to not discriminate based on the factors set out in federal law, including based on religion. As a result, some NDUS institutions have limited student activity fee funding to some organizations based on some organizations' failure to allow any student to participate, become a member, or seek leadership positions in the organization, while others have not limited that funding. However, last year the Department of Education promulgated a new regulation, located at 34 C.F.R. §§ 75.500 and 76.500, which prohibits this limitation. As a result, the NDUS has already begun the process of making this change to SBHE Policy 503.1 and the institution policies, and would welcome working with H.B. 503.1's proponents to ensure that the language of the SBHE policy complies with this new regulation.

I am not here today to say that SBHE Policy 503.1 is perfect – as I have noted, there are a couple places where NDUS has already begun the process to make changes. However, given that the policy was required to be put in place in only four months, during the summer (when most NDUS stakeholders are not on campus), some work on the policy is to be expected. The NDUS has always been open to feedback from legislators, constituents, and groups like FIRE on its existing policies, and would have been happy to address those changes before we arrived here, on a delayed bill before this committee. However, the issues that I have highlighted in my testimony today

underscore why the NDUS must retain the flexibility to react to ever-changing federal law and court rulings. The previous presidential administration made expanding certain elements of campus speech rights a priority, and we expect that the new administration may well seek to either emphasize different aspects of campus speech, or to take back some of previous regulations. Moreover, Courts are consistently reaching conflicting decisions regarding campus speech issues. More than ever, the NDUS and its institutions are perfect examples of how local control can result in a more nimble and effective response to changing conditions. H.B. 1503 is unnecessary and punitive at best, and would actively harm the ability of NDUS's campuses to adapt to changing laws and regulations.

Despite all of the efforts of the SBHE, NDUS, and the institutions over the last two years, however, H.B. 1503 once again erects a confusingly written and punitive cause of action against the State of North Dakota. The cause of action section seems to intend to grant every student the right to file a lawsuit against an institution if that institution violates any of the numerous and detailed provisions set forth in the proposed bill. However, that isn't what the proposed legislation would do. The cause of action is written so confusingly that it could create a cause of action for anyone whose expressive rights were violated by an action which is not compliant with *any* state law, as the cause of action does not specify which law must be violated to support the suit.

Moreover, Chapter 15-10.4 does is require the institutions to create a policy meeting certain parameters. It is unclear how someone's expressive rights could be violated by the failure of the NDUS to establish a certain policy – expressive rights are violated by the application of policies.

Finally, assuming that the cause of action would be interpreted to grant a cause of action to individuals whose rights were allegedly violated by contraventions of SBHE and institution policy – which would likely be a first in North Dakota - the cause of action would not have the desired effect. The North Dakota Risk Management department is required by statute to defend state employees who are sued for actions they took within the scope of their authority. As a result, it would be the taxpayers of the state of North Dakota who would be paying the damages in any such lawsuit, not the NDUS or the individual who allegedly violated a person's rights.

Notwithstanding, the cause of action still encourages frivolous litigation against the state of North Dakota by the inclusion of statutory damages – particularly where there have been no reported violations of expressive rights on NDUS campuses. This part of the bill is particularly concerning where students already have two avenues to pursue if they contend that their First Amendment rights have been violated. First, they can file a complaint with their campus or the system office under SBHE Policy 501.3(5) or seek policy changes to ensure that the alleged violation does not reoccur. Second, they can file a federal lawsuit under federal civil rights laws. The bill's creation of a

new, expensive means for students to seek compensation from North Dakota taxpayers is redundant and unnecessary.

The institutions of the NDUS are unreservedly supportive of free speech. Despite the fact that our campuses have not encountered any substantiated cases of restrictions being placed on free speech, have had no speakers shouted down, no visitors assaulted, no “disinvited” speakers, and no student complaints for at least the last 12 years, which is remarkable in the current political environment, there are still external forces that continue to perpetuate the notion that North Dakota colleges and universities are actively working against free speech and freedom of expression. This is simply not true, and it devalues the hard work of NDUS employees to protect the rights of student rights over the last two years, and the decades prior.

I respectfully recommend a “do not pass” on H.B. 1503 and wish to iterate the willingness of the North Dakota University System to work with this Committee and others, including FIRE, to better understand and address any unresolved concerns. I stand for questions from the Committee.