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To: Senate Education Committee
From: Christopher Dodson, Executive Director
Subject: HB 1503 - Religious and Free Speech Rights of Students on State Campuses
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The North Dakota Catholic Conference supports House Bill 1503.

Students should not lose their basic rights to speech, religious expression, and association when attending a public college or university. Unfortunately, campuses across the nation are enacting policies that infringe on those rights. House Bill 1503 would respect our students and protect their rights on our public colleges and universities.

The conference especially supports the language in the new subsection (h) at the bottom of page 3. This language would ensure that student groups can adopt membership and leadership requirements that reflect their beliefs and missions. Unfortunately, campuses around the nation are adopting policies that require student groups to accept anyone as a member and a leader, even if the individual disagrees with, or is hostile to, the group's mission, purpose, or beliefs. Catholics could assume control over a Baptist group, Democrats and Republicans could undermine each other's clubs, and racists could insert themselves into African-American student clubs. When organizations require that their leaders or members follow the organizations' mission, campuses have penalized the organizations and prevented them from having the same benefits available to other groups such as access to meeting space, message boards, tables at events, and student activity funds.

In a closely divided and somewhat confusing 2010 opinion called *Christian Legal Society v. Martinez*, the United States Supreme Court found that these policies were sometimes permissible.¹ Some colleges and universities have since interpreted the CLS case as an invitation to enact more of these discriminatory policies, leaving the task of protecting student clubs to state legislatures. That is what has happened in North Dakota.

In its testimony in opposition to HB 1503 in the House, the North Dakota University System (NDUS) acknowledged that some of the state's campuses have enacted these discriminatory policies.² According to NDUS's testimony, these campuses deny otherwise available student activity funds to clubs that seek to preserve their purpose by asking their members or leaders to agree with the organizations' beliefs or missions.

NDUS's testimony is an acknowledgment that, to some degree, it is not in compliance with federal regulations. The Trump Administration last year enacted rules that prohibit public universities from applying such policies to religious organizations.³ To its credit, NDUS stated that it intends to revise its statewide policies to bring them into compliance. This overture, however, does not negate the need for HB 1503. The need still exists for several reasons.

First, NDUS acknowledges that it is only revising its policies because it is required to do so by the federal rule. This federal rule, however, could be modified or even rescinded by the new presidential administration. Moreover, some of the same opponents to HB 1503 who argue the bill is not necessary because of the federal regulation are suing to invalidate that very same regulation.⁴ In short, without state legislation, there is no guarantee NDUS would not change its policies again and that protection for religious clubs on North Dakota's campuses would again not exist.

Second, the federal rule applies only to religious clubs. Correspondingly, NDUS has only indicated willingness to revise its policies as they relate to religious clubs. There is no protection for the rights of non-religious clubs, such as political groups, pro-life organizations, LGBTQ advocacy clubs, or environmental societies to preserve their missions and identities.

Third, the door opened by the *CLS* case for these discriminatory policies is very narrow. It is not clear that the policies on NDUS campuses, even after the promised change to comply with the federal rule, would protect students' constitutional rights. Other state university systems have seen protracted legislation stemming from policies like those NDUS acknowledges currently exist.⁵ Students should not have to resort to court to protect their rights. The language in the new subsection (h) on page 3 would meet constitutional muster and prevent litigation.

Fourth, the very fact that NDUS allowed our state's campuses to enact these discriminatory policies in the first place, and the fact that it is only now willing to address the issue because of federal regulations, indicates that legislation is needed to protect students' religious, speech, and association rights on the state-run campuses. This is a matter that should be and needs to be addressed here.

College Republicans have the right to be Republicans, College Atheists have the right to be atheists, and College Christians have the right to be Christians. HB 1503 would protect these rights and contribute to the richness of our university system.

We urge a **Do Pass** recommendation on HB 1503.

¹ *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

² “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.” Testimony of Lisa A. Johnson, Vice Chancellor for Academic/Student Affairs, NDUS, https://www.legis.nd.gov/assembly/67-2021/testimony/HJUD-1503-20210216-6718-A-JOHNSON_LISA_A.pdf

³ 34 C.F.R. 75.500.

⁴ *Secular Student Alliance v. U.S. Department of Education*, U.S. District Court, D.C., Case 1:21-cv-00169. The plaintiffs are represented by Americans United for the Separation of Church and State and American Atheists, both of whom rely on the federal regulation in their submitted testimony in opposition to HB 1503.

⁵ See, e.g. *Business Leaders in Christ v. University of Iowa*, 360 F. Supp.3d 885 (S.D. Iowa 2019), appeal docketed, No. 19-1696 (8th Cir. Apr. 3, 2019); *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960 (S.D. Iowa 2019), appeal docketed, No. 19-3389 (8th Cir. Nov. 5, 2019). Litigation has also initiated against Wayne State University and SUNY-Buffalo (see testimony of Gregory Joa at: https://www.legis.nd.gov/assembly/67-2021/testimony/SEDU-1503-20210322-10229-F-JAO_GREGORY_L.pdf)