FIRE
Foundation for Individual Rights and Expression

February 2, 2023

House Government and Veterans Affairs Committee
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: FIRE's concerns regarding HB 1446

Dear Chairman Schauer & Members of the Committee,

My name is Greg Gonzalez and I am Legislative Counsel for the Foundation for Individual Rights and Expression (FIRE), a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty at our nation's institutions of higher education. FIRE's Joe Cohn previously worked closely with the North Dakota legislature on the state's campus free speech and campus due process legislation — two bills that have made North Dakota a national leader in campus civil liberties. We write today to express our concerns with a bill before the House Government and Veterans Affairs Committee, HB 1446.

FIRE understands the desire to ensure that public dollars spent on higher education are utilized wisely to the benefit of the students enrolled and the state. However, it is important to remember that higher education loses its value when faculty do not have the academic freedom necessary to teach and conduct research that enriches our understanding of the world, free from political interference. Similarly, American society as a whole suffers when faculty do not enjoy the First Amendment right to criticize campus bureaucracies.

Unfortunately, Section 1(4)(c) of the proposed legislation would impose upon tenured faculty the obligation to "exercis[e] mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution." This requirement would effectively empower institutions to take adverse action against tenured faculty for their protected expression online, including criticizing campus administrators or commenting as private citizens

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on matters of public concern. Section 1(4)(c) runs afoul of the First Amendment and must be removed if the bill is to pass constitutional muster.

The bill also weakens tenure. FIRE does not take a position on specific tenure policies or on whether it should be guaranteed under state law. However, we recognize that tenure has historically played a central role in protecting the academic freedom of faculty members across our nation.

For decades, the Supreme Court of the United States has recognized the vital importance of academic freedom for faculty members at public institutions of higher education. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), a landmark case protecting academic freedom, the Court wrote:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.

Ten years later, in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court again underscored our national interest in protecting academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

In light of the essentiality of academic freedom for the proper functioning of our public colleges and universities and the society they serve, FIRE has defended the academic freedom of faculty at institutions nationwide since our founding in 1999.

Accordingly, we are concerned by Section 2(1) of the bill, which would weaken tenure protections. In relevant part, Section 2(1) provides:

> The president of each institution of higher education under the control of the state board of higher education may review performance of any or all of the duties and responsibilities under section 1 of this Act of any faculty member holding tenure at any time the president deems a review is in the institution's best interest.

While the contours of post-tenure review processes can and do vary among institutions, it is vital for academic freedom that such reviews do not become a vehicle for the intrusion of politics into the academic process. Under the proposed legislation, however, the president of each institution of higher education in the state, who are appointed by the State Board of Higher Education — who are themselves political appointees of the governor — will wield significant authority over each member institution's post-tenure review policies. Such a process invites political considerations into post-tenure review and threatens to subject faculty to the "pall of orthodoxy" about which the Supreme Court warned in *Keyishian*.

Compounding the threat, Section 2(6) denies faculty the ability to appeal the president's decision: "A review under this section is not appealable or reviewable by a faculty member or faculty committee."

It is unjust to accord total deference to a president's determinations even when the factual conclusions are erroneous. Any statute or policy that allows for the removal of a tenured professor must allow for a meaningful appeal. To protect faculty from unjust termination and to avoid costly litigation, the legislation must be amended to provide some mechanism for tenured faculty members to appeal the decision to revoke their tenure and terminate their contracts.

Additionally, if there is concern amongst the Legislative Assembly that the academy is lacking in viewpoint diversity, weakening tenure will not solve this problem and may even exacerbate it. After all, it is those who hold minority or dissenting viewpoints who are often most in need of tenure's protections.

In a noteworthy example, in 2014, a political science professor at Marquette University published a personal blog post criticizing a graduate student instructor for stating that it was inappropriate for a student in a philosophy course to express opposition to same-sex marriage. Citing "standards of personal and professional excellence," Marquette suspended the professor and revoked his tenure. After nearly three years of litigation, the Wisconsin Supreme Court ruled that the university had violated the professor's academic

freedom rights, in a manner that would effectively nullify tenure, and ordered him reinstated. *McAdams v. Marquette Univ.*, 383 Wis. 2d 358 (Wis. 2018).

As the Marquette University example illustrates, diluting tenure empowers administrators to target faculty holding disfavored views. Unfortunately, the Marquette case is not an isolated example. FIRE's archives and our Scholars Under FIRE database demonstrate that threats to faculty rights are a persistent problem affecting faculty of every political persuasion. Because tenure has proven crucial to protecting the rights of faculty with dissenting positions, we urge the Committee to reject language that would reduce its effectiveness in safeguarding academic freedom.

For these reasons, FIRE urges the committee to make substantial revisions to HB 1446 to safeguard academic freedom. If our concerns remain unaddressed and the bill advances, we will oppose its passage. Thank you for your time and consideration.

Best regards,

Greg Y. Gonzalez
Legislative Counsel

cc: Majority Leader Mike Lefor