

February 8th 2021

The Honorable Sen. V.J. Smith
Chairperson, Senate Agriculture and Natural Resources Committee
500 East Capitol Ave.
Pierre, South Dakota 57501

RE: Oppose House Bill 1028, Testimony from the ACLU of South Dakota



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Dear Chairman Smith and members of the Senate Agriculture and Natural Resources Committee

I write to you today on behalf of the ACLU of South Dakota in opposition of House Bill (“HB”) 1028. This bill is an unconstitutional attack on the First Amendment rights of all South Dakotans and would codify an explicit form of viewpoint discrimination that is antithetical to our values of intellectual diversity and responsible civic engagement. I urge the committee to vote no on HB 1028.

One of the bedrock principles of the First Amendment is that in a free and open society, people have the ability to speak to their government about issues of public interest.¹ The Supreme Court has often reiterated the importance of maintaining this open communication between the people and the state on matters of public concern;² the Court has gone so far to note that “the opportunity for free political discussion [is] . . . essential to the security of the Republic[.]”³ HB1028 directly undermines this key principle of American freedom.

First, there can be no question that the issue of water usage is a matter of public concern. The state’s laws explicitly acknowledge this fact by declaring that “the people of the state have a paramount interest in the use of the water of the state[.]”⁴ that “the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state[.]”⁵ and that “all water within the state is the property of the people of the state[.]”⁶ Despite this important interest, HB 1028 seeks to severely restrict those who are able to speak for or against the issuance of water permits in the state.

Specifically, HB 1028 states that a person may only participate in a hearing before the Water Management Board if:

- (a) The person alleges that the application, upon approval, will cause injury to the person that is unique from any injury suffered by the public in general;

¹ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”).

² See *Roth v. United States*, 354 U.S. 476, 484 (1957).

³ *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁴ S.D.C.L. § 46-1-1.

⁵ S.D.C.L. § 46-1-2.

⁶ S.D.C.L. § 46-1-3.

(b) The person's injury concerns a matter either within the regulatory authority found in § 46-2A-9 for approval or denial of the application, or other matter concerning the application within the regulatory authority of the board to act upon as defined by §§ 46-2-9 and 46-2-11, or both; and

(c) The person files a petition to oppose the application with the chief engineer and applicant within ten days of the published notice;

These restrictions raise a number of constitutional concerns. First, by allowing testimony only by those who suffer an injury that is “unique from any injury suffered by the general public[,]” HB 1028 establishes a vague and nebulous standard that will allow the board near complete discretion to silence any South Dakotan whose view is in the minority or runs counter to the Water Management Board. Systems like this which place a prior restraint on who may speak bear “a heavy presumptions against constitutional validity[,]”⁷ especially when they give the administrator “virtually unbridled and absolute power.”⁸

Additionally, courts throughout the country have consistently held that First Amendment rights apply to public hearings like the Water Management Board hearings impacted by HB 1028. In doing so these courts have made it clear that the state has a limited ability to restrict speech at these types of hearings and is forbidden from restricting speech based on the viewpoint of the speaker.⁹ Despite these constitutional mandates, HB 1028 restricts who may speak before the Water Management Board in exactly this way.

During the hearing before the Committee on Agriculture and Natural Resources on January 26, 2021, proponents of this bill made it clear that HB 1028 was intended to prohibit groups who disagreed with certain water permits from testifying before the Water Management Board due to their viewpoints and the nature of their testimony.¹⁰ Additionally, HB 1028’s discrimination against certain speaker’s viewpoints can also be seen by it only allowing speakers who oppose, but do not support, a petition to testify. As such, this bill is replete with viewpoint discrimination and is particularly offensive to free speech rights because “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”¹¹

The First Amendment was not designed to allow the state to pick and choose which citizen’s opinions matter; instead it was designed “to assure unfettered interchange of

⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁸ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969).

⁹ *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07 (2001) (noting that any restriction on speech in a public forum “must not discriminate against speech on the basis of viewpoint”).

¹⁰ <https://sdpb.sd.gov/SDPBPodcast/2021/hag10.mp3#t=807> at roughly 16:00 (noting that the bill is meant to prohibit people from raising objections such as the fact that a water permit for a livestock facility could create a nuisance for surrounding landowners or that a water permit will be used to facilitate construction of an oil pipeline).

¹¹ *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995).

ideas for the bringing about of political and social changes desired by the people.”¹² By trying to silence those who can testify in front of the Water Management Board because some people find their views inconvenient, the state is engaging in “an egregious form of content discrimination.”¹³ Therefore, the ACLU of South Dakota encourages legislators to remember that “speech concerning public affairs is more than self-expression; it is the essence of self-government[.]”¹⁴ and to vote no on HB 1028.

If you have any questions about the ACLU of South Dakota’s position on this bill please contact me at 605-332-2508.

Sincerely,

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¹² *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹³ *Rosenberger*, 515 U.S. at 829.

¹⁴ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).