

HOUSE JUDICIARY COMMITTEE
FEBRUARY 2, 2021

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1385

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, Assistant Attorney General, and I appear on behalf of the Attorney General in opposition to House Bill 1385.

This bill would have the Attorney General's office reject a rule if the rule is contrary to legislative intent. Subsection 3 would prevent the proposal of any bill within four years after the legislative assembly failed to pass a bill is substantially similar to the rule it is contrary to legislative intent.

- NDCC 28-32-18(1)(c) already allows the Administrative Rules committee to find all or any portion of a rule void if there is a specific finding that there is "a failure to comply with express legislative intent."
- North Dakota case law states that the failure of a measure is not indicative of legislative intent. Public policy is declared by the action of the legislature—not by its failure to act.
- Sometimes measures fail because the legislature determined it was a matter better served by the rulemaking procedure.
- Legislative intent is not always clear. Measures fail because people disagree.
- Legislative history is not the same as legislative intent.

- If the Legislature does not want an agency to pass rules on a particular subject then it has the ability to take away an agency's authority to make such rules.
- Section 3 is overly broad. It is unclear what would be considered "substantially similar" to a failed bill.

I would be happy to answer any questions.