

Testimony of Daniel J. Dew
Pacific Legal Foundation
on SB 2124
North Dakota House Human Services Committee
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Chair Weisz, Vice Chair Rohr, and members of the House Human Services Committee, my name is Daniel Dew, and I am the legal policy director at Pacific Legal Foundation. PLF is a nonprofit law firm dedicated to individual rights and limited government. PLF was founded in 1973 by then-Governor Ronald Reagan's staff to protect individual rights from government overreach, including property, economic, and speech rights that are increasingly under assault. We have a dozen wins before the United States Supreme Court and, just a few hours ago, my colleagues argued another case before the Supreme Court.

Thank you for taking the time to address emergency powers reform through Senate Bill 2124 and allowing me to testify in favor of the bill. PLF has been working across the country through legislation and litigation to restore the separation of powers that have been absent over the last year.

First, let me say that reforming emergency powers is not about the pandemic, nor is it a referendum on a particular governor. The pandemic exposed a flaw in current law that allows one person to rule unilaterally for more than a year. Reform is necessary to restore the separation of powers that are vital to individual liberty.

Justice Antonin Scalia said, "Every banana republic in the world has a bill of rights. Every president for life has a bill of rights." When the whole of government power rests with one person without checks and balances, the promise of rights is empty and unenforceable.

The Framers understood that the lawmaking power was the "most dangerous" threat to liberty and entrusted it exclusively to a multi-member legislature for many reasons, including because it would ensure public debate, encourage compromise between factions, and lessen the risk of individual bias.

There are times when the government must move quickly to prevent irreversible harm to life or property, and thus, state legislatures have given their governors extra authorities to be used in times of emergency. For example, we are accustomed to emergency declarations and orders passed in response to natural disasters. Natural disasters are the perfect candidate for emergency orders: they arise quickly, and immediate action may need to be taken before the legislature can reasonably respond.

As COVID-19 began to spread in the U.S. last year, little was known about the virus's contagiousness or lethality. During the initial weeks of the emerging pandemic, governors exercised their emergency powers to blunt the impact of the disease using the limited information available to them. But there is no reason why unilateral lawmaking — which is what emergency orders are — should continue indefinitely when the Legislature is in session or could

be called back into session to deliberate whether fundamental restrictions on liberty should continue and under what conditions.

If governors go unchallenged, they are likely to be emboldened to act unilaterally to combat other chronic problems that could be declared emergencies, such as the opioid epidemic, homelessness, or climate change. No doubt, these are serious issues that garner a lot of debate. But are we ready to sacrifice our constitutional safeguards and trust one person to make changes in all policy matters that those complex issues touch?

Senate Bill 2124 does an excellent job to balance the need for government to act quickly in times of emergency and ensures that the legislature is tasked with making law when an emergency shifts to an ongoing crisis.

Another feature of Senate Bill 2124 is it would prohibit the governor from reissuing an emergency order that is the same as or substantially similar to one that expired or was rejected by the legislature. It has been the sad experience in many states that even where the law provides a temporal limitation on emergency powers, the governor will simply issue it again once it has expired.

PLF has additional recommendations for reform, such as subjecting emergency orders to strict scrutiny and expedited judicial review to make sure the courts are fully engaged in their proper role to defend liberty. But Senate Bill 2124 is an enormous stride to protect North Dakota's separation of powers and I encourage your support.

Thank you for the opportunity to testify and I am happy to answer any questions the committee may have.