

January 27, 2021

Dear Chairman Klemin and Members of the House Judiciary Committee:

The ACLU of North Dakota opposes House Bill 1240. We believe this legislation is extremely broad in scope, could chill free speech, and could result in two worrisome outcomes: 1) it could penalize North Dakotans exercising their First Amendment rights with enormous amounts of restitution for being in the wrong place at the wrong time, or 2) it could be utilized to assign all of the potentially enormous costs of property damages caused during a riot to a person who merely disobeyed a public safety order, a misdemeanor offense.



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Due to the potential for chilled speech and the enormous amounts of restitution to be ordered against people who played a minor—if any—role in a riot we urge a **do not pass** recommendation on HB 1240.

HB 1240 imposes burdensome restitution on any person “guilty of an offense under this chapter”—referring to N.D.C.C. § 12.1-25. This chapter includes two felony offenses (§ 12.1-25-01 inciting a riot and § 12.1-25-02 arming rioters) and two misdemeanor offenses. Those misdemeanor offenses are § 12.1-25-03 (engaging in a riot) and § 12.1-25-04. § 12.1-25-04 is the misdemeanor offense of “disobedience of public safety orders under riot conditions.”

This section states that:

“A person is guilty of a class A misdemeanor if, during a riot as defined in section 12.1-25-01, or when one is immediately impending, the person disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder, or promote the safety of persons or property, issued by the senior law enforcement official on the scene.”

That means that a person who does not participate in the riot—including a person who is present in the “immediate vicinity of the riot” before one starts and remains despite an order “when one is immediately impending”—could be held liable for the entire cost of the riot.

This possibility is incredibly troubling for both factual and constitutional reasons. As large-scale protests have taken place repeatedly over the last several years it has become clear that very large crowds can be difficult to maneuver within. In a large crowd that becomes agitated, an individual present for a protest could quickly find themselves stuck in the midst of destruction they did not intend to cause and did not in fact cause; they may become trapped and unable to comply with a public safety order to move or disperse. A person in this exact scenario could be charged and convicted of an offense under N.D.C.C. § 12.1-25 and then be responsible for restitution for *the entire cost of damages* under HB 1240.

As an initial matter, this likely violates constitutional standards established to protect free speech. The Supreme Court has made clear that when people gather together to exercise their First Amendment right—even if that gathering turns

violent—a state “may impose damages for the consequences of violent conduct” but “[o]nly those losses proximately caused by unlawful conduct may be recovered.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982). A person who does not participate in a riot but merely disobeys a public safety order in the riot’s vicinity cannot be said to have “proximately caused” any damages. Imposing liability in such a situation only serves to deter people from gathering together to exercise their First Amendment rights.

In addition to the risk of assigning enormous amounts of restitution to a person who may not have participated in a riot, HB 1240 contains a potential problem with regard to excessive fines under the U.S. Constitution. The Supreme Court has found that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Because the misdemeanor offense found in N.D.C.C. § 12.1-25-04 triggers the potential for restitution under HB 1240 it is possible that an individual who disobeyed a public safety order under riot conditions could bear the *entirety* of the cost of property damages. While inquiries under the Excessive Fines Clause are fact-intensive, it is entirely likely that such restitution in such as a case as allowed under this bill would result in an unconstitutionally excessive fine.

For these reasons, the ACLU of North Dakota urges you to oppose HB 1240 and we respectfully ask that you give it a do not pass recommendation.

Sincerely,

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