

Testimony of
Erik Johnson, City Attorney
City of Fargo

January 20, 2021
House Judiciary Committee
HB 1138
Rep. Lawrence R. Klemin, Chair

Mr. Chairman and Members of the Committee,

My name is Erik Johnson. I am appearing on behalf of the City of Fargo, having represented the City of Fargo for 35 years and having been Fargo's City Attorney since 2007.

The City of Fargo OPPOSES House Bill 1138 and respectfully requests a DO NOT PASS recommendation.

Examples that Raise Questions. I do not know the intent behind this proposed bill; however, I can imagine a number of problems attempting to advise my city if this bill were enacted. Will this bill establish a "pass go/get of jail free" card that would allow every individual or group to either file or threaten to file a lawsuit any time they feel their "free expression" is being impeded in some way, no matter how small? Should the police officer be worried about getting sued every time she comes upon a disruptive individual (or group) arguing and yelling on a downtown sidewalk or street? Can the city street worker remove handbills that have been posted on city right-of-way? May the librarian no longer "sush" the library patrons? What rules can a city council or planning commission establish for running their public meetings and, once those rules are fairly established, can they be enforced without fear of having to defend a lawsuit? Must a municipal judge (a city employee) be worried about entering a judgment of conviction whenever the case focuses upon a defendant expressing himself in some way and he claims "free speech"?

Treble and Punitive Damages. The bill requires the tripling of "actual damages" (including consequential and incidental damages); however, the right to free speech has such intangible value that actual damages would frequently be speculative at best. There is no market price that can be used to place a value of "actual damages" for the alleged loss of free speech. What's more, the bill authorizes the

imposition of “punitive damages”--damages intended to punish the wrongdoer. North Dakota law rarely authorizes the award punitive damages. The situation must involve fraud or maybe a handful of other situations involving extreme and conscious indifference to one’s obligation to another. House Bill 1138 urges punitive damages to be awarded upon proof of merely careless behavior (the “...standard ... is mere negligence.” H.B. 1138). In other words, the State or a city may be required to pay “punishment damages” for a mere mistake in judgment or lack of “due care” even when many decisions are made in the heat of the moment or the circumstances that were known at the time. [I might add that liability insurance policies (including perhaps the North Dakota Insurance Reserve Fund coverage) frequently exclude punitive damage awards from insurance coverage.]

The right to freedom of speech is a fundamental value embodied in our Federal and State Constitutions—with this, no reasonable person disagrees—however House Bill 1138 converts the free-speech right from a shield to a spear. The right to be free of governmental interference with one’s free expression was a shield established by the founders to protect the people from an overly intrusive government. Caution should be used before turning the free speech right into a spear.

CONCLUSION. For the reasons as described, the City of Fargo respectfully requests a DO NOT PASS recommendation on HB 1138.