



NDSBA

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HB 1138

Testimony of Amy DeKok

House Judiciary

January 20, 2021

Chairman and members of the House Judiciary Committee, my name is Amy DeKok. I am in-house Legal Counsel for the North Dakota School Boards Association. NDSBA represents all 178 North Dakota public school districts and their boards. I am here today in opposition to HB 1138.

HB 1138 creates a civil cause of action against the state, political subdivisions, and their employees for a violation of section 4 of article I of the North Dakota Constitution. It also provides that the state or political subdivision is liable for treble damages for compensatory, consequential, and incidental damages. Finally, it provides that a court may also award punitive damages and the standard to award such damages is mere negligence.

We oppose HB 1138 for a few reasons. First, there is no indication in the bill where the proposed provision would be placed in the ND Century Code. It is important to know where this will fit within the Code to understand the potential impact on other chapters and sections of the Code. And this goes directly to my second reason that this bill is problematic.

Second, the bill conflicts with several existing provisions of the Code, specifically within chapter 32-12.1. This chapter relates to liability of political subdivisions and their employees. This chapter would come into play with this bill because it addresses claims brought against a political subdivision or an employee of the political subdivision acting within the scope of the employee's employment or office. There are several inconsistencies between the bill as proposed and this chapter. For example, the bill calls for payment of treble damages for any compensatory, consequential or incidental damages for violation of free speech rights. However, chapter 32-12.1 contains liability caps of \$250,000 per person and \$1 million for any single occurrence. It goes on to say that any payments to persons under these liability cap provisions constitute payment in full. HB 1138 makes no reference as to how to reconcile this. By way of further example, chapter 32-12.1 provides that a political subdivision may not be held liable, or ordered to indemnify an employee held liable, for punitive or exemplary damages. The bill is in direct contradiction to this provision.

Another reason we oppose this bill is that it is inconsistent with the standard for award of punitive damages. Punitive damages are awarded as a penalty to punish the wrongdoing party in order to deter that party and others from repetition of wrongful conduct. Courts typically require an element of malicious intent or motive or egregious conduct in awarding punitive damages. The bill proposes a standard for award of punitive damages as "mere negligence." Mere negligence is not defined in the bill nor used in Century Code. The sponsor may mean ordinary negligence and if so, this would be inconsistent with the typical standard for awarding of punitive damages. Moreover, the bill already calls for the award of treble damages, which is itself punitive. To allow for an additional award of punitive damages on top of treble damages would be an unfair duplication of punitives which our courts have deemed inappropriate. Therefore, the provision awarding additional punitive damages should be eliminated. The bill also mentions incidental and consequential damages. These are special damages that may be awarded in a breach of contract action. The cause of action created by this bill is not a breach of contract action.

Another reason for our opposition is that there are already mechanisms in place to assert violations of free speech rights by state and its officials acting under the color of law and therefore, the bill is unnecessary. The protections of the First Amendment of the U.S. Constitution apply to the states, their political subdivisions, and officials through the 14th Amendment of the Constitution. Individuals may assert violations of these rights under Section 1983 of the Civil Rights Act. There is well-established and well-developed jurisprudence addressing such claims. In additions, individuals may bring a writ of mandamus or writ of prohibition against a political subdivision in response to an alleged failure to adhere to the ND Constitution.

For these reasons, NDSBA stands in opposition to HB 1138 and encourages this committee to give it a do not pass recommendation. I would be happy to answer any questions the committee may have.