PACIFIC LEGAL FOUNDATION

Testimony of Daniel Dew, Pacific Legal Foundation, on SB 2296
North Dakota House Committee on Government and Veterans Affairs
March 16, 2023

Chair Schauer, members of the House Committee on Government and Veterans Affairs:

My name is Daniel Dew and I am the legal policy director at Pacific Legal Foundation. PLF is a nonprofit law firm whose mission is to protect individual liberty from government overreach. We were organized 50 years ago by staffers in then-Governor Ronald Reagan's office. We had our thirteenth and fourteenth wins at the Supreme Court of the United States last term and we have three cases pending before the Court this term.

One of our primary concerns is the constitutional separation of powers. As the late Justice Antonin Scalia has noted, while the Bill of Rights gets a lot of the credit for protecting our liberty, it would not be worth the paper it is written on without a meaningful separation of powers.

One of the ways the separation of powers is eroding is due to judicial deference or bias doctrines. Deference doctrines, like many of our country's problems, originated in Washington, D.C. and have crept into state government.

In our constitutional form of government, the legislature makes the laws, the executive branch executes the laws, and the judiciary interprets the laws when there is a case or controversy. But the growth of the administrative state has put more and more power into the hands of executive agencies. Legislatures have delegated lawmaking authority to unelected bureaucrats through rulemaking authority. Those same bureaucrats are charged with enforcing the very regulations they wrote. They also get the first crack at the judicial authority through in-house administrative hearings. And then if the agency decision is appealed to a court of law, deference doctrines instruct courts to use the agency's interpretation of the law even if it isn't the best interpretation.

When Americans walk into a courthouse, they are often greeted by a depiction of Lady Justice, who is blindfolded and holding the scales of justice. Lady Justice signals to all who enter that they will be treated fairly on their day in court and the law is no respecter of persons. But deference instructs courts to peak from their blindfold and place a thumb on the scale of justice in favor of the government.

North Dakota courts have been inconsistent in applying deference. One North Dakota Supreme Court case held that courts will give "appreciable deference" to agencies on matters of expertise. This reform would provide consistency. And while the agencies

are experts in their highly technical areas, the courts are experts in interpreting law. This is not a responsibility they should hand over to agencies.

SB 2296 is a simple, two sentence reform. It calls for courts to review laws and regulations *de novo*—meaning anew or without bias. The legislature has already instructed courts to review different matters *de novo* dozens of times in North Dakota law. This will put the government and North Dakotans on equal footing in the courts. That does not mean that the court doesn't listen to the agencies. It just means that the agency has the burden to persuade the court like any other party before it.

The second sentence brings administrative law in line with every other area of law, going back hundreds of years. In the criminal context we have the rule of lenity, which instructs courts to rule in favor of the defendant if there is an ambiguous criminal law. We don't want to put someone in prison for violating a law when a reasonable person could not fully grasp its meaning. In contracts law, we interpret ambiguous provisions against the drafter of the contract to encourage clear drafting.

The second sentence of this reform would, after using all the normal canons of construction, resolve any ambiguities against government authority. This accomplishes two purposes: We don't want to punish people or businesses because they failed to comply with a law or regulation that is ambiguous, and we want to encourage those who write laws and regulations to write clearly to put people on notice of what the law requires or prohibits.

Tennessee enacted a law nearly identical to SB 2296 last year, joining 11 states that have rejected deference. In speaking to a group of lawyers, the Tennessee Attorney General said that the law was changing the way regulators drafted regulations because they knew they would no longer get the unjustifiable benefit of the doubt in court when it comes to aggressive interpretation or sloppy drafting. The law didn't change agency authority, it just incentivizes agencies to be better about putting the public on proper notice through clearer regulations.

In the Senate, testimony from North Dakota Health and Human Services opposed the bill in part because, "the Department will need an additional full-time equivalent position for an attorney as it will need to greatly expand administrative rules and proposed legislation to make sure the Department's intent and interpretation is clear." It is shocking that an agency with such broad authority to write regulations with the effect of law is not already doing this.

Testimony from the North Dakota State Board of Pharmacy opposed the bill because, "the Judge is likely not to have the expertise or understanding of the standard of care that may be applied in a particular matter and not have a way to meaningfully

determine that from the appointed members or staff on the Board." In other words, the Board wants to hold people accountable for violating regulations that, in their opinion, are so technical and ambiguous that North Dakota judges could not be trusted to interpret them, even after proper briefing.

There is a lot of talk from the opposition about the need to quickly resolve matters, but it always seems to be how quickly it can be resolved in favor of the government. Obviously agencies believe their interpretations to always be correct and therefore, in their view, the faster the court comes to that conclusion the better. But courts must not be rubber stamps for executive agencies.

SB 2296 would elevate the courts to their proper function to say what the law is and give North Dakota residents and businesses the fair day in court that the constitution promises them.

I'm happy to answer any questions the committee may have.

Respectfully submitted,

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