

Good afternoon, Madam Chair and committee members. For the record, my name is Bob Paulson, and I am a State Senator from District 3 in Minot.

SB 2296 is a bill that, in essence, protects the rights of North Dakota citizens and puts them on level ground with their government. No government agency should be “judge, jury, and executioner” when it comes to disputes with citizens.

Our current administrative hearings process creates just such a disparity. When a citizen appeals a decision of an administrative agency, our current process gives agencies the right to accept or reject the findings of administrative law judges on matters involving their own agencies and usually their own actions.

This bill would make those findings by administrative law judges actual determinations, not just suggestions to a government agency.

With regard to deference, the language instructs courts to be fair when government agencies are involved.

If either party in an administrative hearing disagrees with the result, they would still have the right to take the matter to district court where, once again, a judge would make the decision.

Madam Chair, that is the bill and you will hear more specifics in the testimony that follows. I would respectfully request a Do Pass, and I will stand for any questions.



THE IMPERATIVE TO END WRONGFUL JUDICIAL BIAS

THE PROBLEM: SYSTEMIC COURT BIAS AGAINST CITIZENS

Courthouses around the country feature statues of the iconic Lady Justice. She is blindfolded and holds the scales of justice, signaling to those who enter the courthouse that the law is applied impartially, without regard to wealth, power, or other status. In other words, each party is equal before the law and all arguments will be given fair, unbiased consideration.

But when it comes to government regulatory agencies in most states, Lady Justice's promise falls flat. A truer depiction would be Lady Justice peeking from her blindfold with her thumb on the scale to favor government regulatory agencies and against ordinary people. For much of the past 75 years, judges have wrongly deferred to a regulatory agency's interpretation of laws it is charged with carrying out, regulations it created, and its factual determinations when it brings enforcement actions against ordinary Americans. In showing "deference," judges abdicate their duty to "say what the law is."

Judges also fail to render independent, impartial judgments when they put a thumb on the scale in favor of the government. This subverts the adversarial system of adjudication that has been central to Anglo-American legal tradition for centuries. Judges must not only hear both sides of a case before making a decision, they must listen without systematically favoring the government.

Although unlawful judicial deference, or bias, toward the government originated as a federal mistake, many state courts followed the federal lead and adopted the practice of overly deferring to state regulatory agencies. As the doctrine has been increasingly criticized and is losing favor on the national level, some states have already abolished improper judicial deference through state Supreme Court decisions and legislative action.

THE SOLUTION: STATE LEGISLATURES CAN END THE BIAS WITH TWO SENTENCES

In interpreting a state statute, regulation, or other sub-regulatory document, a state court or an officer hearing an administrative action may not defer to a state agency's interpretation of it, and must instead interpret its meaning and effect de novo.

In actions brought by or against state agencies, after applying all customary tools of interpretation, the court or hearing officer must exercise any remaining doubt in favor of a reasonable interpretation which limits agency power and maximizes individual liberty.

The first sentence simply instructs courts to interpret statutes and regulations de novo (legalese for anew or without bias). The second sentence instructs courts to first use customary tools of judicial interpretation (instead of presumptions in favor of the government), and then to interpret truly vague statutes or regulations in favor of liberty.

THREE REASONS FOR THE PRESUMPTION OF LIBERTY

Ending unlawful and unfair bias favoring the government (the first sentence above) would be a huge victory for state citizens, but there are three reasons why courts' resolving any remaining doubt in favor of individual liberty is justified.

1. It is a bedrock principle in law that vague contract provisions are interpreted against the drafter, who, in most cases, is the more powerful party. That also incentivizes the drafter to be clear in the future. The government is the drafter of laws and regulations.
2. The courts traditionally interpret vague criminal laws against the government because it would be unfair to imprison someone for an unclear law that didn't provide fair notice of what it required. Complex civil laws and regulations can just as easily become a snare for the unwary. There is no criminal or civil justice in penalizing someone for an unknowable rule.
3. The end of government should be the protection of individual liberty. If the tie goes to the runner in baseball, the tie should also go to the people's residual rights. If the government wasn't clear about its command, individuals shouldn't suffer.