

HB 1105 Amendment to 12.1-20-12.1 and 23-12-16 Related to Breastfeeding
Testimony from Representative Gretchen Dobervich
March 16, 2021

Good Morning Chairwoman Lee and Members of the Senate Human Services Committee,

For the record my name is Representative Gretchen Dobervich, I represent District 11 in Fargo. I come before you to request your support of the removal of subjective language relating to the way a woman may breast feed her child in a public setting.

Discreet and modest are subjective adjectives. They reflect an individual's feelings verses fact; they are a personal judgement. Utilization of subjective adjectives to describe the way in which a woman may publicly breastfeed her child does not clearly define how she must do this, therefore leaving her open to failure to comply to the law based on another individual's feelings.

In a January 18, 2021 memorandum from Legislative Council to House Judiciary Chairman Lawrence Klemin it was determined that under the "Void of Vagueness" doctrine the use of "discreet" and "modest" used in current breast feeding law are *"vague and unconstitutional since there are no definitions contained in statute and a reasonable person may not feel she has adequate warning."*

I respectfully request the House Judiciary Committee support the amendments to HB 1105 made by the House Judiciary Committee which strikes the unconstitutional, subjective adjectives so the law simply reads "An individual may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be." This will allow babies to be fed when hungry without mothers unintendedly breaking the law. At its core, this bill is about removing barriers to babies eating.

Thank you for the opportunity to come before you today and for your consideration of HB 1104. Ms. Chairwoman and Members of the Committee I stand for questions.

MEMORANDUM

TO: Chairman Lawrence Klemin (Judiciary Committee)
FROM: Katie Winbauer, Legislative Council Intern
RE: HB 1105
DATE: January 18, 2021

Chairman Klemin, you asked me to research the "Void for Vagueness" doctrine, North Dakota authority interpreting the words "discreet" and "modest," and consequences of multiple infractions against individuals and entities encompassed by the word "person." You also asked me research penalties under chapter 23-12, which pertains to Section 2 of HB 1105.

1. Void for Vagueness

In accordance with the Due Process clause of the Fourteenth Amendment, laws that fail to establish standards for police and public citizens to follow may be considered "vague" and unconstitutional.¹

All laws must meet two requirements to survive a void-for-vagueness challenge: (1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct.²

When analyzing whether the law gives adequate and fair warning, courts view the law "from the standpoint of the reasonable person who might be subject to its terms." The important tenant of the Void for Vagueness doctrine is that the "legislature establish minimal guidelines to govern law enforcement."³ In the criminal law context, the standard of certainty required is more stringent.⁴ "This is simply because it would be unthinkable to convict [an individual] for violating a law he [or she] could not understand."⁵ Notably, vagueness challenges can be cured by definition contained in other statutes or clear definitions in the dictionary.⁶

2. Discreet and Modest

I could not find any North Dakota authority interpreting the words "discreet" or "modest." Nor could I find any statutory law in other states defining the words "discreet" or "modest." The word "discreet" has been used in some North Dakota Supreme Court opinions, most of them from the early 1900s.⁷ "Modest" is used more frequently in North Dakota Supreme Court opinions, but it is most often used in reference to money or assets.⁸

¹ See *City of Belfield v. Kilkenny*, 2007 ND 44, ¶¶ 7-9, 729 N.W.2d 120, 123-24.

² *Id.* at ¶ 10 (citing *Kolander v. Lawson*, 461 U.S. 652, 357 (1983)).

³ *Id.* at ¶ 11 (citing *Kolander*, 461 U.S. at 358).

⁴ *Id.*

⁵ *Id.* (quoting *Barenblatt v. U.S.*, 360 U.S. 109, 137 (1959)).

⁶ See *id.* at ¶ 19.

⁷ See *State v. Weber*, 191 N.W. 610, 612 (N.D. 1922) ("He must exercise a wholesome and discreet supervision over the jury in this respect."); see also *De Roche v. De Roche*, 94 N.W. 767, 769 (N.D. 1903) (quoting a New York case which said "If the wife had been perfectly discreet, provident, and submissive to her husband, I should have allowed her half this property.")

⁸ See *Donlin v. Donlin*, 2007 ND 5, ¶ 16, 725 N.W.2d 905, 909 ("[B]oth Daniel Donlin and June Donlin have a modest standard of living, which would remain modest for a period of time after divorce[.]"); see also *Knudson v. Knudson*, 2018

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Black's Law Dictionary,⁹ which is commonly referred to by courts, defines "discreet" as "wise in avoiding potential errors or in choosing the best, most creditable means for accomplishing an end, esp. when confidentiality is required; prudent; judicious; discerning." Black's does not define "modest," but the definition according to Merriam-Webster is "(3) observing the proprieties of dress and behavior: decent."¹⁰

3. Multiple Infractions Against a "Person"

House Bill 1105 (page 2, lines 12-13) provides that a "person" who prohibits someone from breastfeeding a child is guilty of an infraction. The word "person" includes "an individual, organization, government, political subdivision, or government agency or instrumentality."¹¹ An "individual" is a human being.¹²

A person convicted of an infraction is subject to a maximum fine of \$1,000.¹³ If a person who is convicted of an infraction has been previously convicted two times or more for the same offense within one year, then the infraction can be punishable as a class B misdemeanor.¹⁴ A class B misdemeanor carries a maximum punishment of thirty days' imprisonment and/or a fine of \$1,500.¹⁵ Penalties for organizations, which includes business entities, are different.¹⁶ Organizations are subject to a maximum fine of \$20,000 for a class B misdemeanor.¹⁷ Thus, if a business is convicted of three of the same infractions in one year, it could be punishable as a class B misdemeanor, which would subject the business to a \$20,000 fine.

4. Penalty in Chapter 23-12-16

Section 2 of HB 1105 pertains to § 23-12-16 of the century code, which is a public health chapter. Currently, "If the woman acts in a discreet and modest manner, a woman may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be."¹⁸ Although there is no penalty included in section 16, N.D.C.C. § 23-12-07 provides "Any person who willfully violates any provision of this title, if another penalty is not specifically provided for such violation, is guilty of an infraction." Therefore, there currently is a criminal penalty, an infraction, attached to the breastfeeding law.

ND 199, ¶ 14, 916 N.W.2d 793, 797 ("[T]hey resided in a modest farmhouse on the Knudson family farmstead, and they maintained a modest lifestyle during the marriage.")

⁹ Black's Law Dictionary (11th ed. 2019).

¹⁰ Modest | Definition of Modest by Merriam-Webster (merriam-webster.com)

¹¹ N.D.C.C. § 1-01-49(8).

¹² N.D.C.C. § 1-01-49(3).

¹³ N.D.C.C. § 12.1-32-01(7).

¹⁴ *Id.*

¹⁵ N.D.C.C. § 12.1-32-01(6).

¹⁶ See N.D.C.C. § 12.1-32-01.1.

¹⁷ N.D.C.C. § 12.1-32-01.1(5).

¹⁸ N.D.C.C. § 23-12-16.

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5. Conclusion

In closing, it is possible the words "discreet" and "modest" as used in the current breastfeeding law could be viewed as vague and unconstitutional since there are no definitions contained in statute and a reasonable person may not feel she has adequate warning. Regarding the infraction, if a person or business is convicted for prohibiting breastfeeding multiple times, they may be subject to punishment as if the crime were classified as a class B misdemeanor. Finally, Chapter 23-12 of the century code provides an infraction for violation of the current breastfeeding law, codified at § 23-12-16.