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Testimony of Arthur Towers
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In Opposition to House Bill 2638
Before the
House Committee on Judiciary
House Subcommittee on Civil Law
February 24, 2021

Chair Power, Vice-Chair Wallan, and members of the committee, thank you for the opportunity to testify in opposition to this unnecessary legislation that is extraordinarily broad in its reach.

Flaws in HB 2638

This bill at first blush purports to cover “persons” but instead covers all entities – private business, government, schools, the medical and long-term care industries as well as individuals.

As was testified to by proponents during the hearing on the pre-cursor to this bill (the -38 amendments to HB 4212 in the First Special Session of 2020) the definition of “a person” is sufficiently broad to cover all these entities and more. The definitions of “person” in existing ORS includes associations, organizations, partnerships, corporations, guardians, fiduciaries, executors, the State of Oregon and any public body. If the proponents had sought to limit the bill to individual people, they would have used the phrase “natural person” in Section 1(2)(a) page 1, line 28.

Defendants in lawsuits do not have to comply with Covid guidelines in order to be eligible for immunity from responsibility for injuries and damage they cause.

The defendant simply has to be reasonably compliant with any guideline {Section 1(2)(b), page 2 line 4}.

Section 1 of the bill enumerates the federal, state and local sources of guidance with which an entity must reasonably comply. An entity that is reasonably compliant with a Covid-related city council ordinance or a government flyer could be egregiously violating CDC guidelines and state Executive Orders and still be shielded from responsibility for harm caused. HB 2638 creates the perverse incentive to comply with the least restrictive guideline instead of guidelines most effective in preventing death and disease.

Victims of discrimination would have their rights denied.

The pandemic is disproportionately impacting the elderly and communities of color. There is concern about systemic discrimination in the delivery of health care and vaccines. Victims with provable cases would be denied their 7th Amendment right to a trial by jury if the perpetrator was reasonably compliant with any Covid guideline.

Whistleblowers would not be protected.

Courageous Oregonians have been speaking up about safety on the job and in care settings. Lawsuits have been filed because of the retaliation workers have faced for trying to keep their co-workers and customers safe. These claims would be impacted. Section 1(3) starting on page 2 line 6 lists exceptions to the provisions of the bill. Proponents elected not to exempt whistleblower complaints.

Oregon is a relatively safe state. HB 2638 upsets the balance.

For a variety of reasons, Oregon has a very low pandemic death rate and infection rate compared to other states. Witnesses in the June hearing on this topic expressed their fear of being subject to lawsuits around Covid exposure. To the extent that concern drove businesses and governments to adopt safety provisions, that has helped keep Oregonians safe. Why would the legislature, at this point of the pandemic, remove a safety incentive?

This bill would make schools less safe.

HB 2638 trumps HB 4402 passed just eight weeks ago in the 3rd Special Session of 2020. HB 4402 limited the liability of K-12 school districts. That bill was carefully hammered out with the engagement of at least two dozen stakeholders, including front-line workers, over the course of six months. Why would the legislature create confusion for school districts just as schools are starting to re-open more broadly?

The feared avalanche of lawsuits has not materialized. In Oregon, a state of 4,200,000 people, there have been four suits filed in which Covid infection is blamed on negligence. Two of these suits involve nursing homes. One involves

prisons. The fourth involves a subcontractor who falsified Covid test results of workers at a construction site. Literally, Covid exposure suits are one in a million in Oregon.

As Legislative Counsel testified before House Judiciary Committee in 2020, exposure cases are difficult to prove because the victim has to prove causation. Because of community spread, it is very difficult to prove precisely where a person caught Covid, even with contract tracing or evidence of a worksite outbreak.

Of the remaining few dozen Covid-related suits in Oregon, about a dozen are brought by businesses over contract breaches and unpaid insurance claims. There are about 5 landlord-tenant cases, and some of these may have to do with commercial property.

There are about 10 consumer related cases in Oregon over failure to pay refunds, false advertising, or price gouging. Interestingly on the national level, refunds are the main subject of suits against schools (for-profit and tax-exempt).

There are about 15 suits brought by workers facing retaliation, coercion, wrongful termination or other employment practices.

Finally, there are nearly 25 suits brought against the government claiming overreach in the promulgation and enforcement of Covid guidelines. The Subcommittee held an excellent hearing last month on the Oregon Tort Claims Act. HB 2638 would interfere with Oregonians' rights to hold their own government accountable under the OTCA.

There is no reason for the legislature to limit the 7th Amendment right to a trial by jury. We urge a no vote on HB 2638.

