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Scott Wiggam

State Representative
1st Ohio House District

March 23, 2021

The Honorable Mike DeWine
Governor of Ohio
77 South High Street
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Columbus, Ohio 43215

Governor DeWine,

I am in receipt of your letter dated March 22, 2021. Thank you for sharing with me your response to Substitute Senate Bill 22. I believe your response demonstrates the fundamental differences between the current philosophy of the Executive branch and the philosophy of the majority of members in the Legislative branch. We differ in the role and moral authority of a government that is bound by Constitutional imperatives of protecting individual rights of the citizen by severely limiting the powers of government.

I understand that you believe that your actions over the course of the year were reasonable, rational and even scientific. Even if this is assumed, your actions have demonstrated the unfettered power of Ohio's Executive branch of government and the fact that a future governor could demand through emergency declaration, orders and rules an endless list of freedom ending demands on future generations of Ohioans. When power is consolidated through emergency it always leads to tragic oppression and is rarely retrieved by the people without desperate action. In the past year, Ohioans have faced constantly moving goal posts and life changing policies from one branch of Ohio's three branches of government.

Substitute Senate Bill 22 places guardrails around authority that was given to the Executive branch by the Legislative branch of government. While S.B. 22 still allows the administration to create orders and emergency rules, it reestablishes checks and balances into the process by giving the Legislature the ability to review and ultimately oversee orders and emergency rules by any department under the Executive branch in response to public health emergencies.

The examples cited in your letter all make reference to situations where freedoms of Ohioans are being limited without any form of due process or even at times factual basis. I believe that S.B. 22 rightly protects Ohioan's freedoms while allowing for Executive branch action.

In particular, I will respond below to several scenarios outlined in your letter.

"PROTECTING OHIO CITIZENS"

You gave several hypothetical scenarios that the requirement in S.B. 22 "could result in a serious tragedy." Even though the ultimate authority to quarantine and isolate has been codified since 1886, your letter does not identify a single real-world example of an instance where that power has been used to prevent harm, instead using the terms "if" and "assume" to raise only hypothetical scenarios which will either never occur or could be dealt with through the use of R.C. 3701.13 or R.C. 3701.14.

1. Under current law, the Executive branch would not have been able to quarantine the two students as there was no epidemic or pandemic in Ohio at the time and would not be able to do so in the future under current law in the same situation. The local board of health can still ask future students to self-quarantine. In the entire year of this pandemic, there is not one instance where the Executive branch actually quarantined foreign nationals flying into Ohio's international airports. If there is a concern, the U.S, Department of State and CDC can take measures to quarantine such individuals or stop such flights.

2. The federal government controls access to the United States. If there was a particularly serious outbreak from a particular country, again the U.S. Department of State would prohibit travel from those countries. Furthermore, the officials actively monitoring the 44 individuals who are still waiting for EVD symptoms could simply ask for the test in lieu of symptoms.

3. If the United States is attacked by any weapon, biological or otherwise, neither the local board of health nor the state DOH would have jurisdiction for response. That responsibility would fall to the military in conjunction with the CDC and FEMA. Martial law can be implemented by the federal government under those circumstances.

4. A health department could close down a restaurant for a Norovirus outbreak. By the time a health department could figure out that the cook was spreading it, the cook would no longer be contagious. Are health departments or the DOH seriously asking for the authority to isolate people they think may have a Norovirus? Furthermore, no power within 3701.13 is required to address food-borne illnesses, which already fall within the domain of R.C. 3717.49(C)(1) ("On determining that a license holder is in violation of any requirement of this chapter or the rules adopted under it applicable to food service operations and that the violation presents an immediate danger to the public health, the licensor may suspend the food service operation license without giving written notice or affording the license holder the opportunity to correct the violation.").

"AVALANCHE OF LAWSUITS"

Sovereign immunity is not eliminated. One cause of action is created to give local citizens the opportunity to contest illegal orders of the government. Attorney fees are only available when the plaintiff proves the government issued an illegal order.

The lawsuit can only take place in the county where the individual was wronged. The State is not liable if it does not violate Ohioans' constitutional rights. Even if it does, it remains protected by sovereign immunity. Further, S.B. 22 simply permits adjudication that currently takes place in the *Court of Claims in Columbus*, *i.e*. lawsuits for damages against the State, to take place before elected judges in Ohioans' home counties.

Rather than "creating a special pathway," S.B. 22 is patterned after 42 U.S.C. Section 1988 (State liable for prevailing parties attorney's fees), R.C. 163 (State liable for prevailing parties attorney's fees in eminent domain actions, R.C. 2335.39 (providing that "the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal"); and R.C. 733.61 (Cities liable for attorney's fees when "taxpayers allegations are well-founded"). Pursuant to each statute, the plaintiff must prevail. Accordingly, S.B. 22 simply creates uniformity by eliminating an anomalous immunity, such that citizens whose rights *the State* has verifiably violated may recover the cost of having to prove so in *state* court.

Under the second scenario you write, "…different courts could come to a different conclusion on the same issue, all in the middle of an emergency." This is true now. And S.B. 22 does nothing to alter or abandon this reality. In fact, after Courts of Common Pleas in Lake and Erie Counties determined that the Executive branches pandemic orders were unconstitutional, your attorneys urged latter Ohio courts of common pleas to ignore those rulings and come to a different conclusion on the same issue, all in the middle of an emergency.

In regards to "states of emergency", if the state does not act illegally, there is no issue. However, the prison example is very concerning. The insinuation is that you do not want the court to interfere if there is an emergency at a prison. Isn't that why we have courts? What if a future governor goes too far in response to the "riot"? Instead of cutting off power, what if they try to starve out the prisoners or cut off water and sanitation? Should that be permissible? The courts should be the venue to determine whether the response passes constitutional muster.

"FOOD SAFETY"

Local districts can still shut down individual restaurants for health code violations. The example given would be a health code violation at a particular restaurant. If it is system

wide, say bad beef at a hamburger franchise, the local board would not have jurisdiction. The U.S. Food Inspection Service is responsible for recall of tainted meat and the prevention of consumption thereof. Same goes for the Food and Drug Administration if it is a recall of anything other than meat, poultry or eggs. Those are the domains of the USFIS.

"COURTS WILL MAKE HEALTH POLICY"

The courts wouldn't be making health policy. They would decide if the administration violated the constitution or state law under the guise of an emergency or a health order. That is the purpose of the court.

"STATE UNIVERSITIES"

Universities do not issue the type of rules or orders identified by S.B. 22. Further, Ohio universities are already subject to suit in their home county, and may be sued for damages in federal court in the home venue of the university.

Universities benefit from the same sovereign and qualified immunities identified above. Under S.B. 22, a plaintiff aggrieved by a State rule or order (enforced by a university, presumably), may sue the State directly in his home county rather than having to sue the university so as to obtain venue in his home county, resulting in less litigation for universities.

Moreover, when a university has issued and enforced an unlawful order, there is a public good in permitting citizens whose rights have been violated to correct that matter before an elected Ohio judge.

"THE OHIO GENERAL ASSEMBLY"

The G.A. would not be subject to suit pursuant to the authority granted under S.B. 22. The G.A. does not issue orders or rules. It legislates through bills and concurrent resolutions.

"CONSTITUTIONALITY"

Section 15, Article II of the Ohio Constitution does indeed require the enactment of "laws," by "bills," but S.B. 22 is a "bill" making the "law" that governs the Executive branch's exercise of its authority. The General Assembly is the only policymaking authority identified by the Ohio Constitution, and could eliminate administrative order and rulemaking authority entirely. The Separation of Power is violated by the delegation of authority without standards or limits to the Executive branch, and S.B. 22 attempts to place some conditions on the exercise of that Executive branch's authority.

The Ohio Constitution does not grant emergency powers such as the ones claimed in your letter. All of those powers are statutory. They are given to the governor through legislation. The same is true for the DOH and agencies. Thus, the governor's emergency powers are limited to those given to the office by statute. Not only can the G.A. grant the governor the authority, it can also take it away through legislation. The G.A. can also limit the authority it grants or make the authority it grants conditional. That is precisely what S.B. 22 does. Ultimately, the Court must decide if the bill is constitutional, not the governor.

In conclusion, your letter suggests that the Executive branch of government has or at least should have absolute unfettered authority whenever it decides to declare an emergency or issues an order. This type of power would mean that the governor should make the law, enforce the law, and do so without any possibility of judicial oversight. This type of autocratic rule must be checked by the Legislature and should be tested in the courts because I believe it is not only unacceptable, it is also unconstitutional. An Executive branch that has the ***unchecked*** power to issue a "stay at home order" to healthy citizens or prevent all citizens from being out past 10 p.m. under the threat of arrest, simply has too much power.

Best Regards,

Scott Wiggam
State Representative
1st Ohio House District