

STATE OF OHIO
Executive Department

OFFICE OF THE GOVERNOR

Columbus

VETO MESSAGE

**STATEMENT OF THE REASONS FOR THE VETO OF
SUBSTITUTE SENATE BILL 22**

March 23, 2021

Pursuant to Article II, Section 16, of the Ohio Constitution, which states that the Governor may disapprove of any bill, I hereby disapprove of Substitute Senate Bill 22 (SB 22) and set forth the following reasons for so doing.

Senate Bill 22 jeopardizes the safety of every Ohioan. It goes well beyond the issues that have occurred during the COVID-19 pandemic. SB 22 strikes at the heart of local health departments' ability to move quickly to protect the public from the most serious emergencies Ohio could face. As Dr. Bruce Vanderhoff, Chief Medical Officer at the Ohio Department of Health, said in recent testimony: "SB 22 leaves a gaping hole in our toolbox, hampering the State's ability to quickly respond during emergencies, when lives may be at stake. Emergency response must be nimble, and public health officials must have the ability to react to rapidly to changing conditions as they happen."

SB 22 handcuffs Ohio's ability to confront crises. The emergence of a yet unknown, epidemic illnesses bursting on the scene -- just as COVID-19 did -- remains a very real threat, as does the risk of state and non-state-sponsored terrorism. Ebola also remains a danger across the world -- and right here in Ohio. In fact, we actively monitor travelers who have been to affected parts of the globe. Other diseases are lurking threats, including deadly strains of flu, such as H7N9 or cousins of COVID-19, such as MERS-CoV. Our public health leaders continue to watch for and respond to serious outbreaks of diseases, such as measles, hepatitis A, botulism, and Norovirus in communities across our state.

PROTECTING OHIO CITIZENS

SB 22 strips local health departments and the Ohio Department of Health (ODH) of their ability to protect Ohio citizens from these possible future threats. The bill prohibits a local health department and ODH from requiring someone to quarantine or isolate unless there has been a specific medical diagnosis of that person or unless that person has come in direct contact with someone who has been "medically diagnosed." Here are some examples of how this requirement in SB 22 could result in a serious tragedy:

1. In January 2020, two Miami University students returned to campus from Wuhan China. At that time, coronavirus tests did not exist in Ohio, so to determine if the students had the virus,

their tests had to be sent to the Centers for Disease Control and Prevention. While awaiting the test results, which took more than five days, the Butler County Health Department asked the students to self-quarantine, which they did. Under SB 22, if they had refused, neither the Butler County Health Department nor the Ohio Department of Health would have had the authority to require the students to quarantine before they were medically diagnosed.

And so, if the students had refused to quarantine and they had the virus, they could have infected a number of Miami University students and other Butler County citizens. The Butler County Health Department and ODH would have been helpless to stop this spread. Without immediate access to testing results, it might be impossible to medically diagnose a person, especially someone who is asymptomatic. Such a situation could certainly happen again with a future novel virus.

2. Ebola exists in certain parts of Africa. Today in Ohio, health officials are actively monitoring 44 people who have returned from areas of Africa with active outbreaks of Ebola. While it is currently believed these individuals are at very low risk of having contracted Ebola, if one of them develops symptoms, SB 22 would prevent our public health apparatus from swinging into rapid action and taking decisive steps to isolate, quarantine, and protect the public from the threat of this deadly virus until a medical diagnosis can be obtained.

3. Under SB 22, if terrorists or a foreign country introduced smallpox or the plague into Ohio, neither local health departments nor the Ohio Department of Health would have the power to appropriately quarantine or isolate anyone without a required medical diagnosis. Spread would be the inevitable result.

4. SB 22 also limits health departments' ability to respond to food-borne illnesses. For example, assume there is a Norovirus outbreak in a restaurant that makes over 500 people severely ill, and it is traced back to a cook. Under SB 22, even a symptomatic cook could not be made to isolate without a medical diagnosis, and it would be legally difficult and perhaps legally impossible to force a resistive cook to see a physician for a medical diagnosis. Therefore, the cook could continue to work in that restaurant or another restaurant, and the local health department would be powerless to stop the resulting spread of illness.

AVALACHE OF LAWSUITS

SB 22 makes a dramatic change in how and where the State can be sued. It would:

- Eliminate Ohio's long-standing sovereign immunity protections, authorizing an award of monetary damages against the State for actions taken pursuant to an emergency order;
- Permit class action treatment of the newly authorized damage claims with potential massive financial exposure to the State;
- Provide attorneys' fees awards against the State even if the plaintiff does not ultimately prevail on all or even the main issues;
- Allow lawsuits against state agencies in every county, even if no action has been taken in that county; and
- Authorize suits against the General Assembly, itself.

The bill provides that when a “state of emergency” has been declared, anyone who feels aggrieved by the actions as a result could sue for damages and attorneys’ fees. The bill would take suits for damages against the State out of the Court of Claims, where they have been for over 40 years, and allow them to be filed in any county where a plaintiff lives -- irrespective of the geographical region covered by the challenged order.

It is important to remember that most “states of emergency” have nothing to do with health orders. Rather, they might be issued as a result of flooding along the Ohio River, a tornado in western Ohio, a washed-out road, or a prison riot (remember Lucasville?). So, for example:

1. A state of emergency was declared for the Republican National Convention in 2016, when it was hosted in Cleveland. SB 22 would give any group that did not like the resulting orders issued by the State a legislatively-approved path to sue in any county in Ohio -- not just in Cuyahoga County.

So, let’s suppose that during the Republican National Convention, the Ohio Director of Public Safety ordered certain state routes to be shut down in Cuyahoga County, but an activist group, with members from several different Ohio counties, didn’t like that. Under SB 22, suits against the Public Safety Director could be filed in each county where an activist member lives -- not just in Cuyahoga County where the orders were invoked.

2. Imagine if a weather emergency is declared after a series of tornados in western Ohio. The Public Utilities Commission (PUCO) issues a waiver (which would qualify as an order under SB 22) for the number of hours a truck driver can work to haul storm debris away in the affected area. Under SB 22, a clear legal pathway is given to sue the PUCO both to challenge the waiver and to its duration.

So, you could have Trucking Company A file a lawsuit in a county in northeast Ohio, where it is headquartered, to expand the waiver, while you could also have Trucking Company B file a lawsuit to rescind the waiver in a county in southeast Ohio, where that company is headquartered. Both courts would have jurisdiction and venue under SB 22, and both courts could come to a different conclusion -- all in the middle of an emergency, creating chaos at the worst possible time.

3. What would happen if a sustained prison riot erupted in one of our prisons, creating an institutional takeover with hostages? When a state of emergency is declared, the Governor could issue certain lawful orders, such as cutting the power and water at that prison. Under SB 22, any inmate’s family members could run into their local court and sue the Governor to prevent those orders from taking effect. That could result in the judicial handcuffing of the Executive Branch when trying to deal with a dangerous hostage situation.

FOOD SAFETY

SB 22 also limits a local health department’s ability to issue a general order to potentially impacted groups if it is unable to precisely identify the impacted persons. For example, if the source of E. coli

were determined to be romaine lettuce from a particular supplier, but the local health department did not know which restaurants had received the lettuce in question, SB 22 would prevent the local health department from issuing a general order requiring a class of persons (i.e., all restaurants within its jurisdiction that received romaine lettuce from that supplier) to destroy the contaminated lettuce. Under SB 22, orders may be issued only to specific persons, and any order or regulation that applies to a class of persons would be invalid and have no legal effect.

COURTS WILL MAKE HEALTH POLICY

While the intent of SB 22 is to give the General Assembly more power in regard to health orders, the bill would result in public health policy really being made by individual courts in as many as 88 Ohio counties!

If a state of emergency is declared, SB 22 creates a special pathway to filing lawsuits that is easier and potentially very profitable for trial attorneys. So, at precisely the times that government must act with focus and resolve making immediate, decisive, gut-wrenching, and often unpopular decisions, SB 22 flings the Courthouse doors wide open for immediate judicial intervention. SB 22 not only allows for this, but encourages it through potentially lucrative attorneys' fees and damage awards against the State. And, SB 22 makes jury trials available to those plaintiffs.

Courts, via these lawsuits, will be the branch of government shaping the response to an emergency, even if that emergency is not happening in the courts' normal jurisdiction. Courts, by design of our system of government, are the least equipped of the branches to shape an emergency response -- but SB 22 forces this into their lap.

STATE UNIVERSITIES

Some of you have heard from your state universities expressing serious concerns about SB 22 and the impact it would have on their future. Since 1974, suits for damages against the State, including state universities, have been required to be filed in the Court of Claims. SB 22 would allow lawsuits to be brought against universities for any order related to the state of emergency issued during a state of emergency, creating the possibility for them to be sued for money damages in the Court of Common Pleas in each of the 88 counties in which a student resides.

Further, if SB 22 became law, universities' efforts to protect students living in dormitories, such as mask orders or isolation of students who test positive for COVID-19, would be subject to damage claims in Common Pleas courts. And, under SB 22, recent extreme weather conditions could create a weather emergency potentially giving rise to a damage claim when classes are cancelled or dormitories are closed.

THE OHIO GENERAL ASSEMBLY

The ability to sue the legislature itself would be dramatically expanded by SB 22. The bill's broad definition of "state agency" also includes the General Assembly. As such, SB 22 would authorize suit in any county against the legislature and would authorize an award of damages and attorneys' fees against the General Assembly if an order or rule that the General Assembly extended is ultimately

invalidated, such as orders around employment during an emergency. This unprecedented authorization of suit would expose the members of the General Assembly to document and deposition discovery.

CONSTITUTIONALITY

We believe that significant portions of SB 22 are unconstitutional. Parts of the bill violate the separation of powers doctrine embedded in our Ohio Constitution; other parts violate Article II, Section 15 of the Ohio Constitution, proscribing how laws must be made; and even other parts of the bill likely violate Article IV, Section 5 of the Ohio Constitution, by exercising power reserved to the judiciary.

For all these reasons, I am vetoing SB 22.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus this 23rd day of March, Two ThousandTwenty-One.

Mike DeWine, Governor

This will acknowledge the receipt of a copy of this veto message of Substitute Senate Bill 22 that was disapproved by Governor Mike DeWine on March 23, 2021.

Name and Title of Officer

Date and Time of Receipt