1851 CENTER FOR CONSTITUTIONAL LAW
Interest Party Testimony on House Bill 90

February 16, 2021

Rep. Scott Wiggam, Chairman
State and Local Government Committee

Mr. Chairman and Members of the Committee:

Many features of House Bill 90 are well-drafted and warrant commendation, as do the intentions underlying the Bill. However, due to a number of serious but resolvable oversights, this proposed legislation fails to check the administrative overreach Ohioans have endured over the past eleven months. For the purposes of brevity, this testimony will focus solely on those deficiencies and how to cure them.

1. **Remove the text stating "under section 3701.13 of the Revised Code" so that HB90 limitations apply to other sources of unlimited administrative authority over pandemic matters.** *See Page 3(Line 62-63); Page 4 (Line 100-101)*

Due to several sections of the Bill limiting its scope to R.C. 3701.13, the Bill does not effectively limit the authority of the administrative state or executive branch to impose broad and unchecked regulations on Ohioans. This is because health departments interpret R.C. 3701.14 and R.C. 3707.26 as broadly authorizing them to shut down any business, industry, or school at any time, for any length, without notice or a hearing.

First, leaving untouched R.C. 3701.14, which the Ohio Department of Health now primarily relies upon when imposing sweeping pandemic regulations, subjects Ohioans to the same arbitrary administrative regulations that House Bill 90 *otherwise* seeks to limit.

This reality is best understood in context. In response to 1851 Center litigation to curtail the same type of administrative overreach sought to be checked through HB90, Ohio courts determined that penalizing noncompliance with a R.C. 3701.13 order is impermissibly unconstitutional and otherwise unlawful. See *Rock House Fitness, Inc. v. Acton*, Case No. 20CV000631 (Lake Cty. C.P. 5-20-2020); *LMV DEV SPE, LLC DBA Kalahari Resorts & Conventions v. Acton*, Case No. 2020-CV-0201 (Erie Cty. C.P. 6-20-2020).

In *Rock House*, the Court explained that "[t]he director has no statutory authority to close all businesses . . . She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards . . . Fundamental liberties to own and use property and earn a living are at stake and are violated [Acton's] actions . . . and there is no administrative appeal process within the department of health regulation for this taking." *Id.*, at ¶26, 31, 34.

Further, the court rejected the notion that "one unelected individual could exercise such unfettered power to force everyone to obey impermissibly, vague, arbitrary, and unreasonable rules that the Director devised and revised, modified and reversed, whenever and as she pleases, without any legislative guidance." *Id*., at ¶37. The Court then enjoined Director Acton and the local health department "from imposing or enforcing penalties solely for noncompliance with the director's order." *Id.,* at ¶37.

Similarly, in the case of *Kalahari Resorts,* our litigation also involving Cedar Point, the Court concluded that "the statute granting [the Health Director] the authority, power to enforce, and criminalize also violates the separation of powers that exist in our Constitutional framework to protect our citizens from the consolidation of power in one person." *Kalahari*, supra. That Court correctly reasoned that Ohio Department of Health has "been improperly granted the power to create and criminally enforce, with strict liability, laws simply by a decision of an unelected, unaccountable to the general public, administrative officer by virtue of an Order, application of which is, can and does trample of the fundamental rights of the citizens." *Id.*

Accordingly, after we prevailed in *Kalahari Resorts*, the Ohio Department of Health began relying upon R.C. 3701.14 rather than R.C. 3701.13 as grounds for its authority to make broad public policies regulating many aspects of Ohioans' lives.

In an August 19, 2020 brief appealing its loss in *Rock House* and seeking affirmation of its authority to close any business or industry at any time, the Ohio Department of Health's new attorneys relied almost exclusively on R.C. 3701.14(A)(1) for their power to do so, asserting "the General Assembly imposed a mandatory duty upon ODH to 'take prompt action' and 'suppress' pandemics and then specifically authorized ODH to issue special orders 'for preventing the spread of contagious disease.'" This Committee must play close attention to the following excerpt for the same brief:

> To be clear, ODH's health orders that temporarily closed certain businesses and then re-opened them in a phased progression were not quarantine orders. The General Assembly bestowed much broader authority upon ODH. We start with the mandatory duty imposed upon ODH's Director: "[t]he director of health shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it." R.C. 3701.14(A)(1).

This reliance on R.C. 3701.14 should be taken seriously: in *Kalahari Resorts*, the Trial Court observed that the State's *strongest* claim to then-Director Amy Acton's authority to shutter amusement and water parks was located not in R.C. 3701.13, but in R.C. 3701.14(A) (the Court abstained from further analysis because the State had not previously defended its authority on the basis of R.C. 3701.14).

Second, leaving untouched R.C. 3707.26, which local departments of health now primarily rely upon when imposing sweeping pandemic regulations, subjects Ohioans to many of the same arbitrary administrative regulations that House Bill 90 otherwise seeks to limit.

This statute vests unelected and unaccountable local health departments with the authority to immediately and without Due Process close not just schools (public *and private*), but also to "prohibit public gatherings for such time as is necessary."[1] This is the statute county health departments have relied upon to unilaterally and unconstitutionally close public and private schools. *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020), reh'g denied (Jan. 6, 2021).

[1] In full, this statute states as follows: "Semiannually, and more often, if in its judgment necessary, the board of health of a city or general health district shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and may disinfect any school building. During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board may close any school and prohibit public gatherings for such time as is necessary."

By leaving authorizations of power like R.C. 3701.14 and R.C. 3707.26 unaffected, House Bill 90 does nothing to stem or prevent a recurrence of the administrative and executive branch overreach Ohioans have endured for the past eleven months.

Ultimately, the point is this: over many years, the General Assembly has impermissibly granted sweeping policymaking authority to administrative agencies *throughout* the revised code; any legislation that attempts to identify and single out one such grant or even each such grant - - as HB 90 currently attempts - - will necessarily fail to limit administrative overreach.

But here again, the solution is simple: through HB 90, the General Assembly should directly prohibit that which legislators seek to prohibit. This can be accomplished by simply delete the sentence fragments the limits application of House Bill 90's controls solely to R.C. 3701.13.

2. **Cause orders and rules to *expire if not affirmed by the General Assembly, JCARR, or another committee,* rather than attempting to repeal administrative orders through General Assembly Resolution or committee action.** *See Page 4, Lines 97-114.*

The Legislative Service Commission has flagged as potentially unconstitutional the proposal within House Bill 90 authorizing recission by Committee of agency orders and emergency rules.

To be sure, this analysis is weak: because agencies derive their order and rulemaking authority from the General Assembly, the General Assembly is relatively free to impose conditions on how the delegated authority may be exercised. In fact, imposing *some* conditions is an improvement over the *status quo*, whereby health departments are impermissibly untethered from *any* conditions or standards biding their conduct.

Nevertheless, LSC's "comment" essentially invites a legal challenge, and there is some basis for concern over the extent to which a legislative committee or resolution may shape the law. And an affirmative vote to rescind a rule or order is grossly inferior to text requiring *the expiration* of a rule or order *that is not affirmatively approved* by the General Assembly or a Committee thereof.

Accordingly, this Committee should amend House Bill 90 to require the expiration of any rule or order *not affirmatively extended* by the General Assembly or a Committee thereof, just as it has done with respect to "an executive order issued by the governor in response to a public health emergency," which "shall exist for not more than thirty days unless the general assembly extends the executive order by adopting a concurrent resolution." See *Page 7, Lines 179-183;* see also *Page 11, Lines 304-311 (applying a similar standard to "emergency rules").*

Finally, a period of thirty days is a greater period of time than what is required to respond with approval or disapproval of an administrative law or rule, particularly (1) during a putative "emergency;" (2) when the response is made by a Committee rather than the entire General Assembly; and (3) when the Committee's public meeting may take place virtually, rather than in person.

3. **Prohibit extension of "any restriction contained in any prior order" rather than or in addition to prohibiting extension through any "substantially similar**" order. *See Page 5, Lines 105-110; Page 8, Lines 197, 205, 218.*

Through this prohibition, House Bill 90 admirably seeks to prevent promulgation of a differently-worded but "substantially similar" order. But whether a prior order is "substantially similar" is an issue that will necessarily be resolved by Ohio courts, and the Franklin County Court of Common Pleas in particular.

This Committee should learn the lessons evident from a century of Single Subject Rule litigation: (1) courts will nearly always engage in contortions to defer to the Ohio Department of Health's interpretation of whether or not an order is "substantially similar" (particularly where that phrase is undefined and the particular judge agrees with the policy outcome); and (2) courts have proven, unfortunately, ill-equipped and incapable of determining whether an order is "substantially similar": they have proven unable to consistently determine whether a bill contains one or more "subjects" when applying the Single Subject Rule. See Section 15(D), Article II (No Bill shall contain more than one subject…")

4. **Add teeth to better permit affected citizens to enforce the limits the General Assembly is implementing through House Bill 90.**

Finally, House Bill 90 should authorize Ohioans to initiate litigation to challenge rules and orders that violate these terms *in their home county*, rather than having to travel to the Franklin County Court of Common Pleas, which is the sole county with venue where the State of Ohio is the only proper Defendant. Due to a combination of Ohio's venue rules, government attorney chicanery, and the work of unqualified plaintiffs' attorneys, many cases challenging pandemic order and rules, originally brought in distant counties, have been transferred to Franklin County. There, the deck is stacked against them, and *none* of these plaintiffs have prevailed.

Relatedly, to hold wrongly-aggrieved Ohioans truly harmless from the effects of an order or rule violating these new limits (and to ensure enforcement), House Bill 90 may authorize the payment of attorneys fees to an Ohioan who - - forced to litigate - - prevails in invalidating an order or rule that violates these new limits. See 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").

In Conclusion, House Bill 90 is a noble effort. However, several textual shortcomings limit it from curtailing even one policy enacted by any state or local administrative agency over the past eleven months. Fortunately, the efficacy of House Bill 90 can be easily improved through the amendments we have articulated above.

Should you have any questions, please feel free to contact me by email at *MThompson@OhioConstitution.org* or by phone at (614) 340-9817.

Respectfully submitted,

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