



Center for Justice & Democracy's
Public Policy Clinic
New York Law School
185 West Broadway
New York, NY 10013

April 15, 2022

Governor Mike DeWine
Office of the Governor
Riffe Center, 30th Floor, 77 S. High Street,
Columbus, OH 43215

Re: Concerns About Liability Shield Provisions in HB 218

Dear Governor DeWine:

My name is Gabriel Blinder and I am a student intern with the Center of Justice & Democracy studying the impact of COVID liability shields. I am writing to thank you for allowing HB 606 to expire in September 2021,¹ and to urge you to reject any new efforts to reimpose a liability shield on Ohio companies, such as the one contained in HB 218.² That bill has already passed the House. While I know you have already expressed concern about HB 218 over its vaccine provisions,³ the bill's new liability shield is just as problematic.

Background

HB 606 provided immunity to health care providers, including nursing homes, as well as negligent businesses for practices that exposed and harmed COVID-infected Ohioans. Under this law, only claims involving reckless, intentional, wanton, or willful misconduct were allowed to proceed against covered businesses. HB 606 was signed into law in September 2020. As the nation began to recover from the worst of the pandemic, Ohio joined many other states in allowing similar emergency liability shields to expire.⁴ But on November 18, 2021, the Ohio House passed HB 218, which would, among other things, reinstate this liability shield⁵ and make immunity retroactive to HB 606's expiration date. You have already indicated your intention to

¹ *House Bill Number 606*, 133rd General Assembly, Available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb606/EN/07?format=pdf

² *House Bill Number 218*, 134th General Assembly, Available at <https://ohioaap.org/wp-content/uploads/2021/12/HB218-passed-by-house.pdf>

³ Editorials, "DeWine 'gets it' when it comes to House Bill 218," *Morning Journal*, December 27, 2021, <https://www.morningjournalnews.com/opinion/editorials/2021/12/dewine-gets-it-when-it-comes-to-house-bill-218/>

⁴ See, e.g., Chris Marr, *Bloomberg Law*, <https://news.bloomberglaw.com/daily-labor-report/dying-covid-liability-shield-laws-prompt-push-for-their-revival>

⁵ *House Bill Number 218*, 134th General Assembly

veto this bill should it come to your desk, based on reasons other than the liability shield.⁶ The Ohio Chamber of Commerce also oppose the bill over its vaccine provisions.⁷ This letter is to explain why the liability shield provisions of HB 218 are also extremely troubling and should provide additional reasons for a veto.

HB 218's Liability Shield is Harmful and Unsafe

Most Ohio businesses take their health and safety responsibilities seriously and will continue doing everything they can to protect their workers and customers. But if recent history is any guide, when liability shields exist and negligent businesses are not held accountable, safety can be jeopardized. Nothing exemplifies this more than what happened in Ohio's nursing home industry.⁸

A January 2022 article from the *Ohio Capital Journal*, reporting on the findings of nursing home regulators, "found infection control violations in at least three dozen Ohio nursing homes placed the health and safety of patients in 'immediate jeopardy' during the COVID pandemic."⁹ These negligent actions ranged from allowing COVID-19 positive nurses to work and placing residents who were infected into rooms with those who were not to not wearing state-required preventive items such as PPE gear and masks. The article also suggests HB 606 may have had an impact, noting, "The immunity blocks would-be plaintiffs from prevailing against the facilities in negligence claims. Instead, they'd need to meet a higher legal standard to prove the facilities acted either with 'intent' or with 'reckless disregard' to the consequences."¹⁰ This is a dangerously high standard that is impossible to meet for most harmed residents.

The potential for liability by those who fail to take reasonable care is one of the most powerful incentives we have to ensure that businesses, such as nursing homes, operate safely. When workplaces are not properly protected, patients, customers, clients, and the community are all at risk. Reinstating legal immunity for facilities that operate unsafely, such as the provisions of HB 218, would have real-life safety consequences for all Ohioans.

HB 218's Liability Shield is Unnecessary

The liability shield contained in HB 218 is truly unnecessary. One justification for HB 606, as all COVID liability shield laws, was the fear that the country would be flooded with lawsuits while it was trying to deal with a pandemic. But this "wave of lawsuits" never happened. This was true

⁶ See, e.g., Editorials, *Morning Journal*, <https://www.morningjournalnews.com/opinion/editorials/2021/12/dewine-gets-it-when-it-comes-to-house-bill-218/>

⁷ Ohio Chamber of Commerce, "Before the Senate General Government Budget Committee Testimony on House Bill 218," Available at https://search.prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/134th_ga/ready_for_publication/committee_docs/cmte_s_gen_govt_budget_1/testimony/cmte_s_gen_govt_budget_1_2021-12-07-1100_1041/keithlake.pdf

⁸ Jake Zuckerman, "Immediate jeopardy: Ohio nursing home inspections reveal errors, deception preceded deadly COVID-19 outbreaks," *Ohio Capital Journal*, January 28, 2022, <https://www.cleveland.com/news/2022/01/immediate-jeopardy-ohio-nursing-home-inspections-reveal-errors-deception-preceded-deadly-covid-19-outbreaks.html>

⁹ See, e.g., Jake Zuckerman, *Ohio Capital Journal*, <https://www.cleveland.com/news/2022/01/immediate-jeopardy-ohio-nursing-home-inspections-reveal-errors-deception-preceded-deadly-covid-19-outbreaks.html>

¹⁰ *Id.*

whether or not a state enacted a liability shield. That is because Ohio, like every state, already places significant obstacles in the way of those bringing negligence suits by requiring proof of causation, something nearly impossible to accomplish without precise contact tracing, which does not exist in this country. As one expert explained, tort law requires an infected person to “prove that he or she contracted COVID-19 from the business and not from some other source.”¹¹ However, most people infected with COVID-19 currently have no reliable way of identifying the source of their infection. The gap of three to 11 days between infection and illness, the difficulty of recalling all of one’s contacts during that interval and limited testing for the virus present formidable obstacles to establishing causation.”^{12 13}

The proof is in the numbers. According to the litigation tracker set up by the law firm Hunton Andrews Kurth LLP, there has been very few exposure cases filed since the pandemic began.¹⁴ This is true in Ohio and elsewhere around the country, whether or not a state enacted any sort of liability shield. Even if one could argue that such a law was warranted at the start of the pandemic and at the height of the COVID emergency when there were many unknowns, conditions in the country and Ohio have changed dramatically since then.

For these reasons, I strongly urge you to veto House Bill 218 should it pass the Ohio legislature. If you have any questions, please contact me at Gabriel.Blinder@law.nyls.edu or Professor Joanne Doroshow at Joanne.Doroshow@nyls.edu. Thank you for your time and consideration.

Sincerely,

Gabriel Blinder, *Clinic Student Member*

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cc. Rep. Alessandro Cutrona

cc. Rep. Robert R. Cupp, Speaker of the House, Ohio House of Representatives

cc. Sen. Matt Huffman, President, Ohio Senate

¹¹ Timothy D. Lytton, “Opinion: Businesses don’t need special immunity from coronavirus liability – Mitch McConnell is wrong about a coming ‘avalanche’ of ‘frivolous’ lawsuits,” *MarketWatch*, May 5, 2020, <https://www.marketwatch.com/story/businesses-dont-need-special-immunity-from-coronavirus-liability-mitch-mcconnell-is-wrong-about-a-coming-avalanche-of-frivolous-lawsuits-2020-05-01?f>

¹² See., e.g., Timothy D. Lytton, *MarketWatch*, <https://www.marketwatch.com/story/businesses-dont-need-special-immunity-from-coronavirus-liability-mitch-mcconnell-is-wrong-about-a-coming-avalanche-of-frivolous-lawsuits-2020-05-01?f>

¹³ Senate Judiciary Committee, “Testimony of Professor David C. Vladeck Georgetown University Law Center Before the Senate Judiciary Committee Examining Liability During the COVID-19 Pandemic,” Available at <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20Testimony.pdf>

¹⁴ Hunton Andrews Kurth, “COVID-19 Complaint Tracker,” <https://www.huntonak.com/en/covid-19-tracker.html>