



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

April 15, 2022

The Honorable J. Kevin Stitt
Governor of Oklahoma
Oklahoma State Capitol
Oklahoma City, OK 73105

Re: Support for Repealing Senate Bill 1946, the Business Immunity Law

Dear Governor Stitt:

My name is Colton A. Posey, and I am a student intern at the Center for Justice & Democracy studying the impact of business liability shields. While I am currently attending law school in New York, I am a born and raised Oklahoman with a deep passion and commitment for my home state. I am also lucky enough to say that my entire immediate family still resides in Oklahoma and are active registered voters. I take great pride in my coming from Oklahoma, as well as being a member of the Cherokee Nation, so issues impacting Oklahoma mean a great deal to me. I am writing to strongly urge you to amend or repeal Senate Bill 1946, which immunizes unsafe businesses from pandemic-related claims.

Background

Oklahoma Senate Bill 1946 passed at the outset of the COVID-19 pandemic emergency, nearly two years ago and despite bi-partisan opposition.¹ It provides immunity to businesses in any civil action, no matter their degree of culpability in exposing customers or workers to COVID, provided they follow only the vaguest of local, state, or federal COVID guidelines. Furthermore, S.B. 1946 has no expiration date, which is cause for deep concern as the state gradually emerges from this emergency.²

The Law Strips Oklahomans of their Constitutional Rights

S.B. 1946 is designed to keep individuals and families, who are harmed by exposure to COVID, from being able to file legitimate lawsuits and have their day in court, a precious right enshrined by Oklahoma's Constitution.³ When the Supreme Court of Oklahoma recently found the state's cap on non-economic damages for bodily injuries unconstitutional, the Court said, "[t]his faith and confidence of the people in the jury system are enshrined within our sacrosanct Bill of Rights, expressed through the command that '[t]he right of trial by jury shall be and remain

¹ 111 O.S. § 76.

² 111 O.S. § 76(2).

³ Okla. Const. art. 2, §§ 6-7.

inviolable.”⁴ In direct contrast to this, S.B. 1946 forces Oklahomans to give up their fundamental legal rights and should therefore be repealed.

The Law is Harmful, Overbroad, and Unsafe

S.B. 1946 poses a serious threat to freedom due to its harmful and overbroad language and lack of any expiration date. One of the bill’s opponents, Sen. Brent Howard, R-Altus, argued that the legislature was “throwing a pretty big immunity” and was giving the executive too much authority in determining how the law would apply.⁵ As Sen. Michael Brooks, D-Oklahoma City, put it, the bill was gravely overbroad, and shields “anyone doing business, any person, corporation, or other entity” with virtually no limitations. During a pandemic, the public’s interest in incentivizing safe behavior is particularly great because businesses that negligently contribute to the spread of COVID cause harm not only to individuals but also to Oklahoman communities at large. In contrast, this law removes legal accountability for negligence and weakens the financial incentive for businesses to operate safely.

Other groups, such as labor unions and public health advocates, have argued that liability shields, like Oklahoma’s, “could give businesses a green light to take fewer or even no precautions to limit spread of the virus among their customers and workers.”⁶ This is why many states, including Michigan and Ohio, are allowing their liability shields to expire.⁷ Yet Oklahoma’s law has no expiration date. Immunity remains in effect until it is repealed, allowing unsafe practices to continue in perpetuity, with no accountability for misconduct.

The Law is Unnecessary

The likelihood that a business would be held liable for causing a COVID infection is already very low. According to a litigation tracker set up by the law firm Hunton Andrews Kurth LLP, relatively few COVID exposure claims have been filed around the country, whether or not a liability shield like Oklahoma’s exists.⁸ This is because the tort system already places significant obstacles in the way of negligence suits by requiring proof of causation, something nearly impossible to do without precise contact tracing, which does not exist in this country. David Vladeck, the former Director of the Bureau of Consumer Protection of the Federal Trade Commission, testified before Congress that “[t]he unprecedented transmissibility of this virus will generally make causation guesswork at best.”⁹

Moreover, Oklahoma employers are already largely protected from suits under the state’s worker compensation law. In most situations, worker compensation is the exclusive remedy for

⁴ *Beason v. I.E. Miller Services, Inc.*, 441 P.3d 1107 (Okla. 2019), citing Okla. Const. art. 2, § 19.

⁵ Carter, Ray. “Senators Approve Lawsuit Protections for Business,” Oklahoma Council for Public Affairs. May 11, 2020.

⁶ Marr, Chris. “Dying Covid Liability Shield Laws Prompt Push for Their Revival,” Bloomberg Law. January 27, 2022.

⁷ Apelis, Markus E. “Ohio COVID-19 Immunity Protections Set to Expire Without Legislative Action,” Gallagher Sharp LLP. September 18, 2021.

⁸ “COVID-19 Complaint Tracker.” <https://www.huntonak.com/en/covid-19-tracker.html>.

⁹ “Testimony of Professor David C. Vladeck Georgetown University Law Center Before the Senate Judiciary Committee Examining Liability During the COVID-19 Pandemic,” p.12. <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20Testimony.pdf>.

employees who suffer on-the-job injuries.¹⁰ This means that employees who are eligible for worker's compensation are already precluded from suing their employers for tort damages.

Supporters of Prolonged Liability Shields Are Misguided

Supporters of continued COVID-related liability shields contend that businesses and healthcare professionals “remain vulnerable” to unfair lawsuits as they continue to work through the complexities of life during a pandemic.¹¹ However, as noted above, not only are there very few liability cases filed, but businesses and entities are often already protected. Even if one could argue that this law was warranted at the outset of the pandemic, conditions in Oklahoma and across the country have changed dramatically since. Businesses have reopened and the economy is doing better than ever. In fact, the current state of Oklahoma's economy, despite the pandemic, shows so much promise that the state has “never been more open for business.”¹²

For these reasons, we strongly urge you to support repealing S.B. 1946. Thank you for your time and consideration on this matter. If you have any questions or should need any additional information, please feel free to contact me at Colton.Posey@law.nyls.edu or Professor Joanne Doroshow, joanne.doroshow@nyls.edu.

Sincerely,

Colton A. Posey

cc:

Hon. Greg Treat
President Pro Tempore of the Senate

Hon. Charles McCall
Speaker of the House of Representatives

¹⁰ Burkes, Paula. “Workers Comp Claims May Include COVID-19 Infections,” *The Oklahoman*. May 1, 2020.

¹¹ Robeznieks, Andis. “6 Reasons Why COVID-19 Medical Liability Shield Critics Are Wrong,” *American Medical Association*. July 31, 2020.

¹² Carter, Ray. “COVID Numbers Plunge as Oklahoma Economy Remains Strong,” *Oklahoma Council for Public Affairs*. February 24, 2022.