

Testimony in Support of SB 308
May 13, 2020

Good morning Chairman Eklund, Vice Chairman Manning, Ranking Member Thomas, and Members of the Committee. My name is Anne Marie Sferra and I am an attorney at Bricker & Eckler. I am testifying today in support of SB 308 on behalf of the Ohio Hospital Association.

As you know, the COVID-19 pandemic has adversely impacted virtually every element of our health care system and every employer in the State. SB 308 is intended to protect health care providers and other businesses, generally, as they respond to the current pandemic and future declared disasters and emergencies. The bill is written in two parts — one focused on health care providers and the other focused more generally on the business community.

I will address the health care provisions in the bill first. The need to protect our health care providers for their essential work during this pandemic is necessary to ensure providers take all steps necessary to adequately respond to this health crisis. In the midst of a statewide pandemic, disaster, or emergency, Ohioans cannot afford to have their health care providers inhibited from necessary action due to fear of litigation or liability. We need our health care providers to provide necessary care without fear that their actions will result in liability.

The current pandemic has exposed shortcomings in the existing law that we are seeking to amend (RC 2305.2311). Those shortcomings include:

- The existing law only applies to declared disasters, but should include declared emergencies. For example, in this case, Governor DeWine declared a statewide emergency on March 9, 2020; President Trump did not declare Ohio a disaster until March 31, 2020. The demands on health care providers necessitating the protections did not change in between declarations; only the technical nature of the declaration changed. The bill would apply protections in declared emergencies as well.
- The protection provided in current law is insufficient because it applies only to emergency care, rather than the entire course of treatment of a patient as a result of the pandemic. The bill expands the protection to include other health care services delivered in response to the disaster or emergency.
- Current law does not contemplate the fact that a significant volume of health care services have been delayed pursuant to Director Acton's March 17 order suspending non-essential procedures. Pursuant to that order, providers made very difficult judgments about which procedures to delay, which could result in adverse outcomes to patients, and subsequent lawsuits, in the future. Providers who made such decisions in good faith adherence to the Director's order should be protected.
- Current law does not cover skilled nursing facilities, assisted living facilities, or other health care facilities that are providing care during the pandemic. This bill would provide that needed protection.
- Current law expressly excludes protection for wrongful death claims. Given the high risk of mortality associated with COVID-19 patients, and that wrongful death claims are likely to make up a significant number of the claims against health care providers in the wake of the pandemic, this exclusion renders this statute deficient. Note, also, that it is not unconstitutional to treat wrongful death claims the same

as other tort claims when it comes to the standards that must be met for proving such a claim. The constitutional limitation regarding wrongful death claims relates to the inability to limit damages that can be recovered in wrongful death claims; the constitution does not prohibit the establishment of standards that must be met in support of such a claim.

We understand there have been some questions about the standard of protection included in SB 308. It is important to note that there are several existing liability protection statutes in the health care context in which immunity is granted unless the harm is caused due to willful and wanton misconduct. For example:

- **ORC 2305.23** – Ohio’s “Good Samaritan” statute provides immunity for emergency care or treatment provided by volunteers at the scene of an emergency outside of a health care setting.
- **R.C. 2305.234** – provides immunity for volunteer health services provided to indigent and uninsured persons.
- **R.C. 4765.49** – provides immunity in connection with the provision of “emergency medical services,” which are defined as the type of services performed by first responders, EMTs, and paramedics.
- **R.C. 5502.30** – provides immunity for acts carrying out, complying with, or attempting to comply with a federal, state, or local law, arrangement, or order relating to emergency management.

All of these existing statutes protect health care providers and others except when the harm results from willful and wanton misconduct. Thus, we believe that is the appropriate standard for health care providers called to duty during declared disasters and emergencies, and especially in pandemics, when there is a significant risk of liability due to the provision of care in an environment where many conditions are beyond control. In a pandemic, health care providers are dealing with shortages of supplies like test kits, personal protective equipment (PPE), and ventilators, managing with reduced staffing and staffing changes due to staff illness and outbreaks within facilities, and other factors inherent in a disaster or emergency. In such situations, health care providers are essentially “deputized” to respond to the public health crisis and should be granted the same level of protection as those individuals who provide care in the situations contemplated by the statutes noted above. Health care providers have stepped up in the face of an unprecedented pandemic and should be protected from an avalanche of lawsuits resulting from circumstances beyond their control.

We also recognize that there is some concern with the language in line 121, which provides liability protection “during or in response to” the disaster or emergency. Some view this language as overly broad and we appreciate that concern. Our intent with this language is to ensure that care provided during the pandemic is protected if the care is impacted by the declared disaster or emergency. We believe protection that only applies “during and in response” to the disaster or emergency creates a situation in the current pandemic where arguments could be made that the liability protection only applies to care delivered to COVID-19 patients, and only to care that is completed during the official declared emergency or disaster. However, care delivered to many non-COVID-19 patients is clearly impacted by the pandemic because of equipment and supply shortages, staffing shortages, other resource challenges and other environmental factors. In addition, care that begins during the declared emergency or disaster, for example, clearly may continue beyond its end. We are open to consideration of alternative language that would limit the language, to the extent it is deemed overly broad, while ensuring that the protection is not limited to only situations where a COVID-19 patient receives services,

and that protections would apply to services provided in response to the emergency or disaster even if those services were provided after its official end. We note that whatever language is used to alleviate these concerns should also be used in lines 168-169 to ensure consistency.

Finally, we also note that many states in the Midwest have taken similar actions to provide immunities to their health care providers. Kentucky, Indiana, Michigan, Illinois, and Pennsylvania (as well as numerous other states around the country) have provided liability protection, either by legislation or executive order, to health care providers during declared disasters and emergencies such as the current COVID-19 pandemic. We ask that Ohio's health care providers be similarly protected.

Thank you again for the opportunity to testify on behalf of Ohio's hospitals. I would be happy to answer any questions.