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Written Testimony Before the Ohio House Civil Justice Committee
Regarding House Bill 472 (134th General Assembly)
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Chairperson Hillyer, Vice Chair Grendell, Ranking Member Galonski, and esteemed members of the Ohio Civil Justice Committee, thank you for allowing me to submit my written testimony today.

My name is Brian E. Shinn. I am the Chief Claims Attorney for the Office of Columbus City Attorney Zach Klein. I have been with the Columbus City Attorney's Office since 2017. My staff and I investigate tort claims asserted against the city at the pre-litigation stage. I have significant experience interpreting the Ohio Political Subdivision Tort Liability Act, Ohio Revised Code Chapter 2744 (the "Act") and reviewing Ohio case law interpreting it.

House Bill 472 (HB 472) purports to change two provisions of the Act, which will be explained below. These changes mirror those first proposed in HB 27 from the 133rd General Assembly. At that time, the Office of the Columbus City Attorney – through the testimony of then-Assistant City Attorney Andy Miller - offered written testimony; the concerns of the office remain the same with the current bill. Specifically:

Ohio Revised Code §2744.02(B)(1)

The Act's primary purpose is to preserve the financial integrity of political subdivisions and the limited resources of local government. The Act accomplishes its primary purpose by not only limiting the circumstances under which a political subdivision can be held liable for money damages, but also by providing defenses to liability that can be asserted and litigated early enough in a civil action to avoid long and costly litigation through either dispositive motions or settlement negotiations.

As a general matter, under the current statute political subdivisions are immune from state-law tort claims under the Act. See R.C. 2744.02(A)(1). That immunity is subject to five exceptions, and only one of those is at issue here. Still, it is important to remember that the default rule under the current Act is that political subdivisions are presumptively immune from all liability. This is important to remember because the Act itself represents a balancing of interests that is fundamentally different than the general interests bound by common-law negligence principles. In choosing to enact the current statutory scheme, the General Assembly decided that certain losses, which would otherwise be actionable in tort, should and would go without compensation from local treasuries.

The general immunity provided by the Act is not absolute. There are five statutory exceptions. In carving out those exceptions, the General Assembly decided that there are just five situations in which the interests of a political subdivision's financial integrity should give way to the older common-law tort interests. One of those situations involves the negligent operation of any motor vehicle by a political subdivision's employee when

that employee is engaged within the scope of their employment and authority for the political subdivision. See R.C. 2744.02(B)(1). In making that choice, however, the General Assembly also carved out "exceptions to the exception" for situations in which local emergency responders are responding to emergencies. It applies to law enforcement officers who are operating motor vehicles "while responding to an emergency call." R.C. 2744.02(B)(1)(a). It also applies to firefighters who are operating motor vehicles "while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm." R.C. 2744.02(B)(1)(b). It further applies to certain emergency medical service providers who are operating a motor vehicle while "responding to or completing a call for emergency medical care or treatment." R.C. 2744.02(B)(1)(c). In such situations, the General Assembly decided that the interests shift back in favor of preserving the financial integrity of political subdivisions.

Moreover, as it is currently written, R.C. 2744.02(B)(1) also balances the interests of those who need emergency services and the general public. As a society, we should all want emergency responders to respond to emergencies as quickly as possible. Those individuals in need of emergency services undoubtedly want emergency responders to arrive as soon as is possible. By removing negligence as a basis for civil liability as the current statute provides, emergency responders can dispense with the most time-constraining restraints that would slow non-emergency motorists. In this sense, the Act does more than just balance the interest of the public's moneys against the interest of the public in obtaining tort compensation. It also balances the interests of individuals who are definitely in need of emergency services against those who might (but not necessarily will) be injured as the result of mere negligence.

However, under the current version of R.C. 2744.02(B)(1), emergency responders are not allowed simply to abandon all caution and common sense while responding to emergencies. The interests of the public are still in the balance. The emergency exceptions at issue do not apply when the operation of a motor vehicle, even during an emergency, constitutes "willful or wanton misconduct."

In light of the foregoing, the statute, as written, already strikes a reasonable balance among competing needs (i.e., public safety, emergency needs, and local public finances), and Ohio courts have spent over thirty years developing a voluminous body of case law interpreting that balance and giving it nuance. The proposed changes to this statutory scheme in HB 472 completely ignore this balance and the longstanding jurisprudence that it has created. Increasing the standard of care emergency responders must employ in responding to emergencies may lower the instances in which someone is injured by an emergency responder on the way to an emergency, but it will also decrease response time, and thus increase the instances in which someone is injured by a delay. HB 472 will also increase the funds and time that political subdivisions are required to spend on litigation and judgment. This in turn will decrease the money available for emergency services. It will also reduce the subdivision's capacity to provide prompt emergency services.

Proponents of this legislation have asserted that it is necessary to narrow the scope of what courts have considered to be an "emergency." While reasonable people can reasonably debate the proper breadth and scope of a proper "emergency," the proposed change to R.C.

2744.02(B)(1) effectively eliminates the emergency exception altogether. Under HB 472, there is no emergency exception for firefighters or emergency medical service providers. Although it proposed to keep the exception for law enforcement officers, this exception would only apply in those limited circumstances during which the officers are pursuing a fleeing suspect and only when the suspect attempts to sue the officers. This extremely narrow exception is highly unlikely to occur. As such, HB 472 limits the emergency exception for law enforcement officers so severely that it may as well eliminate it altogether.

For purposes of the law enforcement emergency exception, the term "emergency call" is defined by the General Assembly in R.C. 2744.01(A) as a "call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers." If the proponents of H.B. 472 truly wish to narrow the breadth and scope of what constitutes an "emergency," such an objective could be more efficiently and effectively accomplished by amending the definition of "emergency call" found in R.C. 2744.01(A). However, a complete repeal of the emergency exceptions found in R.C. 2744.02(B)(1)(a)–(c) and a complete reversal of the deliberate balancing of interests already accomplished within R.C. 2744.02(B) is overkill.

Ohio Revised Code 2744.05(C)

As for the proposed change to R.C. 2744.05 within HB 472, the measure is unnecessary and will only lead to confusion. Ohio's laws on joint and several liability, contributory fault, and apportionment of liability already apply to litigation against political subdivisions and employees. To the extent that R.C. 2744.05(C)(1) provides that there "shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages," it does not remove a political subdivision's or its employee's rights under the laws of joint and several liability, contributory fault, and apportionment of liability. Rather, it seeks to make clear that the statutory damages cap of $250,000 applies only to "damages that do not represent the actual loss" of an injured person. There is no need for the General Assembly to state that Ohio's laws on joint and several liability, contributory fault, and apportionment of liability apply to cases involving the operation of motor vehicles.

More troubling is that the proposed change to R.C. 2744.05 implicates the cannon of statutory construction known as *expressio unius est exclusio alterius*. That is, by negative implication, the expression of one thing implies the exclusion of others. By specifically stating that Ohio's laws on joint and several liability, contributory fault, and apportionment of liability apply to cases involving the operation of motor vehicles, H.B. 472 will create the impression that those laws do not apply to any others. Therefore, the proposed changes to R.C. 2744.05, at best, provide no substantive change whatsoever to the existing law, and at worst, create confusion that will inevitably result in a significant amount of new litigation.

Thank you again for the opportunity to provide this written testimony.