Micah Berman, JD
February 24, 2021
Testimony re H.B. 90
Ohio House of Representatives, State and Local Government Committee

Chairman Wiggam, Vice Chair John, Ranking Member Kelly, and Members of the Committee:

My name is Micah Berman and I am a resident of Columbus.

I am an attorney and an expert in public health law and policy. I am an Associate Professor of Public Health and Law at Ohio State University's College of Public Health and Moritz College of Law. I am providing this testimony solely in my personal capacity and not on behalf of the institution. I have taught Public Health Law for the past 15 years and I am a co-author of one of the leading Public Health Law textbooks (*The New Public Health Law*, Oxford University Press, 2018).

Though I have concerns about H.B. 90 as a matter of policy, I wish to (a) highlight the serious concerns about the Bill's constitutionality that were noted in LSC's analysis, and (b) suggest that now is not the right time to move forward with consideration of this bill.

<u>Constitutional Concerns</u>

H.B. 90 would authorize the General Assembly, by concurrent resolution, to override executive and agency actions that are fully consistent with Ohio's statutory law and declare that such actions "have no legal effect." This would mean that the General Assembly is empowered to effectively rewrite its statutes via resolution, which is precisely what Ohio's Constitution prohibits. Under Ohio's Constitution, resolutions—including concurrent resolutions—are not laws, and the only way to rewrite a statute or overturn an executive order or administrative regulation is by passing a bill through both chambers of the legislature and presenting it to the governor for signature.

This is made clear when we look to the text of the Ohio Constitution. Ohio's Constitution states, "The general assembly shall enact no law except by bill[.]" Art. II, Sec. 15. *Resolutions—including concurrent resolutions—are not bills*, and thus cannot carry the force of law. As defined by LSC, a resolution is "A formal written expression of the opinion or will of the legislature, the subject matter of which would not properly constitute a statute." Accordingly, "when the legislature wishes to act in an advisory capacity, it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in the state constitution." 73 Am. Jur. 2d Statutes § 2. It is precisely because resolutions are *not* law that they do not need to be presented to the governor for a signature.

Under the Ohio Constitution, there are some actions the Legislature may take that do not require the signature of the governor, but they are not actions that create binding law themselves. For example, the legislature may, by joint resolution (with a two-thirds vote in each house), recommend that the governor be removed from office for reason of disability. But this joint resolution only serves as a recommendation that triggers a further decision-making process; the Ohio Constitution gives the Ohio Supreme Court "original, exclusive, and final jurisdiction" to rule on a governor's removal. Art. III, Sec. 22. Similarly, the legislature may, by joint resolution (with a three-fifths vote in each house), place a constitutional amendment on the ballot. But again, that merely triggers another decision-making process. Under the Ohio Constitution, voters ultimately get to decide on whether or not the constitutional amendment is adopted. Art. XVI, Sec. 1. These examples suggests that Ohio's Framers did not intend for the General Assembly to have wide-ranging authority to make binding policy via resolution, including the authority to override executive orders or administrative rules. And giving such powers to a legislative committee, as H.B. 90 does, would be far more constitutionally suspect. Indeed, to say that a committee alone can rewrite this body's laws and take away authority that existing law gives to the governor or to administrative agencies would be unheard of.

More broadly, as LSC noted, H.B. 90 raises fundamental questions of separation of powers. The Ohio Constitution provides that "[t]he supreme executive power of this State shall be vested in the governor." Art. III, Sec. 5. Executive orders are the means by which the Governor, as the "supreme executive," manages the affairs of the executive branch. The General Assembly taking unto itself the ability to override executive orders by resolution would appear to be in *direct conflict* with this constitutional provision. Moreover, it would be unprecedented. To my knowledge, there is no state in which the legislature is empowered to overrule executive orders as is proposed in H.B. 90, presumably because is such an obvious breach of the separation of powers doctrine.

Some proponents of H.B. 90 have suggested that there are already cases in which the General Assembly can block administrative rules by concurrent resolution. For example, the Joint Committee on Agency Rule Review (JCARR) can recommend, under certain circumstances, that the General Assembly preemptively block proposed agency rules via joint resolution before the rules are finalized. ORC § 106.021. On this point, I would note that JCARR's rule review procedure (including the use of concurrent resolutions to block regulations, sometimes referred to as a "legislative veto") has never been subjected to judicial review. Numerous state supreme courts have struck down similar legislative review committees and legislative veto provisions on either separation of powers or "presentment clause" grounds (or both), including in Alaska, Kansas, Kentucky, Missouri, Michigan, Massachusetts, New Hampshire, New Jersey, Oregon, and West Virginia. Though every state's law is different and a couple of states have upheld legislative vetoes, the case law weighs very heavily against their constitutionality. (As LSC noted, the U.S. Supreme Court has also ruled that this type of legislative veto at the federal level is unconstitutional.) Adopting H.B. 90 could invite a legal challenge to the General Assembly's use of concurrent resolutions for "legislative veto" purposes that could have ramifications that go far beyond this bill.

Timing

You don't rewrite fire safety laws when your house is burning; you put out the fire first. There may be well-founded concerns about the way the Ohio's dated and somewhat arcane health emergency powers have been employed in response to the COVID-19 pandemic, but Ohio is still in the throes of the pandemic and attempting to manage a complex vaccine distribution effort. I agree that the General Assembly should – after carefully studying the experiences and lessons of the past year – consider revising the emergency powers in Ohio's Health Code. But rushing through a bill with serious constitutional concerns would be a mistake.

A leading legal scholar in this area, Professor Lindsay Wiley at American University, has written extensively about the need to "democratize" the law of disaster response, a desire this committee likely shares. As she writes, "Scientific risk assessments are critical to public health governance, but pandemic response — like any other form of public health intervention — also requires moral and policy choices." Thus, she argues (and I agree) that the legislature should put in a place a clear and transparent framework to guide executive branch decisions in public health emergencies. Put differently, instead of waiting to see what the executive branch does and deciding whether or not you like it, as H.B. 90 would do, the General Assembly should proactively design a legal framework for disaster response that is built around its understanding of Ohioans' values and priorities. That is the way to *constitutionally* ensure that the executive branch's response to public health emergencies is consistent with the legislature's goals and policy preferences. Professor Wiley is working on model code language to put this principle into action, and other national groups are developing – or will develop – other models as well. I urge you to slow down this process and consider how to best design a new, comprehensive framework for disaster response that will stand the test of time. I am more than happy to assist you in that effort.

For these reasons, I urge you to reject H.B. 90 in its current form. I am happy to answer any questions.