

**IN THE SUPREME COURT OF OHIO**

State ex rel Candy Bowling, et al., ) CASE NO. 2021-1062  
)  
Plaintiffs-Appellees, )  
)  
vs. ) On Appeal from the Franklin County Court  
) of Appeals, Tenth Appellate District,  
) Case No. 21AP000380  
Michael DeWine, et al., )  
)  
Defendants-Appellants. )

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**BRIEF OF *AMICI CURIAE* THE OHIO CHAMBER OF COMMERCE,  
THE OHIO BUSINESS ROUNDTABLE, THE OHIO RESTAURANT ASSOCIATION,  
THE OHIO HOTEL AND LODGING ASSOCIATION, THE OHIO GROCERS  
ASSOCIATION, THE OHIO TRUCKING ASSOCIATION, THE OHIO  
MANUFACTURERS' ASSOCIATION, THE OHIO COUNCIL OF RETAIL  
MERCHANTS, AND THE OHIO FARM BUREAU FEDERATION  
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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## **I. STATEMENT OF INTEREST OF AMICI CURIAE**

The amici curiae organizations described in more detail below (collectively the “Ohio Business Amici”) represent thousands of members that help form the bedrock of Ohio’s economy by employing millions of Ohioans and providing key goods and services across the state. The Ohio Business Amici and their members have a vital interest in this case, where a misinterpretation of a statute poses harm to Ohio’s economy and workforce. The Ohio Business Amici urge this Court to reverse the lower court’s ruling, which misinterprets R.C. 4141.43(I) to require Ohio to participate in harmful federal programs not contemplated by the statute, effectively hamstringing Ohio’s ability to recover from crises like the COVID-19 pandemic.

**The Ohio Chamber of Commerce** (the “Ohio Chamber”) is Ohio’s largest and most diverse statewide business advocacy organization representing businesses ranging in size from small, sole proprietorships to some of the largest U.S. companies. It works to promote and protect the interests of its more than 8,000 business members while building a more favorable business climate in Ohio by advocating for the interests of Ohio’s business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system, which fosters a business climate where enterprise and Ohioans prosper. The Ohio Chamber regularly files amicus briefs in cases important to its members’ interests in courts across the state of Ohio.

**The Ohio Business Roundtable** (the “OBRT”), established in 1992, was founded for one sole purpose: to improve Ohio’s business climate. Since its inception, the OBRT has worked with Ohio’s governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. OBRT members—the Chief Executive Officers of many of our state’s largest, most successful businesses—have helped bring about momentous change in Ohio’s economic landscape. OBRT’s executives identify vexing, intractable issues

facing Ohio's job creators, and through their expertise, experience and resources, pursue policies that make Ohio stronger.

**The Ohio Restaurant Association** (the "ORA") is the chief promoter, educator and advocate for Ohio's restaurant and foodservice industry. The ORA is comprised of more than 2,000 members, including independent and multi-unit restaurant companies and industry purveyors, ranging from large national companies employing tens of thousands of Ohioans to small single-location, family-run neighborhood restaurants and bars. The ORA is committed to enhancing all parts of Ohio's restaurant, hospitality and foodservice industry, an integral part of Ohio's economy, a contributor to the vibrancy of communities throughout Ohio, and the state's second-largest private sector employer.

**The Ohio Hotel & Lodging Association** (the "OHLA") was formed in 1893 and serves as the leading voice for owners, operators, and professionals in every type of lodging business across the Buckeye State. The OHLA's mission is to support efforts that grow Ohio's travel economy, provide jobs for hospitality professionals, and maintain a prosperous hotel and lodging market. Through its advocacy, the OHLA works with policymakers throughout Ohio to advance the interests of its members at the Ohio Statehouse, the Governor's Office, and in local communities, so that Ohio is a welcoming state for travelers and the professionals who serve them.

**The Ohio Grocers Association** (the "OGA"), founded in 1899, has served Ohio's food industry for more than 120 years. With over 500 members, there is an OGA business located in nearly every community across Ohio. OGA's members range from small family-owned establishments to the State's largest grocery stores, food manufacturers, distributors, and wholesalers, which uniquely positions the OGA to represent the industry in front of Ohio's

policymakers. As part of OGA's mission, the association advocates for a better business and legal climate in Ohio that helps their members grow and advance Ohio's economic prosperity.

Founded in 1918, **the Ohio Trucking Association** ("OTA") is Ohio's leader in advocacy and education for trucking industry professionals. OTA backs its members by supporting public policy solutions before Ohio's elected officials that will make the trucking industry more operationally efficient and enhance the public image and professionalism of the industry for its 812 member companies. OTA's members operate in every sector of the trucking industry from private carriers, for-hire carries, and companies that provide goods and services to truck operators. This reach makes the OTA well suited to advocate for the trucking industry in Ohio's courts and to seek a stable legal environment that promotes economic growth across the state.

**The Ohio Manufacturers' Association** ("OMA") is a statewide non-profit trade association whose membership consists of over 1,300 manufacturing companies. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

Founded in 1922, **the Ohio Council of Retail Merchants** ("OCRM") is Ohio's oldest and largest advocate for the retail and wholesale industries, representing more than 7,000 retailers, wholesalers and distributors, ranging from local enterprises to influential regional businesses and large companies operating across the state. Ohio's retail industry supports 1.5 million jobs in Ohio. OCRM is dedicated to maintaining a legal environment that supports businesses and creates jobs, and to presenting and protecting its members' interests on important statewide issues.

**The Ohio Farm Bureau Federation** ("OFBF") is Ohio's largest general farm organization, representing members in all of Ohio's 88 counties. OFBF's grassroots structure places its members at the helm of developing policy to advance agriculture and strengthen



communities at the local, state and national level. OFBF members run the gamut from large to small businesses, from crop production to energy development, from livestock production to food processing, and everything in between. OFBF advocates for these members to ensure a strong economy and better future for all of Ohio.

## **II. INTRODUCTION**

In this case of first impression in Ohio, the court of appeals incorrectly transformed R.C. 4141.43(I)—a statute requiring the Director of Job and Family Services to perform certain administrative actions if necessary to permit Ohio to obtain “advantages available” under a list of previously enacted federal acts—into one that limits the Governor (who is not named in the provision) from exercising his constitutional authority to take certain executive actions (that are not listed in the provision) to stop harms caused by recent federal acts (that are not named in the provision). The court of appeals’ decision goes beyond the plain language of the statute and reversed a trial court decision that was appropriately based on the understanding that a court “cannot legislate from the bench and overlook the clear terms of R.C. 4141.45 and R.C. 4141.43(I).” (21-CV-4469 R. 82 (“Decision and Entry”), at 8–9.) The Ohio Business Amici file this brief to offer their unique business perspective to explain why the lower court’s opinion is not only wrong, but dangerous for Ohio’s economy in this case and potential future cases.

In May 2021, Governor DeWine notified the United States Department of Labor that, effective at the end of June 2021, Ohio would be terminating its administration of the Federal Pandemic Unemployment Compensation (“FPUC”), a temporary federal program that had recently been created by the CARES Act in response to the pandemic. (*See* 21-CV-4469 R. 63, Stipulation, Ex. A.) The Governor explained that while the FPUC had a positive impact at the height of the pandemic when jobs were scarce or uncertain, they were now having a negative impact by discouraging Ohioans from working when the economy was in recovery and Ohio

businesses were looking to hire. (*Id.*) Thus, the Governor decided that it was no longer in the public interest to pay extended benefits to individuals who were not working. (*Id.*)

Months later, after Ohio’s termination of the FPUC had become effective, Plaintiffs asked the trial court for emergency relief to override the Governor’s policy decision and prevent Ohio from leaving that program. The trial court rightly denied this request, finding that nothing in R.C. 4141.43(I) required the Governor to continue Ohio’s voluntary participation in this temporary federal program. (*See* Decision and Entry.) The court of appeals reversed and remanded, finding that the Ohio legislature, through a statutory provision enacted in 1971, intended to require the Governor to enter into contracts with the federal government to participate in new federal programs created 50 years later by a federal act not contemplated or enumerated in the statute. *See State ex rel Bowling v. DeWine*, 10th Dist. Franklin No. 21AP-380, 2021-Ohio-2902 (“Op.”).

The Governor was within his authority to withdraw Ohio from participating in the FPUC and was justified in doing so. Based on public data substantiated by the on-the-ground experience of the Ohio Business Amici’s members, it was clear that Ohio businesses—and in turn, Ohio’s economy—would have continued to suffer if the program had continued. While others may disagree and believe that Ohio should have continued participating in the FPUC, that policy disagreement does not justify reading oppressive requirements into R.C. 4141.43(I) that are not supported by the plain text of the statute. As the trial court correctly explained, courts should not “legislate from the bench” and should not second-guess the Governor’s wise policy decision to terminate Ohio’s administration of the FPUC.

Thus, the Ohio Business Amici urge this Court to reverse the court of appeals and reinstate the trial court’s decision denying Plaintiffs’ motion for injunctive relief.

### **III. STATEMENT OF FACTS**

The Ohio Business Amici defer to the statement of facts as set forth in Appellants’ brief.

#### IV. ARGUMENT

**PROPOSITION OF LAW: R.C. 4141.43(I) does not prohibit the Governor from withdrawing Ohio from a voluntary and temporary federal program created under the recently enacted CARES Act, which is neither mentioned nor contemplated by the statute.**

In order to obtain a preliminary injunction, Plaintiffs have the burden to show: (1) a substantial likelihood that they will prevail on the merits; (2) they will suffer irreparable injury or harm if the requested relief is denied; (3) no unjustifiable harm to third parties will occur if the injunctive relief is granted; and (4) the injunctive relief requested will serve the public interest. *Franks v. Rankin*, 10th Dist. Franklin No. 11AP-934, 2012-Ohio-1920, ¶ 28.

The trial court correctly determined that Plaintiffs had failed to show that they were substantially likely to prevail on the merits, but the court of appeals reversed that determination in a 2-1 decision. *See* Op. ¶ 61. In doing so, the appellate court misinterpreted the plain language of R.C. 4141.43(I). In addition to being wrong, the court of appeals' decision poses serious harm to Ohio's economy by destroying the ability of Ohio governors to react to crisis and exercise any discretion in deciding whether participating in new federal programs is in Ohio's best interest.

##### **A. The court of appeals misinterpreted the plain language of R.C. 4141.43(I) .**

Plaintiffs contend that Defendants "are violating their clear legal and statutory duty to secure [] benefits for employees in the State." (Compl. ¶ 36.) Plaintiffs rely solely on R.C. 4141.43(I) as the basis for this alleged legal and statutory duty, which provides:

The director shall cooperate with the United States department of labor to the fullest extent consistent with this chapter, and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

The court of appeals' decision focused on whether the FPUC program created by the CARES Act should be considered as being "available under" the acts listed in R.C. 4141.43(I). It incorrectly determined that it should, and held that the Governor was prohibited from terminating Ohio's contract with the federal government related to the FPUC. *See* Op. at ¶¶ 33–47. Not only was the court of appeals' analysis incorrect on this point, but it also failed to analyze other terms in R.C. 4141.43(I) that render the statute inapplicable to the Governor's actions. The plain language of R.C. 4141.43(I) forecloses the conclusion reached by the court of appeals.

**1. Any obligations in R.C. 4141.43(I) apply only to the legislative acts specifically identified in the statute. The CARES Act is not identified in the statute.**

The court of appeals agreed that R.C. 4141.43(I) compels action only "when benefits are made available under one of the five federal statutes specifically enumerated in R.C. 4141.43(I)." Op. ¶ 40. Thus, it concluded, "the ultimate question is whether FPUC benefits are available under one of the federal laws stated in R.C. 4141.43." *Id.* If this Court finds that the payments under the FPUC are available under the CARES Act, which created the program, and not any of the acts listed in R.C. 4141.43(I), it can reverse the court of appeals and need not conduct further analysis.

As the trial court explained: "[t]he wording chosen by the Ohio General Assembly clearly does not include the CARES Act" and "the FPUC extended benefits were undeniably created by the CARES Act." (Decision and Entry, p. 5 (July 29, 2021).) There can be no doubt that the payments in question here were made "available" through the CARES Act. Congress created the program and made the funds in question available through the portion of the CARES Act titled "Relief for Workers Affected by Coronavirus Act." *See* 15 U.S.C. § 9023(d). The subsequent agreement that the Governor signed between the State of Ohio and the Department of Labor makes clear that the Agreement is to "carry out the provisions of the Relief for Workers Affected by

Coronavirus Act (Public Law 116-136).”<sup>1</sup> (21-CV-4469 R. 63, Stipulation, Ex. B.) The court of appeals also acknowledged that the CARES Act appropriated new funds from the general fund of the Treasury to pay for the relevant program and that the funds are not routed through the unemployment compensation account of the Unemployment Trust Fund. Op. ¶ 44. The CARES Act simply is not one of the relevant acts listed in R.C. 4141.43(I), thus, Ohio’s participation in the FPUC cannot be mandatory under any reading of the statute.

The court of appeals based its determination that the FPUC funds were “available under” either the Federal-State Extended Unemployment Compensation Act (“EUCA”) or the Social Security Act (“SSA”) because the CARES Act borrowed terminology or administrative structures related to those acts to help administer these new programs. See Op. ¶¶ 45–47. But the mere fact that the CARES Act borrowed terms from other acts or used existing systems to efficiently administer its entirely new temporary program does not make the CARES Act programs somehow “available under” the other acts enumerated in R.C. 4141.43(I).

Other state courts have rejected such reasoning. In *Brannon v. McMaster*, the Supreme Court of South Carolina addressed a similar challenge under a similar South Carolina statute. 864 S.E.2d 548 (S.C. 2021). The Court concluded that the FPUC funds were not “advantages under” the Social Security Act. *Id.* at 550. Although the funds for the new CARES Act programs may “pass through bank accounts of the Social Security Administration . . . [t]his is not sufficient to render benefits paid [] to be ‘advantages available under the provisions of the [SSA].’” *Id.* An Indiana Court of Appeals came to a similar result. See *Holcomb v. T.L.*, 175 N.E.3d 1177 (Ind.App. 2021). In *Holcomb*, the court found that the new CARES Act programs are not benefits “conferred under” previously enacted statutes:

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<sup>1</sup> Public Law 116-136 is the CARES Act.

In the present case, 15 U.S.C. §§ 9021, 9023, and 9025 are not enumerated in the text of Indiana Code section 22-4-37-1, and those sections do not amend any of the enumerated statutes by modification, addition, or deletion, and the purpose of sections 9021, 9023, and 9025 are to create the CARES Act benefits, which is different than the purpose of 42 U.S.C. §§ 1101, 1104 and 1105. The CARES Act benefits are distributed by utilizing the same accounting systems used to fund the administrative costs of the state UI programs, but the CARES Act benefits are established and conferred by entirely different statutes than those enumerated in Indiana Code section 22-4-37-1. Congress needed an efficient way to distribute the CARES Act benefits, and such a system was already in place under the statutes enumerated in Indiana Code section 22-4-37-1. But utilizing the same system to distribute the CARES Act benefits is not evidence that Congress intended to change or amend the traditional UI scheme through the CARES Act. The CARES Act is intended to be temporary, provides different benefits to more types of people and for different amounts of time, and serves as a supplement to traditional UI benefits during an unprecedented pandemic.

*Id.* at ¶ 20.

Thus, because any FPUC payments are made available under the CARES Act, and not the acts listed in R.C. 4141.43(I), 4141.43(I) imposes no requirements on the Governor related to the FPUC and the court of appeals decision should be reversed.

**2. The statute permits the Governor to exercise discretion regarding Ohio’s participation in federal programs.**

Even if the new temporary FPUC program created by the CARES Act constitutes “advantages available” under the acts listed in R.C. 4141.43(I), the statute still does not compel the Governor to sign a contract with the federal government and force Ohio to participate in the FPUC. The plain language of the statute permits the Governor discretion in evaluating Ohio’s participation in federal programs in two ways.

First, the statute applies only to “advantages” offered under certain legislative acts. The term “advantages” is not defined in the statute, so it should be given its normal meaning. *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶ 17, citing *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1167, ¶ 11. Black’s law dictionary defines “advantage” as “a circumstance, ability, or condition that produces a superior position or state of

being.” Advantage, *Black’s Law Dictionary* (11th Ed. 2019). Thus, the statute requires a determination that Ohio participating in a program constitutes an advantage or puts Ohio in a superior position. See *S.B., et al., v. McMaster, et al.*, No. 2021-CP-40-03774 (S.C. Richland C.P. Aug. 13, 2021) (interpreting “advantage” to determine that South Carolina’s executive officials had “discretion to determine what benefits from the federal government actually put the State and its citizens in a ‘superiority of position or condition.’”). Here the Governor made the determination that the FPUC was no longer resulting in a superior position, but was harming Ohio and its citizens.

Next, the statute only compels the **Director** to take certain acts, but does not intrude on the **Governor’s** executive powers. See R.C. 4141.43(I) (“[t]he director shall cooperate with the United States department of labor. . . and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary . . .”). The trial court correctly determined that R.C. 4141.43(I) does “not place an obligation on Governor DeWine to continue participation in” the FPUC and that the actions taken by the Governor—signing a contract with the department of labor and then later withdrawing from the contract—“do not qualify as the adoption of appropriate rules, regulations, and administrative methods and standards.” (Decision and Entry, pp. 5–6.)

Thus, if a desired “advantage” is “available under” one of the enumerated legislative acts, and if the Governor determines that the program offers an “advantage” and decides Ohio will participate in a new federal program (here, by entering into a contract with the department of labor), the Director must take the administrative steps to allow that participation to proceed. The statute requires no more than this, and does not deprive the Governor of his executive powers or discretion.

**B. The court of appeals' flawed interpretation of R.C. 4141.43(I) poses a risk to Ohio's economy, both in this case and potential future cases.**

The facts presented in this appeal demonstrate the concrete danger posed by the court of appeals flawed interpretation of R.C. 4141.43(I) to Ohio's economy. It would hamstring Ohio from having the necessary flexibility to effectively respond to and recover from economic crises and leave Ohio to the whim of the federal government and the programs it chooses to implement, no matter the cost, harm, or conditions.

In May of 2021, Ohio was facing an economic crisis. Ohio was experiencing an artificial workforce shortage caused, in part, by the ongoing payments from the FPUC. As Governor DeWine explained in his letter to the Department of Labor, as the economy began recovering from the initial stages of the pandemic, Ohio businesses started re-opening and needed workers:

You can see it as you drive through any part of Ohio, with many signs looking for workers and offering signing bonuses. The need for workers is apparent in many industries, including restaurants, retail, and manufacturing.

(21-CV-4469 R. 63, Stipulation, Ex. A.) The Governor explained that the labor shortage was creating a real and concrete harm to the Ohio economy: "The shortage of workers is having a real impact on our supply chain and the cost and availability of goods we rely on to keep our state moving." (*Id.*) And, he explained that the labor shortage was caused, in part, by the continuation of the FPUC: "It is clear that Ohio workers are no longer out of work because of the pandemic shutdown. The FPUC extra \$300 a week in assistance is now discouraging some from returning to work." (*Id.*) Thus, the Governor was justified in concluding that the FPUC was no longer an "advantage" to Ohio and in terminating Ohio's participation in it.<sup>2</sup>

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<sup>2</sup> Governor DeWine is not an outlier in coming to this conclusion, as over two dozen other states also chose to terminate their administration of the FPUC.



Governor DeWine's analysis was substantiated by the experiences of the Ohio Business Amici's members across the state and by data from that time period. The Ohio Business Amici's members had reopened and were looking to hire, but Ohioans were not returning to the workforce due to the extended unemployment benefits. Even though the OhioMeansJobs website revealed that there were hundreds of thousands of open jobs in Ohio, with many of them offering a salary of over \$50,000 per year, Ohio's labor force participation rate (59.9% in May 2021) was significantly below pre-pandemic levels (63.7% in February 2020). *See* Ohio Unemployment Statistics Database, U.S. Bureau of Labor Statistics.<sup>3</sup>

When that data was translated to the real world, it revealed just how devastating the disincentive to work created by the FPUC, and the resulting labor shortage, had been to Ohio businesses. A live industry survey on workforce issues conducted by the OHLA revealed that 98% of Ohio's lodging businesses were understaffed: 62.5 % report being "Severely Understaffed" and 35.6 % report being "Somewhat Understaffed." (*See* Letter from J. Savarise to K. Shimp (July 20, 2021), attached hereto as Exhibit A.) Despite offering competitive wages, wage incentives, flexible hours, and benefits, 76% of respondents cited a lack of applications or applicants not showing up to interviews. *Id.* This lack of labor meant that 85% of respondents could not sell their inventory, and more than half had to limit other revenue producing activity such as food/beverage/banquet operations. *Id.* This same story was repeated by Ohio businesses across every segment of the Ohio economy.

Ohio's participation in the FPUC also made Ohio's UI program more attractive to scam artists, who had already submitted hundreds of millions of dollars in false claims under the programs. According to a GAO Report, states across the country made approximately \$12.9

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<sup>3</sup> Available at <https://data.bls.gov/timeseries/LASST3900000000000004> (last accessed on January 7, 2022).

billion in overpayments in unemployment insurance programs during the first four quarters of the pandemic (April 2020 through March 2021), with substantial amounts of these overpayments due to fraud. *See* United States Government Accountability Office, Report to Congressional Committees: COVID-19 - Continued Attention Needed to Enhance Federal Preparedness, Response, Service Delivery, and Program Integrity (July 2021) at 160–61.<sup>4</sup> Ohio was not impervious to these fraudulent claims. By July of 2021, Ohio had paid out over \$444 million for fraudulent claims through the Pandemic Unemployment Assistance program. *See* Ohio On The Hunt To Recover \$465M In Unemployment Fraud, Statehouse News Bureau (July 8, 2021).<sup>5</sup>

Thus, the Governor needed the discretion to evaluate whether the FPUC was benefitting or harming Ohio and act accordingly. And, thanks to his actions, the workforce is now starting to recover, as Ohio’s labor force participation rate has increased every month since May of 2021. *See* Ohio Unemployment Statistics Database, U.S. Bureau of Labor Statistics.<sup>6</sup> And, Ohio Business Amici’s members are reporting a more engaged workforce and a growing success in filling their open positions. Although the recovery process from COVID-19 will be slow, Ohio Business Amici are confident that the Governor’s decision helped to halt the decline and substantially accelerate that recovery.

Moreover, even if there could be a policy debate as to whether the FPUC was advantageous or not, this Court should not second-guess policy decisions made by politically accountable officials in other branches. Governor DeWine is the elected official in whom “[t]he supreme executive power of this state” is vested. *See* Ohio Constitution, Article III, Section 05. The

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<sup>4</sup> Available at <https://www.gao.gov/assets/gao-21-551.pdf> (last accessed January 7, 2022).

<sup>5</sup> Available at <https://www.stateneews.org/post/ohio-hunt-recover-465m-unemployment-fraud> (last accessed January 7, 2022).

<sup>6</sup> Available at <https://data.bls.gov/timeseries/LASST3900000000000004> (last accessed on January 7, 2022).

Governor was well within his discretion to withdraw Ohio from the voluntary contract regarding Ohio's participation in the FPUC. *Ohio Roundtable v. Taft*, 112 Ohio Misc.2d 49, 2002-Ohio-3669, 773 N.E.2d 113, ¶ 68 (C.P.) (“the Governor’s power to decide whether Ohio will enter into an agreement with other states is grounded in the Constitution,” and that such power “exists independently” of statute). The court of appeals tried to distinguish *Taft* by finding that, here, the Governor’s action “was in direct contrast” to the mandate in R.C. 4141.43—but, as explained above, when correctly read, R.C. 4141.43(I) contains no such mandate and imposes no limitations on the Governor’s power.

By adopting the trial court’s correct interpretation of R.C. 4141.43(I), this Court will restore the Governor’s discretion to weigh the benefits of Ohio’s participation in future temporary federal programs that were not contemplated when R.C. 4141.43(I) was enacted decades ago. That discretion worked to the benefit of Ohio in this case, and it is needed to protect Ohio in the future.

If the court of appeals’ decision is left to stand, Ohio will be required to participate in any future federal program that simply borrows definitions or processes from the enumerated acts in R.C. 4141.43(I), no matter the terms. Without having any discretion, the Governor would be forced to enter into contracts with the federal government to participate in those programs, no matter what conditions the federal government places on Ohio. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (“Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 65 L.E.2d 902 (1980) (Burger, C. J.). It would lead to absurd results to read this 1971 statute to indicate that the legislature intended to give up such great sovereignty and require Ohio’s

participation in unknown programs to be established 50 years in the future, no questions asked. The Ohio Business Amici believe that Ohio is best-positioned to determine how to run its economy, and is concerned about the harms that would result if Ohio was required to blindly enter into new federal programs with no analysis or discretion.

## V. CONCLUSION

The Ohio Business Amici respectfully request that the Court reverse the court of appeals' decision and hold that R.C. 4141.43(I) did not prohibit the Governor from withdrawing Ohio from the FPUC after he had determined that the programs no longer offered an advantage to Ohio.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served by email on January 7, 2022 upon the following counsel:

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**The Ohio Business Amici Brief**

**Exhibit A**

July 20, 2021

Kevin Shimp  
Director, Labor & Legal Affairs  
Ohio Chamber of Commerce  
35 South Third Street, STE 100  
Columbus, OH 43215

**RE: Workforce Survey**

Dear Kevin,

Thank you for your and the Chamber's work on removing disincentives to work as we enter the recovery phase of the pandemic. As our organizations have discussed publicly, there are plentiful jobs available in many industries, including the hospitality and travel sector.

The Ohio Hotel & Lodging Association has a **live industry survey on workforce issues**. Results to date illustrate the challenges facing these businesses, and those employees who work in them and are performing expanded duties due to this crisis:

- 62.5 percent of Ohio's lodging businesses report they are "Severely Understaffed"
- 35.6 percent are "Somewhat Understaffed" – an astonishing total of 98 percent
- More than half of our member businesses say competitors are not offering higher wages
- 72 percent say transportation is not a barrier (a reason often suggested as an obstacle)
- 78.4 percent are offering wage incentives
- 64 percent are offering highly flexible hours
- More than 98 percent of hotels offer benefits to full time employees
- And yet, 76 percent cite a lack of applications
- 86.5 percent say applicants do not show up for interviews
- Only 0.5 percent say they currently have no hiring challenges

**Lack of labor will impede recovery. 85 percent** of lodging businesses are already reporting they can not sell all of their available inventory, more than half must limit other revenue producing aspects, such as food and beverage or banquet operations.

It is critical for Ohio to move forward into recovery by eliminating unnecessary disincentives to work. The Ohio Hotel & Lodging Association supports the Ohio Chamber on any steps we can take in this regard.

Thank you for your help.

Sincerely,



**Joseph Savarise**  
President & CEO  
joe@ohla.org