IN THE SUPREME COURT OF OHIO

STATE ex rel. CANDY BOWLING, et al.,	:	Case No. 2021-1062
	:	
Plaintiffs-Appellees,	:	
	:	
v.	:	On Appeal from the Franklin
	:	County Court of Appeals,
GOVERNOR MIKE DEWINE, et al.,	:	Tenth Appellate District,
	:	Case No. 21AP000380
Defendants-Appellants.	:	

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS GOVERNOR MIKE DEWINE AND DIRECTOR MATT DAMSCHRODER AND URGING REVERSAL

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I. INTEREST OF *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the local, State, and Federal levels. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and promoting those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. § 501(c)(3).

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for free-market, pro-growth policies at the local, State, and Federal levels of government. The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

II. INTRODUCTION

The enforcement mechanisms for civil statutes, administrative rules, taxes or subsidies—from federal tax credits to local speeding tickets—rely on the commonsense premise that economic incentives drive behavior. While the goals of government programs vary, the notion that people and companies will generally act according to their perceived economic interests remains a constant.

Like the longstanding Unemployment Insurance ("UI") program, Congress enacted the Federal Pandemic Unemployment Compensation ("FPUC") program as a State-Federal partnership. It was designed to both cushion the economic blow for those thrown out of work by the pandemic and to stabilize the economy. *See* Congressional Research Service, R46687 (Version

1), *Current Status of Unemployment Insurance (UI) Benefits: Permanent-Law Programs and COVID-19 Pandemic Response*, (Feb. 17, 2021), *available at* https://crsreports.congress.gov/product/pdf/R/R46687/1 (last accessed Jan. 9, 2022).

Yet policies enacted to achieve specific goals often also result in unintended consequences. In some cases, the body politic is willing to accept certain unintended policy consequences in the midst of a crisis. But when the crisis passes, those unintended consequences may become unacceptable or more harmful than the problem they were originally intended to remedy. Such is the case here.

The extraordinary employment circumstances relied upon to enact federal economic relief during the height of the pandemic—when businesses were closed by stay-at-home orders and millions of employees nationwide were thrown out of work with little sense of when the crisis might end—were substantially ameliorated by the time Ohio opted out of continuing with the additional benefits of the FPUC program. By June 2021, businesses had reopened, most state-imposed health-related restrictions were lifted, and Covid-19 vaccines were widely available. With those changed circumstances, it was apparent that continuing the program produced undesirable effects. Indeed, economic studies suggest that the continuation of the FPUC and other Temporary Federal UI benefits had the unintended yet unsurprising consequence of delaying recipients' return to the workforce. Simply put, both the available data and a common-sense understanding of how economic incentives drive behavior indicate that Temporary Federal UI benefits have played a significant role in keeping some workers on the sidelines. This delayed Ohio's economic recovery and hampered economic growth.

The court of appeals' decision in this case has introduced additional uncertainty into the labor market and could further exacerbate the problems that the Governor was trying to solve.

Although the Temporary Federal UI programs have now sunsetted, the possibility of receiving three months of retroactive benefits may impact workers' decisions on when and whether to return to the workforce.

Amicus curiae understands that this Court's decision should be and will be guided by the relevant statutory law. The Buckeye Institute believes that the law is clear and that the Governor is not obligated to continue participating in the FPUC program. This brief therefore focuses on the important public policy implications that this case holds for Ohioans. The Governor's decision to end the additional benefits under FPUC was sound economic policy and has had a positive (although limited) effect on labor participation.

Both Ohio's employers and workforce need greater certainty as our State recovers from the Covid-19 pandemic and the economic harms that it caused. This Court can provide much-needed certainty regarding the limited scope and effect of R.C. 4141.43(I) by adopting the arguments set forth below.

III. STATEMENT OF THE FACTS AND CASE

The Buckeye Institute adopts by reference the Statement of the Facts and Case set forth in the Defendants-Appellants' Brief.

IV. ARGUMENT AND LAW

Proposition of Law: Revised Code 4141.43(I) does not compel the Governor to participate in all federal unemployment compensation programs created by the federal CARES Act.

A. Revised Code 4141.43(I) Does Not Apply to the Federal Pandemic Unemployment Compensation Program.

Although this brief focuses on the important public policy implications that this case holds for Ohioans, The Buckeye Institute recognizes that this Court's consideration will be guided by the applicable statutory law. The Buckeye Institute respectfully submits that neither state nor federal law compels Ohio to continue participating in the FPUC program.

Federal law clearly indicates that States are free to participate and, if they so choose, to withdraw from the program as well. *See* 15 U.S.C. § 9023(a) ("Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor …. Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement."). Thus, the remaining question is whether Ohio law requires the Governor to continue participating in the FPUC program. It does not.

The court of appeals erred in holding that R.C. 4141.43(I) requires the Governor and Director to "secure" additional FPUC payments to the citizens of Ohio. *See State ex rel. Bowling v. DeWine*, 2021-Ohio-2902, ¶ 47, 2021 WL 3733205, *11 (10th Dist., Aug 24, 2021). Section 4141.43(I) does not require the State to accept all offers of federal aid or other spending. It merely requires the Director to take steps to ensure that the State can obtain such aid if it chooses to do so. Yet even then, by its plain terms the statute applies only to five specific, enumerated federal laws. These include the Social Security Act, the Federal Unemployment Tax Act, the Wagner-Peyser Act, the Federal-State Extended Unemployment Compensation Act of 1970, and the Workforce Innovation and Opportunity Act. R.C. 4141.43(I). The CARES Act is not among these enumerated statutes.

It is a basic principle of construction that the express inclusion of the listed statutes implies exclusion of any others. As this Court has consistently held, the canon "*expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other." *Crawford-Cole v. Lucas Cty. Dep't of Job & Fam. Servs.*, 2009-Ohio-1355, ¶ 42, 121 Ohio St. 3d 560, 566, 906 N.E.2d 409, 414 (quoting *Myers v. Toledo*, 2006-Ohio-4353, ¶ 24, 110 Ohio St. 3d

218, 222, 852 N.E.2d 1176, 1180); *see also* 85 Ohio Jur. 3d Statutes § 221 (Russell J. Davis & Rachel M. Kane, updated Nov. 2021) ("A general principle of interpretation is that the mention of one thing implies the exclusion of another, or '*expressio unius est exclusio alterius*.'").

Furthermore, the court of appeals itself recognized that the relevant funds for FPUC do not flow through the Unemployment Trust Funds associated with the acts listed in R.C. 4141.43(I). *See State ex rel Bowling*, 2021-Ohio-2902, ¶¶ 42-47, 2021 WL 3733205, at *10-11. Revised Code 4141.43(I) simply does not affect the Governor's ability to withdraw the State from the FPUC program.

Revised Code 4141.43(I) does not require the Governor or the State of Ohio to continue the additional FPUC payments. Because the Governor acted lawfully, the courts may not substitute their judgment for his policy decision. *See, e.g.*, *State ex rel Armstrong v. Davey*, 130 Ohio St. 160, 164 (1935) (the Court is "without authority to substitute its judgment for that of the Governor, and to exact the performance of a duty not imposed by law"). For this reason and those discussed below, The Buckeye Institute urges reversal of the decision of the court of appeals.

B. The Governor's Decision to End the Additional FPUC Payments Was Sound Economic Policy.

The Buckeye Institute believes the statutory question before this Court is clear. Amicus writes separately, however, in order to highlight the important public policy implications that this case holds for Ohioans. Available data suggest that by June 2021, the additional FPUC payments were delaying employees' return to work. Likewise, economic analysis shows that ending such payments has led to an increase in the flow of workers from unemployment to employment. The Governor's decision to end the additional FPUC payments was not a magic talisman for Ohio's economy, but it was sound economic policy.

1. Economic Data Show that Temporary Federal Unemployment Insurance Programs Delayed Employees' Return To Work.

a) <u>The Worker Shortage is Real and Remains Significant.</u>

The economy of early 2020 calls to mind empty streets, shuttered businesses, and home isolation. The calling card of the 2021 economy, in contrast, was a ubiquitous "Help Wanted" sign. Across the country, labor shortages led to longer wait times at many businesses, and many businesses operated at reduced capacity, for fewer hours, or closed locations all together. *See, e.g.*, KRCA Channel 3 News (Sacramento, California), *Expectations are higher, and tempers are shorter: Tahoe restaurants asks diners to be kind, patient*, (July 16, 2021), *available at* https://tinyurl.com/2255avjs (last accessed Jan. 9, 2022); Milwaukee Journal Sentinel, *'Please bear with us': Why some Milwaukee restaurants have shorter menus, longer wait times and higher prices,* (July 13, 2021), *available at* https://tinyurl.com/3269xtbs (last accessed Jan. 9, 2022).

Ohio was, and is, no exception to this trend. For example, in 2021 the Winking Lizard Tavern closed its Gateway location, situated in downtown Cleveland close to Progressive Field and Rocket Mortgage FieldHouse, due in part to its inability to find workers. *See* Cleveland.com, *Winking Lizard Gateway to Close: It's Absolutely Brutal Out There Co-Owner Says,* (Aug. 26, 2021), *available at* https://www.cleveland.com/entertainment/2021/08/winking-lizard-gateway-to-close-its-absolutely-brutal-out-there-co-owner-says.html (last accessed Jan. 6, 2022); WKYC Studios, *Winking Lizard permanently closing downtown Gateway location*, (Oct. 4, 2021), *available at* https://www.wkyc.com/article/news/local/cleveland/winking-lizard-permanently-closing-downtown-cleveland-gateway-location/95-3ea42d17-b2ee-45fb-b8e0-c20e2b7c2a0f (last accessed Jan. 6, 2022). Winking Lizard management had stated that "the business was short on staff by more than 150 workers," a problem that compounded with other pandemic-related issues such as supply shortages. *Id.*

While the hospitality industry has been hardest hit by the labor shortage, it is far from alone. A 2021 survey of the Associated General Contractors of America found that 61% of construction firms cited labor shortages as a reason for delays in projects. *See* Columbus Dispatch, *Pandemic Continues to Take Toll on Ohio Construction Industry*, (Sept. 3, 2021), *available at* https://www.dispatch.com/story/business/2021/09/03/labor-and-material-challenges-continue-plague-construction-industry/5685558001 (last accessed Jan. 6, 2022). A similar pattern affected manufacturing. Indeed, even as domestic manufacturing activity "surged to a 37-year high in March [2021], the industry [had] more than half a million job openings." CNN Business, *American Factories are Desperate for Workers, It's a $1 Trillion Problem,* (May 4, 2021), *available at* https://tinyurl.com/53fyfppm (last accessed Jan. 9, 2022). Manufacturers struggled to find skilled workers and even had difficulty filling entry-level positions that did not require expertise. *Id.*

A year-end 2021 survey of Ohio small business owners conducted by the National Federation of Independent Business ("NFIB") found that more than 56% of respondents had open positions. *See* NFIB Ohio, 2021 Fourth Quarter Small Business Economic Issues, (Dec. 21, 2021), *available at* https://assets.nfib.com/nfibcom/2021-Year-End-Survey-Results.pdf (last accessed Jan. 8, 2022). More than 72% of respondents indicated that it has been more difficult to fill vacancies, including more than 59% who reported it was "extremely more difficult." *Id.* Nearly half of respondents said that staffing issues were causing lost sales. *Id.*

Economic data collected by the U.S. Department of Labor and institutional researchers support these anecdotal reports. In August 2021, the Department of Labor reported that there were "10.1 million open jobs on the final day of June … up from 9.2 million in May." CNBC, *Job* *openings surge over 10 Million for first time ever, Labor Department says,* (Aug. 9, 2021), *available at* https://www.cnbc.com/2021/08/09/job-openings-surge-above-10-million-for-first-time-ever-labor-department-says.html (last accessed Jan. 9, 2022). Economists have pointed out that the record number of job openings is not caused by economic expansion and new job creation, but by workers choosing to remain on the sidelines. In the words of a labor economist for job-search firm ZipRecruiter, "We have fewer people in the labor market now than we did before COVID." Wall Street Journal, *Unfilled Job Openings Outnumber Unemployed Americans Seeking Work*, (Aug. 9, 2021), *available at* https://www.wsj.com/articles/unfilled-job-openings-outnumber-unemployed-americans-seeking-work-11628531130 (last accessed Jan. 9, 2022). "[B]usinesses have surged back far more quickly than job seekers." *Id.*

Similarly, Ohio's labor participation rate, as tracked by the U.S. Bureau of Labor Statistics ("BLS"), shows empirically that fewer Ohioans are participating in the workforce than before the pandemic. In January 2020, Ohio's labor participation rate, which is derived by dividing the total of Ohio's employed and unemployed workers by the State's total civilian population, stood at 63.7%. *See* U.S. Bureau of Labor Statistics*, Local Area Unemployment Statistics: Databases, Tables & Calculators by Subject (Ohio)*, *available at* https://data.bls.gov/timeseries/LASST390000000000006?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last accessed Jan. 8, 2022). That rate fell to 59.8% in April 2020, during the early days of the pandemic when the economy was impacted by stay-at-home orders and other significant Covid-19 related health orders. *See id.* The data show that not only were many Ohioans thrown out of work by the pandemic (and the government's response to it), but that many gave up looking for work. With the widespread availability of vaccines and the repeal of many health orders regulating business practices, the labor participation rate has recovered—but only to 61.3% in the preliminary data for November 2021. *Id.* This is well below its pre-pandemic level and represents a loss of more than 200,000 people from Ohio's labor force.

Ohio's overall employment numbers are closely correlated with the lower labor participation rate. In fact, according to BLS data, there is *a nearly one-for-one loss* of people when comparing the shrinking labor participation to the State's employment. From January 2020 to November 2021, the size of Ohio's labor force fell from 5,895,125 to 5,682,379, for a loss of 212,746. *Id.* Over the same span, Ohio's employment fell from 5,627,571 to 5,406,984, for a total loss of 220,587. *Id.*

The policy challenged by Plaintiffs-Appellees in this case was designed to mitigate these problems. When deciding to withdraw from the Temporary Federal UI Programs, Governor DeWine noted that he had heard from employers that they could not hire enough people to run their businesses. *See* Cleveland.com, *Gov. Mike DeWine is Rejecting Federal Unemployment Aid, Cutting Off Extra $300 Weekly to Jobless Workers, Starting June 26,* (May 13, 2021), *available at* https://www.cleveland.com/open/2021/05/gov-mike-dewine-is-rejecting-federal-unemployment-aid-cutting-off-extra-300-weekly-to-jobless-workers.html (last accessed Jan. 9, 2022). The Governor acknowledged that there were "multiple reasons" that jobs were not being filled, but emphasized that the FPUC payments were, "in some cases, certainly discouraging people from going back" to work. *Id.*

b) <u>The FPUC Payments Were Slowing a Return to the Workforce.</u>

Whatever their merits may have been, the Temporary Federal UI programs were also a disincentive to returning to employment and played a role in delaying Ohio's economic recovery. The Temporary Federal UI programs, particularly the FPUC program, expanded the State-Federal safety net in a way that exceeded the pre-pandemic income levels of many employees. The

Congressional Budget Office found that under the CARES Act, which initially provided an additional $600 per week in unemployment compensation, roughly "five of every six recipients would receive benefits that exceeded the weekly amounts they could expect to earn from work during those six months." Congressional Budget Office, *Letter to Senator Grassley*, (June 4, 2020), *available at* https://www.cbo.gov/system/files/2020-06/56387-CBO-Grassley-Letter.pdf (last accessed Jan. 10, 2022).

Although the additional benefit was eventually pared back to $300 per week—the amount at issue here—a Goldman Sachs study published in August 2021 showed that "almost half of workers earned more from benefits than from their prior job." Goldman Sachs, *Back to Work When Benefits End*, (Aug. 21, 2021), *available at* https://tinyurl.com/y6ejndmx (last accessed Jan. 10, 2022). In fact, the Goldman Sachs economists estimated that "the median UI recipient received a benefit worth roughly 90% of their prior wage …." *Id.* In other words, the median unemployment insurance recipient was faced with the choice of returning to work for merely 10% more than what he or she received for not working. Moreover, this 10% differential is based only on pre-tax salary and does not take into account that under the American Rescue Plan Act ("ARPA"), the first $10,200 of unemployment compensation is tax free for the majority of taxpayers. *See* 26 U.S.C. § 85(c)(1). Since income earned by returning to the workforce would be taxable, staying home may prove more beneficial for many unemployment insurance recipients even if the benefit level was slightly lower than their salaries. These policies created disincentives for many who might have otherwise returned to the workforce.

The national experience when the $600 weekly benefit was reduced to $300 is also instructive. University of Chicago economist Casey Mulligan and former White House advisor Stephen Moore, writing in the Wall Street Journal in December 2020, noted that "Bureau of Labor

Statistics data show that from May through July—when unemployment benefits were high—job openings surged." Wall Street Journal, *Unemployment Bonus Proves Its Harm*, (Dec. 3, 2020), *available at* https://www.wsj.com/articles/unemployment-bonus-proves-its-harm-11607037230 (last accessed Jan. 10, 2022). Conversely, "[o]nce the high benefits expired in August, job openings fell for the first time since the start of the pandemic." *Id.*

An August 2021 study by the University of Wisconsin found that in States that terminated Temporary Federal UI Programs—as Ohio did with the FPUC program—beneficiaries responded by returning to work at a faster rate than recipients in the States that had maintained those programs:

> [T]he terminating states saw a relative improvement. For example, employment in the household survey grew half a percentage point faster and total nonfarm payroll employment grew nearly a full percentage point faster over the last two months. By contrast, while the labor markets in the rest of the US continued to improve, and some indicators saw an acceleration, the differences were smaller. Employment growth accelerated by more in the terminating states in both the household and payroll surveys, and the labor force grew more rapidly.

Noah Williams, *More Early Evidence on the End of Expanded Federal Unemployment Benefits*, at 2, Center for Research on the Wisconsin Economy (University of Wisconsin-Madison), (Aug. 20, 2021), *available at* https://tinyurl.com/x8t86z3s (accessed Jan. 10, 2022). Similarly, the Mercatus Center at George Mason University found that "higher UI benefits tend to discourage employment, whereas the end of UI eligibility appears to motivate more workers to become employed." Mercatus Center Policy Brief, *COVID-19 Expanded Unemployment Insurance Benefits May Have Discouraged a Faster Recovery,* (Sept. 3, 2021), *available at* https://tinyurl.com/j2vyta4w (last accessed Jan. 10, 2022).

Of course, numerous factors beyond salary may influence individuals' decisions to return (or not return) to the labor force. These include, among others, mismatches between available jobs and skills, a lack of adequate childcare, or fear of infection. Expanded unemployment benefits are certainly not the only relevant factor, but they are a significant one. Indeed, the Mercatus Center pointed to a Columbia University study which saw "a 20% increase in the job-acceptance rate of UI participants relative to the states that had continued the federal UI expansion." *Id*. Simply put, workers were more likely to accept jobs in States that had opted out of the increased federal unemployment benefits.

2. The Economic Data Demonstrate that Ending the Additional Unemployment Insurance Benefits Correlated with Increased Employment.

As discussed above, by mid-2021 Ohio had a significant worker shortage. Governor DeWine's policy decision to end the additional FPUC payments, which is challenged by the Plaintiffs-Appellees here, was designed to mitigate that problem. The data show that the Governor's decision was a reasonable one.

Like the studies discussed above, recent economic analysis demonstrates that the additional unemployment insurance benefits discouraged people from returning to work. Likewise, the data show that the States which ended these benefits early saw a greater flow of people from unemployment to employment following their change in policy. In fact, a National Bureau of Economic Research working paper indicates that the national job market would have recovered faster if more States had followed policies like those of Ohio. *See* Harry Holzer *et al.*, *Did Pandemic Unemployment Benefits Reduce Employment? Evidence from Early State-Level Expirations in June 2021*, National Bureau of Economic Research, (Dec. 2021), *available at* https://www.nber.org/papers/w29575 (last accessed Jan. 8, 2022) [hereinafter "NBER Study"].[1]

[1] *See also* Wall Street Journal, *Pandemic Jobless Benefits and Work*, (Jan. 2, 2022), *available at* tinyurl.com/yskm64s8 (last accessed Jan. 10, 2022) ("Companies are having a hard time finding

In the NBER Study, economists Harry Holzer (who served as chief economist for the U.S. Department of Labor in the Clinton administration), R. Glenn Hubbard, and Michael Strain examine the transition from unemployment to employment in the 18 States that ended both the additional FPUC payments and the expansion of eligibility for unemployment benefits in June 2021. *See* NBER Study, at 2. They separately examine four States, including Ohio, which ended the FPUC payments early but continued with the expanded eligibility until September 2021. *See id.* at 2, 21.

Using data from the BLS monthly household survey, the NBER Study estimates the effect of early termination of pandemic UI benefits on flows from unemployment to employment. For example, the study finds that the 18 States which ended both the FPUC payments and the expanded UI eligibility in June 2021 experienced a 14% increase in the flow from unemployment to employment in July and August among 25 to 54-year-olds, compared to the control period of February-June 2021. NBER Study, at 2. Likewise, the NBER Study finds that in States like Ohio—which ended FPUC payments but continued with expanded UI eligibility—ending FPUC alone "increased transitions from unemployment to employment by 8.3 percentage points" among the prime-age demographic. *Id.* at 21.

The NBER Study shows that "transitions to employment increased in the states <u>ending</u> extended benefits, relative to those that did not," in July and August 2021. *Id.* at 18 (emphasis added). Conversely, the States that continued with both the additional benefits and expanded eligibility hampered their own job markets. For those 24 States and the District of Columbia, the NBER Study concludes that the unemployment rate among prime-age workers would have been

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workers, and a new National Bureau of Economic Research working paper shows the job market would have bounced back even faster without expanded unemployment benefits.").

0.7 percentage points lower in August if they had they ended the additional benefits in June. *Id.* at 4. The national unemployment rate would have been 0.3 percentage points lower had all States ended those benefits early. *Id.* This difference represents hundreds of thousands of workers nationwide.

Like the authors of the NBER Study, *amicus curiae* recognizes that these results are relatively modest compared to the overall effect of the Covid-19 pandemic. *Cf. id.* at 5. And of course, numerous other factors contribute to workers' decisions to reenter the job market (or not), just as numerous other factors affect Ohio's overall economy. Nonetheless, the data suggest that the Governor's decision to end the additional FPUC payments did what it was intended to do: it helped mitigate the employment crisis by increasing the flow of workers from unemployment to employment.

V. CONCLUSION

For the foregoing reasons, *amicus curiae* The Buckeye Institute urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of *Amicus Curiae* The Buckeye Institute in Support of Defendants-Appellants Governor Mike DeWine and Director Matt Damschroder and Urging Reversal was served on all counsel of record via the Court's electronic filing system and e-mail this 10th day of January 2022.

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