IN THE SUPREME COURT OF OHIO

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.	:	

JURISDICTIONAL MEMORANDUM OF AMICUS CURIAE THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANT GOVERNOR MIKE DEWINE

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I. INTRODUCTION AND STATEMENT OF AMICI INTEREST

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 state and federal level. 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 marketing 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. section 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. STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Case set forth in the Appellants' Jurisdictional Brief.

III. ARGUMENT AND LAW

A. The Continued Payment or Back-payment of Temporary Federal UI Benefits Presents a Substantial Constitutional Question and Issues of Great General Interest

1. Introduction

The enforcement mechanism for every civil statute, every administrative rule, every tax or subsidy, every government program—from federal tax credits to local speeding tickets—can be reduced to a single commonsense premise: Economic incentives drive behavior. While the goals of government programs vary, the notion that people and companies will almost always act according to their perceived economic interests remains a constant. Like the longstanding

Unemployment Insurance program, Congress enacted the Federal Pandemic Unemployment Compensation ("FPUC") program as a State-Federal partnership to both cushion the economic blow of those recently thrown out of work by the pandemic and to stimulate the economy going forward. See Congressional Research Service, R46687, *Current Status of Unemployment Insurance (UI) Benefits: Permanent-Law Programs and COVID-19 Pandemic Response*, (Feb. 17, 2021) https://tinyurl.com/rezba42k (accessed Oct. 8, 2021).

Yet policies enacted to achieve one policy objective can result in unintended consequences. Or, in some cases, like a patient who is willing to endure pharmaceutical side-effects to treat a more severe ailment, the body politic is willing to accept certain unintended policy consequences in the midst of crisis. But when that crisis passes, those unintended consequences become unacceptable and potentially worse than the disease they were enacted to treat.

So it is 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 were thrown out of work overnight with little sense of when the crisis might end—were substantially ameliorated by businesses re-opening and the widespread availability of vaccines by the time Ohio opted out of continuing the FPUC program. With that change in circumstances, it became apparent that continuing the program produced undesirable effects. Indeed, economic studies suggest that the continuation of the FPUC and other Temporary Federal UI benefits has had the unintended—yet unsurprising—consequence of delaying recipients' return to the workforce. Simply put, the 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, delaying economic growth.

The Court of Appeals' decision has introduced additional uncertainty into the labor market. Although the Temporary Federal UI programs have sunset, the possibility of receiving three months of retroactive benefits will likely impact decisions on when and whether to return to the workforce. Uncertainty is the natural enemy of economic growth. By taking jurisdiction of this case, this Court can clarify immediately and definitively the status of the Temporary Federal UI programs and inject needed certainty into what has been an uncertain 18 months.

This brief focuses on this the important public policy implications this case holds for Ohioans and why this case presents an issue of great public interest. Understanding that any ultimate decision on the merits should be and will be guided by the law, the Buckeye Institute notes that beyond economic certainty for workers and businesses, the Court can also provide certainty regarding the limited scope and effect of R.C. 4141.43(I) by adopting the legal arguments set forth in the State's brief.

This case thus presents both a substantial constitutional question and issues of public and great general interest.

B. Economic Data Show that Temporary Federal UI Programs Has Delayed Employees' Return To Work.

1. The Worker Shortage is Real and Significant.

The economy of early 2020 calls to mind empty streets, shuttered businesses, home isolation. The calling card of the 2021 economy, in contrast, is the ubiquitous "Help Wanted" sign. Across the country, the labor shortage has led to longer wait times at many businesses, companies operating at reduced capacity, for fewer hours, or closing locations all together. See e.g., KRCA3, *Expectations are higher, and tempers are shorter: Tahoe restaurants asks diners to be kind, patient*, (Jul. 16, 2021) https://tinyurl.com/2255avjs (accessed Oct. 8, 2021); Milwaukee Journal Sentinel, *'Please bear with us': Why some Milwaukee restaurants have* *shorter menus, longer wait times and higher prices,* (Jul. 13, 2021) https://tinyurl.com/3269xtbs (accessed Oct. 8, 2021).

Ohio is no exception. For example, in Cleveland, the Winking Lizard Tavern recently closed its Gateway location, located in downtown Cleveland close to Progressive Field and Rocket Mortgage FieldHouse, due in part to its inability to find workers. Cleveland.com, *Winking Lizard Gateway to Close: It's Absolutely Brutal Out There Co-Owner Says,* (Aug. 26, 2021) https://www.cleveland.com/entertainment/2021/08/winking-lizard-gateway-to-close-its-absolutely-brutal-out-there-co-owner-says.html (accessed Oct. 8. 2021); WKYC Studios, *Winking Lizard permanently closing downtown Gateway location*, (Oct. 4, 2021) https://www.wkyc.com/article/news/local/cleveland/winking-lizard-permanently-closing-downtown-cleveland-gateway-location/95-3ea42d17-b2ee-45fb-b8e0-c20e2b7c2a0f (accessed Oct. 8, 2021). Winking Lizard management had stated that "the business was short on staff by more than 150 workers . . . ." and that "[t]he pandemic is also responsible for scaled back menus and drink choices, due to supply and labor shortages."

While the hospitality industry has been hardest hit by the labor shortage, it is far from alone. A survey of the Associated General Contractors of America found that 61% of construction firms cite labor shortages as a reason for delays in projects. The Columbus Dispatch, *Pandemic Continues to Take Toll On Ohio Construction Industry*, (Sept. 3, 2021) https://www.dispatch.com/story/business/2021/09/03/labor-and-material-challenges-continue-plague-construction-industry/5685558001 (accessed Oct. 8, 2021). So too manufacturers, where as "US manufacturing activity surged to a 37-year high in March [2021], the industry has more than half a million job openings. CNN Business, *American Factories are Desperate for Workers, It's a $1 Trillion Problem,* (May 4, 2021) https://tinyurl.com/53fyfppm (accessed October 8, 2021.)

Economic data collected by the Department of Labor and institutional researchers support these anecdotal reports. In August of 2021, the U.S. 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) https://www.cnbc.com/2021/08/09/job-openings-surge-above-10-million-for-first-time-ever-labor-department-says.html (accessed Oct. 8, 2021). 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. businesses have surged back far more quickly than job seekers." The Wall Street Journal, *Unfilled Job Opening Outnumber Unemployed Americans Seeking Work*, (Aug. 9, 2021) https://www.wsj.com/articles/unfilled-job-openings-outnumber-unemployed-americans-seeking-work-11628531130 (accessed Oct. 8, 2021).

Similarly, Ohio's labor participation rate, as tracked by the U.S. Bureau of Labor Statistics, shows empirically that fewer Ohioans are seeking to participate in the workforce than before the pandemic. In July of 2019, 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. U.S. Bureau of Labor Statistics*, Labor Force Participation Rate for Ohio* [LBSNSA39], (Sept. 29, 2021) https://fred.stlouisfed.org/series/LBSNSA39 (accessed Oct. 8, 2021). That rate fell precipitously to 59.6 in April of 2020 during the early days of the pandemic when the economy shut down due to COVID fears and government emergency orders. *Id.* This data show that not only were many Ohioans thrown out of work by the pandemic, but that many gave up looking for work. With the advent of vaccines and the re-opening, the labor participation rate has recovered—but only to 61.3 in September of 2021, well below its pre-pandemic level. *Id.*

In deciding to withdraw from the Temporary Federal UI Programs, Governor DeWine noted that he had heard from many employers that they cannot hire enough people to run their businesses, as well as from workers who felt overworked because their place of employment was understaffed. Cleveland.com, *Gov. Mike DeWine is Rejecting Federal Unemployment Aid, Cutting Off Extra $300 Weekly to Jobless Workers, Starting June 26,* (May 13, 2021) https://www.cleveland.com/open/2021/05/gov-mike-dewine-is-rejecting-federal-unemployment-aid-cutting-off-extra-300-weekly-to-jobless-workers.html (accessed Oct. 8, 2021). While politicians and academics can debate why the labor participation rate remains below 2019 levels and whether terminating the expanded benefits was the correct policy to pursue, the lack of available workers and the importance of getting jobs filled are issue of great public and general concern.

2. The Economic Incentives of the Temporary Federal UI Programs

Likewise, the question of whether the Temporary Federal UI programs were a disincentive to returning to employment, presents an issue of great public and general concern. The relief sought by the plaintiff in this case may, in fact, exacerbate the current worker shortage and further delay Ohio's economic recovery. The Temporary Federal UI programs, particularly the Federal Pandemic Unemployment Compensation ("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) https://www.cbo.gov/system/files/2020-06/56387-CBO-Grassley-Letter.pdf (accessed Oct. 8, 2021).

Although the benefit was pared back to $300 per week—the amount at issue here—a Goldman Sachs study published in August of 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) https://tinyurl.com/y6ejndmx (accessed Oct. 8, 2021). In fact, the Goldman Sachs economists estimated that “the median UI recipient received a benefit worth roughly 90% of their prior wage . . . . “. In other words, the median UI 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 most 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 lucrative for many UI recipients even if the benefit level was lower than their salaries. While modern Ohioans may rightly lay claim to their pioneer heritage and the work ethic of the settlers who felled trees, tilled the soil, and carved a State out of the wilderness, they can be forgiven for failing to exhibit that work ethic when the incentive to work is removed.

The national experience when the $600 a week 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 of 2020, noted that “Bureau of Labor Statistics data show that from May through July—when unemployment benefits were high—job openings surged.” The Wall Street Journal, *Unemployment Bonus Proves Its Harm*, (Dec. 3, 2020) https://tinyurl.com/3ffyw4w7 (accessed Oct. 8, 2021). Conversely, “[o]nce the high benefits expired in August, job openings fell for the first time since the start of the pandemic." *Id.*

A more recent study by the University of Wisconsin found that in those states, like Ohio, that terminated Temporary Federal UI Programs, beneficiaries responded to the incentive sunsetting benefits by returning to work at a faster rate than recipients in those states that maintained the programs:

> [A]fter [the termination date], the 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.

University of Wisconsin, Center for Research on the Wisconsin Economy, *More Early Evidence on the End of Expanded Federal Unemployment Benefits*, (Aug. 20, 2021) https://tinyurl.com/x8t86z3s (accessed Oct. 8, 2021). Similarly, a study by the Mercatus Center at George Mason University relying on data from the Bureau of Labor Statistics and released just last month 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. 2021) https://tinyurl.com/j2vyta4w (accessed Oct. 8, 2021).

As these studies are careful to acknowledge, there are factors beyond salary that may influence workers' decisions—for example, a mismatch between available jobs and skills, lack of childcare, or fear of infection—to return to the workforce. Still, the Mercatus study looked at these other causes and explained that while the argument for alternative causes is "partly correct, [ ] those [alternative] reasons for avoiding employment likely had the largest effect at the beginning of the pandemic, when it made sense to err on the side of caution before reliable information was available and effective safety protocols were instituted." *Id.* The authors also 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, holding the other variables equal, workers were 20% more likely to accept jobs in states that had opted out of the increased federal UI benefits. And regardless of what other factors may be in play, it is naïve to contend that the availability of continued benefits at the enhanced level plays no role in their calculus and is not an important public policy question of general interest.

Perhaps most important to this case, the Mercatus study pointed out that among states that declined the expanded benefits, 15 states did not experience legal challenges, while eleven states, including Ohio, did. In those states that "faced legal challenges to the termination of their participation in the federal programs [ ] legal injunctions were granted in four states, whereas three lawsuits were rejected and legal proceedings are ongoing in four other states." *Id*. The authors posit that "It seems likely that UI participants whose return to employment is conditional on the provision of UI benefits (or lack thereof) might have perceived the end of UI benefits in these 11 states as being less certain than did similar participants in the 15 states that did not experience legal challenges and ended participation in all federal programs." *Id*. This perception and uncertainty—regardless of this case's eventual outcome—militates in favor of this Court taking jurisdiction to decide the issue quickly and conclusively.

To be sure, other studies have found a less robust correlation between the ending of the enhanced unemployment benefit and a return to the workforce. See e.g., The Washington Post, *States that Cut Unemployment Early Aren't Seeing a Hiring Boom, But Who Gets Hired is Changing*, (July 27, 2021) https://tinyurl.com/3vnk5mxs (accessed Oct. 8, 2021). But even those studies skeptical of the elimination of expanded benefits noted that while overall hiring varied little between states accepting and rejecting the expanded benefits, the continued presence of expanded benefits had a substantial effect on who was entering the workforce. The Washington Post noted that a study by the payroll processor Gusto found that while the states that reduced unemployment benefits in June "did not see an immediate spike in overall hiring," early evidence suggested that "the teen hiring boom" that had occurred in those states slowed, while "workers 25 and older returned to work more quickly." *Id.* Conversely, in states that retained the full benefits, employers in the hospitality sector hired more teens. *Id.* This contrast shows that in states that retained full benefits, adult workers—who qualify for unemployment—stayed on the sidelines while teens—who do not qualify for benefits—filled the gap. Thus, the headline writers apparently buried the lede: Expanded benefits have a significant public policy impact.

Other researchers have hypothesized that in comparing the recovery in states that terminated benefits with states that did not, the signal may be obscured by the noise of those states that had strict lockdowns in place opening up:

> Overall, the labor markets in the terminating states were already in better shape in March 2021, with lower unemployment rates and employment that had recovered more from the COVID-19 recession. From March-May, the rest of the US recovered relatively faster. That is, the labor markets in the rest of the US were catching up with the terminating states. However, after May, the 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.

Williams, *supra*.

There are, of course, no studies yet examining Ohio's precise situation—where the State has declined additional benefits, the benefit period has now expired, and the Court of Appeals has opened up the possibility that benefit recipients may be eligible for approximately three months of retroactive benefits. The lag time between the collection of economic data, analysis, and publication—not to mention the divergence of views between economists—means that policy makers (and courts) are never able to act with perfect information. This issue's impact on the state's economy and its workers and businesses—regardless of what decision the Court reaches on the merits—warrants this Court's exercise of jurisdiction.

IV. CONCLUSION

For all the foregoing reasons, the appellant's Jurisdiction Appeal should be accepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief In Support of Jurisdiction was served on all counsel of record via the Court's electronic filing system and e-mail this 8th day of October 2021.

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