Supreme Court of Ohio Clerk of Court - Filed December 18, 2025 - Case No. 2025-1055

IN THE SUPREME COURT OF OHIO

STATE ex re. CANDY BOWLING, et al.,	)	Case No. 2025-1055
	)	
Appellees,	)	
	)	On Appeal from the Tenth District
vs.	)	Court of Appeals, Franklin County
	)	
MIKE DeWINE, et al.,	)	Court of Appeals Case Nos. 25-AP-
	)	191, 25-AP-192, 25-AP-193
Appellants.	)	
	)	
	)	

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTERESTS OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute has taken the lead in Ohio and across the country in advocating for free-market, pro-growth policies that incentivize work at the local, state, and federal levels of government. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT

This case turns not on the wisdom of any federal unemployment program, but on fundamental principles governing mandamus actions, statutory interpretation, separation of powers, and judicial restraint. First, Appellees seek a writ of mandamus ordering the Governor to do the impossible, demand funds from a federal program that ceased to exist in 2021. A mandamus will not "lie if the performance of the act prayed for is impossible . . . ." *State ex rel. Brown v. Bd. of Cnty. Commrs. of Franklin Cnty*., 21 Ohio St.2d 62, 66 (1970). Second, the court of appeals erred in applying the law-of-the-case doctrine to enforce a statutory interpretation that the General Assembly has since repudiated by amendment. The doctrine exists to promote efficiency and finality, not to entrench judicial interpretations against legislative correction. When the legislature amends a statute, courts must apply the law as it currently exists.

Third, even if the prior version of the Cooperation Statute still exists for purpose of this dispute, well-established canons of statutory construction do not support the Tenth District's expansive and novel reading. Read in context, and giving the words their plan and ordinary

meaning, the Cooperation Statute's prior version does not command that Ohio's executive branch accept every federal dime offered relating to unemployment compensation. The court of appeals' reading is in essence a rejection of core principles of federalism—surrender of state policy-making authority to the federal government. As such, absent a clear legislative command, courts should not construe general cooperation statutes to compel executive participation in optional federal programs. Such an interpretation would convert a statute designed to preserve administrative flexibility into a judicially enforceable fiscal mandate, displacing executive judgment in an area traditionally committed to political accountability. Either error independently warrants reversal. Together, they raise serious concerns about the proper roles of courts and the General Assembly under Ohio law.

ARGUMENT AND LAW

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

I. Introduction

The Court has already spoken in this exact case: It is moot. Yet the lower courts ignored this Court's dismissal of this "cause" and instead found for Appellees. The Court need not expend much judicial resources on this case; rather, it should summarily reverse the court of appeals and dismiss the case—once and for all.

Following this case's first iteration, and in response to the Tenth District's decision, the General Assembly amended the Cooperation Statute on which the Tenth District based its original decision to clarify that the state's executive branch's cooperation with the federal Department of Labor's unemployment programs does not require the governor, or the director of Ohio's Department of Job and Family Services, to accept every available dollar. This action is thus no longer about whether R.C. 4141.43 compels the governor to accept any and all federal funding

available—it expressly does not—but whether the Tenth District can ignore the General Assembly's express revision making clear that the Cooperation Statute does not require the governor to accept federal money any time it is offered.

Like a patient who is willing to endure the harsh side-effects of aggressive treatment when facing a life-threatening illness, the body politic is willing to accept some negative consequences in the midst of a crisis—here, a disincentive to return to work. But when the crisis passes, those undesirable side effects become unacceptable and potentially worse than the disease they were enacted to treat. And just as a patient would expect his or her physician to adjust his or her treatment regimen based on the severity of the case, citizens expect their state government to act like a prudent physician—administering strong medicine *only when needed*.

So it is here. When this case first came before this Court, the extraordinary employment conditions upon which the federal government relied to authorize enhanced unemployment benefits during the pandemic's height—a time 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—had already substantially subsided.

The governor's ability to act as a prudent physician to the body politic, particularly when it comes to participation in federal programs that assign that discretion to him in the first instance, is a matter of cooperative federalism. Although the pandemic is over, the CARES Act will not be the last time that the federal government offers funds to the states. In some cases, these funds may be needed and helpful. In others, they may come with strings attached or—like the CARES act—unwelcome side effects. Given that the reading of the Cooperation Statute (even in its prior form) implicates the federal relationship, the Court should carefully apply established canons of statutory construction. The canons of noscitur a sociis, ejusdem generis, and the canon for the avoidance of

absurd or unworkable results all counsel against reading the Cooperation Statute's prior version as a legislative command to participate fully in every federal program related to unemployment. More importantly, the "clear statement rule" applied by federal courts in interpreting federal statutes requires that when Congress means to alter the federal relationship or require the executive to take specific action, it do so clearly and unambiguously. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This Court should apply that same principle here. Absent a clear command, courts should not presume that a state intends to cede its policy-making sovereignty to the federal government and default to the statutory construction that preserves federalism and state separation of powers

II. Appellees' requested mandamus to force the state to participate in the Federal Pandemic Unemployment Compensation fails because the current law indisputably does not require such participation, and the Federal Pandemic Unemployment Compensation no longer exists.

The common pleas court granted Appellees' mandamus request ordering the governor "to take all action necessary to reinstate Ohio's participation in the [Federal Pandemic Unemployment Compensation ("FPUC")] program from June 26, 2021 through its expiration." *State ex rel. Bowling v. DeWine*, Franklin C.P. No. 21 CVH07-4469, 12 (Feb. 12, 2025). But this commands the impossible. A writ of mandamus shall issue only where the relator establishes by clear and convincing evidence a clear legal right to the relief requested and the lack of an adequate remedy in the ordinary course of law. *State ex. Rel. Manley v. Walsh*, 2014-Ohio-4563, ¶ 18 (collecting cases). Implicit in a writ of mandamus and Civ. R. 65 is the requirement that the clear legal duty be a *current* legal duty that the court can order the government official to perform going forward. A public official has no clear legal duty to take an action that the *current* version of the statute does not compel. *See, e.g., State ex rel. Osborne v. Zumbar*, 2008-Ohio-4437, ¶¶ 10–11 (5th Dist.) (applying amended version of statute); *State ex rel. Henry v. Board of Educ., Madison Plains Local Schools*, 20 Ohio App.3d 185, 187–88 (12th Dist. 1984) (no clear legal duty under statute as

amended in response to prior court rulings).

Further, the FPUC program expired by its own terms on September 6, 2021. Put simply, a retroactive writ of mandamus is a logical impossibility. "[T]he writ of mandamus is a high prerogative writ which does not lie if the performance of the act prayed for is impossible . . . ." *State ex rel. Brown* , 21 Ohio St.2d at 66. In a similar case, the court denied a mandamus request asking the court to mandate an appropriation from a prior fiscal year because "the act prayed for is impossible." *State ex rel. Celebrezze v. Bd. of Cnty. Comm'rs of Allen Cnty., Ohio*, 1986 WL 1751, *5 (3d Dist Feb. 3, 1986), *aff'd*, 32 Ohio St.3d 24 (1987).

Even the trial court recognized the futility of ordering something impossible. The court denied the Appellees' "second mandamus claim, which demanded the prompt payment of any FPUC benefits received," because it "was premature because Governor DeWine was not yet in possession of those benefits." *State ex rel. Bowling v. DeWine*, 2025-Ohio-2313, ¶ 13 (10th Dist.), *appeal allowed*, 2025-Ohio-4853.

III. Because the language on which the Tenth District based its decision was repealed after *Bowling I*, the law of the case doctrine does not apply.

The law of the case doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). It is "a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Id.* But it does not apply when there is an intervening change in the applicable law. Courts most often see this exception when a higher court changes the law. *Id.* But any higher authority will trigger this exception, including changing the underlying statute upon which a ruling rests. The General Assembly has the authority to change a statute in response to a court decision. An amended statute creates a new legal reality, and courts should not blindly follow prior "law of the

case" on an interpretation that the legislature has since changed.

This iterative process has happened hundreds, if not thousands, of times in Ohio's history. The General Assembly enacts a statute, a court interprets that statute, and the General Assembly amends the Revised Code to remedy a constitutional deficiency, resolve an ambiguity, or, in some cases, craft a legislative response to supersede the court's interpretation. For example, this Court's overruling of legislative limits on damages in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), prompted the legislature to rewrite its tort reform statute, which, in turn, spurred judicial review of the new statute. *See Arbino v. Johnson & Johnson*, 2007-Ohio-6948. Similarly, from the mid-1980s through 2010, this Court and the General Assembly engaged in what Justice Pfieffer described as a "tug of war" over what constituted a viable employer intentional tort, with the General Assembly frequently enacting employer protections only to have them struck down by the Court, leading to new legislative efforts followed by more judicial challenges. *Kaminski v. Metal & Wire Products Co.*, 2010-Ohio-1027, ¶ 118 (Pfieffer, J., dissenting). This push and pull finally reached equilibrium with this Court's decisions in *Kaminski* and *Stetter v. R.J. Corman Derailment Services, LLC*, 2010-Ohio-1029, where the Court upheld the 2005 version of that statute.

Thus, democracy's Socratic dialogue proceeds, with each new iteration reflecting the will of the people as expressed by the General Assembly tempered and informed by the judgment of the courts. This is precisely what happened here following the Tenth District's first decision in this action. The General Assembly, in the interest of curing the apparent ambiguity that the court of appeals found, and clarifying that the legislature did not mean to require the governor to accept every federal dollar available, amended R.C. 4141.43(I)(2) to provide that "nothing . . . precludes the director from ceasing to participate in any voluntary, optional, special, or emergency program

offered by the federal government, including" the program at issue in this case. *See* 2023 Am.Sub.H.B. No. 33, amending R.C. 4141.43(I).

This refiled case's timeline is instructive. The period for the payment of FPUC benefits ended on September 6, 2021. *State ex rel. Bowling*, 2025-Ohio-2313, at ¶ 8. On November 22, 2022, this Court dismissed the case "as moot." On January 2, 2023, Ms. Bowling filed a supplemental complaint. On October 3, 2023, the General Assembly amended the relevant statute, R.C. 4141.43, to reverse the holding of the court of appeals by explicitly stating that the Ohio director of job and family services may cease participating in the FPUC program. Nevertheless, the common pleas court relied on the Tenth District Court of Appeals prior decision, rather than the amended statute, to rule in favor of Appellees.

Likewise, the Tenth District simply relied on it prior decision based on the law of the case doctrine, ignoring the intervening change in the law. *See State ex rel.* Bowling at ¶ 26. The Tenth District points to the necessity of the rule to "ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.*, quoting *Nolan*, 11 Ohio St.3d at 3. This rationale for applying the law of the case doctrine, however, does not apply here.

First, there is no risk of inconsistent results in the case or "endless litigation" because the General Assembly, just as it did on tort reform, employer intentional torts, and dozens of other issues, clarified the statute and resolved the issue. Thus, the legislature rendered *Bowling I* a dead letter—there cannot be any further litigation based on the statutory language Appellees raised.

Nor is there any threat to the structure of superior and inferior courts. On the contrary, the Tenth District's application of the law of the case doctrine to re-enact a repealed statute poses a much more substantial threat to the state's constitutional order. "No rule of law is better settled

throughout the United States than that a state Legislature has absolute power to enact, that is, pass, amend, or repeal, any law whatsoever it pleases . . . ." *Internatl. Broth. of Firemen & Oilers, Local Union No. 49 v. Cincinnati Gas & Elec. Co.*, 17 Ohio Supp. 179, 181–182 (C.P. 1946). And "the courts can only restrain the execution of a statute when it conflicts with either" the state or Federal Constitutions. *Id.*

Here, the Tenth District is not merely "restraining the execution of a statute," it is enforcing a statute that the legislature has expressly repealed. The legislature deleted the relied upon language from the statute in response to its belief that the Tenth District had misapplied the former language. As Alexander Hamilton argued in defending the judicial power of the proposed federal courts,

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

The Federalist No. 78, at 443 (Alexander Hamilton) (Fall River Press ed., 2021). Judgment requires a court to look at the statute currently in effect.

IV. The prior Cooperation Statute does not require Ohio to continue to participate in enhanced unemployment.

A. The statute's plain language merely requires the director to provide a legal infrastructure to administer unemployment benefits.

A court's "paramount concern in examining a statute is the legislature's intent in enacting the statute." *Gabbard v. Madison Local School Dist. Bd. of Education*, 2021-Ohio-2067, ¶ 13, citing *State ex rel. Steele v. Morrissey*, 2004-Ohio-4960, ¶ 21. To determine that intent, the court looks first to "the statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage." *Id.* Courts "give effect to the words the General Assembly has chosen, and [] may neither add to nor delete from the statutory language." *Id.*, citing *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 19. Simply put, "review 'starts and stops'

with the unambiguous statutory language." *Id.*, citing *Johnson v. Montgomery*, 2017-Ohio-7445, ¶ 15.

The prior statute's plain language, enacted decades before the CARES Act, does not prohibit the governor from opting out of continued participation in any federal program relating to unemployment. Rather, it merely requires that the state take the appropriate administrative actions to qualify for participation in federal unemployment programs:

> 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, and the "Federal-State Extended Unemployment Compensation Act of 1970," 84 Stat. 596, 26 U.S.C.A. 3306.

R.C. 4141.43(I) (effective 2017).

Applying a plain language analysis, the verb "cooperate" means "to participate or assist in a joint effort to accomplish an end." Merriam Webster, *Cooperate*, https://www.merriam-webster.com/thesaurus/cooperate (accessed Dec. 18, 2025). Several clauses follow that refine the scope of that cooperation. To what extent must the director cooperate? "To the fullest extent consistent with this chapter." R.C. 4141.43(I) (effective 2017). The legislature thus placed a reservation on the director's cooperation; cooperation beyond the scope of Chapter R.C. 4141 is not required. The cooperation directive thus orders the director to generally assist the federal government in administering unemployment benefits but imposes no specific duty on the director.

The next phrase, beginning with "and shall take such action," does, however, require the director to take specific actions. *See id.* And it is here that if the legislature wanted to require continued participation in any program related to unemployment that it would have made that command clear. The next phrase describes *how* the director shall take action—"through the

adoption of appropriate rules, regulations, and administrative methods and standards." *Id.* This is the stuff of standard administrative rulemaking. Congress designed the federal programs listed in R.C. 4141.43 to be administered by the states. *See, e.g.,* 26 U.S.C. 3306(e). And this administrative delegation required a regulatory infrastructure tied to the programs at issue.

Applying a plain language reading, the last clause, "as may be necessary to secure to this state and its citizens all advantages available" under the enumerated statutes, is merely explanatory. *See* R.C. 4141.43(I) (effective 2017). *Why* must the director adopt rules, regulations, and administrative methods? So that the state and its citizens may obtain the benefits of the programs. Simply put, the General Assembly did not order the director "to secure all advantages of federal unemployment programs." It merely noted that as the reason for the director to create the state infrastructure necessary to implement those programs. If the General Assembly had meant to require the director "to secure all advantages available" it would have said so explicitly. It would *not* have ordered that the director shall "cooperate" and engage in rulemaking, it would have mandated that the director *accept all federal funds* available from any federal unemployment program, then existing or ever enacted in the future.

B. Under canons of statutory construction, courts should not presume mandatory participation in an optional federal program absent a clear legislative command.

Eeven if the Court finds some ambiguity in the legislature's direction, canons of statutory interpretation counsel a narrow reading. First, the canon of noscitur a sociis teaches that a word is "given more precise content by the neighboring words with which it is associated." *Fischer v. United States*, 603 U.S. 480, 481 (2024); *see Renfroe v. Ashley*, 167 Ohio St. 472, 474 (1958) (applying noscitur a sociis, "the meaning of words may be indicated or controlled by those with which they are associated"). While R.C. 4141.43 does not present the classic noscitur a sociis situation where a term in a list is assigned a meaning similar to the other terms in the list, the canon

still applies. *See, e.g., Tiger Lily, LLC v. United States Dept. of Hous. & Urban Dev.*, 525 F.Supp.3d 850, 860 (W.D.Tenn. 2021), *affirmed* 5 F.4th 666 (6th Cir. 2021). In *Tiger Lily*, the federal government argued that statutory language vesting the director of the Centers for Disease Control and Prevention to "take such measures" to prevent the spread of communicable diseases, "including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals" authorized the CDC Director to suspend enforcement of residential leases nationwide. Applying the noscitur a sociis and ejusdem generis canons, the district court held that the general command "to take such measures" should be read to imply only such measures similar in kind to those listed. The Sixth Circuit affirmed but went even further, holding that reading the phrase "take such measures" narrowly and in the context of the words surrounding it comported with "the expectation that Congress would 'speak clearly if it wish[ed] to assign to an agency decisions of vast economic and political significance . . . .'" *Tiger Lily, LLC v. United States Dept. of Hous. & Urban Dev.*, 5 F.4th 666, 671 (6th Cir. 2021). Here, the Tenth District did not seek to define a term in the list ("rules, regulations, and administrative methods and standards") but imported "cooperate" into that list and tacitly defined it as a duty to accept all potential federal unemployment payments, even where the CARES Act itself gave the state—through its governor—discretion to opt-out of those payments. A duty to accept—or perhaps more accurately, refuse to decline potential federal money—is different in kind than adopting rules and regulations to administer the federal statutes listed.

Similarly, under the related canon of ejusdem generis, "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to those specific items that precede it." *Fischer*, 603 U.S. at 481 (2024). As this Court has explained,

> [W]here in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then

> afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.

Gabbard, 2021-Ohio-2067, ¶ 26, quoting *State v. Aspell*, 10 Ohio St.2d 1, paragraph 2 of the syllabus (1967). Adopting rules and regulations and administrative standards is the bread and butter of state department directors. Similar language authorizing or required directors to engage in rulemaking to achieve the ends of a particular statute appears throughout the Revised Code. This command to engage in rulemaking is well-understood and has definite features. For example, the rulemaking process and the process for creating administrative standards is governed by its own statutory scheme and subject to legislative and judicial review. A duty to continue participation in a federal program is nothing like the well-understood responsibilities of a department director in promulgating rules and standards.

Perhaps more importantly, the Tenth District reads R.C. 4141.43 as a waiver of the state's policy making authority in respect to unemployment programs. This is an implicit rejection of the principles of federalism upon which the nation was founded. And while neither the U.S. Constitution nor the Ohio Constitution expressly prohibits the General Assembly from abandoning its authority to Congress, such a waiver should be lightly presumed. Federal courts have applied this "clear statement" rule in construing federal statutes, and this Court should do the same. If one plausible reading of a statute will significantly intrude upon state sovereignty or alter the federal-state balance, and another plausible reading would not, courts should adopt the latter unless the legislature has spoken clearly. *Gregory,* 501 U.S. at 460.

In *Gregory*, the U.S. Supreme Court wrestled with the apparent conflict between the federal Age Discrimination in Employment Act and Missouri's state constitutional provision requiring state court judges to retire at age 70. The Court held that because "Congressional interference with

this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers," it would not presume that Congress had intended to "upset the usual balance of federal and state powers." *Id*. The Court explained that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (Cleaned up.) *Id*. at 460–461, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). Similarly, in *Sossamon*, the U.S. Supreme Court held that it will not interpret statutes to waive state sovereign prerogative unless the waiver is "unequivocally expressed." *Sossamon v. Texas*, 563 U.S. 277, 288 (2011).

While this Court has never expressly applied the clear statement rule to preserve federalism—it appears never to have needed to—it can defend Ohio's sovereignty, as the General Assembly did in repealing the version of the statute on which the Tenth District erroneously relied, by not inferring a surrender of policy-making authority from R.C. 4141.43's general instruction to "cooperate."

Further, courts in other states have explained how reading a state statute to delegate policy making to the federal government conflicts with the underlying assumption of the federalist bargain inherent in the Constitution. "Every one knows that the states were jealous of their rights, and that nothing pertaining to their sovereignty was yielded to the federal government, unless the grant was either essential to the existence and efficiency of that government, or the well being of the whole people; and in all cases the utmost caution was observed in making the grant." *Gardner v. Hall*, 61 N.C. 21, 24 (1866). New York state courts have likewise explained that the New York Constitution's vesting of the "legislative power" in the "Senate and Assembly" prevents abdication of this power "by delegation to others." *De Agostina v. Parkshire Ridge Amusements*, 155 Misc.

518, 524 (N.Y. Sup. Ct. 1935). There, the state legislature, through its State Recovery Act, expressly announced the policy of the state of New York

> to co-operate in the furtherance of the objects and purposes declared in [the National Industrial Recovery Act], and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

Id. at 522–23. The New York court struck down the legislature's delegation of its sovereign power, noting that the delegation was not merely to "any state administrative agency, but to the President of the United States." *Id*.

Ohio's Constitution contains the same unequivocal reservation of legislative power to the General Assembly. Ohio Const., art. II, § 1. Absent some clear statement that the legislature intended to surrender the state's sovereignty over unemployment compensation to the federal government, the courts should not presume such a sweeping change to the federal relationship.

The Tenth District's reading also implicates the constitutional balance of power between Ohio's executive and legislative branches. This Court has emphasized that statutes should not be interpreted to impose mandatory duties on the executive absent clear language. *See State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 163–64 (1935). And while courts may "on suitable occasions" "apply the spur of mandamus to put the discretion of * * * officers in motion [ ] after that discretion has been exercised, * * * no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end." *Id.* In this case, the CARES Act specifically gave *the governor the discretion to opt-out of the program*. *See* 15 U.S.C. 9023(a) and 9025(a) ("Any Strate which desires to do so may enter into and participate in an agreement [for enhanced unemployment benefits] . . . . Any State which is party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such Agreement."). Construing

the Cooperation Statute's prior version to compel continued participation in optional federal programs would represent a substantial reallocation of authority. Decisions concerning whether to accept federal funds—particularly programs that are time-limited or economically contingent—require policy judgments about labor markets and the fiscal effect on the state's economy as a whole. The prior version of the R.C. 4141.43 does not clearly remove the discretion of the governor (or the director) and such an intent should not be implied. Certainly, if the legislature had wanted the state to continue to participate over the governor's objection, it could have passed legislation expressly requiring that continuation. But it did not. In fact, after learning of the Tenth District's decision, it did the opposite and expressly authorized the Governor to terminate the state's agreement with the Secretary.

More troubling, such a reading makes the Court—not the governor or legislature—the de facto administrator of unemployment programs. When the governor, through his decision to opt out of the CARES Act, and the legislature, through its repeal and revision of the Cooperation Statute made policy decisions—policy decisions that implicate the state's relationship with the federal government and the balance between Ohio legislative and executive branches, this Court should not overturn those decisions absent a clear statutory command.

CONCLUSION

The courts below ordered the Governor to do the impossible, or at least something useless: demand the federal government give to the state funds that no longer exist. But even if the federal government would reenact an expired program and appropriate new money for Ohio, Ohio's new law explicitly does not require Ohio to take those funds. Further, The Tenth District's decision—if it stands—would permit the perverse result of allowing plaintiffs to sue under "ghost precedents"—decisions that persist despite the repeal of the statute on which they are premised.

For the above reasons, the Court should reverse the court of appeals order.

Respectfully submitted,

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December 18, 2025

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above Amicus Curiae Brief of The Buckeye Institute in Support of Appellants was served this 18th day of December 2025 via e-mail on:

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