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 THE BUCKEYE INSTITUTE'S MEMORANDUM IN SUPPORT OF JURISDICTION

Jay R. Carson (0068526)
Counsel of Record
David C. Tryon (0028954)
Alex M. Certo (0102790)
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
Legal@BuckeyeInstitute.org

Attorneys for Amicus Curiae The Buckeye Institute

Dave Yost (0056290)
Mathura J. Sridharan (0100811)
Michael J. Hendershot (0081842)
Ann Yackshaw (0090623)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
Mathura.Sridharan@OhioAGO.gov

Counsel for Appellants Governor Mike DeWine and Director Matt Damschroder

Marc E. Dann (0039425)
Brian D. Flick (0081605)
Andrew M. Engel (0047371)
DANNLAW
15000 Madison Road Lakewood, Ohio 44107
216.373.0539
notices@dannlaw.com

Counsel for Appellees Candy Bowling, et al.

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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).

STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Case set forth in Appellants' Memorandum in Support of Jurisdiction.

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.

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 the Plaintiff. The Court need not expend much judicial resources on this case; rather it should accept jurisdiction and summarily reverse the court of appeals subject to Rule 7.08 (B)(3), and dismiss the case—once and for all. But even if the court does not summarily reverse, the Court should still accept jurisdiction because of the great impact this case has on the law and the public.

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 both to cushion the economic blow to 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* (2021), available at https://tinyurl.com/rezba42k (accessed Aug. 20, 2025).

Yet policies enacted to achieve one policy objective often result in unintended—if not unsurprising—consequences. Or, in some cases, like a patient who is willing to endure the harsh side-effects of aggressive treatment when facing a life-threatening ailment, 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 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—prescribing strong medicine only when needed.

So it is here. When this case first came before this Court, 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—had already been substantially ameliorated. With that change in circumstances, as The Buckeye Institute argued in its

jurisdictional amicus brief then, because continued participation in the program had the undesirable effect of discouraging out-of-work Ohioans from returning to the workforce, the governor's ability to leave the program presented a question of substantial constitutional importance and of great general interest.

Even with the pandemic five years behind us, the governor's ability to act as a prudent physician to the body politic is still one of substantial constitutional importance and great general interest. But the General Assembly's amendment of the "Cooperation Statute" on which the Tenth District based its original decision adds even more constitutional urgency to this case. This action is 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.

As The Buckeye Institute argued during this case's first trip to this Court, uncertainty is economic growth's natural enemy. The Tenth District's recent decision has unfortunately added to the uncertainty surrounding not only the governor's discretion to decline certain federal assistance, but on the legislature's authority to amend statutes.

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 FPUC—unwelcome side effects. In all cases, the people of Ohio, through their elected governor and state legislators, should have the option to decide whether the federal prescription best suits their circumstances. By taking jurisdiction of this case, this Court can clarify the meaning of the Cooperation Statute and, more importantly, the General Assembly's ability to respond to court decisions by amending statutes.

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

II. The law of *Bowling I* does not apply after the statutory language interpreted in the first case has been repealed.

It is not unusual to hear prospective judges—whether on the campaign trail or at confirmation hearings—assure listeners that their job is not to make policy, but rather, like an umpire, "to call balls and strikes." Inherent in this metaphor is the idea that when the legislature has missed the strike zone, the court's ruling will prompt it to throw more accurate pitches. It is therefore common—and indeed desirable—that when the General Assembly receives a court ruling that a statute is unconstitutional or unclear, the legislature takes steps to remedy it.

This iterative process has happened hundreds, if not thousands, of times in Ohio's history. A court issues a ruling, 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 a decision of this Court. 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 one Justice 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 continues, with each new iteration reflecting the will of the people as expressed by the General Assembly tempered and informed by the judgment of the Court. 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 cases' timeline is instructive. The period for the payment of FPUC benefits ended on September 6, 2021. *State ex rel. Bowling v. DeWine*, 2025-Ohio-2313, ¶ 8. On November 22, 2022, the Ohio Supreme Court dismissed the case "as moot."[1] 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, relying on the Tenth District Court of Appeals prior decision, ruled in favor of the Plaintiffs.

The Tenth District applied the law of the case doctrine and relied on its own prior decision. *See State ex rel. Bowling v. DeWine*, 2025-Ohio-2313, ¶ 26 (10th Dist.). 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 v. Nolan*, 11 Ohio St.3d 1, 3 (1984). This rationale for

[1] The Court accepted jurisdiction on November 9, 2021. 165 Ohio St. 3d 1442.

applying the law of the case doctrine, however, does not apply here. There is no risk of inconsistent results in the case.

First, there is no risk of "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 the plaintiffs 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 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, unless it is prohibited from so doing by either the state or federal Constitutions; that the courts can only restrain the execution of a statute when it conflicts with either one or the other of said Constitutions.

Internatl. Broth. of Firemen & Oilers, Local Union No. 49 v. Cincinnati Gas & Elec. Co., 17 Ohio Supp. 179, 181–82 (C.P. 1946).

Here, the Tenth District is not merely "restraining the execution of a statute," it is enforcing a statute that the legislature has expressly repealed. This is arguably far worse than garden-variety activism, where a court might consciously or unconsciously read its own preferences into the language of a statute. This is particularly true when the legislature deleted that 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. Whether a court can rely on its own prior decision to contradict the plain language of a subsequently enacted statute raises a significant constitutional question.

III. Ms. Bowling has no cause of action under any current state or federal statute.

Ms. Bowling cannot properly seek prospective injunctive relief based on the prior statute because the relevant statutory language has changed and the federal program no longer exists. The FPUC program expired by its own terms on September 6, 2021. Moreover, injunctive relief by its nature is forward looking. As such, it requires a *present* right to the relief sought. The current statute makes clear that the theory advanced under the prior version cannot succeed on the merits now. She therefore cannot seek relief based on the prior version of that statute and a prior federal program. Put simply, a retroactive writ of mandamus is a logical impossibility.

Ms. Bowling's case is, at its heart, a petition for a writ of mandamus. As this Court is well aware, 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*, 142 Ohio St. 3d 387–88 (2014) (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. In other words, a public official has no clear legal duty to take an action which the current version of the statute does not compel. *See, e.g. State ex rel. Osborne v. Zumbar,* 2008-Ohio-4437, ¶¶ 10–11(applying amended version of statute)*; State ex rel. Henry v. Board of Educ., Madison Plains Local Schools*, 20 Ohio App. 3d 185, 187–88 (1984)(no clear legal duty under statute as amended).

Nor can Ms. Bowling point to some sort of vested right to the additional unemployment compensation she and the class members seek. The program, by its own terms, was voluntary. The State of Ohio voluntarily participated until it reached a point where it believed further participation

would defeat the important policy goals of encouraging Ohioans to return to the workforce.. 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. Future plaintiffs should not be permitted to rely on decisions which the legislature explicitly reversed with new legislation.

IV. Economic data shows that temporary federal unemployment programs delayed employees returning to work.

A. The effect of continued enhanced unemployment payments on workforce participation was real, significant, and harmful.

The economy of early 2020 calls to mind empty streets, shuttered businesses, and home isolation. The calling card of the 2021 economy, in contrast, is the ubiquitous "Help Wanted" sign. Across the country, the labor shortage led to longer wait times at many businesses, and companies operating at reduced capacity, for fewer hours, or closing locations altogether. *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 Aug. 20, 2025); 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 Aug. 20, 2025).

Ohio was no exception. The Winking Lizard Tavern in Cleveland, for example, closed its Gateway location near Progressive Field and Rocket Mortgage FieldHouse due in part to its inability to find workers. WKYC Studios, *Winking Lizard permanently closing downtown Gateway location* (Oct. 4, 2021), https://tinyurl.com/fbxjchdb (accessed Aug. 20, 2025). Winking Lizard's 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." *Id.*

While the hospitality industry was hardest hit by the labor shortage, it was far from alone. A

survey of the Associated General Contractors of America found that 61% of construction firms cited 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://tinyurl.com/2usha9y5 (accessed Aug. 20, 2025). So too manufacturers, where, as "US manufacturing activity surged to a 37-year high in March [2021], the industry ha[d] 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 Aug. 20, 2025.)

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 "[t]here 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://tinyurl.com/yc4e9sjv (accessed Aug. 20, 2025). Economists have pointed out that the record number of job openings was 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, "[w]e have fewer people in the labor market now than we did before COVID. . . businesses have surged back far more quickly than job seekers." Wall Street Journal, *Unfilled Job Openings Outnumber Unemployed Americans Seeking Work* (Aug. 9, 2021), https://tinyurl.com/y59va6sm (accessed Aug. 20, 2025).

Similarly, Ohio's labor participation rate, as tracked by the U.S. Bureau of Labor Statistics, shows empirically that during and after the pandemic fewer Ohioans sought 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 Aug. 20, 2025). 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 shows that not only were many Ohioans thrown out of work by the pandemic, but that many gave up looking for work.

In deciding to withdraw from the temporary FPUC, Governor DeWine noted that he had heard from many employers that they could not 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://tinyurl.com/5bjdf7kj (accessed Aug. 20, 2025). The impact of the court of appeals holding on the General Assembly's ability to adjust public policy to changing conditions is an issue of great public and general concern.

B. The economic disincentives of the temporary FPUC presents an issue of great public and general concern.

The FPUC program's broad negative impact on Ohio's economy and employment prospects for Ohio's workers presents another issue of great public and general concern. Although the pandemic has passed, the Plaintiffs' requested relief that the Governor—to the extent he would have any authority to do so—resurrect the enhanced unemployment benefits program, such an action presents the same policy concerns that it did when this case was originally brought, and thus making this a case of great general interest.

The temporary federal unemployment programs—particularly the FPUC—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 [unemployment] benefits that exceeded the weekly amounts they could expect to earn from work during those six months." Letter from Phillip L. Swagel, Director, Congressional Budget Office to Senator Grassley (June 4, 2020), available at https://tinyurl.com/ye4bynxf (accessed Aug. 20, 2025).

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 Aug. 20, 2025). 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 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, 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 unemployment 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.

But, when the unemployment benefit was reduced from $600 to $300 per week, more people went to work. University of Chicago economist Casey Mulligan and former White House advisor Stephen Moore noted in December 2020, that "Bureau of Labor Statistics data show[ed] that from

May through July—when unemployment benefits were high—job openings surged." Wall Street Journal, *Unemployment Bonus Proves Its Harm* (Dec. 3, 2020), https://tinyurl.com/3ffyw4w7 (accessed Aug. 20, 2025). 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 that terminated temporary federal unemployment programs—like Ohio—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.

Center for Research on the Wisconsin Economy, *More Early Evidence on the End of Expanded Federal Unemployment Benefits* (2021), available at https://tinyurl.com/x8t86z3s (accessed Aug. 20, 2025). Similarly, a study by the Mercatus Center at George Mason University, relying on data from the Bureau of Labor Statistics, 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), https://tinyurl.com/j2vyta4w (accessed Aug. 20, 2025).

As these studies are careful to acknowledge, factors beyond salary 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 that 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 unemployment 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, fifteen 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, and 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

> [i]t 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.[2] This perception points to the great public interest in this case. While the pandemic is over, there will be other crises. And the federal government's response to those crises will almost surely

[2] But c.f. 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 Aug. 20, 2025) (finding a less robust correlation between the ending of the enhanced unemployment benefit and a return to the workforce.)

involve the payment of money. The state government needs flexibility to respond responsibly.

The impact of government benefits on workforce participation, and whether the state is compelled to accept them is, thus, a matter of great public and general concern.

CONCLUSION

For the above reasons, Appellants' Jurisdiction Appeal should be accepted, summarily reversed and dismissed. Alternatively, the Court should accept jurisdiction and decide the case on the merits.

Respectfully submitted,

/s/ *Jay R. Carson*
Jay R. Carson (0068526)
Counsel of Record
David C. Tryon (0028954)
Alex M. Certo (0102790)
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
Legal@BuckeyeInstitute.org

Attorneys for Amicus Curiae
The Buckeye Institute

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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 26th day of August 2025 via e-mail on:

MARC E. DANN (0039425)
BRIAN D. FLICK (0081605)
ANDREW M. ENGEL (0047371)
notices@dannlaw.com

Counsel for Appellees Candy Bowling, et al.

MATHURA J. SRIDHARAN (0100811)
Mathura.Sridharan@OhioAGO.gov

Counsel of Record for Appellants
Governor Mike DeWine and Director Matt Damschroder

/s/ *Jay R. Carson*
Jay R. Carson (0068526)
Counsel for Amicus Curiae
The Buckeye Institute