In the

Supreme Court of Ohio

STATE ex rel. CANDY BOWLING, et al.,	:	Case No. 2021-1062
	:	
Plaintiffs-Appellees,	:	On appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
MIKE DeWINE, et al.,	:	
	:	Court of Appeals
Defendants-Appellants.	:	Case No. 21-AP-00380
	:	

BRIEF OF APPELLANTS GOVERNOR MIKE DeWINE AND DIRECTOR MATT DAMSCHRODER

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INTRODUCTION

As Ohio emerged from the pandemic, employers across the State struggled to fill job openings. Governor DeWine identified a governmental policy that contributed to this worker shortage: the unemployed, for over a year, had been receiving hundreds of extra dollars a week through a federal program in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). This decreased their incentive to take new jobs. The States were allowed to participate in this program, and Ohio had done so. But federal law allowed the States, through their governors, to withdraw at any time. Governor DeWine elected to withdraw, ending the State's participation. This case presents the question whether Ohio law forbade him from doing so. The answer is "no." The Governor lawfully ended the State's participation in one of the CARES Act programs before its federally scheduled expiration. Because the Tenth District held otherwise, this Court should reverse.

The Tenth District's contrary ruling rests on a misreading of a state law that this brief calls the "Cooperation Statute." That statute requires the Director of Job and Family Services to adopt "rules, regulations, … methods and standards" as "may be necessary to secure to this state and its citizens the advantages" of five specifically enumerated federal statutes. R.C. 4141.43(I). The Tenth District interpreted the Cooperation Statute's language, which the General Assembly passed in the 1970s, as requiring Ohio to accept the CARES Act funds, which Congress first made available in 2020. It erred. For one

thing, the Cooperation Statute does not *require* the State to accept all aid available even under the five federal laws it enumerates; it merely requires the Director to adopt rules so that the State can participate in the programs those laws create *should it choose to do so*. More fundamentally, the CARES Act is not among the five federal laws enumerated in the Cooperation Statute. Put differently, the Cooperation Statute gives the Director no duties with respect to the CARES Act.

In addition to mishandling the statutory analysis, the Tenth District erroneously interpreted the Ohio Constitution. It concluded that Governor DeWine violated the separation of powers by deciding a "complex and controversial economic issue" contrary to "a specific policy mandate in a long-standing statute." *State ex rel. Bowling v. DeWine*, 2021-Ohio-2902 ¶¶53, 54 (10th Dist.) ("App. Op."). The Tenth District erred. No state law—"long-standing" or otherwise—compelled Ohio to participate in the program here at issue. The Tenth District concluded otherwise only because it incorrectly read the Cooperation Statute to require the State's participation. Because nothing compelled the Governor to participate in the program, the Governor's withdrawal did not contradict any policy mandate from the legislature.

The Court should reverse with Tenth District's judgment.

STATEMENT

1. The federal government has long played a significant role in the provision of unemployment benefits. The modern era of unemployment insurance dates to the New

Deal and the original Social Security Act. *See, e.g.*, *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 574 (1937). Even today, while most unemployment benefits are funded by a state tax imposed on employers, the federal government continues to subsidize unemployment benefits. For example, the federal government pays much of the States' administrative costs though a federal tax on employers. *See, e.g.*, 42 U.S.C. §1101; *United States v. Loving*, 588 F. App'x 494, 495–96 (7th Cir. 2015). The federal government also pays a portion of the employer contribution during times of high unemployment. *See, e.g.*, 42 U.S.C. §1321. And the federal government helps fund the extended weeks of benefits available to individuals who remain unemployed past the twenty-six-week period during which standard benefits are typically available. *See, e.g.*, 26 U.S.C. §3304(a)(11).

From the view of the unemployed, there are generally two tiers of benefits. Standard benefits last twenty-six weeks in most States, including Ohio. *See* R.C. 4141.30(D). After exhausting these benefits, an unemployed person may be eligible to receive extended benefits under the Federal–State Extended Unemployment Compensation Act of 1970. *See* 26 U.S.C. § 3304(a)(11). (These benefits are available when unemployment rates in a State hit a certain level. *See id*.) For the first twenty-six weeks, States pay the benefits while the federal government pays the administrative costs. After that, the States and the federal government split the costs of extended benefits, while the federal government continues paying administrative costs. *See, e.g.*, *Cosby v. Ward*, 843 F.2d 967, 970 (7th Cir. 1988).

No matter the tier of benefits at issue, the State may obtain the federal government's assistance only if the Secretary of Labor approves the state rules and state regulations governing the State's unemployment-compensation system. *See generally* 26 U.S.C.§3304; *accord Steward Mach.*, 301 U.S. at 574; *In re Cmty. Mem'l Hosp.*, 494 B.R. 906, 906–07 (Bankr. E.D. Mich. 2013). The federal Department of Labor has long published guidance, including model statutory language, that States may rely upon to ensure their eligibility for federal benefits. *See* U.S. Dep't of Labor, Manpower Admin., Unemployment Ins. Serv., *Manual of State Employment Security Legislation* (1950), https://perma.cc/XHJ5-MLWG ("Blue Book").

Apart from these programs of direct payment to the unemployed, the federal government has set up programs to help the unemployed find jobs. Again, the history dates back to the New Deal. The Wagner-Peyser Act of 1933 created an agency "to promote the establishment and maintenance of a national system of public employment offices." 29 U.S.C. §49. "State agencies, which have been approved by the Secretary of Labor, are authorized to participate in the nationwide employment service." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594 (1982). One such national program "enables employers to use governmental resources to recruit workers in states with low demand for labor to work in states with high demand." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 230 (7th Cir. 1983). Congress most recently updated the Wagner-Peyser Act in 2014, in the Workforce Innovation and Opportunity Act. As amended, the law

provides federal funds—this time for workforce development—to interested States that adopt certain rules and regulations. *See, e.g.*, *Coastal Cntys. Workforce, Inc. v. LePage*, No. 1:17-CV-00417, 2018 WL 545712, at *1 (D. Me. Jan. 24, 2018).

2. Turn now to Ohio law. All of these just-discussed federal programs are open *only* to States that adopt specified provisions, methods, and standards. The key Ohio statute enabling the Ohio Director of Job and Family Services to make those conforming rules and regulations is R.C. 4141.43(I). This brief will call it the Cooperation Statute. It provides:

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

Breaking this down, the statute tells the Director to promulgate rules and standards. Which rules and standards? Those that "may be necessary" for Ohio to receive the benefits available through five pieces of federal legislation: the 1933 Wagner-Peyser Act; the 1935 Social Security Act (at least as it deals with unemployment benefits); the 1970 updates to the Federal Unemployment Tax Act; the Federal-State Extended Unemployment Compensation Act of 1970; and the Workforce Innovation and Opportunity Act.

Just one of these five enumerated laws—the Federal-State Extended Unemployment Compensation Act of 1970—primarily involves money to be expended in the form of unemployment benefits. The other four primarily involve federal funding for administrative costs or workforce training.

3. Neither these federal laws nor anything else was enough to combat the economic disruptions that the COVID-19 pandemic caused. To help ease the pain, Congress passed the CARES Act. 15 U.S.C. §9001 *et seq*. That act, among other things, created temporary unemployment-benefit programs in which States could, if they wanted, participate. Three programs stand out. First, the Federal Pandemic Unemployment Compensation program, which added dollars to the amount payable for weekly unemployment benefits. This extra money applied to all available unemployment programs for individuals eligible for the base weekly benefit, including traditional unemployment benefits, Pandemic Unemployment Assistance benefits, and Pandemic Emergency Unemployment Compensation. Second, the Pandemic Unemployment Assistance program, which provided money for those not otherwise eligible for traditional unemployment payments. Third, the Pandemic Emergency Unemployment Compensation program, which added weeks of benefits for those otherwise eligible for traditional unemployment. Only the first of these three programs—the Federal Pandemic Unemployment Compensation program, which this brief refers to as "the Program"—is relevant here.

States that chose to enroll in the Program secured extra unemployment benefits

for their unemployed citizens. *See* 15 U.S.C. §9023. Between March and July of 2020, eligible individuals in participating States received an extra $600 per week. Later, the amount decreased to $300 per week. *See* 15 U.S.C. §9023(b)(3)(A).

As far as federal law is concerned, States need not participate in the Program. In Congress's words: "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." 15 U.S.C. §9023(a). The program eligibility window closed on September 6, 2021. 15 U.S.C. §9023(b)(3)(A)(ii).

The State of Ohio initially opted in. As a result, eligible individuals in Ohio received the extra money each week. This, however, created a problem: the increased money reduced the need and incentive to work and thus tightened the labor market. Put more simply, employers around the State struggled to find employees. In light of these difficulties, Governor DeWine decided to withdraw the State from the Program. On May 24, 2021, he notified the U.S. Department of Labor that Ohio would no longer participate after the week ending June 26, 2021. App. Op. ¶6.

Governor DeWine opted out of the program based on his determination that the additional benefits were discouraging people from returning to work. That disincentive created a serious problem, because employers across the State and the country were desperate for employees. *See* Letter from Gov. DeWine to Dep't of Lab., Joint Stip., Ex. A

(July 22, 2021). If employers are unable to find employees, they may be forced out of business, forced to forgo investment opportunities, or forced to make investments in States with more favorable labor markets. In Lieutenant Governor Husted's words: "As companies around the globe begin to expand and make new investments coming out of the pandemic, the ability to provide a workforce is emerging as the primary factor in their decisions.… States that can favorably respond are going to win the jobs that will employ people for years to come." *COVID-19 Update: Ohio Vax-a-Million, Kids Vaccination, Federal Pandemic Unemployment Compensation*, Office of the Governor, (May 13, 2021) https://perma.cc/4NL8-X7T2. The Governor's Office reported that it "heard over and over again from employers who can't find workers to fill open positions," which led to the "tough decision[]" about unemployment compensation. *Governor, Lt. Governor Issue Statement on Federal Pandemic Unemployment Compensation Ruling*, Office of the Governor, (July 29, 2021) https://perma.cc/6NJX-YTT3. In the Governor's eyes, withdrawing from the Program encouraged Ohioans to "find quality, well-paying jobs." *Id*. While declining the federal money was a "tough" decision, the Governor believed that "both employers and workers" stood to benefit in the long run. *Id.*

According to some metrics, the Governor's decision played out as he hoped. As reported by the Department of Labor, Ohio had "statistically significant" seasonally adjusted rise in employment from September to October 2021. *See* U.S. Bureau of Labor Statistics, *State Employment and Unemployment Summary* (Nov. 19, 2021),

https://perma.cc/6LTS-JUDW. Continuing the trend, the unemployment rate in Ohio dropped from 5.1 percent to 4.8 percent from October to November of 2021. Ohio Dep't of Job and Family Servs., *Ohio's Unemployment Rate Decreased to 4.8% in November* (Dec. 17, 2021), https://perma.cc/FY9D-63D9.

Once Ohio ceased participating, unemployed Ohioans stopped receiving the additional benefits available through the Program. They, however, remained eligible to receive traditional unemployment benefits under state law, along with other pandemic-related benefits that were available through early September.

4. Three individuals who had been receiving extra benefits because of the State's enrollment in the Program filed this lawsuit to challenge the Governor's withdrawal. They argued that the Cooperation Statute *required* the Governor and the Director of the Ohio Department of Job and Family Services to secure funds through the Program.

After a hearing, the Franklin County Court of Common Pleas denied the plaintiffs' motion for a temporary restraining order and a preliminary injunction. The court held that the plaintiffs were not likely to succeed on the merits. It gave two reasons. First, the Cooperation Statute requires the Director to take certain steps to obtain benefits available under specifically enumerated federal laws. *State ex rel. Bowling v. DeWine*, No. 21CVH07-4469, at 5 (Frank. Cnty. C.P. July 29, 2021) ("Trial Op."). Because the CARES Act is not one of the specifically enumerated laws, and because the Program's funds are available under the CARES Act, the statute "clearly" does not mandate Ohio's participation in the

Program. *Id.* Second, the Cooperation Statute does not require the Governor or the Director to accept all federal funds on offer—it instead requires the Director to adopt "rules, regulations, and administration methods and standards, as may be necessary to secure" benefits for Ohioans. Because the Governor's decision to withdraw did not prevent the Director from adopting such rules, regulations, method and standards, it did not implicate the Cooperation Statute at all. Trial Op. 5–6.

5. The Tenth District reversed. The majority first determined that it had jurisdiction to hear the appeal from a decision denying the plaintiffs' request for a preliminary injunction. App. Op. ¶¶18–28. It then proceeded to the merits, where it concluded that the Governor and the Director had no choice but to accept the Program's benefits.

The Tenth District framed the question this way: Are the disputed benefits "'available' under one of the federal laws" listed in the Cooperation Statute? App. Op. ¶40. It held that they are. To reach this conclusion, the Tenth District made two statutory arguments that are difficult to follow. Both relied on a definitional provision in the CARES Act. The provision states, in relevant part:

> For purposes of this section--
>
> ...
>
> (2) any reference to unemployment benefits described in this paragraph shall be considered to refer to--
>
> (A) extended compensation (*as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970*);

> (B) regular compensation (as defined by section 85(b) of Title 26) provided under any program administered by a State under an agreement with the Secretary;
>
> (C) pandemic unemployment assistance under section 9021 of this title;
>
> (D) pandemic emergency unemployment compensation under section 9025 of this title; and
>
> (E) short-time compensation under a short-time compensation program (as defined in section 3306(v) of Title 26).

15 U.S.C. §9023(i) (emphasis added).

The Tenth District first homed in on "subparagraph (2)(A)." App. Op. ¶46. The court noted that, according to that subparagraph, "one definition of [the Program] is 'extended compensation' as defined under the Federal-State Unemployment Compensation Act of 1970." *Id.* From this, the Tenth District seemed to infer that the Program is part of the Federal-State Unemployment Compensation Act of 1970. That Act is one of the five laws enumerated in the Cooperation Statute—it is, in other words, one of the laws that the Cooperation Statute requires the Director to pass rules and regulations in connection with. R.C. 4141.43(I). On that basis, the Tenth District appears to have concluded that the Cooperation Statute required the Director to adopt rules and regulations as may be necessary to secure the benefits of the Program. And from that, the Tenth District concluded that the State had to accept the benefits available through the Program.

The Tenth District provided a second statutory argument for its conclusion, too. *See* App. Op. ¶47. This time, it pointed to subsections (2)(C) and (2)(D). Those

subsections state that the unemployment benefits "described in this paragraph shall be considered to refer to … pandemic unemployment assistance" and "pandemic emergency unemployment compensation." In other words, the phrase "unemployment benefits" would be construed as referring to, among other things, the Pandemic Unemployment Assistance program and the Pandemic Emergency Unemployment Compensation program that Congress created in the CARES Act along with the Program at issue here. *See above* at 6. Those other two programs were "administered through provisions of the Social Security Act, another of the federal statutes referenced in" the Cooperation Statute. App. Op. ¶47. The Program itself is not, as the Tenth District recognized. App. Op. ¶¶43–44. Nonetheless, the Tenth District assumed that "Congress" would not have "wanted to recognize[]" a distinction between the three programs it created. App. Op. ¶47. So the Tenth District concluded that the Program should be treated as though it too were administered under the Social Security Act. The Social Security Act is one of the federal laws enumerated in the Cooperation Statute. On this basis, apparently, the court concluded that the Cooperation Statute imposes duties on the Director in connection with the Program.

The court finished its opinion with two constitutional arguments. First, it reasoned that the General Assembly alone has the power to make public policy and that the Governor's decision to withdraw from the Program constituted an improper exercise of legislative power. App. Op. ¶53. Second, the majority appealed to Article II, Section 34

of the Ohio Constitution. That section gives the General Assembly the power to pass laws "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees." Ohio Const. art. II, §34. The Tenth District concluded that Governor DeWine, by refusing funds that a state law required him to accept, improperly interfered with this legislative authority. App. Op. ¶¶48–55.

The Governor and Director appealed. This Court refused a request to lift a stay of the lower court's mandate, and later accepted jurisdiction. *See State ex rel. Bowling v. DeWine*, 164 Ohio St. 3d 1423, 2021-Ohio-3015; *Case Announcements*, 2021-Ohio-3938 (Nov. 9, 2021).

ARGUMENT

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.*

The Governor's decision to withdraw from the Program did not violate the Cooperation Statute. The Tenth District erred in holding otherwise. This Court should reverse.

A. The Cooperation Statute does not command the Governor to accept all federal unemployment funds.

"The governor is the supreme executive of the state, and a responsibility delegated to an executive agency is essentially delegated to the governor's subordinate." *State ex rel. Ohio Roundtable v. Taft*, 2003-Ohio-3340 ¶25 (10th Dist.) (*per curiam*). The Director of Job and Family Services is the Governor's agent. *See* R.C. 121.03(E). And the Cooperation

Statute requires the Director, as the Governor's agent, to take certain actions. In particular, the Director must promulgate rules and regulations "as may be necessary to secure to this state and its citizens all advantages available under" five enumerated federal laws. R.C. 4141.43(I). This case presents the question whether the Governor violated the Cooperation Statute by withdrawing from the Program.

He did not. That follows for two, independently sufficient reasons. *First*, while the Cooperation Statute requires the Director to enact rules and regulations enabling the State to obtain certain federal benefits if it so chooses, the Cooperation Statute *does not* require the Governor, the Director, the State, or anyone else to actually secure those benefits. So the Governor's decision to withdraw from the Program could not possibly have violated the Cooperation Statute. *Second*, the Cooperation Statute imposes duties *only* with respect to benefits "available under" five specifically enumerated federal laws. The Program is not part of, and so its benefits are not "available under," any of those laws. Accordingly, the Cooperation Statute imposes no obligations whatsoever with respect to the Program. For either of these two reasons, the Court should reverse the Tenth District. This brief considers them in turn.

1. The Cooperation Statute imposes no obligation to accept any funds at all.

As with any case that turns on the meaning of a statute, the Court here must begin with the Cooperation Statute's text:

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

R.C. 4141.43(I).

Because "words in a statute do not exist in a vacuum," *State v. Nelson*, 162 Ohio St. 3d 338, 2020-Ohio-3690 ¶20 (quotations omitted), words must be read in context, *State v. Porterfield*, 106 Ohio St. 3d 5, 2005-Ohio-3095 ¶12. To account for a word's context, courts give words their "ordinary meaning" as they are "used within the surrounding text." *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St. 3d 199, 2018-Ohio-5207 ¶9; *see also* R.C. 1.42; *Delphi Auto. Sys., L.L.C. v. Dir., Ohio Dep't of Job & Fam. Servs.*, 160 Ohio St. 3d 350, 2020-Ohio-2793 ¶21; *Chesapeake Expl., L.L.C. v. Buell*, 144 Ohio St. 3d 490, 2015-Ohio-4551 ¶35; *Corder v. Ohio Edison Co.*, 162 Ohio St. 3d 639, 2020-Ohio-5220 ¶¶43–44 (DeWine, J., and O'Connor, C.J., concurring in part and dissenting in part).

Here, context is critical. While the Cooperation Statute uses the verb "to secure," it does not simply command the Director (or his principal, the Governor) "to secure benefits." Instead, it commands the Director to adopt "appropriate rules, regulations, and administrative methods and standards, *as may be necessary* to secure to this state and its

citizens all advantages available" under five enumerated laws. R.C. 4141.43(I) (emphasis added). In other words, it commands the Director to adopt the rules and regulations that are "necessary"—in other words, needed or required—for the State to obtain ("secure") the available funding. The statute is thus aimed at assuring that Ohio does not miss out on federal aid by failing to enact rules and procedures that federal law makes a condition of receiving that aid. It is *not* aimed at requiring the Director to actually obtain the funds available. Thus, the Governor could not have violated the Cooperation Statute by opting out of the Program.

Consider an analogy. Suppose the owner of an auto-body shop ordered the shop manager "to locate funds as may be necessary to hire a new mechanic." The manager would not conceivably understand this as an order to hire a new mechanic. Instead, he would understand it as an order to put the business in a position where it would be able to hire a new mechanic. To take another example, imagine a law-firm partner who tells an associate to "draft a complaint and prepare any other documents that may be necessary to challenge" a recently enacted law. The associate would not likely fare well in her year-end review if she construed this as an order to file, rather than an order to draft a filing that would enable the firm to file if it later thought it wise. So too here. If the statute were intended to require the Governor to sign up for every federal unemployment program, the statute would say so. And it would name the Governor, the principal, not the Director, the agent.

This interpretation gains further support from the principle that courts are to avoid statutory constructions that render any language within the statute superfluous. *In re Estate of Centorbi*, 129 Ohio St. 3d 78, 2011-Ohio-2267 ¶13; *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 373 (1917). Had the General Assembly meant to mandate acceptance of the funds, it would have simply omitted the phrase "as may be necessary." That phrase does nothing, it is superfluous, if the Cooperation Statute is read as a command to secure federal funds rather than a command to adopt the rules necessary to secure federal funds should the State wish to do so.

This contextual meaning aligns with how the language was understood by those who drafted it. This language comes almost verbatim from the Department of Labor's recommendation in the so-called Orange Book, a publication drafted as an "aid to States in making appropriate and necessary modifications when they develop their own statutory amendments" in light of the then-new federal amendments. U.S. Dep't of Labor, Manpower Admin., Unemployment Ins. Serv., *Draft Legislation to Implement the Employment Security Amendments of 1970 … H.R. 14705*, at (i), 111 (1970), https://perma.cc/Q4F8-EAQ7 ("Orange Book"); *see also* Dept' of Labor, Blue Book, at 94–95 (recommending almost identical language, minus later-enacted statutes). The specific language that Ohio adopted as its own was "designed to provide specific support in the State law … that will assure consistency with Federal requirements." Orange Book, at 113. In other words, the language assures that state law poses no obstacle to receiving federal assistance with

state-run unemployment-insurance systems. It is not a command to take every optional federal dollar.

In sum, the Cooperation Statute simply requires the State to put itself in a position to obtain any available "advantages" under the listed statutes. It does not require that the State actually accept all available advantages. The Governor's opt-out decision does not violate that command. After all, his decision to withdraw from the Program does not prevent the Director from adopting "rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under" the listed statutes. R.C. 4141.43(I). And in fact, the Director has adopted all such rules and standards necessary to secure those benefits—the Governor has just declined to accept the benefits. *See, e.g.*, O.A.C. 4141-43-02 (standards for disclosures of confidential information); O.A.C. 4141-35-06 (coordination with unemployment systems in other states). So the Governor's withdrawal from the Program did not violate the Cooperation Statute.

2. The Cooperation Statute does not impose any duties on the Director with respect to the Program.

Even assuming the Cooperation Statute requires the State to accept some federal funds, it does not require the State to accept funds offered through the Program. Recall that the Cooperation Statute imposes obligations *only* with respect to funds "available under" five enumerated statutes. In this context, the word "under" is "most naturally read to mean … pursuant to or by reason of the authority of." *Nat'l Ass'n of Mfrs. v. Dep't*

of Def., 138 S. Ct. 617, 630 (2018) (quotations omitted); *see also, e.g.*, Oxford English Dictionary Online (2d ed. 1989) ("in accordance with"); *Black's Law Dictionary* 1368 (5th ed. 1979) ("according to"); Webster's New International Dictionary 2765 (2d ed. 1948) ("[d]epending for rights upon"); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013) ("in compliance with"). This court regularly uses the word in precisely that sense. *See, e.g.*, *O'Neal v. State*, — Ohio St. 3d —, 2021-Ohio-3663 ¶60; *State v. Patrick*, 164 Ohio St. 3d 309, 2020-Ohio-6803 ¶22.

Applying the plain meaning of "under," the Director's duty to adopt rules and policies runs *only* to those rules and policies needed to obtain the benefits available pursuant to or by reason of the five federal laws that the Cooperation Statute lists: 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). If the General Assembly wanted to require the State to accept all available federal money, it "could have" said so quite simply. *State v. Bryant*, 160 Ohio St. 3d 113, 2020-Ohio-1041 ¶18. Maryland did exactly that; its legislature passed a law requiring the State's executive branch to do "everything possible to maximize" benefits available to Maryland. *See D.A. v. Hogan*, No. 24-C-21-002988, at 15 n.6 (C.C. Balt. City July 13, 2021), https://perma.cc/PQC8-GK68 . Ohio passed no similar law—the Cooperation Statute imposes duties that apply *only* with respect to the benefits available under five specific federal laws.

Accordingly, the Cooperation Statute imposes no duties with respect to money available under federal laws other than the five laws it enumerates. And that proves dispositive here, because the money available through the Program is not available pursuant to the five specifically enumerated laws. Instead, the Program's funds are available pursuant to: (1) the CARES Act, which was passed years after the Cooperation Statute; and (2) state law. The money is not available pursuant to, or in any sense "under," the five federal laws enumerated in the Cooperation Statute. Accordingly, the Cooperation Statute imposed no duties *at all* relative to the Program. And from that, it follows that the Governor's decision to leave the Program could not have violated the Cooperation Statute.

This interpretation accords with decisions from two courts in other States addressing the exact same question under materially identical laws. The South Carolina Supreme Court recently considered a challenge to Governor McMaster's decision to withdraw from *all* CARES Act programs after initially participating in all of them. *Brannon v. McMaster*, 434 S.C. 386, 388–89 (2021). A South Carolina statute reads almost word-for-word like Ohio's Cooperation statute. It directs a South Carolina executive to

> cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as 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, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. §41-29-230(1) (emphasis added). The South Carolina Supreme Court deemed this language "unambiguous." *Brannon*, 434 S.C. at 390. The court reasoned that the money does not represent "'advantages available under the provisions of the'" listed statutes. *Id*. (quotations omitted). Instead, the money was available through the CARES Act and state law.

This is an even easier case than *Brannon*. South Carolina's law, like Ohio's, imposes duties in connection with the "Social Security Act." S.C. Code Ann. §41-29-230(1). And in *Brannon*, some of the programs at issue provided the States with money by routing funds "through bank accounts of the Social Security Administration." 434 S.C. at 390. Even that, the South Carolina Supreme Court held, was insufficient to transform the CARES Act funds into funds "available under" the Social Security Act. Here, even that tenuous connection is missing, because the Program is indisputably *not* administered through bank accounts held by the Social Security Administration.

The Indiana Court of Appeals also issued a decision that fully accords with *Brannon* and with the State's position here. It determined that, because "CARES Act benefits are established and conferred by entirely different statutes than those enumerated" in the Indiana cooperation statute, Indiana's Governor had the power to decline those benefits. *Holcomb v. T.L.*, 175 N.E.3d 1177, 1184 (Ind. Ct. App. 2021).

Two other appellate courts issued stays of lower court injunctions that would have forced governors in Arkansas and Oklahoma to rejoin a CARES Act program they had

withdrawn from. *See Hutchinson v. Armstrong*, No. CV-21-365 (Arkansas S. Ct. Aug. 5, 2021), https://perma.cc/S9HW-TPKF; *Owens v. Zumwalt*, No. 119,786 (Oklahoma S. Ct. Aug. 17, 2021), https://perma.cc/QNY9-WCSV. As far as the Governor and the Director are aware, no injunction mandating CARES Act participation has survived appellate review.

To recapitulate, the Cooperation Statute does not require the Director, the Governor, or anyone else to do *anything* with respect to the Program. Instead, the Cooperation Statute requires the executive branch to take certain steps with respect to funds available "by reason of" five federal acts. The Program's funds are not available "by reason of" those acts. Instead, the Program's funds are available "by reason of" the CARES Act and state law alone. Because the Cooperation Statute creates no duty to obtain funds available "under" (that is, "by reason of") the CARES Act, it has no relevance to the Governor's decision to withdraw from a CARES Act program.

3. R.C. 107.17 removes any lingering doubt about the Governor's power to withdraw from the Program.

The above shows why the Cooperation Statute has nothing to say about the Governor's choice to withdraw from the Program. *First*, the Cooperation Statute does not require the State to accept any federal funds. *Second*, the Cooperation Statute does not impose any duties with respect to the Program. Both insights independently suffice to resolve this case in favor of the Governor.

But another statute—R.C. 107.17—makes this even clearer. That statute

"empower[s]" the Governor to "commit the state to participation in any federal program not authorized by existing state law, where such program in the judgment of the governor will benefit this state and its citizens through grants of money or other provision for jobs or services." R.C. 107.17. If the Cooperation Statute broadly requires the Governor to accept federal funds—or, at least, federal funds available through the five laws the Cooperation Statute enumerates—it conflicts with R.C. 107.17. Why? Because R.C. 107.17 says that the Governor *need not* enroll the State in every federal program—he has discretion to do so or not.

The court should endeavor to avoid any conflict. The "Revised Code, like any document, is designed to be understood as a whole." *Porterfield*, 106 Ohio St. 3d 5 ¶12. From that follows the "well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶21 (quotations omitted). That means courts must "harmonize provisions unless they irreconcilably conflict." *State v. South*, 144 Ohio St. 3d 295, 2015-Ohio-3930 ¶8; *see also State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808 ¶12; *Ex parte Hesse*, 93 Ohio St. 230, 234 (1915). The State's interpretation harmonizes the provisions—there is no conflict if the Cooperation Statute simply requires the Director to adopt rules that enable the State to accept federal funding *if* it chooses to do so. The Tenth District's reading, in contrast, causes the statutes to conflict.

Even if the statutes did conflict, that conflict would nonetheless require reversal. This follows from two other rules that tell the courts what to do if laws *cannot* be harmonized. The first, which is codified at R.C. 1.51, says that a specific provision generally "prevails as an exception to the general provision." *See, e.g.*, *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 135 Ohio St. 3d 395, 2013-Ohio-1505 ¶26; *State ex rel. Dublin Sec., Inc. v. Ohio Div. of Sec*., 68 Ohio St. 3d 426, 430 (1994). The second, which applies when two irreconcilable statutes lay equal claim to the mantle of general or specific, provides that "the statute latest in date of enactment prevails." R.C. 1.52(A); *see Pribble,* 158 Ohio St. 3d 490 ¶31 (DeWine, J., dissenting) (explaining relationship between R.C. 1.51 and 1.52); *State v. Owen*, 995 N.E. 2d 911, 2013-Ohio-2824 ¶29 (11th Dist.) (same).

Both rules would require resolving any conflict between the Cooperation Statute and R.C. 107.17 in favor of the latter. First, R.C. 107.17 is the more specific statute because it deals with the precise question whether the Governor has the power to decline federal funds. *See, e.g.*, *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 2004-Ohio-4354 ¶15 (applying more-specific statute); *Schindler Elevator Corp. v. Tracy*, 84 Ohio St. 3d 496, 499 (1999) (same). Second, to the extent neither statute is more specific than the other, R.C. 107.17 prevails because it was enacted later in time. *Compare* 134 Ohio Laws 91, 150 (Oct. 29, 1971) *with* 136 Ohio Laws (II) 3867, 3868–69 (Mar. 8, 1977); *see, e.g.*, *State v. Thomas*, 148 Ohio St. 3d 248, 2016-Ohio-5567 ¶17 (applying later-enacted statute); *Ford Motor Co. v. Ohio Bureau of Emp. Servs.*, 59 Ohio St. 3d 188, 193 (1991) (Douglas, J., concurring in part

and dissenting in part) (same).

* * *

The Governor's decision to withdraw from the Program did not violate the Cooperation Statute. And even if the Court disagrees, it should nonetheless uphold the withdrawal as a lawful exercise under R.C. 107.17, which trumps the Cooperation Statute insofar as the statutes conflict. This Court should reverse the Tenth District.

B. The Tenth District misread state and federal law in concluding that the Governor had no discretion to opt out of the Program.

The Tenth District interpreted the Cooperation Statute, federal law, and the Ohio Constitution to prohibit withdrawing from the Program. It erred in all respects.

1. The Court should reject the Tenth District's flawed statutory interpretations.

Recall that there are two hurdles to finding a violation of the Cooperation Statute in this case. *First*, the Statute commands the Director to pass rules and regulations only, and does not require that he accept all federal dollars available through the laws enumerated in the Cooperation Statute. *See above* at 14–18. *Second*, the meaning of "under" limits any command to money directly available because of the listed statutes, which would not include money made available through the CARES Act and distributed via state law. *Id.* at 18–21. The Tenth District did not engage with the first of these problems at all. And its attempt to overcome the second hurdle foundered on the statutory text.

a. The Tenth District relied primarily on a tortured reading of definitions set forth

in one statute that Congress passed in the CARES Act. The provision states, in relevant part:

> For purposes of this section--
>
> …
>
> (2) any reference to unemployment benefits described in this paragraph shall be considered to refer to--
>
> (A) extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970);
>
> (B) regular compensation (as defined by section 85(b) of Title 26) provided under any program administered by a State under an agreement with the Secretary;
>
> (C) pandemic unemployment assistance under section 9021 of this title;
>
> (D) pandemic emergency unemployment compensation under section 9025 of this title; and
>
> (E) short-time compensation under a short-time compensation program (as defined in section 3306(v) of Title 26).

15 U.S.C. §9023(i). The Court homed in on subparagraph (2)(A), which states that every reference "in this paragraph" to "unemployment benefits" refers to, among other things: "extended compensation (as defined by Section 205 of the Federal-State Extended Unemployment Compensation Act of 1970)." App. Op. ¶¶45–46. Relying on this language, the Tenth District seemed to conclude that the benefits available through the Program are benefits available under the Federal-State Unemployment Compensation Act of 1970. The Federal-State Extended Unemployment Compensation Act of 1970 is among the laws enumerated in the Cooperation Statute. Therefore, the Tenth District reasoned, benefits

available through the Program must be considered benefits available under the Federal-State Extended Unemployment Compensation Act of 1970.

This argument suffers from two independently fatal flaws. *First*, it does not address the first hurdle to awarding relief: *even if* funds available under the Program are in fact available under the Federal-State Extended Unemployment Compensation Act of 1970, the Cooperation Statute would impose no duty to *accept* those funds. It would merely require the Director to promulgate rules and standards enabling the State to accept the money if that is what its policymakers decide to do.

Second, this language *does not* show that funds available under the Program are in fact available under the Federal-State Extended Unemployment Compensation Act of 1970. Subparagraph (2)(A) says that the phrase "unemployment benefits," as used in one "paragraph," refers to benefits available through a number of different legislative acts. It is unclear which "paragraph" this language is referring to. But ultimately, it does not matter. This language establishes *only* that the phrase "unemployment benefits" includes, among other things, benefits available "under" the Federal-State Extended Unemployment Compensation Act of 1970. Subparagraph (2)(A) does not say that all unemployment-related benefits, including those available through the Program, *are themselves* available "under" the Federal-State Extended Unemployment Compensation Act of 1970. It therefore does not justify the conclusion that the Director's duties with respect to benefits "available under the provisions of … the 'Federal-State Extended

Unemployment Compensation Act of 1970,'" apply with respect to benefits available under the Program.

b. The Tenth District also pointed to the Social Security Act, another of the enumerated statutes. App. Op. ¶47. The Tenth District correctly observed that funds available through the Program are not funneled through or otherwise available under the Social Security Act. *See* App. Op. ¶43. Nonetheless, it concluded that, because Congress made *other* pandemic-related benefits available through Social Security Act accounts, it made sense to treat the Program funds as though they were available under the Social Security Act.

The Court should emphatically reject this argument, again for two independent reasons. *First*, and once more, *even if* the Program's funds were made available through the Social Security Act, the Cooperation Statute does not require the Director or the State to accept those funds—it merely requires the Director to adopt rules and standards enabling the State to accept the funds should it choose to do so.

Second, the Tenth District's decision to treat the Program's funds as though they were available through the Social Security Act, even though they are not, is impossible to understand. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (quoting *Russello v. United States*, 464 U.S. 16,

23 (1983)); *see also Miracle v. Ohio Dep't of Veterans Servs.*, 157 Ohio St. 3d 413, 2019-Ohio-3308 ¶19. Thus, the fact that Congress made *some* pandemic-related assistance available through Social Security Act accounts while *declining* to do the same with the Program, proves that funds available under the Program *are not* available under the Social Security Act. By deciding to treat the Program as though it were administered through the Social Security Act, even though it is not, the Tenth District rewrote the CARES Act.

To underscore the point that no unemployment benefits are made available "under" the Social Security Act, consider federal bankruptcy practice. Bankruptcy courts sometimes confront the question whether a debtor received unemployment-compensation payments "under" the Social Security Act. And those courts, almost universally, hold that the answer is "no." *See, e.g.*, *In re Kucharz*, 418 B.R. 635, 641 (Bankr. C.D. Ill. 2009). As one court explained, "states are subject to various limitations in establishing their unemployment compensation laws. Some limitations are found in the [Social Security Act], some in other federal laws, but the state pays the benefits themselves to claimants and benefits are received by claimants under and in accordance with state law." *In re Novak*, No. 13-16-11408 JA, 2017 WL 1104052, at *5 (Bankr. D.N.M. Mar. 23, 2017). The federal government may fund some unemployment benefits, but those benefits are paid out *under* Ohio law, not federal Social Security law.

2. The Tenth District's constitutional arguments rest on its flawed statutory arguments.

The Tenth District additionally rested its judgment on a flawed constitutional

analysis. It began by citing cases from this Court for the proposition that matters of public policy are reserved to the General Assembly. *See* App. Op. ¶53 (citing *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶21). The Tenth District interpreted those cases to mean that public-policy decisions are "reserved" to that body "exclusively." *Id.* In fact, however, the cases stand only for the proposition that this Court has no power to second-guess the legislature's policy determinations. That proposition, while true, is irrelevant to this case. The question here is *whether* the General Assembly eliminated all discretion for the Governor to accept or decline federal aid for unemployment payments. The principle that the General Assembly sets much public policy does not help answer the question of what that policy entails.

Beyond that, the Tenth District is wrong to say that the Governor's decision declining the federal money "encroached" on the General Assembly's *exclusive* power over "matters of public policy." *Id.* The General Assembly may set much of Ohio policy, but the Constitution commits to the Governor the "supreme executive power" of the State, the power of the line-item veto, and so on. *See* Ohio Const. art. III, §5; art. II, §16. The Governor could not do much of anything—he certainly could not exercise these expressly enumerated powers—if he were barred from making any policy decisions.

The Tenth District additionally pointed to Article II, Section 34 of the Ohio Constitution, which empowers the General Assembly to pass laws "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health,

safety and general welfare of all employees." Ohio Const. art. II, §34. The Tenth District concluded that the General Assembly passed the Cooperation Statute pursuant to Section 34. *See* App. Op. ¶¶52–54. Therefore, it reasoned, the Governor intruded on the legislature's Section 34 authority by violating the Cooperation Statute. *Id.* That argument fails, because it wrongly assumes that the Governor's withdrawal decision violated the Cooperation Statute. As explained above, it did not. Thus, even if the Cooperation Statute is Section 34 legislation, the Governor's action did not interfere with the legislature's Section 34 power. But there is reason to doubt that the Cooperation Statute is Section 34 legislation anyway. That clause is better read as "limited to laws governing the workplace environment." *City of Cleveland v. State*, 157 Ohio St. 3d 330, 2019-Ohio-3820 ¶59 (DeWine, J., concurring in judgment, joined by Stewart, J.); *see also id.*at ¶94 (O'Connor, C.J., dissenting, joined by Stewart and Donnelly, JJ.). Invoking Article II, Section 34 is both irrelevant and wrong.

If there is any separation-of-powers issue in this case, it runs the other way. When a lower court interferes with the "exercise of [a Governor's] discretionary powers as chief executive," this Court will step in with an extraordinary writ to preserve that discretion. *See State ex rel. Gilligan v. Hoddinott*, 36 Ohio St. 2d 127 syl. ¶3 (1973). So separation-of-powers principles counsel extreme caution before a court enjoins the Governor. Nothing short of a very clear statement from the General Assembly can authorize this Court enjoining the Governor. *See id.* After all, if the Governor acted lawfully—if the Cooperation

Statute and the Ohio Constitution *did* empower the Governor to withdraw from the program—then courts are "without authority to substitute [their] judgment for that of the Governor, and to exact the performance of a duty not imposed by law." *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 164 (1935). "There are times when the exercise of sound discretion in the performance of executive acts represents the highest calling of a chief executive officer." *Gilligan*, 36 Ohio St. 2d at 132. The decision to withdraw from the Program here was one of those times, and this Court should not second-guess that judgment call.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief was served by e-mail on January 10, 2022, upon the following counsel:

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APPENDIX

Exhibit 1

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Candy Bowling et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 21AP-380 (C.P.C. No. 21CVH07-4469)
Michael DeWine et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 24, 2021, that sustained appellant's sole assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for proceedings consistent with the decision of this court. Any outstanding appellate court costs are waived.

MENTEL & JAMISON, JJ.

/S/JUDGE

Tenth District Court of Appeals

Date: 08-24-2021

Case Title: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Case Number: 21AP000380

Type: JEJ - JUDGMENT ENTRY

It Is So Ordered

/s/Judge Michael C. Mentel

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Candy Bowling et al.,	:	
Plaintiffs-Appellants,	:	
		No. 21AP-380
v.	:	(C.P.C. No. 21CVH07-4469)
Michael DeWine et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 24, 2021

On brief: *DannLaw*, *Brian D. Flick*, *Marc E. Dann*, and *Emily White*; *Advocate Attorneys, LLP*, and *Andrew M. Engel*, for appellants. **Argued:** *Andrew M. Engel.*

On brief: *Dave Yost*, Attorney General, *Julie M. Pfeiffer*, and *Allison D. Daniel*, for appellee Ohio Governor Mike DeWine; *Eric A. Baum*, for appellee Director, Ohio Department of Job and Family Services. **Argued:** *Julie M. Pfeiffer.*

On brief: *Jones Day*, *Michael R. Gladman*, and *Elizabeth A. Benshoff*, for Amici Curiae Chamber of Commerce of the United States of America and National Federation of Independent Business Small Business Legal Center.

On brief: *Vorys, Sater, Seymour and Pease LLP, Daniel E. Shuey*, and *Erica M. Rodriguez,* for Amici Curiae the Ohio Chamber of Commerce, the Ohio Business Roundtable, the Ohio Restaurant Association, the Ohio Hotel and Lodging Association, the Ohio Grocers Association, and the Ohio Trucking Association.

On brief: *Policy Matters Ohio*, and *Hannah C. Halbert*, for Amici Curiae Policy Matters Ohio, American Sustainable Business Council, National Employment Law Project, William E. Spriggs, Economic Policy Institute, and Andrew Stettner.

APPEAL from the Franklin County Court of Common Pleas

MENTEL, J.

{¶ 1} After Governor DeWine terminated an agreement with the United States Department of Labor, thereby cutting off certain unemployment benefits authorized by Congress in the wake of the unemployment crisis brought on by the coronavirus pandemic, Shawnee Huff, Candy Bowling, and David Willis (collectively, "Appellants") filed a motion for a temporary restraining order and a preliminary injunction in the trial court against the Governor, Mike DeWine, and Matt Damschroder, the Director of the Ohio Department of Job and Family Services ("Director") (collectively with Governor DeWine, "Appellees"). The Franklin County Court of Common Pleas denied appellants' motion and they filed this interlocutory appeal. As explained below, we conclude that the trial court abused its discretion when it ruled that appellants had no likelihood of success on the merits of their claim, and we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} In response to the unprecedented economic disruption caused by the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act on March 27, 2020. Pub.L. No. 116-136, 134 Stat. 281 (codified at 15 U.S.C Section 9001-9141). Title II of the CARES Act, the Relief for Workers Affected by Coronavirus Act, created a number of unemployment insurance benefits in response to the mass layoffs and job losses attributable to the pandemic. 15 U.S.C 9001 note. These benefits included Pandemic Unemployment Insurance ("PUA"), "a temporary federal program that provides up to thirty-nine weeks of benefits to individuals who are not otherwise eligible for state unemployment insurance benefits." *Islam v. Cuomo*, 475 F.Supp. 3d 144, 155 (E.D.N.Y.2020); *see* 15 U.S.C. 9021. Pandemic Emergency Unemployment Compensation ("PEUC") provided an additional 13 weeks of benefits to individuals who had "exhausted all rights" to regular state or federal unemployment compensation or were otherwise ineligible for such compensation. 15 U.S.C. 9025(A)(2)(a).

{¶ 3} The CARES Act also created Federal Pandemic Unemployment Compensation ("FPUC"). 15 U.S.C. 9023. From March 27 through July 31, 2020, FPUC provided "an additional amount of $600" per week in benefits to individuals receiving unemployment compensation. Pub.L. No. 116-36, Section 2104(b)(1)(B). On December 27,

2020, Congress reauthorized FPUC and allowed a weekly benefit until March 14, 2021 but lowered the benefit amount to $300 weekly. *See* Continued Assistance for Unemployed Workers Act of 2020, Pub.L. No. 116-260, Div. N, Title II, Subtitle A, Ch. 1, Subch. I, Section 203, 134 Stat. 1182, 1953 (codified at 15 U.S.C. 9023 (a) & (b)). The extended benefit period also applied to PUA and PEUC benefits. *See* Pub.L. No. 116-260, section 201 and 206. On March 11, 2021, Congress extended the PUA, PEUC, and FPUC benefit periods until September 6, 2021. *See* American Rescue Plan Act of 2021, Pub.L. No. 117-2, Title IX, Subtitle A, Part 1, Section 9011, 9013 and 9016, 135 Stat. 4, 118-20, codified at 15 U.S.C. 9021(c), 9023(b)(3)(A)(iii) & (e)(2), and 9025(g).

{¶ 4} The CARES Act required the United States Secretary of Labor to provide PUA, PEUC, and FPUC benefits pursuant to agreements with states. *See* 15 U.S.C. 9021(f), 9023(a) and 9025(a). The provisions governing PEUC and FPUC benefits contained identical language concerning a state's discretion to enter into and end any agreement for benefits: "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." 15 U.S.C. 9023(a) and 9025(a)(1).

{¶ 5} On March 28, 2020, Governor DeWine entered into an agreement with the Secretary of Labor authorizing a number of CARES Act unemployment benefits for Ohioans, including PUA, PEUC, and FPUC benefits. (Mar. 28, 2020 Agreement Between the State of Ohio and the Secretary of Labor, United States Department of Labor (hereinafter, "Agreement"), Ex. B. to July 22, 2021 Joint Stipulations of All Parties (hereinafter, "Joint Stipulations").)

{¶ 6} On May 13, 2021, the Governor announced that Ohio would terminate its participation in FPUC. (Joint Stipulations at ¶ 5.) In a letter sent to the United States Department of Labor on May 24, 2021, he stated that FPUC "will end with the week ending June 26, 2021," and gave the 30-day notice of intent to terminate participation required by the CARES Act. (Ex. A to Joint Stipulations.) He cited "positive trends" in the Ohio economy, including "a current low unemployment rate of 4.7 percent" and the increasing number of vaccinations in the state. *Id.* The Governor acknowledged that FPUC had "been a great help to Ohioans in need" and "a lifeline" that had "helped buy groceries and pay

rent." *Id.* However, in his estimation, "[t]he need for workers is apparent in many industries, including restaurants, retail and manufacturing." *Id.* The Governor also stated:

> It is clear that Ohio workers are no longer out of work because of the pandemic shutdown. The FPUC extra $300 a week in assistance is now discouraging some from returning to work. This assistance was always intended to be temporary. Now is the time to end it.

Id.

{¶ 7} On July 16, 2021, appellants filed a complaint for mandamus, declaratory judgment, and injunctive relief with an accompanying motion for a temporary restraining order and a preliminary injunction in the trial court against appellees. In the complaint, Mr. Huff alleged that after his layoff from a call center in February 2021 "due to the pandemic," he was dependent upon "$339.00 in unemployment compensation plus $300.00 weekly in FPUC" that he received to support his family. (July 16, 2021 Compl. at ¶ 9.) Without these benefits, Mr. Huff alleged, he would "lose the ability to pay all of his living expenses including his housing, utilities, and food."[1] *Id.* at ¶ 10.

{¶ 8} Ms. Bowling attested to unemployment from a layoff that had occurred in January 2020. *Id.* at Ex. 1, Bowling Aff. at ¶ 4. According to Ms. Bowling, she used the unemployment benefits she had received, including FPUC, to pay for "household expenses including rent, utilities and food," as well as for "medical expenses and necessary expenses for [her] service animal." (Bowling Aff. at ¶ 8.) Her FPUC benefit had terminated on June 26, 2021, and, as a result, Ms. Bowling stated that she "face[d] the immediate financial distress of being unable to pay for my on-going expenses such as rent, utilities, and food." *Id.* at ¶ 9-10.

{¶ 9} Mr. Willis attested to similar circumstances. He had been laid off from his position as a landscaper in March 2020 "due to the Pandemic," used unemployment compensation and FPUC to pay for household expenses, utilities, and food, and faced the "immediate financial distress of being unable to pay for" those expenses after the termination of his FPUC benefits on June 26, 2021. (Compl. at Ex. 2, Willis Aff. at ¶ 4-10.)

{¶ 10} The complaint alleged that, by terminating the agreement for FPUC benefits, the Governor and Director violated the mandate of R.C. 4141.43(I) that the Director both

[1] No affidavit from Mr. Huff was attached to the complaint, affidavits from the other plaintiffs were attached.

"cooperate with" the United States Department of Labor and "secure * * * all advantages available" under the federal unemployment statutes listed in the statute. (Compl. at ¶ 34.) In Count I of the complaint, they sought a declaratory judgment that the Governor and Director "must secure all possible federal pandemic unemployment benefits to Ohioans." *Id.* at ¶ 40. In Count II, appellants sought an injunction enjoining the termination of such benefits. *Id.* at ¶ 41-48. Count III sought a writ of mandamus "requiring the Defendants to take all actions necessary to immediately restore FPUC benefits as is required by R.C. 4141.43(I)." *Id.* at ¶ 57.

{¶ 11} Appellants also sought immediate relief by filing a motion under Civ.R. 65 for a temporary restraining order and a preliminary injunction. (July 16, 2021 Mot.) Appellants argued that they were substantially likely to succeed on the merits of their claim because the "explicit text" of R.C. 4141.43(I) required appellees to "secure all possible federal pandemic benefits available to unemployed Ohioans" under the federal unemployment statutes it listed, and being unable to "meet their basic living expenses" as a result of the termination of FPUC constituting irreparable harm. (July 16, 2021 Mot. at 3-4.) They also argued that injunctive relief would not impose due hardship on appellees because the funds in question "had already been appropriated by Congress" and were still available, and the CARES Act covered any cost to the state. (July 16, 2021 Mot. at 4.) They also argued that the public interest would be served by issuing the injunction because "over 300,000 Ohioans" were receiving FPUC, and the funds "provide[d] an additional $98 million boost to Ohio's economy." *Id.* at 5.

{¶ 12} Appellees responded with a motion to dismiss the declaratory judgment and mandamus claims, as well as a memorandum opposing the request for a temporary restraining order and preliminary injunction. They argued that R.C. 4141.43(I) "confers no entitlement to FPUC benefits whatsoever" because they did not "fall under any of the federal statutes" enumerated in the Ohio statute. (July 21, 2021 Joint Combined Mot. to Dismiss and Memo. in Opp. at 5-6.) Appellees also argued that the Governor "acted within his discretion to determine that the FPUC benefit was no longer needed in Ohio," citing 15 U.S.C. 9023(a), the provision of the CARES Act that allowed a state to terminate an agreement for benefits with 30-days notice. *Id.* at 7-8. Because the Governor acted within his discretion, appellees argued, appellants had no legal right to relief in mandamus. *Id.* at 10-11.

{¶ 13} Appellees also argued that appellants could not satisfy any of the four prongs required to obtain a preliminary injunction. Appellants' incorrect reading of R.C. 4141.43(I) showed that they were not likely to succeed on the merits of their claims, appellees argued, and the measurable "monetary nature" of FPUC benefits was not an appropriate subject for injunctive relief. (July 21, 2021 Joint Combined Mot. to Dismiss and Memo in Opp. at 13-14.) Appellees also claimed that granting the relief would harm them because an injunction would interfere with the executive's ability "to carry out its duly enacted plans," as well as harm the public interest in having the "economy strengthened" by thwarting the Governor's intention to end the "labor shortage" created by the ongoing dispersal of FPUC benefits.[2] *Id.* at 14-15.

{¶ 14} In appellants' reply to the motion to dismiss, they made the following points. First, they argued that the Ohio Constitution delegated "the authority to legislate matters concerning the welfare of employees," including unemployment compensation, exclusively to the Ohio General Assembly, not the Governor. (July 23, 2021 Reply at 5.) Second, appellants argued that the Ohio General Assembly expressly adopted a policy of requiring the executive to secure "all advantages available" under the federal unemployment statutes listed in R.C. 4141.43(I) when it enacted the provision, and FPUC benefits under the CARES Act fell under those statutes. *Id.* at 7-8. Appellants also cited recent court decisions in Maryland and Indiana interpreting similar statutory language requiring those state executives to accept all pandemic-related unemployment benefits provided by the CARES Act. *Id.* at 9-10. Third, they argued that appellees had "usurped the legislative power reserved by the General Assembly" by terminating the agreement for FPUC benefits, thereby "violat[ing] the principle of separation of powers." *Id.* at 11-13. Finally, appellants argued that the irreparable harm they would suffer could not be addressed by monetary damages that "will not pay for rent and food today" and "defeat the purpose of the unemployment compensation program." *Id.* at 15.

{¶ 15} The trial court denied appellants' motion for a temporary restraining order and a preliminary injunction on July 29, 2021. It cited the standard for granting a motion for a preliminary injunction, as stated in *P & G v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000):

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[2] Appellees also asserted a defense based on the doctrine of laches that they have not raised in this appeal.

> [A] party requesting a preliminary injunction must show that (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction.

{¶ 16} The trial court disagreed with appellants' assessment of their likelihood of success of the merits of their claim based on its determination that R.C. 4141.43(I) did not apply to FPUC benefits under the CARES Act. (July 29, 2021 Decision at 5.) The trial court also rejected appellants' argument that the Governor acted outside the scope of his authority, noting that the General Assembly had taken no action to amend R.C. 4141.43(I) "to include the CARES Act" to prevent him from terminating its benefits. *Id.* at 7. However, the trial court did agree with appellants that the termination of FPUC benefits resulted in "a significant and irreparable injury," as "any delay in the issuance [of] FPUC benefits months or years down the road * * * does not pay for rent and food today." *Id.* at 8. "To argue otherwise is disingenuous." *Id.* The trial court's decision did not address the other two prongs of the preliminary injunction analysis, unjustifiable harm to third parties or any public interest served by the injunction, or the appellants' declaratory judgment or mandamus claims. *See id.*

{¶ 17} Appellants appealed and requested expedited consideration, which was granted. (Aug. 2, 2021 Notice of Appeal; Aug. 2, 2021 Mot. to Expedite Appeal.) In response, appellees filed a motion to dismiss the appeal for lack of jurisdiction on the grounds that the trial court's decision was not a final, appealable order. (Aug. 4, 2021 Appellees' Joint Combined Response to Appellants' Mot. for Expedited Appeal and Mot. to Dismiss Appeal for Lack of Jurisdiction (hereinafter, "Joint Combined Response").) Various third parties have also filed amicus briefs in support of appellants and appellees.[3]

II. JURISDICTION

{¶ 18} Because appellees' motion tests this court's ability to hear this interlocutory appeal, "we begin by examining the question of the court's jurisdiction." *Jack Maxton*

[3] Amicus briefs have been filed by the Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center, the Ohio Chamber of Commerce, the Ohio Business Roundtable, the Ohio Restaurant Association, the Ohio Grocers Association, the Ohio Trucking Association, Policy Matters Ohio, the American Sustainable Business Council, the National Employment Law Project, William E. Spriggs, the Economic Policy Institute, and Andrew Stettner.

Chevrolet, Inc. v. Hanbali, 10th Dist. No. 15AP-816, 2016-Ohio-1244, ¶ 5 (sustaining motion to dismiss for lack of a final appealable order, precluding consideration of the merits of the appeal). *See also Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989) ("It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.").

{¶ 19} Under Article IV, Section 3 of the Ohio Constitution, "[c]ourts of appeal shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders" from the courts of common pleas. "To qualify as a final order that invokes the jurisdiction of an appellate court, an order must satisfy one of the definitions set forth under R.C. 2505.02." *Bay Emm Vay Store, Inc. v. BMW Fin. Servs. NA, L.L.C.*, 10th Dist. No. 17AP-786, 2018-Ohio-2736, ¶ 6. R.C. 2505.02(B) sets forth seven definitions of final orders "that may be reviewed, affirmed, modified, or reversed" by a court of appeals. The fourth definition is the only one relevant to this proceeding and provides a two-part definition of a "provisional remedy." R.C. 2505.02(B)(4). It recognizes the following as a final, appealable order:

> An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Id.

{¶ 20} By definition, a "proceeding for a preliminary injunction" is a "provisional remedy." R.C. 2502.02(A)(3). The trial court's order denied the provisional remedy of a preliminary injunction and "determine[d] the action" with respect to it, thereby preventing a judgment in favor of the appellants. Appellees concede this point. (Joint Combined Response at 7.) We agree and hold that the first prong of R.C. 2502(B)(4) is satisfied.

{¶ 21} The second prong of R.C. 2505.02(B)(4) asks whether delaying the resolution of "all proceedings, issues, claims, and parties in the action" would still provide "a meaningful or effective remedy" to the appealing party. "This division of the final order

statute recognizes that, in spite of courts' interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment." *State v. Muncie*, 91 Ohio St.3d 440, 451 (2001).

{¶ 22} Appellees argue that because "FPUC benefits are readily calculable," appellants would have an effective remedy in the form of money damages if they were to prevail at a trial on the merits. (Joint Combined Response at 9.) We agree with the general proposition cited to support the premise of appellees' argument: relief in the form of money damages does not constitute a "meaningful or effective remedy" under R.C. 2505.02(B)(4)(b). *See id.*, citing *Cleveland Clinic Found. v. Orange Technologies, L.L.C.*, 8th Dist. No. 100011, 2014-Ohio-211, ¶ 14 (stating that "[c]alculable monetary losses and losses incurred during the pendency of the case can be remedied by money damages at the conclusion of the case, so there is generally no right to an immediate appeal from the ruling on the preliminary injunction," and dismissing interlocutory appeal where pending claims remained unresolved). *See also Dimension Serv. Corp. v. First Colonial Ins. Co.*, 10th Dist. No. 14AP-368, 2014-Ohio-5108, ¶ 18 (holding that the "ability to seek money damages" was not affected by the denial of a motion for preliminary injunction). For the following reasons, however, we do not agree that money damages would constitute a meaningful or effective remedy for appellants' claims.

{¶ 23} First, "[n]ot every claim for monetary relief constitutes 'money damages.' " *Interim HealthCare of Columbus, Inc. v. State Dept. of Adm. Servs.*, 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 15. "Even when the relief sought consists of the state's ultimately paying money, a cause of action will sound in equity if 'money damages' is not the essence of the claim." *Id.*, citing *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, ¶ 15. Thus, "[w]hen a party seeks funds to which a statute allegedly entitles it, rather than money in compensation for the losses that the party will suffer or has suffered by virtue of the withholding of those funds, the nature of the relief sought is specific relief, not relief in the form of monetary damages." *Ohio Hosp. Assn. v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, ¶ 29. *See also Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 104 (1991) (holding that an "order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief"), citing and quoting *Bowen v.*

Massachusetts, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.' "); *Henley Health Care v. State Bur. of Workers' Comp.*, 10th Dist. No. 94APE08-1216, 1995 Ohio App. LEXIS 715, *7 (Feb. 23, 1995) (applying *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.* and *Bowen* and observing that "occasionally a money award can be a specific remedy").

{¶ 24} Furthermore, a party's possible award of future monetary damages may not amount to a "meaningful or effective remedy" under R.C. 2505.02(B)(4)(b) where an injunction seeks access to a finite amount of government-appropriated funds. The nature of such relief was pivotal to the question of the Eight District Court of Appeals' jurisdiction under R.C. 2505.02 in *AIDS Taskforce of Greater Cleveland v. Ohio Dept. of Health*, 8th Dist. No. 106971, 2018-Ohio-2727, ¶ 7. In that case, a charity had applied to the Ohio Department of Health for funding pursuant to a federal grant but was denied. *Id.* After the state approved awards to other organizations, the charity was denied an injunction to prevent the dispersal of the funds and appealed. *Id.* The Eighth District held that R.C. 2502.02(B)(4)(b) was satisfied, reasoning that:

> If the AIDS Taskforce is prevented from immediately appealing the court's denial of its preliminary injunction, the Part B funds for which the Taskforce has applied and been denied will likely be distributed by the ODH to the appellee organizations before the trial court renders its final judgment. As such, the Part B funds will have been exhausted. Moreover, there is no evidence that the federal program will make additional funds available in the future. And even if the Taskforce ultimately prevails on its claim for declaratory judgment, such a declaration that the ODH was in error in denying the Taskforce the Part B funds lacks any meaning or effectiveness if the funds no longer exist.

AIDS Taskforce of Greater Cleveland at ¶ 17.

{¶ 25} Here, as well, the federal funds in question are only available for a limited amount of time. Any federal-state agreement dispersing FPUC "shall apply to weeks of unemployment * * * ending on or before September 6, 2021," and there is no indication that Congress will extend the availability period. 15 U.S.C. 9025(g). In a matter of weeks, FPUC funds will "no longer exist." *AIDS Taskforce of Greater Cleveland* at ¶ 17.

{¶ 26} And, as the Supreme Court of Ohio stated when interpreting R.C. 2505.02(B)(4)(b), the question of "whether [an] appeal after final judgment would afford a

meaningful or effective remedy" requires examining more than the relief sought: a court must "consider whether there is a harm such that appeal after final judgment would not 'rectify the damage.' " *In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17, ¶ 18, quoting *Muncie*, at 451, quoting *Gibson-Myers & Assocs., Inc. v. Pearce*, 9th Dist. No. 19358, 1999 Ohio App. LEXIS 5010 (Oct. 27, 1999). "Put another way, 'the proverbial bell cannot be unrung.' " *Id.* In this case, there is harm beyond the expiration of the funds described. The Supreme Court has stated that the purpose of unemployment compensation "is to enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day." (Emphasis sic.) *Leach v. Republic Steel Corp.*, 176 Ohio St. 221, 223 (1964). *See also Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, ¶ 22, quoting *Leach*. In addition, the United States Supreme Court has described the purpose of unemployment compensation under federal statutes by quoting at length the following statement from hearing testimony of a Secretary of Labor:

> I think that the importance of providing purchasing power for these people, even though temporary, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment-insurance benefits in the hands of the people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device.

California Dept. of Human Resources Dev. v. Java, 402 U.S. 121, 132-33 (1971).

{¶ 27} In short, future monetary damages would not allow appellants "to subsist on a reasonably decent level" today or have any effect on appellants' immediate ability to pay for rent, utilities, or food. This harm could not be rectified by money damages at a later date, when the injury could not be undone. Appellants would not be afforded a meaningful or effective remedy by an appeal following final judgment, as R.C. 2505.02(B)(4)(b) requires.

{¶ 28} Because both prongs of R.C. 2505.02(B)(4) are satisfied, the trial court's decision constitutes a final, appealable order that we have jurisdiction to review. Accordingly, appellees' motion to dismiss this appeal is denied.

III. ASSIGNMENT OF ERROR

{¶ 29} We turn to appellants' assignment of error, which states:

> The trial court erred in overruling Appellants' motions for temporary restraining order and preliminary injunction by failing to find that Appellants were likely to prevail on the merits of their claims.

IV. STANDARD OF REVIEW

{¶ 30} Two standards of review apply to the issues raised in this appeal. An abuse of discretion standard applies to the trial court's ultimate ruling denying injunctive relief under Civ.R. 65. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 591 (1995), paragraph three of the syllabus ("The issue whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion."). An "unreasonable, arbitrary, or unconscionable" action by the trial court amounts to an abuse of discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). To find an abuse of discretion, the appellate court must conclude that the trial court's ruling "lacks a 'sound reasoning process.' " *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990).

{¶ 31} In addition, the "question of statutory construction presents an issue of law that we determine de novo on appeal." *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, ¶ 8. *See also Akron Centre Plaza, Ltd. Liab. Co. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, ¶ 10 (on questions of statutory interpretation, the "review is not deferential, but de novo"). The "main objective" when interpreting a statute "is to determine and give effect to the legislative intent." *Turner v. Certainteed Corp.*, 155 Ohio St.3d 149, 2018-Ohio-3869, ¶ 11, citing *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65 (1995). In doing so, "[w]e owe no deference to the lower court's decision, nor are we limited to choosing between the different interpretations of the statute presented by the parties." *Id.*

V. ANALYSIS

{¶ 32} Appellants support their contention that the trial court erred by denying their motion for injunctive relief with two arguments, each of which addresses the ruling that they were unlikely to succeed on the merits. We consider each in turn.

A. *Whether R.C. 4141.43(I) mandates that Ohio accept "all available" unemployment benefits offered under certain federal statutes*

{¶ 33} Appellants argue that R.C. 4141.43(I) requires the state to accept all unemployment benefits available under the federal statutes it lists. (Appellants' Brief at 9.) They believe that the trial court incorrectly interpreted R.C. 4141.43(I) to not cover CARES Act benefits, based on the observation that CARES Act benefits "are not specifically referenced" in it, and that the trial court was incorrect to state "that 'the FPUC benefits are wholly created and administered outside of the Social Security Act thereby abrogating any application of R.C. 4141.43(I).' " (Appellants' Brief at 10, quoting July 29, 2021 Decision at 5.) Appellants point to the legislative history of the statute as an indication of the General Assembly's intent "to ensure that the state and its citizens would secure the greatest access to benefits." *Id.* They also read R.C. 4141.43(I) through the lens of R.C. 4141.46, which requires a liberal construction of Ohio's unemployment compensation statutes. (Appellants' Brief at 15.) In addition, appellants cite to several recent opinions from other states with "similar legislative language" where courts have ruled that plaintiffs are likely to succeed on their claims for injunctive relief to restart benefits under the CARES Act.[4] (Appellants' Brief at 16.)

{¶ 34} In response, appellees assert that "R.C. 4141.43(I) does not compel Governor DeWine to continue the administration of FPUC benefits." (Appellees' Brief at 8.) Like the trial court, they point to the "plain, unambiguous language" of the statute that "does not incorporate CARES Act provisions." *Id.* at 9. Appellees argue that R.C. 4141.43(I) imposes no mandate on the executive that applies here because FPUC benefits are "funded by the general fund of the Treasury" and were "created and administered entirely *outside* of [the Federal-State Unemployment Tax Act of 1970] and the Social Security Act," two of the federal statutes enumerated under the Ohio statute. (Emphasis sic.) (Appellees' Brief at 11-12.)

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[4] *D.A. v. Hogan,* Md. No. 24-C-21-002988, 2021 U.S. Dist. LEXIS 123410 (July 3, 2021); *T.L. v. Holcomb*, Ind. Case No. 49D11-2106-PL-020140 (July 22, 2021).

{¶ 35} In *State ex rel. National Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, ¶ 14, the Supreme Court of Ohio provided the following guidance for statutory interpretation:

> When construing a statute, this court's paramount concern is legislative intent. *State ex rel. Musial v. City of N. Olmsted*, 106 Ohio St. 3d 459, 2005-Ohio-5521, 835 N.E.2d 1243, ¶ 23. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St. 3d 543, 545, 1996-Ohio-291, 660 N.E.2d 463 (1996). R.C. 1.42 instructs: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Our role is to evaluate the statute as a whole and to interpret it in a manner that will give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative. *State ex rel. Myers v. Bd. of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917).

{¶ 36} Our task is to interpret R.C. 4141.43, a provision of Ohio's Unemployment Compensation Act. In addition to the general principles of statutory interpretation stated above, the General Assembly has directed that "[s]ections 4141.01 to 4141.46, inclusive, of the Revised Code shall be liberally construed." *See, e.g., David A. Bennett, D.D.S., Ltd. v. Dir., Ohio Dept. of Job Family Servs.*, 10th Dist. No. 11AP-1029, 2012-Ohio-2327, ¶ 6 ("the unemployment compensation statutes must be liberally construed in favor of awarding benefits to the applicant").

{¶ 37} R.C. 4141.43 is titled "Cooperation with federal, state and other agencies," and its subsection (I) provides:

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

> U.S.C.A. 3306, and the "Workforce Innovation and Opportunity Act," 29 U.S.C.A. 3101 et seq.[5]

{¶ 38} We think it inarguable that R.C. 4141.43(I) expresses the General Assembly's command to the state, by enlisting the administrative efforts of the executive to procure "all available benefits" under the federal statutes listed. In *United Steelworkers of Am. v. Doyle*, 168 Ohio St. 324, 325-26 (1958), the Supreme Court of Ohio "emphasized" the following:

> [T]his court is not permitted to concern itself with the question whether supplemental unemployment benefits should be sanctioned by the law of this state. That, of course, is not a judicial problem but one of legislative policy for determination by the General Assembly or by constitutional amendment. And, as has been said repeatedly in matters of statutory construction, it is not a question as to what the Legislature intended to enact; rather it is a question of the meaning of that which the Legislature did enact.

{¶ 39} The "question of the meaning" of R.C. 4141.43(I) is also illuminated by comparing the original language of the provision with its ultimate form. Ohio's Unemployment Compensation Act was created during the 91st General Assembly of Ohio during 1935 through 1936. *See* H.B. No. 608, 116 Ohio Laws Part II, 286. The original version of R.C. 4141.43(I) stated that the unemployment "commission may cooperate" with other state and federal agencies "necessary for the proper administration of this act." The General Assembly saw fit to repeal the permissive language of the original provision in 1972, when it replaced the suggestion of cooperation with a mandate that then-existing "administrator shall cooperate with the United States Department of Labor to the fullest extent consistent with" the Unemployment Compensation Act. Am.Sub.S.B. No. 77, 134

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[5] R.C. 4141.43 provides incorrect citations to the Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"): "84 Stat. 596" and "26 U.S.C.A. 3306." The Statutes at Large citation references a provision of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. No. 91-538, that appears to invert the page citation of EUCA, which is 84 Stat. 695. The reference to 26 U.S.C. 3306 may have resulted from the fact that the overall 1970 legislative enactment of which EUCA was a part, the Employment Security Amendments of 1970, amends 26 U.S.C. 3306 in its first section, Title I, Part A, while Title II contains the EUCA and is codified at 26 U.S.C. 3304 note. *Compare* 84 Stat. 695 *with* 84 Stat. 708. Nevertheless, it is undisputed that R.C. 4141.43 refers to EUCA, in spite of these errors. *See Brim v. Rice*, 20 Ohio App.2d 293, 295 (1st Dist.1969) ("correcting 'manifestly nonsensical' erroneous statutory reference" because "courts do have authority to correct [an] obvious typographical error" in order "to give effect to the obvious intent of the statute"). *See also Stanton v. Frankel Bros. Realty Co.*, 117 Ohio St. 345, 350 (1927) ("It is a well-settled rule that courts will not permit a statute to be defeated on account of a mistake or error, where the intention of the Legislature can be collected from the whole statute, or where one word has been erroneously used for another, and where the context affords means of correction."); *Delahoussaye v. Ohio State Racing Comm.*, 10th Dist. No. 03AP-954, 2004-Ohio-3388 (applying *Stanton*).

Ohio Laws 150. In addition, the Generally Assembly inserted the specific references to the five federal statutes and the direction "to secure to this state and its citizens all advantages available under" them. *Id*. The General Assembly has not seen fit to amend or alter the substantive language of R.C. 4141.43(I) since then, a period of nearly 50 years.

{¶ 40} However, as appellees state in their brief: "To the extent that the statute does more than mandate 'cooperation' by the ODJFS director to conform with federal unemployment law, it is triggered *only* when benefits are made available under one of the five federal statutes specifically enumerated in R.C. 4141.43(I)." (Emphasis sic.) (Appellees' Brief at 10.) Thus, the ultimate question is whether FPUC benefits are "available" under one of the federal laws stated in R.C. 4141.43. Unsurprisingly, the parties disagree on this issue.

{¶ 41} Citing 15 U.S.C. 9021(g)(1), appellants argue that "both the increased unemployment benefits and the costs associated with administering those benefits are paid through accounts established within the Unemployment Trust Fund, which itself was created by the Social Security Act." (Appellants' Brief at 12.) Citing the same provision, they claim that "[a]ll PUA benefits—including FPUC—and administrative costs are funded by 42 U.S.C. §§ 1104(a) and 1105(a)," which are provisions of the Social Security Act. (Appellants' Brief at 13.) And, they further argue, "all PEUC benefits, including FPUC, are funded by 42 U.S.C. §§ 1104(a) and 1105(a)," citing 15 U.S.C. 9025(d). (Appellants' Brief at 13.)

{¶ 42} Appellees counter that FPUC benefits are actually "funded by the general fund of the Treasury," not the provisions cited by appellants, and that appellants have therefore "improperly conflate[d] the FPUC provisions with the PUA and PEUC provisions." (Appellees' Brief at 11-12.)

{¶ 43} Appellees are correct insofar as appellants do not accurately describe the funding mechanisms set up by the CARES Act that govern PUA, PEUC, and FPUC benefits. 15 U.S.C. 9021 governs PUA. Its funding provision is set forth in 15 U.S.C. 9021(g)(1), which states: "Funds in the extended unemployment compensation account (as established by section 905(a) of the Social Security Act (42 U.S.C. 1105(a)) of the Unemployment Trust Fund (as established by section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used to make payments to States pursuant to [agreements entered into with states under the previous subsection]." 15 U.S.C. 9025 governs PEUC benefits, and its funding provision contains nearly identical language: "Funds in the extended unemployment compensation account (as established by section 905(a) of the Social Security Act (42 U.S.C. 1105(a)) of the

Unemployment Trust Fund (as established by section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used for the making of payments to States having agreements entered into under this section."

{¶ 44} The FPUC provision, in contrast, states only that "[t]here are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection." 15 U.S.C. 9023(d)(3). The Secretary of Labor certifies the amount of FPUC "to the Secretary of the Treasury for payment to each State" directly. 15 U.S.C. 9023(d)(2). Thus, unlike the PUA and PEUC provisions, the appropriated funds are not routed through the unemployment compensation account of the Unemployment Trust Fund. We do note that all three types of benefits, regardless of how they are routed, originate from the general fund of the United States Treasury. 15 U.S.C. 9023(d)(3); 15 U.S.C. 9021(g)(2)(B) (for PUA funds, "the Secretary of the Treasury shall transfer from the general fund of the Treasury * * * to the employment security administration account"); 15 U.S.C. 9021(d)(1)(B) (for PEUC funds, "the Secretary of the Treasury shall transfer from the general fund of the Treasury * * * to the extended unemployment compensation account"). Appellees' position is that this distinction that "the PUA and PEUC may use Social Security Act funds and accounts, [while] the FPUC benefit does not," is a "critical and controlling" distinction demonstrating that the FPUC funds are not one of the "advantages available" under one of the federal statutes enumerated in R.C. 4141.43. (Appellees' Brief at 13, fn. 1.)[6]

{¶ 45} However, this purported distinction recedes into inconsequentiality when one considers the CARES Act definitions of FPUC and applies them under R.C. 4141.43. The FPUC definitions state:

> For purposes of this section—
>
> (1) the terms "compensation", "regular compensation", "benefit year", "State", "State agency", "State law", and "week" have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note); and

[6] Appellees claim in a footnote that they "are not asserting that use of the extended unemployment compensation account and/or the Unemployment Trust Fund by these CARES Act provisions creates any entitlement to continuation of those benefits" because they did not terminate PUA and PEUC benefits. But they cannot simultaneously argue (1) PUA and PEUC fall under the mandate of R.C. 4141.43(I) but FPUC does not, and (2) PUA, PEUC, and FPUC do not fall under the mandate of R.C. 4141.43(I).

> (2) any reference to unemployment benefits described in this paragraph shall be considered to refer to—
>
> (A) *extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970)*;
>
> (B) regular compensation (as defined by section 85(b) of the Internal Revenue Code of 1986) provided under any program administered by a State under an agreement with the Secretary;
>
> (C) *pandemic unemployment assistance under section 2102 [15 U.S.C. 9021];*
>
> (D) *pandemic emergency unemployment compensation under section 2107 [15 U.S.C. 9025]*; and
>
> (E) short-time compensation under a short-time compensation program (as defined in section 3306(v) of the Internal Revenue Code of 1986 [26 U.S.C. 3306(v)]).

(Emphasis added.) 15 U.S.C. 9023(i).

{¶ 46} According to subsection (2)(A) above, one definition of FPUC is "extended compensation" as defined under the Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"), codified at 26 U.S.C. 3004 note. EUCA defines "extended compensation" as "compensation * * * payable for weeks of unemployment beginning in an extended benefit period to an individual under *those provisions of the State law which satisfy the requirements of this title* with respect to the payment of extended compensation." (Emphasis added.) 26 U.S.C. 3304 note, Section 205. Thus, FPUC is defined as unemployment compensation administered under state law that satisfies the requirements of EUCA. Recall that EUCA is one of the federal statutes enumerated in R.C. 4141.43(I).

{¶ 47} FPUC is also *defined as* "pandemic unemployment assistance under" 15 U.S.C. 9021, or PUA. 15 U.S.C. 9023(i)(2)(C). In addition, FPUC is *defined as* "pandemic emergency unemployment compensation under" 15 U.S.C. 9025, or PEUC. 15 U.S.C. 9023(i)(2)(D). Based on these equivalencies, there is no categorial distinction between FPUC and PUA, or FPUC an PEUC that Congress wanted to have recognized. As appellees

describe, both PUA and PEUC are administered through provisions of the Social Security Act, another of the federal statutes referenced in R.C. 4141.43(I). (Appellees' Brief at 12-13.) We conclude that FPUC is one of the "available advantages" described in R.C. 4141.43(I) that the General Assembly requires appellees "secure" to the citizens of the State of Ohio.

B. *Whether the Governor violated the principle of separation of powers by terminating the Agreement for FPUC benefits*

{¶ 48} In the second argument in support of their appeal, appellants argue that the Governor "usurped the legislative power reserved to the General Assembly" under the Ohio Constitution and R.C. 4141.45, thereby violating the principle of separation of powers. (Appellants' Brief at 19, 20-25.) In addition, they argue that the Governor "is bound by R.C. 4141.43(I)," and that the trial court erroneously limited the mandate of that statute to the Director. (Appellants' Brief at 25-28.)

{¶ 49} In response, appellees argue that the Governor acted within his authority under the Ohio Constitution, which "gives the Governor broad power to enter into agreements with other jurisdictions, including federal agencies." (Appellees' Brief at 27-28.)

{¶ 50} The doctrine of separation of powers "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159 (1986), citing *State v. Harmon*, 31 Ohio St. 250 (1877). " 'The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.' " *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134 (2000), quoting *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473 (1929). "The Ohio Constitution is the paramount law of this state, and we recognize that the framers chose its language carefully and deliberately, employed words in their natural sense, and intended what they said." *Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶ 16, citing *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). Thus, our discussion must begin with the text of the constitutional provisions that grant the powers in question.

{¶ 51} Under Ohio Constitution, Article III, Section 5, "[t]he supreme executive power of this state shall be vested in the governor." Ohio Constitution, Article III, Section 6, provides that the governor "shall see that the laws are faithfully executed." Separately, "[t]he legislative power of the state shall be vested in a general assembly." Ohio Constitution, Article II, Section 1. The Ohio Constitution further elaborates on the legislative power of the General Assembly concerning the "[w]elfare of employe[e]s," in Article II, Section 34, which states: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employe[e]s; and no other provision of the constitution shall impair or limit this power."

{¶ 52} It is instructive that, in addition to the division of power between the executive and legislative branches, the Ohio Constitution also commands that "no other provision of the constitution shall impair or limit [the] power" of the General Assembly to "provid[e] for the comfort, health, safety and general welfare" of employees in this state. This command applies with force to the policy mandate of R.C. 4141.43(I) to secure "all available advantages" under the applicable federal unemployment laws. Ohio Constitution, Article II, Section 34. R.C. 4141.43(I) falls within the General Assembly's power to provide for the welfare of employees of this state, and thus the Governor cannot "impair or limit" the requirement to obtain those advantages through the exercise of his executive power. Ohio Constitution, Article II, Section 34.

{¶ 53} "A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is 'the ultimate arbiter of public policy.' " *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 21, quoting *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 21. However, the Governor's own words demonstrate that he assumed the mantle of "ultimate arbiter" on the decision of whether to continue FPUC benefits. *Id.* He justified their termination with his assessment that "[t]he shortage of workers is having a real impact on our supply chain and the cost and availability of goods"; his belief that "Ohio workers are no longer out of work because of the pandemic shutdowns"; and his personal resolution of a complex and controversial economic issue: "The FPUC extra $300 a week in assistance is now discouraging some from returning to work." (Joint Stipulation, Ex. A.) Thus, he concluded, "[n]ow is the time to end it." *Id.* In doing so, he encroached upon the legislative

power exclusively reserved to the General Assembly under the Constitution to decide matters of public policy. The Governor's termination of FPUC benefits was in derogation of that body's mandate under R.C. 4141.43(I) to secure "all available benefits" for the citizens of this state.

{¶ 54} Appellees respond by citing *Ohio Roundtable v. Taft*, 112 Ohio Misc.2d 49, 2002-Ohio-3669, in which the Franklin County Court of Common Pleas ruled that "the Governor's power to decide whether Ohio will enter into an agreement with other states is grounded in the Constitution," and that such power "exists independently" of a statute governing interstate lottery agreements that had not yet taken effect. There is no question that the executive has the authority to enter into an agreement with another sovereign under the express grant of such power in the Constitution. *See* Ohio Constitution, Article III, Section 5. But this case, in contrast, involves an executive action that stood in direct contrast to a specific policy mandate in a long-standing statute, R.C. 4141.43, as well as a violation of the constitutionally delineated check on the executive's ability to "impair or limit" that policy. Ohio Constitution, Article II, Section 34.

{¶ 55} Based on our de novo review of the applicable statutory and constitutional texts, we conclude that the trial court abused its discretion when it determined that appellants were not likely to succeed on the merits of the claim and denied the preliminary injunction. The assignment of error is sustained.

C. *Whether appellants are entitled to judgment as a matter of law under Ohio Appellate Rule 12(B)*

{¶ 56} As a remedy on appeal, appellants request that we "reverse the trial court's judgment and, pursuant to App.R. 12(B), enter the judgment which Appellants requested below." (Appellants' Brief at 29.) However, in addition to injunctive relief, the "judgment requested below," as set forth in the prayer for relief of appellants' complaint, encompasses their declaratory judgment and mandamus claims, as well as attorneys' fees and costs. We are, at most, able to consider the injunctive relief requested, in accordance with the limited jurisdiction conferred under R.C. 2505.02 due to the interlocutory status of this appeal. *See supra* Part II. In other words, the most that this court could do is reverse and remand for entry of the preliminary injunction. *See Charles Penzone, Inc. v. Koster*, 10th Dist. No. 07AP-569, 2008-Ohio-327 (reversing denial of request for preliminary injunction, holding

that plaintiff had satisfied factors necessary for injunction, and remanding cause to the trial court).

{¶ 57} However, appellants have not demonstrated that they are entitled to such relief. App.R. 12(B) states, in relevant part:

> When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

{¶ 58} Under this standard, appellants need to have demonstrated that they have satisfied all requirements for a preliminary injunction, thereby showing that they are "entitled" to it before this court could order the trial court to enter the order "as a matter of law." For a court to grant a preliminary injunction, the party seeking the injunction must show "(1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction." *Ohio Democratic Party v. LaRose*, 10th Dist. No. 20AP-421, 2020-Ohio-4664, ¶ 32. *See also Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶ 18 (10th Dist.) (stating four factors). And, "in determining whether to grant injunctive relief, * * * the factors 'must be balanced,' and * * * 'no one factor is dispositive.' " *Escape Ents., Ltd. v. Gosh Ents., Inc.*, 10th Dist. No. 04AP-834, 2005-Ohio-2637, ¶ 48, quoting *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14 (8th Dist.1996).

{¶ 59} Typically, "the likelihood of success and irreparable harm factors predominate." *Youngstown City School Dist. Bd. of Edn. v. State*, 10th Dist. No. 15AP-941, 2017-Ohio-555, ¶ 68 (Brunner, J., dissenting). In this case, the trial court settled the issue of irreparable injury, which was not appealed, and on remand, this opinion's resolution of the issue of appellants' likelihood of success on the merits will be the law of the case. *See Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, ¶ 1 ("The law-of-the-case doctrine

provides that legal questions resolved by a reviewing court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels."). Unlike *Ohio Democratic Party* and *Hydrofarm, Inc.,* in which the trial court granted the injunctive relief, the trial court here denied relief.

{¶ 60} In doing so, the trial court did not address two of the four factors relevant to the preliminary injunction analysis: unjustifiable harm to third parties or any public interest served by the injunction. The trial court may have ignored those factors in the interests of judicial economy, because in finding no likelihood of success on the merits, its ruling precluded relief. But the analysis remains incomplete. *See Jack Guttman, Inc. v. Kopykake Ents.*, 302 F.3d 1352, 1362-63 (Fed.Cir.2002) (where the trial court denied the preliminary injunction motion and "did not complete its analysis of the four factors [required] to show entitlement to a preliminary injunction," the analysis "still rests within the discretion of the trial court. Thus, the appropriate remedy is not to reverse with instructions to enter the injunction," but to remand for the trial court to complete the analysis). We are also mindful that a "court should exercise great caution regarding the granting of an injunction which would interfere with another branch of government," and therefore believe that a complete analysis of the four factors must occur before the issuance of any injunctive relief. *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 16, quoting *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 526 (1994). For these reasons, we decline to order the trial court to enter the injunction without completing the required analysis, and therefore remand this case to the trial court so that it may consider the previously unaddressed factors relevant to appellants' request for a preliminary injunction.

VI. CONCLUSION

{¶ 61} Appellants' sole assignment of error is sustained and appellees' motion to dismiss is denied. The final order of the Franklin County Court of Common Pleas is reversed and the case is remanded for further proceedings in accordance with this decision.

Motion to dismiss denied;
Judgment reversed and case remanded.

JAMISON, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 62} Because I would grant appellees' motion to dismiss this interlocutory appeal for lack of jurisdiction, I respectfully dissent.

{¶ 63} As discussed by the majority, to constitute a final, appealable order, the order must be one in which "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). In the case sub judice, appellants' complaint was filed 64 days after the Governor announced that Ohio would terminate its participation in FPUC effective June 26, 2021, and 20 days after the FPUC benefits terminated. While appellants' July 16, 2021 complaint seeks both mandamus and declaratory relief, Count II of the complaint seeks an injunction "[e]njoining the State from terminating federally-funded unemployment benefits" and contains in its prayer for relief a request to "[e]njoin [appellees] from withdrawing the State of Ohio from unemployment benefits offered through the CARES Act." (Compl. at 7, 9.) Because the enhanced benefits have already terminated, the heart of appellants' action now lies within the asserted claims of mandamus and declaratory judgment that have not yet been addressed and remain pending in the trial court.

{¶ 64} Given the issue currently before us and the unique factual circumstances presented herein, including the current posture of the case and the fact that the FPUC benefits were terminated prior to the filing of the complaint, I cannot conclude that appellants have no adequate remedy from the effect of the trial court's order on appeal from final judgment on the remaining claims. Thus, in my view the majority's discussion of the merits of this action is premature.

{¶ 65} Accordingly, I would grant appellees' motion to dismiss this interlocutory appeal for lack of jurisdiction and refrain at this time from passing judgment on the merits of appellants' asserted assignment of error.

Exhibit 3

IN THE FRANKLIN COUNTY, OHIO COURT OF COMMON PLEAS
CIVIL DIVISION

STATE ex rel CANDY BOWLING, et al	:	
Plaintiffs,	:	Case No. 21 CVH07-4469
v.	:	JUDGE HOLBROOK
MICHAEL DEWINE, et al	:	
Defendants.	:	

DECISION AND ENTRY DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This matter came before the Court on July 23, 2021, for a hearing on plaintiffs' motion for temporary restraining order and preliminary injunction. The hearing was recorded on the Court's JAVS system in Courtroom 5B. At the culmination of the hearing, the Court invited the parties to submit any supplemental briefs on or before 5:00 p.m. July 26, 2021.

Having considered the briefs submitted, arguments of counsel, affidavits in support of the motion, and the salient law, the Court issues the following decision.

Background

On March 27, 2020, in response to the COVID-19 Pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which, inter alia, provided enhanced unemployment insurance benefits for workers who would not otherwise be eligible for relief. 15 U.S.C. § 9001 et seq. Three types of benefits are created by the CARES Act: (1) Pandemic Unemployment Assistance ("PUA"); (2) Pandemic Emergency Unemployment Compensation ("PEUC"); and (3) Federal Pandemic Unemployment Compensation ("FPUC"), which increased the amount of unemployment

insurance benefit payments a worker could receive by $300 a week from December 27, 2020 to September 6, 2021. See 15 U.S.C. § 9023, further amended by the American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, §§ 9011, 9013, 9016 (March 11, 2021). The CARES Act requires the U.S. Secretary of Labor to provide CARES Act Benefits through agreements with the States and specifically provides that agreements regarding the receipt of PEUC and FPUC benefits may be terminated by a state upon 30 days' written notice. 15 U.S.C. §§ 9023(a), 9025(a).

On May 13, 2021, Governor Mike DeWine announced that Ohio will end its participation in the FPUC program effective June 26, 2021.[1] As a result of this announcement, plaintiffs, who allege they are all recipients of FPUC benefits filed the instant action for Declaratory Judgment, Injunctive Relief and a Writ of Mandamus against Governor DeWine and Matt Damschroder, in his official capacity as Director of the Ohio Department of Job and Family Services. Simultaneous to the filing of the complaint, plaintiffs moved the court for a temporary restraining order and preliminary injunction. Within the motion, plaintiffs argue they are entitled to a preliminary injunction enjoining the State of Ohio from prematurely terminating their FPUC benefits.

Law and Analysis

The party requesting the preliminary injunction must show that "(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served

[1] It is the Court's understanding that the State of Ohio is continuing to participate in PUA and PEUC benefits through the expiration of the same on or about September 6, 2021.

by the injunction." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000). Each of the forgoing elements must be established by a showing of clear and convincing evidence. *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 486, 790 (10th Dist.1996). Clear and convincing evidence is a degree of proof that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *DHSC, LLC v. Ohio Dep't of Job and Family Servs.*, 2012-Ohio-1014, ¶40 (10th Dist.).

Substantial Likelihood of Success on the Merits – R.C. Chapter 4141

The bulk of the parties' argument addresses the first element of an injunction – there is a substantial likelihood that the plaintiffs will prevail on the merits. Accordingly, the Court will start there. Pursuant to the complaint and motion, R.C. 4141.43(I) and R.C. 4141.45 provide the basis for the injunctive relief plaintiffs seek. R.C. 4141.43(I) provides in its entirety:

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

R.C. 4141.45 states, "[a]ll the rights, privileges, or immunities conferred by sections 4141.01 to 4141.46, inclusive, of the Revised Code, or by acts done pursuant thereto, shall exist subject to the power of the general assembly to amend or repeal such sections at any time."

In reliance on this language, plaintiffs contend the statutes mandate that defendants continue the State's participation in the FPUC program. Defendants, on the other hand, submit that the terms of the statutes do not support plaintiffs' position.

When the Court considers the meaning of a statute, the first step is to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 2000-Ohio-2 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. Ambiguity means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." Id.; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486¶ 10. The Court "do[es] not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380 (1994). Indeed, were the Court to ignore the unambiguous language of a statute, or if find a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, it would "invade the role of the legislature: to write the laws." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8

Applying these principles, the Court finds that plaintiffs have not met their burden of establishing a substantial likelihood of success on the merits by clear and convincing

evidence. R.C. 4141.45 simply gives the General Assembly the power to amend or repeal the provisions of R.C. 4141.01 to R.C. 4141.46 at any time. And R.C. 4141.43(I), by its plain and unambiguous terms, is limited to:

> all advantages available under the provisions of the 'Social Security Act' that relate to unemployment compensation, the 'Federal Unemployment Tax Act,' (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the 'Wagner-Peyser Act,' (1933) 48 Stat. 113, 29 U.S.C.A. 49, the 'Federal-State Extended Unemployment Compensation Act of 1970,' 84 Stat. 596, 26 U.S.C.A. 3306, and the 'Workforce Innovation and Opportunity Act,' 29 U.S.C.A. 3101 et seq.

The wording chosen by the Ohio General Assembly clearly does not include the CARES Act. Moreover, the Court finds that the provisions of the Social Security Act that relate to unemployment compensation are not applicable. Such provisions are not what afford the advantage that Ohio's citizens are seeking here; rather, the FPUC extended benefits were undeniably created by the CARES Act. Moreover, the FPUC benefits are funded by the general fund of the Treasury as opposed to accounts established under the Social Security Act. See 15 U.S.C. § 9023(d)(3) (There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.) Accordingly, the FPUC benefits are wholly created and administered outside of the Social Security Act thereby abrogating any application of R.C. 4141.43(I).

Beyond the forgoing, the Court also notes that the mandate of R.C. 4141.43(I) sought to be enforced by plaintiffs is limited to the director of the Ohio Department of Job and Family Services, and specifically, his adoption of appropriate rules, regulations, and administrative methods and standards. The actions taken by Governor DeWine to terminate the State's agreement with the Secretary of Labor with respect to FPUC benefits

do not qualify as the adoption of appropriate rules, regulations, and administrative methods and standards. In other words, the statute does not contemplate the Court's enforcement of voluntary agreements like the one at issue here.

Simply put, because the clear and unambiguous language of R.C. 4141.45 and R.C. 4141.43(I) do not place an obligation on Governor DeWine to continue participation in the FPUC program, the Court finds plaintiffs cannot meet their burden of proving a substantial likelihood of success on the merits by clear and convincing evidence. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Finally, plaintiffs' citation to the decisions out of Arkansas, Indiana and Maryland do not operate to alter this Court's findings. Such decisions are neither binding nor persuasive. The statutes at issue in Indiana and Maryland are broader than R.C. 4141.43(I). The burden of proof for a preliminary injunction is greater in Ohio. See *Ind. High Sch. Athletic Ass'n, Inc. v. Martin,* 731 N.E.2d 1, 7 (Ind. App. 2000) (elements of preliminary injunction must be proven by more than a scintilla and less than preponderance); *Air Lift, Ltd. v. Board of County Comm'rs*, 262 Md. 368, 394 (1971) (applicant for a preliminary injunction must present strong prima facie evidence of the facts and must prove material allegations by a preponderance of the evidence*); Custom Microsystems Inc. v. Blake*, 344 Ark. 536, (2001) (the test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation). And finally, the benefits being terminated are different. Accordingly, the Court declines to follow these distinguishable cases.

Substantial Likelihood of Success on the Merits – Defendants' Authority to Act

Plaintiffs additionally argue that they have a substantial likelihood of success on the merits because Governor DeWine acted outside the authority granted to him under the Ohio Constitution. Conversely, defendants argue that Governor DeWine had constitutional authority to so act.

Section 5, Article III of the Ohio Constitution says: "The supreme executive power of this State shall be vested in the governor." Although the phrase "executive power" has not been specifically defined, it appears to be well established in Ohio law that the Governor not only has the powers necessary to perform the duties specifically required of him by the Constitution and statutes, but he is also empowered to act in the interest of the state and in ways not specified, so long as his actions do not contravene the Constitution or violate laws passed by the legislature within its constitutional authority. *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 371 (1925).

As discussed above, Governor DeWine's actions to terminate the State's participation in FPUC benefits are not in conflict with R.C. 4141.43(I) or R.C. 4141.45. In point of fact, R.C. 4141.45 clearly contemplates the General Assembly's authority to amend R.C. 4141.43(I). Had the General Assembly taken it upon itself to exercise such power, and amended the statute to include the CARES Act, this would be a very different decision. Without a provision in the law which would preclude Governor DeWine from terminating an agreement for FPUC benefits, this Court cannot find that plaintiffs have established by clear and convincing evidence that Governor DeWine acted outside the scope of his authority by doing so here. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Plaintiffs' Irreparable Injury

Though the inquiry could end here, the Court would be remiss not to address the element that plaintiffs did prove by clear and convincing evidence – plaintiffs' irreparable injuries.

Plaintiff Candy Bowling used the weekly $300.00 FPUC benefit to pay for household and medical expenses including the necessary expenses of a service animal. Bowling Aff. at ¶8. Without the FPUC compensation, Plaintiff Bowling is unable to meet these basic living expenses. Id. at ¶10. The same is true for Plaintiff David Willis and countless other Ohioans. And as aptly stated in plaintiffs' reply brief, any delay in the issuance FPUC benefits months or years down the road were plaintiffs to ultimately prevail does not pay for rent and food today. To be sure, this Court finds plaintiffs' loss of benefits as a result of Governor DeWine's actions to terminate the State's participation in FPUC to be a significant and irreparable injury. To argue otherwise is disingenuous.

Even with such a significant and irreparable loss, the Court is bound by the laws of the State of Ohio. In this case, said laws mandate that plaintiffs not only establish their irreparable injuries, but also the substantial likelihood of success by clear and convincing evidence. That has not occurred here.

Conclusion

As with all decisions to be made during the pandemic, this is not one that can be taken lightly. The Court is aware of, and sympathetic to, the thousands of Ohioans without work and in desperate need of any assistance available; however, the injuries suffered by said Ohioans, including plaintiffs here, are but one element for the Court's consideration on a motion for a preliminary injunction. Indeed, the Court simply cannot

legislate from the bench and overlook the clear terms of R.C. 4141.45 and R.C. 4141.43(I). Accordingly, for the reasons set forth herein, the Court finds plaintiffs' motion for a temporary restraining order and preliminary injunction is not well-taken, and hereby **DENIES** the same**.**

Though plaintiffs' claims for declaratory judgment and a writ of mandamus remain pending, the Court finds that pursuant to R.C. 2505.02 and Civ.R. 54(B) **this is a final appealable order; there is no just reason for delay.**

IT IS SO ORDERED.

Electronic notification to counsel of record

Franklin County Court of Common Pleas

Date: 07-29-2021

Case Title: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Case Number: 21CV004469

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Michael J. Holbrook

Court Disposition

Case Number: 21CV004469

Case Style: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 21CV0044692021-07-1699740000
   Document Title: 07-16-2021-MOTION FOR TEMPORARY RESTRAINING ORDER - PLAINTIFF: CANDY BOWLING
   Disposition: MOTION DENIED

15 U.S.C. § 9023 Emergency increase in unemployment compensation benefits

(a) Federal-State agreements. Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the "Secretary"). 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.

(b) Provisions of agreement.

(1) Federal pandemic unemployment compensation. Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to—

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount equal to the amount specified in paragraph (3) (in this section referred to as "Federal Pandemic Unemployment Compensation"), plus

(C) an additional amount of $100 (in this section referred to as "Mixed Earner Unemployment Compensation") in any case in which the individual received at least $5,000 of self-employment income (as defined in section 1402(b) of the Internal Revenue Code of 1986 [26 USCS § 1402(b)]) in the most recent taxable year ending prior to the individual's application for regular compensation.

(2) Allowable methods of payment. Any Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation provided for in accordance with paragraph (1) shall be payable either—

(A) as an amount which is paid at the same time and in the same manner as any regular compensation otherwise payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any regular compensation otherwise payable.

(3) Amount of Federal Pandemic Unemployment Compensation.

(A) In general. The amount specified in this paragraph is the following amount:

(i) For weeks of unemployment beginning after the date on which an agreement is entered into under this section and ending on or before July 31, 2020, $600.

(ii) For weeks of unemployment beginning after December 26, 2020 (or, if later, the date on which such agreement is entered into), and ending on or before September 6, 2021, $300.

(4) Certain documentation required. An agreement under this section shall include a requirement, similar to the requirement under section 2102(a)(3)(A)(iii) [15 USCS § 9021(a)(3)(A)(iii)], for the substantiation of self-employment income with respect to each applicant for Mixed Earner Unemployment Compensation under paragraph (1)(C).

(c) Nonreduction rule.

(1) In general. An agreement under this section shall not apply (or shall cease to apply) with respect to a State upon a determination by the Secretary that the method governing the computation of regular compensation under the State law of that State has been modified in a manner such that the number of weeks (the maximum benefit entitlement), or the average weekly benefit amount, of regular compensation which will be payable during the period of the agreement (determined disregarding any Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation) will be less than the number of weeks, or the average weekly benefit amount, of the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the State law, as in effect on January 1, 2020.

(2) Maximum benefit entitlement. In paragraph (1), the term "maximum benefit entitlement" means the amount of regular unemployment compensation payable to an individual with respect to the individual's benefit year.

(d) Payments to States.

(1) In general.

(A) Full reimbursement. There shall be paid to each State which has entered into an agreement under this section an amount equal to 100 percent of—

(i) the total amount of Federal Pandemic Unemployment Compensation and Mixed Earner Unemployment Compensation paid to individuals by the State pursuant to such agreement; and

(ii) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary).

(B) Terms of payments. Sums payable to any State by reason of such State's having an agreement under this section shall be payable, either in advance or by way of reimbursement (as determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this section for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(2) Certifications. The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this section.

(3) Appropriation. There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.

(e) Applicability. An agreement entered into under this section shall apply—

(1) to weeks of unemployment beginning after the date on which such agreement is entered into and ending on or before July 31, 2020; and

(2) to weeks of unemployment beginning after December 26, 2020 (or, if later, the date on which such agreement is entered into), and ending on or before September 6, 2021.

(f) Fraud and overpayments.

(1) In general. If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation to which such individual was not entitled, such individual—

(A) shall be ineligible for further Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(B) shall be subject to prosecution under section 1001 of title 18, United States Code.

(2) Repayment. In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation to the State agency, except that the State agency may waive such repayment if it determines that—

(A) the payment of such Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

(3) Recovery by State agency.

(A) In general. The State agency shall recover the amount to be repaid, or any part thereof, by deductions from any Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation payable to such individual or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency

which provides for the payment of any assistance or allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the Federal Pandemic Unemployment Compensation or Mixed Earner Unemployment Compensation to which they were not entitled, in accordance with the same procedures as apply to the recovery of overpayments of regular unemployment benefits paid by the State.

(B) Opportunity for hearing. No repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

(4) Review. Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

(g) Application to other unemployment benefits. Each agreement under this section shall include provisions to provide that—

(1) the purposes of the preceding provisions of this section, as such provisions apply with respect to Federal Pandemic Unemployment Compensation, shall be applied with respect to unemployment benefits described in subsection (i)(2) to the same extent and in the same manner as if those benefits were regular compensation; and

(2) the purposes of the preceding provisions of this section, as such provisions apply with respect to Mixed Earner Unemployment Compensation, shall be applied with respect to unemployment benefits described in subparagraph (A), (B), (D), or (E) of subsection (i)(2) to the same extent and in the same manner as if those benefits were regular compensation.

(h) Disregard of additional compensation for purposes of Medicaid and CHIP. The monthly equivalent of any Federal pandemic unemployment compensation paid to an individual under this section shall be disregarded when determining income for any purpose under the programs established under titles XIX and title XXI of the Social Security Act (42 U.S.C. 1396 et seq., 1397aa et seq.) .

(i) Definitions. For purposes of this section—

(1) the terms "compensation", "regular compensation", "benefit year", "State", "State agency", "State law", and "week" have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note); and

(2) any reference to unemployment benefits described in this paragraph shall be considered to refer to—

(A) extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970);

(B) regular compensation (as defined by section 85(b) of the Internal Revenue Code of 1986) provided under any program administered by a State under an agreement with the Secretary;

(C) pandemic unemployment assistance under section 2102 [15 USCS § 9021];

(D) pandemic emergency unemployment compensation under section 2107 [15 USCS § 9025]; and

(E) short-time compensation under a short-time compensation program (as defined in section 3306(v) of the Internal Revenue Code of 1986 [26 USCS § 3306(v)]).

Ohio Rev. Code § 107.17 Authorizing one year participation in federal program.

The governor, pursuant to the constitution and laws of this state, is empowered to commit the state to participation in any federal program not authorized by existing state law, where such program in the judgment of the governor will benefit this state and its citizens through grants of money or other provision for jobs or services. Such commitment may also entail both pledge and payment of a matching contribution from this state, whether in money or in kind, if such contribution, in the judgment of the governor, is available from existing appropriations and authorizations. All commitments for money shall be subject to the approval of the controlling board, which shall not be restricted for this purpose by the provisions of section 127.17 of the Revised Code. Action authorized by this section shall be taken by executive order, which shall identify the program in which the state will participate, designate the state officer, board, commission, or other agency that will participate on behalf of the state, and identify the source of moneys or contribution in kind that will constitute the state match for the program. Any commitment so made in exercise of the power granted to the governor by this section does not extend beyond one program year subject to earlier cancellation by action of the general assembly. The governor shall transmit to the speaker of the house of representatives and the president of the senate a copy of any such executive order upon its issuance and shall deposit the original with the secretary of state.

Ohio Rev. Code § 4141.43 Cooperation with federal, state, and other agencies.

(A) The director of job and family services may cooperate with the industrial commission, the bureau of workers' compensation, the United States internal revenue service, the United States employment service, and other similar departments and agencies, as determined by the director, in the exchange or disclosure of information as to wages, employment, payrolls, unemployment, and other information. The director may employ, jointly with one or more of such agencies or departments, auditors, examiners, inspectors, and other employees necessary for the administration of this chapter and employment and training services for workers in the state.

(B) The director may make the state's record relating to the administration of this chapter available to the railroad retirement board and may furnish the board at the board's expense such copies thereof as the board deems necessary for its purposes.

(C) The director may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment compensation law.

(D) The director may enter into arrangements with the appropriate agencies of other states or of the United States or Canada whereby individuals performing services in this and other states for a single employer under circumstances not specifically provided for in division (B) of section 4141.01 of the Revised Code or in similar provisions in the unemployment compensation laws of such other states shall be deemed to be engaged in employment performed entirely within this state or within one of such other states or within Canada, and whereby potential rights to benefits accumulated under the unemployment compensation laws of several states or under such a law of the United States, or both, or of Canada may constitute the basis for the payment of benefits through a single appropriate agency under terms that the director finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the unemployment compensation fund.

(E) The director may enter into agreements with the appropriate agencies of other states or of the United States or Canada:

> (1) Whereby services or wages upon the basis of which an individual may become entitled to benefits under the unemployment compensation law of another state or of the United States or Canada shall be deemed to be employment or wages for employment by employers for the purposes of

qualifying claimants for benefits under this chapter, and the director may estimate the number of weeks of employment represented by the wages reported to the director for such claimants by such other agency, provided such other state agency or agency of the United States or Canada has agreed to reimburse the unemployment compensation fund for such portion of benefits paid under this chapter upon the basis of such services or wages as the director finds will be fair and reasonable as to all affected interests;

(2) Whereby the director will reimburse other state or federal or Canadian agencies charged with the administration of unemployment compensation laws with such reasonable portion of benefits, paid under the law of such other states or of the United States or of Canada upon the basis of employment or wages for employment by employers, as the director finds will be fair and reasonable as to all affected interests. Reimbursements so payable shall be deemed to be benefits for the purpose of section 4141.09 and division (A) of section 4141.30 of the Revised Code. However, no reimbursement so payable shall be charged against any employer's account for the purposes of section 4141.24 of the Revised Code if the employer's account, under the same or similar circumstances, with respect to benefits charged under the provisions of this chapter, other than this section, would not be charged or, if the claimant at the time the claimant files the combined wage claim cannot establish benefit rights under this chapter. This noncharging shall not be applicable to a nonprofit organization that has elected to make payments in lieu of contributions under section 4141.241 of the Revised Code, except as provided in division (D)(2) of section 4141.24 of the Revised Code. The director may make to other state or federal or Canadian agencies and receive from such other state or federal or Canadian agencies reimbursements from or to the unemployment compensation fund, in accordance with arrangements pursuant to this section.

(3) Notwithstanding division (B)(2)(f) of section 4141.01 of the Revised Code, the director may enter into agreements with other states whereby services performed for a crew leader, as defined in division (BB) of section 4141.01 of the Revised Code, may be covered in the state in which the crew leader either:

(a) Has the crew leader's place of business or from which the crew leader's business is operated or controlled;

(b) Resides if the crew leader has no place of business in any state.

(F) The director may apply for an advance to the unemployment compensation fund and do all things necessary or required to obtain such advance and arrange for the repayment of such advance in accordance with Title XII of the "Social Security Act" as amended.

(G) The director may enter into reciprocal agreements or arrangements with the appropriate agencies of other states in regard to services on vessels engaged in interstate or foreign commerce whereby such services for a single employer, wherever performed, shall be deemed performed within this state or within such other states.

(H) The director shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment, covered under this chapter, with the individual's wages and employment covered under the unemployment compensation laws of other states which are approved by the United States secretary of labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for:

(1) Applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws, and

(2) Avoiding the duplicate use of wages and employment by reason of such combining.

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

(J) The director may disclose wage information furnished to or maintained by the director under Chapter 4141. of the Revised Code to a consumer reporting agency as defined by the "Fair Credit Reporting Act," 84 Stat. 1128, 15 U.S.C.A. 1681a, as amended, for the purpose of verifying an individual's income under a written agreement that requires all of the following:

(1) A written statement of informed consent from the individual whose information is to be disclosed;

(2) A written statement confirming that the consumer reporting agency and any other entity to which the information is disclosed or released will safeguard the information from illegal or unauthorized disclosure;

(3) A written statement confirming that the consumer reporting agency will pay to the bureau all costs associated with the disclosure.

The director shall prescribe a manner and format in which this information may be provided.

(K) The director shall adopt rules defining the requirements of the release of individual income verification information specified in division (J) of this section, which shall include all terms and conditions necessary to meet the requirements of federal law as interpreted by the United States department of labor or considered necessary by the director for the proper administration of this division.

(L) The director shall disclose information furnished to or maintained by the director under this chapter upon request and on a reimbursable basis as required by section 303 of the "Social Security Act," 42 U.S.C.A. 503, and section 3304 of the "Internal Revenue Code," 26 U.S.C.A. 3304.