

**IN THE FRANKLIN COUNTY COURT OF APPEALS
TENTH APPELLATE DISTRICT**

<p>CANDY BOWLING, <i>et al.</i></p> <p>Plaintiff,</p> <p>v.</p> <p>MICHAEL DEWINE, in his official capacity as GOVERNOR of the State of Ohio, <i>et al.</i></p> <p>Defendant.</p>	<p>Case No.: 21AP000380</p> <p>On appeal from the Franklin County Common Pleas Court, Case No. 21 CV 04469</p> <p>ACCELERATED CALENDAR</p>
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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

Assignment of Error: 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.

First issue presented for review: Does R.C. 4141.43(I) mandate that the executive branch of the State take all action necessary to secure for Ohioans the maximum unemployment compensation benefits available under federal law?

Second issue presented for review: Does the Governor, acting without legislative approval, possess the authority to terminate Ohio's participation in a federal unemployment compensation program that provides additional benefits to unemployed Ohioans?

INTRODUCTION:

Appellants, Candy Bowling, Shawnee Huff, and David Willis, appeal from the Franklin County Common Pleas Court’s July 29, 2021 *Decision And Entry Denying Plaintiffs’ Motion For Temporary Restraining Order And Preliminary Injunction (“Decision”)*. Appellants sought injunctive against Appellants DeWine (hereinafter referred to the “Governor”) and Damschroeder (collectively referred to as the “State”) barring the State’s decision to withdraw from the federal government’s Federal Pandemic Unemployment Compensation (“FPUC”) program which was enacted as part of the CARES Act (Pub. Law 116-136) (the “Act”).

Appellants contend that R.C. 4141.43(I) requires the State to maximize all available unemployment benefits offered by the federal government. They also argue that the Governor, acting without legislative approval, may not terminate Ohio’s participation in any federal unemployment program.

This case raises purely legal issues. It poses two fundamental questions:

2. Under R.C. 4141.43(I), may the State refuse to participate in the FPUC for its entire term?

2. Did the Governor possess the authority, by himself, to terminate Ohio's participation in the FPUC program?

If the answer to either of these questions is "no," then this Court should reverse the trial court and enter the temporary restraining order and preliminary injunction denied below.

FACTS:

The facts of this case are not in dispute. Appellant's supported their complaint with affidavits that Appellees do not challenge. The parties also entered into stipulations regarding other relevant facts.

Stipulation, T.d. 60. The real dispute in this case relates to interpretation of the applicable law. Therefore, many of the relevant facts relate to the interplay of new, Covid-related amendments to federal statutes and existing state unemployment statutes.

The CARES Act enhanced unemployment benefits.

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The CARES Act was

Congress's response to the tremendous economic strain the Covid pandemic placed on all sectors of the United States economy. And FPUC was one of the Act's benefits that Congress intended to alleviate the financial strain placed on American workers who, through no fault of their own, could no longer work to support their families.

The CARES Act created three types of benefits: (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 \$600 a week. See 15 U.S.C. § 9023.¹

The CARES Act requires the U.S. Secretary of Labor to provide CARES Act benefits, including FPUC, through agreements with the States. 15 U.S.C. 9021(f). Pursuant to that statute the Governor executed a contract on behalf of the State of Ohio with the Department of Labor

¹ This extra \$600 per week was reduced to \$300 per week through the American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, § 9011, 9013, 9016.

in March 2020. *Stipulations*, T.d. 60, Ex. A. Through that contract, Ohio accepted all PUA, PEUC, and FPUC benefits available under the CARES Act. *Id.*, paragraph XIV p. 3. The contract requires that Ohio’s Department of Job and Family Services “apply the methods of administration required by section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)) to the functions undertaken pursuant to this Agreement.” *Id.*, paragraph X, p. 3.

The operative provision of CARES Act for the FPUC benefits is Sec. 2104, entitled “Emergency Increase In Unemployment Compensation Benefits”:

(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 of \$600 (in this section referred to as ‘Federal Pandemic Unemployment Compensation’).

15 U.S.C. 9024(b) (emphasis added). Therefore, FPUC is nothing more than a flat dollar increase to regular weekly unemployment benefits available under the Social Security Act.

Subsection (i) of 15 U.S.C. § 9023 bolsters this conclusion. That provision provides definitions for the FPUC statute:

(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 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). Thus, both the Federal-State Extended Unemployment Compensation Act of 1970 and 26 U.S.C. § 3306 are incorporated into FPUC, and the interpretation of FPUC must be made in conjunction with those statutes.

Federal disbursements to States of FPUC funds.

Although PUA, PEUC and FPUC provided different benefits, all those benefits are administered under 15 U.C.S. 9021. All monies paid to the states for PUA, PEUC, and FPUC benefits are disbursed from the “extended unemployment compensation account” established by section 1105(a) of title 42 of the Unemployment Trust Fund. 15 U.S.C. 9021. “Amounts in the extended unemployment compensation account shall be available for transfer to the accounts of the States in the Unemployment

Trust Fund as provided in section 204(e) of the Federal-State Extended Unemployment Compensation Act of 1970.” 42 U.S.C. 1105(c).

Similarly, all monies disbursed to states to cover the administrative expenses of administering the CARES Act benefits are paid through the employment security administration account. 15 U.S.C. 9021(g)(2)(A).²

Thus, all monies disbursed to Ohio to pay FPUC benefits and administration expenses are transferred from accounts established under the “Federal-State Extended Unemployment Compensation Act of 1970,” which itself is a part of the Social Security Act. 15 U.S.C. 9021. And all FPUC monies transferred into each state’s “extended unemployment compensation account” are commingled with regular unemployment compensation benefits and then transferred to the state for payment to beneficiaries.

The Governor decides to terminate the DOL Contract.

² 15 U.S.C. 9021(g)(2)(A) provides: “Funds in the employment security administration account (as established by section 901(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 subsection (f)(2)(B).”

In May of this year, when the country seemed to have turned the corner on the crisis, Governor DeWine decided that the additional weekly \$300 FPUC benefit was obstructing Ohio's path to economic recovery. And on May 24, 2021, the Governor wrote a letter to the Department of Labor withdrawing the State from the FPUC program effective June 26, 2021. *Stipulations*, T.d. 60, Ex. B. Since that June 26th date, those Ohioans who otherwise would have qualified for the additional FPUC benefits, have instead seen their unemployment benefits reduced.

The impact on Appellants.

Each of the Appellants qualified for the FPUC benefits and continued to be eligible for those benefits on June 26, 2021, when the program ended in Ohio. And each is now suffering the very financial difficulties that FPUC was meant to combat. In fact, the trial court expressly found that each Appellant was in dire economic straits and that the denial of FPUC benefits is causing them irreparable harm. *Decision*, p. 8.

ARGUMENT:

The trial court denied Appellants the requested injunctive relief for two reasons. First, it held that R.C. 4141.43(I) does not require the State to participate in the FPUC program at all. Second, it held that the Governor, as the chief executive of the state, possessed the requisite power to terminate Ohio’s FPUC contract with the Department of Labor, notwithstanding the language of R.C. 4141.45. It reached these conclusions despite the mandate of R.C. 4141.46, which requires liberal construction of the state’s unemployment insurance statutes.

The trial court’s decision was reversible error.

A. R.C. 4141.43(I) mandates that the State accept all available federal unemployment benefits for Ohioans.

Since its inception, the state of Ohio has participated in the federal unemployment program, enacted by Congress and signed by President Franklin Roosevelt in the landmark Social Security Act. As part of Ohio’s unemployment compensation system, the Ohio General Assembly requires the Director of the Department of Job and Family

Services “take such action . . . 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. . . .”

R.C. § 4141.43(I).³

The trial court held that the benefits available under the CARES Act, which includes FPUC, are not specifically referenced in R.C. 4141.43(I) and 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).” *Id.* The trial court also held that this language does not bar the Governor—as opposed to the Director of the Department of Job and Family Services—from depriving Ohioans of available federal unemployment benefits through executive fiat.

Decision, p. 5. Both of these conclusions are incorrect.

1. FPUC is incorporated into, and administered under, the unemployment compensation provisions of the Social Security Act.

Revised Code 4141.43(I) reads, in its entirety:

³ Unemployment benefits administered under Title III, section 303 of the Social Security Act.

(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.*

R.C. § 4141.43(I).

The legislative history of this language is instructive. This language regarding “all advantages available” did not appear in the original 1936 law. After questions arose concerning the eligibility of Ohioans for supplemental unemployment insurance in the 1950s, the Ohio Supreme Court held that it was the duty of the General Assembly to clarify the scope of unemployment benefits:

[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.

...

If such a plan of supplemental unemployment benefits is to be approved in this state, that approval should not be left to mere inference but should be placed on the sound basis of definite statutory or constitutional amendment.

United Steel Workers of America v. Doyle, 168 Ohio St. 324, 325-26, 328 (1958).

After the *Doyle* decision was issued, the Ohio General Assembly took action to amend Ohio's unemployment compensation law to expressly state its intention was to ensure that the state and its citizens would secure the greatest access to benefits.

In this case, the trial court held that the FPUC benefits did not arise under the Social Security Act. Decision, p. 5. But a plain reading of the FPUC and the contract between Ohio and the Department of Labor leads to a different conclusion.

As set forth above, 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. 15 U.S.C. § 9021(g)(1).

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Contrary to Appellees’ arguments, the FPUC is part of the Social Security Act and is administered as part of the state’s unemployment compensation system. In fact, the Contract between the State and the Department of Labor requires the State to administer FPUC benefits under the existing framework created by the Social Security Act. *Stipulations*, T.d. 60, Ex. A, paragraph X. And the Federal-State Extended Unemployment Compensation Act of 1970 and 26 U.S.C. § 3306 are incorporated into FPUC. Therefore FPUC benefits arise and are administered under federal statutes specifically referenced in R.C. § 4141.43(I), triggering its application.

Congress did not create a separate vehicle for the enhanced federal benefits in the CARES Act. The PUA weekly benefit amount includes the \$300-per-week FPUC payments. 15 U.S.C. § 9021(d)(1). All PUA benefits—including FPUC—and administrative costs are funded by 42 U.S.C. §§ 1104(a) and 1105(a). 15 U.S.C. § 9021(g). Similarly, the PEUC benefits also include the \$300-per-week FPUC payments. 15 U.S.C. § 9025(a)(4)(A). And all PEUC benefits, including FPUC, are funded by 42 U.S.C. §§ 1104(a) and 1105(a), while the PEUC

administration costs are funded by 42 U.S.C. § 1101(a). 15 U.S.C. § 9025(d). The FPUC benefits conferred under 42 U.S.C. §§ 1101, et seq. are an extension of the existing Federal Unemployment Tax Act, 26 U.S.C. §§ 3301.01, et seq. The Federal Unemployment Tax Act is one of the specifically enumerated laws under R.C. § 4143.43(I).

The State's arguments that the benefits at issue in this case do not fall within those specified in the statute are without merit and ignore the plain language of the CARES Act and the American Recovery Act.

Congress, through 42 U.S.C. § 1101, et seq., established various funds and accounts to hold money for the states, including the Unemployment Trust Fund, the Employment Security Administration Account, and the Extended Unemployment Compensation Account. The CARES Act provisions incorporate the Unemployment Trust Fund, the Employment Security Administration Account, and the Extended Unemployment Compensation Account into PUA, PEUC, and FPUC. These unemployment compensation enhancements achieve this by providing a framework for agreements between states and the U.S. Department of Labor that are a mechanism for the states to access the benefits of 42

U.S.C. § 1101, et seq. Put simply, PUA, PEUC, and FPUC do not create new programs. Rather, they authorize states to draw enhanced benefits already conferred under 42 U.S.C. § 1101, et seq. through the existing system.

2. The language of R.C. 4141.43(I) requires the State to participate in FPUC throughout its entire life.

Ohio's unemployment compensation statutes must be liberally construed. R.C. 4141.46. "A liberal construction has been defined as giving "generously all that the statute authorizes," and "adopting the most comprehensive meaning of the statutory terms in order to accomplish the aims of the Act and to advance its purpose, with all reasonable doubts resolved in favor of the applicability of the statute to the particular case. Interpretation and construction should not result in a decision so technical or narrow as to defeat the compensatory objective of the Act." *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 741 N.E.2d 121, 2001-Ohio-236, (citations omitted).

Unfortunately, the trial court read R.C. 4141.43(I) narrowly to deny Ohioans the benefits afforded under FPUC. The trial court applied

a purely technical reading to the statute, and in so doing, avoided the expansive reading that would effectuate the law's compensatory objectives. Rather, the trial court embraced the Governor's unilateral policy decision to override the policy previously announced by the General Assembly.

Courts in other states have concluded that similar legislative language requiring states to cooperate with the federal government "to the fullest extent" or to "secure all available benefits" expressed clear legislative intent to mandate to accept the unemployment benefits at issue in this case. For example, in evaluating similar legislative language in Maryland requiring state officials to cooperate with the Department of Labor "to the fullest extent", a Maryland court recently held that state officials lacked authority to reject pandemic unemployment benefits:

The Court concludes that Plaintiffs have shown a likelihood of success in demonstrating that the "fullest extent" language of § 8-310(a)(1) should be interpreted in this context to constrain administrative discretion and require the Maryland Labor Secretary to maximize use of any available federal unemployment benefits. By plain language, the General Assembly meant cooperation "to the fullest extent that this title allows" to be extensive and

comprehensive. In the same section, the command that the Maryland Secretary “shall cooperate” with the federal Secretary “to the fullest extent” contrasts with the discretion accorded that she “may afford reasonable cooperation” with other federal units. *Id.* § 8-310(b)(1) (emphasis added). Moreover, mandating cooperation “to the fullest extent that this title allows” carries the implication that the Maryland Secretary must act whenever an opportunity for cooperation exists within the bounds of Maryland law. This is not just “the Secretary should be very cooperative with federal officials.” It requires action as far as Maryland law in this arena will permit.

D.A. v. Hogan, Maryland Circuit Court for Baltimore City, Case No.24-C-21-002988 (Memorandum Opinion Granting Temporary Restraining Order, July 3, 2021) (attached as Ex. A to *Supplemental Brief of Defendants DeWine and Damschroeder*, T.d. 71).

In Indiana, the Marion Superior Court interpreted similar statutory language as a legislative mandate to secure the same federal unemployment benefits at issue here:

(4) Indiana Code § 22-4-37-1 states, in relevant part, that “[i]t is declared to be the purpose of this article to secure to the state of Indiana and to employers and employees in Indiana all the rights and benefits which are conferred under the provisions of 42 U.S.C. 501 through 504, 42 U.S.C. 1101 through 1109, 26 U.S.C. 3301 through 331 1, and 29 U.S.C. 49 *et seq.*, and the amendments to those statutes.” The enumerated US Code sections deal with the establishment

and funding of federal and state unemployment benefits schemes.

(15) The Legislature's determination in I.C. 22-4-37-1 is an instruction to the Department of Workforce Development to administer unemployment benefits available in the Unemployment Trust Fund. Similar to the Legislature's determination of other aspects of the system of unemployment benefits in Indiana, like the number of weeks a claimant may be eligible or how to calculate a claimant's monetary benefit amount, I.C. 22-4-37-1's directive to secure all rights and benefits conferred by 42 U.S.C. § 1104 is binding on the State.

(16) A preponderance of the evidence demonstrates the State of Indiana's decision to prematurely end PUA, PEUC and FPUC benefits in Indiana violates I.C. 22-4-37-1. Therefore, Plaintiffs have shown reasonable likelihood of prevailing on the merits of their declaratory judgment action.

T.L. v. Holcomb, Marion Superior Court, Case No. 49D11-2106-PL-020140 (Findings of Fact, Conclusions of Law, and Judgment, July 22, 2021) (attached as Ex. B to *Supplemental Brief of Defendants DeWine and Damschroeder*, T.d. 71); *see also, Armstrong v. Hutchison*, Pulaski County Circuit Court, Case No. 2021-4507 (*Order*, July 28, 2021) (attached as Ex. A to *Notice Of Supplemental Authority*, T.d. 79).

The Indiana, Maryland, and Arkansas statutes seek the same objective as R.C. 4141.43(I)—to maximize the unemployment benefits

available from the federal government. Their reasoning should guide the Court in this matter.

B. The Governor’s power is not unconstrained.

Ours is a system of law. And the law applies to all in equal measure - even government officials. Indeed, those charged with enforcing the laws should be all the more cognizant of limits of their authority. And we, as a society, should be careful to keep our elected officials in check lest the law be ignored.

1. The State usurped the legislative power reserved to the General Assembly.

Appellants ask the Court to order the State to reinstate the FPUC program in Ohio because the Governor was without authority to terminate Ohio’s participation in that program. Whereas R.C. § 4141.43(I) requires the State to participate in the FPUC program, R.C. § 4141.45 prohibits withdrawal from that program without an act of the General Assembly.

R.C. 4141.45 states: “All 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.” R.C. 4141.45. This provision is somewhat odd. It states a proposition that is inherent in our form of government. The legislature must, by definition, possess the power to legislate. Why then was the provision included?

The only rational answer is that the provision is intended to reserve to the General Assembly the exclusive power to modify the State’s unemployment compensation system. And when viewed in conjunction with Article II, Section 34 of the Ohio Constitution, this conclusion becomes all the more apparent.

But by exercising a power reserved to the legislature, the Governor encroached on the authority of the legislature and violated the principle of separation of powers.

“The first, and defining, principle of a free constitutional government is the separation of powers.” *State v. Bodyke*, 126 Ohio St.3d 266, 933 N.E.2d 753, 2010-Ohio-2424, ¶ 39. “The separation-of-powers doctrine represents the constitutional diffusion of power within

our tripartite government. The doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.” *Stetter v. R.J. Corman Derailment Services, L.L.C.*, 125 Ohio St.3d 280, 927 N.E.2d 1092, 2010-Ohio-1029, (2010); *see also Hale v. State* (1896), 55 Ohio St. 210, 214, 45 N.E. 199, 200 (“[T]he people possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments.”).

The Ohio Supreme Court has long lauded the Constitution’s system of checks and balances:

As James Madison explained in Federalist Paper No. 47, the sharing of powers through a system of checks and balances complemented the principle of separation of powers by acting as an additional restraint on government. This blending of powers not only limits government itself, it also provides mechanisms by which each branch can defend its place in our constitutional system. The Federalist Papers No. 47 (Madison 1788) (Wills Ed.1982), at 243-246.

DeRolph v. State, 93 Ohio St.3d 309, 327, 754 N.E.2d 1184, 2001-Ohio-1343, (2001). Where a specific power is expressly reserved

to one branch, the other branches have no authority to intrude on that power.

Like its federal counterpart, the Ohio Constitution commits legislative power to the legislative branch, the Ohio General Assembly. Further, Article II, Section 34 of the Ohio Constitution specifically reserves to the General Assembly the authority to legislate matters concerning the welfare of employees:

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 employees; and no other provision of the constitution shall impair or limit this power.

Ohio Const. Art. II, Sec. 34.

And like his federal counterpart, the Governor has the duty to “see that the laws are faithfully executed.” Ohio Const. Art. III, Sec. 6. But legislative power remains exclusively in the legislature, not the executive. And with respect to labor and employment issues, the power of the General Assembly is paramount to the “supreme executive power” of the Governor. Ohio Const. Art. II, Sec. 34.

In his well-known concurrence in *Youngstown Sheet & Tube Co.*, Justice Jackson set forth an instructive description of the separation of powers and functions between the legislature and the executive:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case

only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952)

(Jackson, J., concurring). This case presents the third scenario—one in which the executive acts contrary to the expressed intentions of the legislative branch.

Yet that is what the Governor has done. Even though R.C. § 4141.45 specifically reserved to the General Assembly the power to terminate or modify Ohio’s employment compensation system, the Governor decided to act in his own self-interest and in disregard of the law. The Governor is substituting his policy assessment for that of the legislature when it enacted 4141.43(I). He simply lacks the constitutional or statutory authority to do so.

However, when it passed R.C. § 4141.43(I), the General Assembly has already considered and rejected the policy arguments posed by the State. The scope of unemployment benefits in Ohio was not without controversy at the time R.C. § 4141.43(I) was enacted. A contemporary

observer noted that there was a fierce policy debate concerning the expansion of benefits in the 1950s, but that the Ohio General Assembly had ultimately passed legislation firmly and unambiguously in favor of the expansion of benefits in the face of a previous economic and employment emergency:

With that invitation [of the *Doyle* court] still ringing in their ears, and with the aftereffects of the recession of 1958 very much before them, the members of both Houses of the General Assembly in 1959 elected to pass the amendments referred to at the beginning of this article. It may be fortunate that circumstances combined to bring about this result, since there was formidable opposition to the very last. It may be presumed that many of the same groups who fought the unemployment insurance program in the beginning, and who have periodically opposed amendments to liberalize the state laws and keep the program up-to-date, were behind the opposition to the solution through private supplementation. In any event, the issue has finally been settled in Ohio, at least for the present.

Edwin Teple, Supplemental Unemployment Benefits, 20 Ohio St. L.J. 583 (1959).

2. The Governor, as chief executive of the State, is bound by R.C. 4141.43(I).

Ohio's unemployment compensation system is administered by the Department of Job and Family Services. R.C. 4141.13. And the Governor appoints the director of job and family services, who is

“subject to removal at the pleasure of the governor.” R.C. 121.03. “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*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, 2003 WL 21470307, at ¶ 25.

“However, a director may also exercise executive power through authority delegated by the General Assembly.” *State ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 804 N.E.2d 88, 2004-Ohio-493, (3rd Dist. 2004) (citing *State ex rel. Junk v. Herrick* (1923), 107 Ohio St. 611, 621, 140 N.E. 314.

In its *Decision*, the trial court noted “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.” *Decision*, p. 5. The trial court then concluded that the Governor’s actions were not those contemplated by the statute, and therefore permitted. These conclusions are flawed for three reasons.

First, the trial court ignores the fact that the director of job and family services and the governor are not truly distinct offices. The director is the governor's subordinate and serves at the pleasure of the governor. R.C. 121.03. In essence, the director is utterly beholden to the governor for his position and power. There is no practical possibility for the exercise of independent will by the director. Because the Governor holds supreme executive power of the state, in essence, he is the holder of the offices within his department, including that of the Department of Job and Family Services.

Second, and more importantly, the trial court's holding permits the Governor to thwart the General Assembly through executive action any time he wants. By negating through executive order an action of an administrative agency, the Governor can bar the agency from carrying out its statutory functions. And he may do so even if the power in question was conferred by the General Assembly in the first place. The trial court's reasoning threatens the constitutional authority of the General Assembly and should not be adopted casually.

Finally, a contract, which is required under the CARES Act, is a method of obtaining benefits for the State's citizens. Indeed, it is the sole method provided by the CARES Act to obtain increased unemployment benefits for Ohioans. The Court should note that the Governor executed the Agreement with the Department of Labor obligating the Director of Job and Family Services to perform the Agreement. It is inconsistent to argue that the Governor is distinct from the Director when his actions bind the Director.

CONCLUSION:

Ohio both mandates the State's participation in federal unemployment programs and forbids termination of that participation without legislative action. The Governor, acting on behalf of the entire state, including his appointed Director of Job and Family Services, unilaterally terminated Ohio's participation in FPUC. Supreme executive power does not mean supreme power. The authority of the executive is defined and limited, and when the General Assembly has lawfully acted to limit that power, its will must be acknowledged.

In this instance, the Governor's actions justify the imposition of a temporary restraining order and a preliminary injunction. The trial court found that Appellants are suffering irreparable harm because of the governor's conduct. Its basis for denying the requested relief relates solely to its interpretation of the statutes at issue.

In this instance, Appellants request that the Court reverse the trial court's judgment and, pursuant to App. R. 12(B), enter the judgment which Appellants requested below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021 a copy of the foregoing was submitted electronically to the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, and by email directly to counsel on the date of filing.

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