IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE STATE OF OHIO, ex rel. CANDY BOWLING, et al., Plaintiffs, v. MICHAEL DEWINE, et al., Defendants.	:	Case No. 21-CV-4469 Judge Michael Holbrook
THE STATE OF OHIO, ex rel. JAMES PARKER, et al., Plaintiffs, v. MICHAEL DEWINE, et al., Defendants.	:	Case No. 21-CV-5524 Judge Michael Holbrook
SEBASTIAN NASH, et al., Plaintiffs, v. MICHAEL DEWINE, et al., Defendants.	:	Case No. 21-CV-5525 Judge Michael Holbrook

DEFENDANTS' COMBINED BRIEF IN RESPONSE TO JANUARY 30, 2023 ENTRY, RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE, AND MOTION TO DISMISS PLAINTIFF'S CONSOLIDATED CLASS ACTION COMPLAINT

Defendants Mike DeWine, in his official capacity as the Governor of Ohio, Ohio Department of Job and Family Services ("ODJFS"), and Matt Damschroder, in his official capacity

as Director of ODJFS, hereby submit their brief responsive to this Court's January 30, 2023 Entry. This filing also serves as Defendants' response to Plaintiffs' motion for leave to file the Consolidated Class Action Complaint and their motion to dismiss Plaintiffs' Consolidated Class Action Complaint based upon mootness and lack of subject-matter jurisdiction. A Memorandum follows.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

Plaintiffs'[1] "Consolidated Class Action Complaint" should be dismissed as it sets forth claims that are moot and seeks relief that this Court lacks jurisdiction to award. Alternatively, Plaintiffs' request for leave to amend should be denied because amendment would be futile.

Plaintiffs are asking this Court for something that no longer exists—payments from a temporary federal pandemic-relief program that ended over a year ago. In 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which included the Federal Pandemic Unemployment Compensation ("FPUC") program as a supplemental unemployment-compensation benefit available to the states. Ohio initially chose to participate in FPUC, and it subsequently used the discretion given to it by Congress to end that participation effective June 26, 2021. Less than three months later, on September 6, 2021, all FPUC benefits ended. At present, FPUC does not exist. Despite this, Plaintiffs are asking this Court to order Defendants to obtain "Ohio's share" of leftover FPUC funding and distribute those funds to Plaintiffs and their purported class to retroactively pay enhanced unemployment-compensation benefits from June 26–September 6, 2021.

The Ohio Supreme Court rightfully declared this case moot. The legal question in that appeal—and on remand to this Court—is whether state law prohibited Ohio from ending its participation in FPUC early. Plaintiffs argue that the answer is yes and that, as relief, they should

[1] Plaintiffs Candy Bowling, David Willis, and Shawnee Huff filed the July 16, 2021 complaint. *See generally* Compl. Plaintiffs James Parker and Sarah Russell filed a separate complaint on August 31, 2021. *State ex rel. Parker v. Ohio Department of Job & Fam Servs.*, Franklin C.P. No. 21 CV 5524 (Aug. 31, 2021). That same day, Plaintiffs Sebastian Nash and Zachary Dunn filed a third complaint. *Nash v. Ohio Department of Job & Fam. Servs.*, Franklin C.P. No. 21 CV 5525 (Aug. 31, 2021). The three cases were consolidated before this Court on September 23, 2021. *See* Entry Approving Consolidation. For simplicity, this Memorandum refers to all plaintiffs in all cases collectively as "Plaintiffs."

receive the FPUC money they would have received had Ohio not left the program early. But FPUC no longer exists, and so, as a practical matter, this Court cannot grant Plaintiffs effectual relief. As a result, these consolidated cases are moot and must be dismissed.

The mandamus claim added to Plaintiffs' Consolidated Class Action Complaint, which arguably survives mootness, should nonetheless be dismissed for lack of subject-matter jurisdiction. Plaintiffs seek, *inter alia*, an order that Defendants pay Plaintiffs the FPUC benefits that Plaintiffs claim they were entitled to—regardless of whether Ohio can successfully rejoin the FPUC program and obtain federal funding to do so. Plaintiffs therefore seek money damages against the State, which this Court does not have jurisdiction to award. Because Plaintiffs' claim for money damages arises from the same circumstances as their claims for declaratory judgment and injunctive relief, the Court of Claims has exclusive jurisdiction over all of Plaintiffs' claims. Thus, if the Court does not find the case moot, it should dismiss Plaintiffs' Consolidated Class Action Complaint for lack of subject-matter jurisdiction.

* * *

This memorandum answers the Court's questions posed in its January 30, 2023, entry in the following manner: Sections V.A.1-3. address whether the claims raised in the original complaint and/or supplemental complaint are moot. Section V.A.4. addresses whether the Court has subject-matter jurisdiction over the claims raised in the supplemental complaint. Section V.B. sets forth additional reasons for dismissal not addressed in the Court's January 30 entry. Section V.C. addresses whether leave of court was required for plaintiffs to file a supplemental class action complaint and whether leave should be granted.

II. FACTUAL BACKGROUND

Standard unemployment benefits in Ohio last twenty-six weeks. R.C. 4141.30(D). During these weeks, the State pays the unemployment benefit, and the federal government shoulders the administrative costs. Thereafter, an unemployed individual may qualify for extended benefits, *see* 26 U.S.C. § 3304(a)(11), the costs of which are split between the State and federal governments. To obtain federal assistance in paying these and other workforce benefits, a State's unemployment-compensation system must receive approval from the federal Secretary of Labor. *See generally* 26 U.S.C. § 3304; *see also Alfred L Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 594 (1982) (authorizing approved state agencies to participate in the nationwide employment service); *Coastal Counties Workforce, Inc. v. LePage*, No. 1:17-cv-00417, 2018 U.S. Dist. LEXIS 11213, *1 (D. Me. Jan. 24, 2018) (providing federal funds for workforce development to States with certain rules and regulations).

To that end, the Director of ODJFS has statutory authority to take actions to ensure that Ohio can participate in federal workforce programming and receive federal funding. This statute, referred to here as the Cooperation Statute, provides as follows:

> 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). Simply put, the Director has authority to structure Ohio's unemployment-compensation programs such that Ohioans are eligible to receive available federal funds.

The onset of the COVID-19 pandemic in early 2020 threatened to overwhelm all available sources of aid for unemployed workers. To ameliorate the pandemic's effects on working families, Congress enacted the CARES Act in early 2020. 15 U.S.C. § 9001 *et seq.* The CARES Act included three layers of unemployment benefits. Relevant here, the Act created FPUC benefits to supplement traditional unemployment-compensation benefits. 15 U.S.C. § 9023. Congress made FPUC benefits available to each State for use at the State's discretion: "[a]ny State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor." 15 U.S.C. § 9023(a). Likewise, Congress gave States the discretion to terminate FPUC benefits: "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." *Id*.

Ohio entered into an agreement for FPUC benefits. Consolidated Class Action Complaint ("CCAC") at ¶ 18. As a result of Ohio's agreement, individuals already receiving traditional unemployment-compensation benefits received an additional $600 per week in FPUC benefits beginning in March 2020, which was later reduced to an additional $300 per week. 15 U.S.C. § 9023(b)(3)(A). Although Congress extended the FPUC eligibility window several times, all FPUC benefits ended on September 6, 2021. *Id*.; *see also* CCAC at ¶¶ 15-16.

Eventually, the ongoing receipt of FPUC benefits led to a new problem: a reduced incentive to work. With employers struggling to find employees, Governor DeWine elected to terminate the State's agreement with the Secretary of Labor. *See* Letter from Governor DeWine to Principal Deputy Assistant Secretary LeVine, Exhibit A to Defendants' Motion to Dismiss, Case No. 21-CV-4469. On May 24, 2021, he notified the U.S. Department of Labor that Ohio would no longer participate in the FPUC program after the week ending June 26, 2021. *Id*. Thus, beginning June 27, 2021, Ohio no longer had an agreement with the Department of Labor to provide FPUC

payments. This date fell less than three months before the FPUC eligibility window closed for good on September 6, 2021. 15 U.S.C. § 9023(b)(3)(A)(ii). This termination affected FPUC benefits only; unemployed workers continued to receive other forms of unemployment compensation.

III. PROCEDURAL HISTORY

On July 16, 2021, Plaintiffs filed a complaint for declaratory, injunctive, and mandamus relief. Plaintiffs were recipients of the FPUC benefits that Governor DeWine terminated in late June. Plaintiffs sought a declaration that the Cooperation Statute, R.C. 4141.34(I), required Defendants to secure all available unemployment compensation, including FPUC benefits. CCAC ¶¶ 37-40. Plaintiffs asked the Court to enjoin Defendants from terminating FPUC benefits and to order Defendants to renew Ohio's agreement for FPUC benefits with the Secretary of Labor. *Id*. ¶¶ 41-58. Plaintiffs sought preliminary injunctive relief, which this Court denied. *See* Decision and Entry Denying Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Case No. 21-CV-4469. Plaintiffs appealed.

The Tenth District Court of Appeals reversed. *State ex rel. Bowling v. DeWine*, 10th Dist. Franklin No. 21AP-380, 2021-Ohio-2902. According to the Tenth District, this dispute hinged on one "ultimate question"—specifically, are FPUC benefits "'available' under one of the federal laws stated in R.C. 4141.43," the Cooperation Statute? *Id*. at ¶ 40. The Court concluded that FPUC benefits are, in fact, "extended compensation" under the Federal-State Extended Employment Compensation Act of 1970, one of the statutes enumerated in the Cooperation Statute. *Id*. at ¶ 46. Because it found that FPUC benefits fall within the scope of the Cooperation Statute, the Tenth District concluded that Defendants had a statutory duty to procure those benefits for Ohioans and violated that duty by terminating Ohio's participation in the FPUC program. *Id*. at ¶¶ 38-47. Having concluded that Plaintiffs were likely to succeed on the merits of their claim that they are

entitled to FPUC benefits, the Court remanded the case for consideration of the other preliminary-injunction factors. *Id*. at ¶¶ 59-61.

Defendants sought review in the Supreme Court of Ohio, which accepted their appeal. *State ex rel. Bowling v. DeWine*, 165 Ohio St.3d 1442, 2021-Ohio-3938, 175 N.E.3d 1270. Specifically, Defendants posed the following 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," and the parties briefed the specific issue of whether R.C. 4141.43(I) mandated Ohio's continuation in FPUC. *See* Defendants' Memorandum in Support of Jurisdiction at p. 10; Briefs, Case No. 2021-1062. Briefing and oral argument on Defendants' appeal lasted well into 2022, months beyond the FPUC program's expiration in September 2021. Ultimately, the Supreme Court dismissed the case as moot. In full, its opinion reads as follows: "This cause is dismissed, sua sponte, as moot." *State ex rel. Bowling v. DeWine*, S. Ct. No. 2021-1062, 2022-Ohio-4122, ¶ 1. Defendants moved the Supreme Court to modify its decision, adding language vacating the Tenth District's opinion and remanding with instructions to dismiss the case as moot. *State ex rel. Bowling v. DeWine*, S. Ct. No. 2021-1062 (Nov. 23, 2022), Appellants' Motion for Reconsideration. That motion was denied. *State ex rel. Bowling v. DeWine*, S. Ct. No. 2021-1062, 2022-Ohio-4617.

Without waiting for direction from the Court of Appeals, on January 2, 2023, Plaintiffs filed a consolidated class-action complaint in this Court. *See generally* CCAC. Plaintiffs seek to certify a class of "[a]ll Ohioans eligible to receive FPUC benefits at any point between June 26, 2021 and September 6, 2021 (inclusive), but who did not receive them as a result of Defendants' termination of FPUC benefits." *Id.* at ¶ 73.[2] As in their initial complaint, Plaintiffs continue to seek

[2] As of the date of this filing, Plaintiffs have not yet filed a motion for class certification.

declaratory, injunctive, and mandamus relief. Although Plaintiffs acknowledge that the FPUC program expired on September 6, 2021, Plaintiffs believe that FPUC funds still exist and still remain available to States upon request. *Id*. at ¶ 33 & fn.5. Accordingly, Plaintiffs argue that a justiciable controversy persists because, if the Court holds that R.C. 4141.43(I) requires Defendants to procure FPUC benefits, Defendants can "reinstate" FPUC benefits and retroactively provide them to Plaintiffs. *Id*. at ¶ 83. To that end, Plaintiffs seek an order requiring Defendants to reinstate Ohio's participation in FPUC, *id*. at ¶ 99, as well as a writ of mandamus ordering the same, *id*. at ¶ 114. In the alternative, Plaintiffs seek a writ of mandamus forcing Defendants to pay FPUC benefits to Plaintiffs directly. *Id*. ¶¶ 115-25.

IV. STANDARD OF REVIEW

"The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question. It is not the duty of a court to decide purely academic or abstract questions." *T&R Props. v. Wimberly*, 10th Dist. Franklin No. 19AP-567, 2020-Ohio-4279, ¶ 7, quoting *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791, 600 N.E.2d 736 (10th Dist.1991). "No actual controversy exists where a case has been rendered moot by an outside event." *Id.*, quoting *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991). "When a case becomes moot, dismissal of the case is appropriate because the case no longer presents a justiciable controversy." *Id.*, quoting *Rithy Properties, Inc. v. Cheeseman*, 2016-Ohio-1602, 63 N.E.3d 752, ¶ 14 (10th Dist.). Thus, if, pending appeal, something occurs that renders it impossible for the court to grant the plaintiff effectual relief, the appeal will be dismissed. *Flaherty*, 74 Ohio App.3d at 791, quoting *Pacific Terminal Co. v.*

Interstate Commerce Comm., 219 U.S. 498, 514, 31 S.Ct. 279, 283, 55 L.Ed. 310, 315 (1910). *See also State ex rel. Ohio Democratic Party v. LaRose*, 159 Ohio St.3d 277, 2020-Ohio-1253, 150 N.E.3d 99, ¶ 5. Mootness is a jurisdictional question. *Downtown Enters. Co. v. Mullet*, 5th Dist. Holmes No. 17CA016, 2018-Ohio-3228, ¶ 75.

When a motion to dismiss is based upon mootness, a court "can review evidential materials which normally would not be proper in the context of a Civ.R. 12(B)(6) motion; that is, the moving party can establish the mootness of an issue through extrinsic evidence." *State ex rel. Noble v. Vettel*, 11th Dist. Ashtabula No. 2004-A-0079, 2005-Ohio-692, ¶ 5.

Civ.R. 12(B)(1) "permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation." *Guillory v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. Franklin Nos. 07AP-861, 07AP-928, 2008-Ohio-2299, ¶ 6. "The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *Id.* A court "is not confined to the allegations of the complaint when determining its subject-matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment." *Id.*

V. ARGUMENT

A. This Court should dismiss the Consolidated Class Action Complaint because it lacks jurisdiction.

The Court lacks jurisdiction over Plaintiffs' Consolidated Class Action Complaint for two independent reasons. First, Plaintiffs' claims have been mooted by the expiration of the FPUC program on September 6, 2021, and this Court cannot entertain jurisdiction over moot claims. Second, this Court lacks subject-matter jurisdiction because Plaintiffs' claim that Defendants owe them FPUC benefits is nothing more than a demand for money damages against the State.

1. This case is moot because the FPUC program has expired.

Plaintiffs seek declaratory, injunctive, and mandamus relief[3] based on one legal premise: state law requires Defendants to participate in the FPUC program. CCAC at ¶¶ 79-114. But the FPUC program no longer exists, *see id.* at ¶ 33 and 15 U.S.C. § 9023(b)(3)(A)(ii), and so the question of what R.C. 4141.43(I) requires with respect to FPUC is now moot. Any claim to present or future FPUC benefits is likewise moot. *Heyward v. City of New York*, S.D.N.Y. No. 21-CV-9376, 2023 U.S. Dist. LEXIS 3707, *5-6 (challenge to City's vaccine-mandate program was moot once the program expired); *Sharifullin v. Blinken*, D.D.C. No. 21-cv-728, 2022 U.S. Dist. LEXIS 32749, *7-8 (mandamus action seeking adjudication of visa application was moot once the relevant visa program expired); *cf. City of Cincinnati v. State*, 1st Dist. Hamilton No. C-170563, 2020-Ohio-4547 (challenge to state statute mooted when the statute had been repealed and replaced); *City of Bexley v. State*, 10th Dist. Franklin No. 17AP-465, 2019-Ohio-4688, ¶ 13 (same).

Plaintiffs believe, however, that a controversy between the parties still exists on a backward-looking basis. Plaintiffs' claims are premised on their repeated insistence, "on information and belief," that Ohio can reinstate its agreement with the Department of Labor and obtain funding from the federal government to pay retroactive FPUC claims. *See, e.g.*, CCAC at ¶¶ 33-35, 83, 96, 110. Plaintiffs point to a letter dated September 3, 2021, from Jim Garner, the Administrator of the Department of Labor's Office of Unemployment Insurance, to support their assertion that FPUC funds are still available to the States despite the program's expiration, but they ignore the specific contents of the letter. *See id*. at ¶ 33, n. 5. That letter states, in relevant part, "[i]f your state is re-considering its termination of one or more CARES Act programs, please

[3] Plaintiffs also seek alternative mandamus relief, which will be addressed in Section V.A.4., below.

reach out to the Department as soon as possible to discuss the options that may be available to ensure that any changes are made ***prior to October 6***." (Emphasis added.) Affidavit of Kelly Huskey ¶ 8 & Ex. B, Letter from Jim Garner, U.S. Dept. of Labor, Employment and Training Administration, available at https://oui.doleta.gov/unemploy/pdf/cares_act_termination.pdf (last accessed February 10, 2023). It continues to note that the Department of Labor "***will consider*** a request to rescind that is submitted in writing and signed by the Governor or their appointed designee." (Emphasis added.) *Id.* Thus, even if FPUC benefits remained available for some period of time after September 6, 2021, this letter does not establish that such benefits existed after the October 6, 2021 deadline set forth in the letter, much less on January 2, 2023, when Plaintiffs filed their Consolidated Class Action Complaint.

In fact, other Department of Labor guidance shows that FPUC benefits are no longer available. The Department of Labor issued additional guidance regarding reinstituting participation in FPUC. In a letter to the States, it said:

> Any state that has provided notice to the Department of its intent to terminate any of the pandemic UI programs prior to the September 6, 2021 end date may reinstitute participation in any or all programs it previously indicated it would be terminating. If the state's date of termination has not become effective, the state simply needs to provide the Department with written notice that it is rescinding or modifying the effective date of its prior notice of termination for the particular program(s) and the state will then be able to continue making payments under the program(s). If the date of termination has occurred and the state has terminated participation, ***the state may need to enter into a new agreement with the Department to reinstitute operations***. By entering into a new agreement, the state may experience a lapse in time period for which the state may pay benefits under the FPUC, MEUC, and PEUC programs as ***the new agreement becomes effective the week of unemployment beginning after a new agreement is signed***.

(Emphases added.) Huskey Aff. ¶ 8 & Ex. A p. 7. According to the Department of Labor, a State should enter into a new agreement to reinstitute FPUC benefits. That agreement can only become

effective the week after it is signed. But because the FPUC program ended years ago, any new agreement would "become[] effective" at a time in which no FPUC benefits are offered.

Simply put, the Department of Labor has not said that, in 2023, a State may re-enroll itself in the now-defunct FPUC program and receive federal funding to pay retroactive claims dated prior to September 6, 2021. Huskey Aff. ¶ 15. On the contrary, its guidance indicates that any reinstatement after termination must be approved by the Department of Labor and should have been requested prior to October 6, 2021.[4] Defendants made no such request prior to October 6, 2021. *Id*. at ¶ 13. Defendants have received no communications from the Department of Labor indicating that reinstatement of FPUC benefits is possible after October 6, 2021. Nor has the Department of Labor made available any mechanism for States to re-enroll in the FPUC program after that date. *Id*. at ¶ 14. Further, any request for reinstatement of the FPUC program would require a new agreement with the Department of Labor and would only apply to claims *after* the new agreement is signed. Because FPUC has now ended, there are no FPUC claims payable after a new agreement is signed. *Id*. at ¶¶ 9-10, 16. All available evidence shows that Ohio has no way to reactivate an agreement that has not existed for 19 months for a program that has not existed for 17 months.

Indeed, Plaintiffs even acknowledged that this case would become moot once the FPUC program expired. In their Emergency Motion for Relief from Stay, filed in the Ohio Supreme Court in August 2021, they noted the impending expiration of FPUC benefits, sought an order remanding the case to this Court, and characterized remand as "necessary to avoid mooting ***the claims at issue*** in this case." (Emphasis added.) Emerg. Mot. at 1. Plaintiffs were correct in August 2021 that

[4] A May 2022 email from the Department of Labor confirms that this guidance "continues to stand" as the Department's position on CARES Act programs. Huskey Aff. ¶ 14 & fn.1.

expiration of FPUC benefits mooted the claims at issue in this case, and they are wrong to depart from that stance now.

As a factual matter, the controversy between the parties is moot. Plaintiffs cannot obtain any FPUC benefits going forward, and no mechanism exists to secure FPUC benefits from the Department of Labor retroactively either.[5] The Court cannot award Plaintiffs the relief they seek, and Plaintiffs' claims are therefore moot.

2. This case is moot because the Supreme Court of Ohio held as much.

No doubt recognizing the state of affairs set forth above, the Supreme Court correctly concluded that the controversy between the parties is moot. That decision is binding here. The Ohio Supreme Court was surely aware that the end-date for the FPUC program had passed and, recognizing that FPUC benefits were no longer available, it dismissed the matter as moot. The brevity of the Ohio Supreme Court's dismissal entry exemplifies the simplicity of the situation: the FPUC program no longer exists, and so the issue is moot.

The scope of the Supreme Court's mootness order is further clarified by the legal issue before the Court. Defendants' memorandum in support of jurisdiction presented the following 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." *See* Jur. Mem., Case No. 2021-1062, at 10. Accordingly, Defendants argued, state law did not forbid the Governor from withdrawing from the FPUC program. *See id*. at 12–13. No other issue appeared in the memorandum in support of jurisdiction or in the parties' briefing. The correct interpretation

[5] Admittedly, Plaintiffs' claim in Count IV of the Consolidated Class Action Complaint that Defendants must pay FPUC benefits directly to Plaintiffs is not mooted by the unavailability of FPUC funds from the Department of Labor. But the Court lacks subject-matter jurisdiction over any claim that the State must pay monetary relief to Plaintiffs. *See* Section V.A.4., below.

of R.C. 4141.43(I) was the sole issue before the Supreme Court and was the sole issue that could have been mooted.

Plaintiffs' Consolidated Class Action Complaint is premised on the Court's accepting Plaintiffs' interpretation of R.C. 4141.43(I). But this Court is bound by the Ohio Supreme Court's finding that the statutory interpretation issue is moot. "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." (Citation omitted.) *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 47, 741 N.E.2d 127 (2001). Instead, under the law-of-the-case doctrine, "a reviewing court's decision was the law in the reviewed case for all legal questions and for all subsequent proceedings in the case." (Citation omitted.) *Id.* Thus, "on remand, a trial court must adhere to the appellate court's determination, and is without authority to extend or vary the mandate given, absent extraordinary circumstances, such as an intervening decision by the Ohio Supreme Court." *Floom v. Prudential Prop. & Cas. Ins. Co.*, 5th Dist. Stark No. 2003CA00122, 2003-Ohio-5957, ¶ 20, quoting *Hawley v. Ritley*, 35 Ohio St.3d 157, 519 N.E.2d 390 (1992).

The Ohio Supreme Court has declared the controversy between the parties as to R.C. 4141.43(I)'s meaning moot, and this Court is bound by that holding.

3. Plaintiffs' arguments that a live controversy persists all fail.

In their briefing to the Supreme Court, Consolidated Class Action Complaint, and arguments to this Court, Plaintiffs advance several theories why their case is not moot. Each theory fails.

First, Plaintiffs believe that the Supreme Court's mootness determination applies only to the preliminary-injunction order, not the underlying legal controversy on the interpretation and

application of the Cooperation Statute. Plaintiffs concede that a preliminary injunction "can no longer be granted as a matter of law," and the preliminary-injunction proceedings are therefore moot. Opp. to Motion for Reconsideration at 2. But Plaintiffs insist that the Supreme Court did not conclude that the underlying legal controversy between the parties was moot. As explained in Section V.A.2. above, however, the proceedings before the Supreme Court and the posture of the case do not support Plaintiffs' argument on this point. The question posed to the Ohio Supreme Court was not whether a preliminary injunction was available, but a question of law: whether R.C. 4141.43(I) compelled Ohio's continued participation in FPUC. *See, e.g.*, Jur. Mem., Case No. 2021-1062, at 10-15; Appellant's Brief, Case No. 2021-1062, at 13-22; Appellee's Brief, Case No. 2021-1062, at 14-22. If, as Plaintiffs believe, the Supreme Court did not find the underlying statutory-interpretation question to be moot, it would not have declared the appeal moot. Indeed, if a live controversy still existed as to the correct interpretation of the Cooperation Statute, the Court would have answered the legal question posed in Defendants' Memorandum in Support of Jurisdiction.

But even if Plaintiffs are correct that the mootness decision applied to the preliminary-injunction proceedings alone, their Complaint is not saved. As a factual matter, for all the reasons identified in Section V.A.1. above, this Court cannot award them relief. Whether this Court situates its mootness determination in a straightforward application of the Supreme Court's holding or in the factual unavailability of FPUC benefits, the result is the same: the case is moot.

Second, Plaintiffs appeared to argue at the January 24, 2023 status conference that the Tenth District's preliminary-injunction order remains binding on the parties and resolves the statutory-interpretation issue. To begin, this position irreconcilably clashes with Plaintiffs' insistence that the Supreme Court's holding mooted the preliminary-injunction proceedings only.

Suppose that Plaintiffs are correct and the Supreme Court decided that the preliminary-injunction proceedings alone became moot. That mootness determination, in turn, would apply to the preliminary-injunction decision issued by the Tenth District Court of Appeals. In other words, Plaintiffs cannot argue both (1) that the Supreme Court mooted the preliminary-injunction proceedings, and the preliminary-injunction proceedings alone, and (2) that the Tenth District's preliminary-injunction order is still effective and remains the law of this case.

The logical inconsistency of Plaintiffs' position aside, the Tenth District's opinion still does not un-moot this case. Even if the Tenth District's opinion requires this Court to find that R.C. 4141.43(I) mandates participation in the FPUC program, the simple fact remains that ***there is no FPUC program***. As set forth in Part V.A.1.above, Defendants cannot reinstate Ohio's participation in a program that no longer exists, even if state law required them to do so in the summer of 2021. The Court simply cannot grant relief in the form of reinstating the FPUC program. Accordingly, whether the Tenth District's opinion remains binding on the parties is ultimately immaterial: the case is moot.

Third, Plaintiffs believe that the controversy between the parties as to the application of the Cooperation Statute might recur in the future, should Congress reauthorize the FPUC program. They assert that "there is a substantial likelihood that the United States Congress will, in the future, reauthorize FPUC (or another similar program), just as it previously did through CAUWA," that "there is a substantial risk that Defendants, on behalf of the State of Ohio, will refuse to participate or prematurely withdraw from participation in such a program, just as they have done in the past," and that "Plaintiffs and Class members would likely be entitled to unemployment benefits under a reauthorized version of FPUC." CCAC at ¶¶ 84, 87-88. Plaintiffs therefore rely on three hypothetical situations, all of which must occur to give rise to a cause of action. This does not

establish an exception to mootness. *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142.

Not even federal courts ground their jurisdiction "in the mere hope of congressional action." *Saxby v. Mayorkas*, D.D.C. No. 21-cv-964, 2022 U.S. Dist. LEXIS 5418, *3 (Jan. 11, 2022). In fact, "[t]he mootness doctrine prohibits courts from deciding a case if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (Citations omitted.) *Id.*; *see Front Range Equine Rescue v. Vilsack*, 782 F.3d 565, 570 (10th Cir.2015). Here, for the relief requested to be effectual this Court would have to speculate that Congress will re-authorize the FPUC program. That is not a prediction on which the court can base its jurisdiction.

4. The Court lacks subject-matter jurisdiction because Plaintiffs' claim for FPUC benefits paid by the State is a claim for money damages.

If reinstatement of the FPUC program proves impossible, Plaintiffs offer an alternative theory of relief. In Count IV of their Consolidated Class Action Complaint, Plaintiffs argue that they are entitled to a writ of mandamus requiring "Defendants to take all actions necessary to promptly pay FPUC benefits due to Plaintiffs and Class members for the period beginning on June 26, 2021 through September 6, 2021." CCAC at ¶ 125. *See also id.* at Prayer for Relief, ¶ F (seeking an order that Defendants "promptly pay FPUC benefits due to Plaintiffs and Class members"). In short, Plaintiffs seek the payment of money damages—in the form of FPUC benefits—directly from the State. Such relief is not available here. And, because Plaintiffs' other claims arise from the same circumstances, this Court lacks jurisdiction over the entire case.

The Court of Claims of Ohio has exclusive and original jurisdiction to determine the liability of state officials. R.C. 2743.02(F). The definition of "state" includes "the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and

other instrumentalities of the state." R.C. 2743.01(A). The Court of Claims' exclusive jurisdiction empowers that court "to adjudicate an action or class of actions to the exclusion of all other courts." *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St.3d 234, 2004-Ohio-824, 804 N.E.2d 19, ¶ 26. Original jurisdiction empowers the Court of Claims "to hear and decide a matter before any other court can review the matter." *Id*.

The Court of Claims has exclusive, original jurisdiction over civil actions against the State for money damages. *See, e.g.*, *Measles v. Indus. Comm'n of Ohio*, 128 Ohio St.3d 458, 2011-Ohio-1523, 946 N.E.2d 204, ¶ 7. The Court of Claims "has no jurisdiction over actions that only seek declaratory judgment or injunctive relief because, before the advent of the [Court of Claims Act], parties could sue the state for declaratory and injunctive relief in the courts of common pleas." *Cristino v. Ohio Bureau of Workers' Comp.*, 10th Dist. Franklin No. 13AP-772, 2014-Ohio-1383, ¶ 12. However, if a plaintiff asserting a legal claim for money damages "also files a claim for declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances . . . the court of claims has exclusive, original jurisdiction" over that claim as well." *State ex rel. Sawicki v. Court of Common Pleas*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 29, quoting R.C. 2743.03(A)(2). *See also George v. State*, 10th Dist. Franklin Nos. 10AP-4, 10AP-97, 2010-Ohio-5262, ¶ 21 ("To the extent that the claims for injunctive and declaratory relief are brought against the state, the Court of Claims has exclusive original jurisdiction, pursuant to R.C. 2743.03(A)(2), because these claims arise out of the same circumstances giving rise to the civil action for money damages.").

Whether the Court of Claims or the court of common pleas has jurisdiction depends on whether the stated claims are legal or equitable. *City of Cleveland v. Ohio Bureau of Workers' Comp.*, 159 Ohio St.3d 549, 2020-Ohio-337, 152 N.E.3d 172, ¶ 10. Suits for money damages

against the state fall within the exclusive, original jurisdiction of the Court of Claims. *Measles*, 128 Ohio St.3d at ¶ 7. Suits involving both equitable and legal claims must also be brought in the Court of Claims. *Id.*

Whether requested restitution is legal or equitable "depends on 'the basis for [the plaintiff's] claim'' and the nature of the underlying remedies sought." *City of Cleveland*, 159 Ohio St.3d at ¶ 11, quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). *See also State Ex Rel Bureau of Workers Compensation v. Judge O'Donnell*, S.Ct. No. 2022-0108, 2023-Ohio-428, ¶ 13 ("Regardless of how an action is labeled, the substance of the party's arguments and the type of relief requested determine the nature of the action."). The Ohio Supreme Court has recognized a general distinction between legal and equitable restitution:

> Restitution is available as a ***legal*** remedy when a plaintiff cannot "assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds recovering money to pay for some benefit the defendant had received from him" * * * Restitution is available as an ***equitable*** remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."

(Emphases added.) *Santos v. Ohio Bureau of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, 13 (further citation omitted). *See also City of Cleveland* at ¶ 11.

For example, in *City of Cleveland*, the city of Cleveland sued the Bureau of Workers' Compensation complaining that the Bureau charged it excessive insurance premiums to offset lower premiums paid by other employers. *City of Cleveland* at ¶ 1. The city sought reimbursement of the allegedly-excessive premiums. *Id.* The Ohio Supreme Court found that "[t]he money allegedly overpaid is no longer in the BWC's possession" because it went into a general insurance fund, became comingled with other premium payments, and was paid out to employers or injured

workers. *Id.* at ¶ 17. Because the money sought could not clearly be traced to particular funds or property in the Bureau's possession, the court found that "Cleveland's claim sounds in law." *Id.* It then concluded that the Court of Claims had exclusive jurisdiction over the claim. *Id. See also Judge O'Donnell*, *supra*, at ¶¶ 14-18.

In contrast, in *Santos*, the plaintiff filed an action seeking relief from the Bureau of Workers' Compensation's attempts to assert subrogation rights against him for money he received as a result of an intentional-tort claim against his employer. *Santos*, 101 Ohio St.3d at ¶ 2. Because he sought "the return of ***specific funds*** wrongfully collected or held by the state," his claim was brought in equity. (Emphasis added.) *Id.* at ¶ 17. The common pleas court, therefore, could exercise jurisdiction. *Id.*

This case is akin to *City of Cleveland*. Plaintiffs seek a writ of mandamus ordering monetary payments be made by the State Defendants directly to Plaintiffs. Plaintiffs do not seek the return of specific money held by Ohio—meaning, they are not asking Ohio to return the specific $300 per week that it previously withheld and is now holding, as was the case in *Santos*. Instead, they are asking the State to pay them an amount equal to the $300 per week that FPUC would have funded but that the federal government still retained. They, therefore, seek legal relief against Defendants.

Additionally, Plaintiffs' claim for legal relief arises from the same circumstances as their claims for declaratory judgment and injunctive relief—namely, the early termination of Ohio's participation in FPUC. *See, e.g.*, CCAC at ¶¶ 32, 80, 103, 117, 122, 125. The State Defendants include an elected state officer, an appointed state officer, and a state department, all of which are the "state" for purposes of Court of Claims jurisdiction. R.C. 2743.01(A). The Court of Claims therefore has exclusive and original jurisdiction over all of Plaintiffs' claims. *George*, 2010-Ohio-

5262, at ¶ 21. Thus, if the Court does not find the case moot, it should dismiss Plaintiffs' Consolidated Class Action Complaint for lack of subject-matter jurisdiction.

B. Plaintiffs' complaint must be dismissed because there is no private right of action under the Cooperation Statute.

Plaintiffs' Consolidated Class Action Complaint fails for the additional reason that the Cooperation Statute does not confer any private right of action, and the Court should not infer one.

The Cooperation Statute gives the Director of ODJFS the authority to enter into agreements with other agencies and commissions, to adopt rules, and to share information with boards and commissions. *See generally* R.C. 4141.43. The statute does not give anyone the authority to bring an action to force the Director to enter into agreements, adopt rules, share information, or take any particular action. It does not contain an express right of private enforcement.

Where a statute does not include an express right of enforcement, the Ohio Supreme Court uses a three-part test to determine whether an implied right of action exists. "That test examines: (1) whether the statute creates a right in favor of the plaintiff, (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy through a private right of action, and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy." *City of Maple Heights v. Netflix, Inc.*, S. Ct. No. 2021-0864, 2022-Ohio-4174, ¶ 16, quoting *Anderson v. Smith*, 196 Ohio App.3d 540, 2011-Ohio-5619, 964 N.E.2d 468, ¶ 10.

Application of these factors indicates that no implied private cause of action exists. First, the Cooperation Statute creates no rights for unemployed workers either explicitly or implicitly. Instead, it is part of the overall regulatory charge from the General Assembly to the Department of Job and Family Services. *See Fletcher v. Nationwide Mut. Ins. Co.*, 2d Dist. Darke No. 02CA1599, 2003-Ohio-3038, ¶ 19 (statutes that prohibit unfair or deceptive acts or practices by

insurance companies are part of regularly scheme and do not create private rights of action). Other statutes create rights for unemployed workers—for example, and as explained further below, R.C. 4141.28, 4141.281, and 4141.282 set forth the administrative process for resolving unemployment claims. But the legislative scheme enacted by the General Assembly does not contemplate or authorize any direct actions for benefits in courts of common pleas.[6]

Second, there is no indication that the General Assembly intended the Cooperation Statute to provide for a direct action to obtain unemployment benefits. Rather, the General Assembly created a special statutory proceeding through which anyone seeking to obtain unemployment benefits under Ohio's unemployment-compensation system must proceed. *See* R.C. 4141.281(A) (authorizing an appeal from a benefits determination to the unemployment compensation review commission); R.C. 4141.282 (authorizing further appeal to common pleas court).

Third, it would not be consistent with the underlying purpose of the legislative scheme to imply a private remedy. As explained above, R.C. 4141.43 is part of the statutory framework that regulates Ohio's unemployment-compensation system. That regulatory scheme includes one way for an unemployed worker to seek unemployment benefits or to challenge a benefits determination: an appeal through R.C. 4141.281, *et seq.* It would not be consistent with the legislative purpose to imply a remedy for obtaining unemployment benefits that usurps the special statutory proceeding the General Assembly created.

In any event, "[t]he idea that a court should read between the lines of statutory text to recognize an implied cause of action is a relic from a different time." *Maple Heights* at ¶ 36 (Kennedy, J., concurring). Permitting an implied cause of action "is to judicially amend [a] statute

[6] One exception is R.C. 4141.41, which authorizes the attorney general to commence an action to collect unemployment contributions, forfeitures, and interest legally due to the State.

to provide a cause of action that the General Assembly did not enact," a power forbidden to the courts. *Id*. at ¶ 38.

Indeed, where a state legislature provides administrative remedies to enforce unemployment benefits, courts have declined to recognize implied causes of action under analogous cooperation statutes. For example, in *Owens v. Zumwalt*, 2022 OK 14, 503 P.3d 1211, ¶ 11, the Oklahoma Supreme Court addressed Oklahoma's version of the Cooperation Statute, 40 O.S. 4-313, which, like R.C. 4141.43, stated that the state's Employment Security Commission "shall cooperate to the fullest extent consistent with the provisions of this act, with the Social Security Act, as amended, and is authorized and directed to take such action . . . as may be necessary to secure to this state and its citizens all advantages available under the provisions of such act, under the provisions of Sections 1602 and 1603 of the Federal Unemployment Tax Act and under the provisions of the [Wagner-Peyser Act of 1933], as amended." 40 O.S. 4-313. *Compare* R.C. 4141.43(I). The *Owens* Court, in concluding that no private right of action exists, found that (1) Oklahoma's Cooperation Statute is a regulatory statute; (2) nothing in that statute "indicates the Legislature intended, either explicitly or implicitly, to create a private remedy to enforce the [statute]"; (3) the state legislature provided an administrative remedy to enforce one's right to unemployment benefits; and (4) implying a private right of action under Oklahoma's Cooperation Statute "would undermine the administrative scheme." *Owens* at ¶¶ 10-13. This Court should apply the reasoning of *Owens* to this case and find that no implied right of action exists.

The lack of a private right of action destroys each claim raised in the Consolidated Class Action Complaint. As to the declaratory-judgment claim, a court may deny declaratory relief when no justiciable issue or actual controversy exists between the parties. *Wilburn v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 01AP-198, 2001 Ohio App. LEXIS 5253, *4-5. A

justiciable issue requires the existence of a legal interest or right. *Id*. *5. Because Plaintiffs have no rights under R.C. 4141.43, there are no justiciable issues between the parties to declare. As to Plaintiffs' mandamus claims, Plaintiffs have no clear legal right to relief under R.C. 4141.43. Moreover, the availability of administrative proceedings under R.C. 4141.281 affords them an adequate remedy at law. And as to Plaintiffs' claim for injunctive relief, that is a remedy, not a cause of action. *Bresler v. Rock*, 2018-Ohio-5138, 117 N.E.3d 184, ¶ 45 (10th Dist.).

C. Plaintiffs' motion for leave to file their Consolidated Class Action Complaint should be denied as futile.

If the Court so desires, instead of dismissing Plaintiffs' Consolidated Class Action Complaint, it could deny Plaintiffs leave to file the new pleading in the first place. As explained above, when the Supreme Court dismissed the appeal in this case as moot, Plaintiffs' claims were no longer live, justiciable controversies. Thus, Plaintiffs' attempt to amend their complaints to consolidate the parties but bring the same claims—claims over which this Court lacks jurisdiction—is pointless.

Civ.R. 15(A) governs amendment of pleadings. A party may amend its pleading as a matter of course only within 28 days after serving it or within 28 days after service of a responsive pleading or motion under Civ.R. 12(B), (E), or (F). Civ.R. 15(A). In all other cases, a party may only amend its pleading with the opposing party's written consent or with leave of court. *Id.*[7] Although the rule allows for "liberal" amendment of pleadings and provides that leave to amend shall be "freely give[n] * * * when justice so requires," there is no unconditional or absolute right to amend a complaint after the time period specified in Civ.R. 15(A) has passed. A trial court may

[7] A Complaint was previously been filed in each of these three cases, and more than 28 days have passed since either the filing of those Complaints or the filing of a motion to dismiss. *See* Dockets, Case Nos. 21-CV-4469, 21-CV-5524, 21-CV-5525.

properly deny a motion for leave to amend a complaint if the amendment would be futile. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co*., 60 Ohio St.3d 120, 123, 573 N.E.2d 622 (1991); *Harris v. Cunix*, 2022-Ohio-839, 187 N.E.3d 582, ¶ 8 (10th Dist.). In *Wilmington Steel*, the Ohio Supreme Court held that "where a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." Likewise, Ohio courts have upheld a trial court's denial of a motion to amend the complaint where the amendment to the complaint would not withstand a motion to dismiss. *See, e.g., Hogrefe v. Mercy St. Vincent Med. Ctr*., 6th Dist. Lucas No. L-13-1265, 2014-Ohio-2687; *Tri-State Computer Exchange, Inc. v. Burt*, 1st Dist. Hamilton No. C-020345, 2003-Ohio-3197; *see also State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs*., 65 Ohio St.3d 545, 549, 605 N.E.2d 378 (1992). A trial court's decision on a motion for leave to file an amended pleading is reviewed for an abuse of discretion. *Wilmington Steel* at 122.

Here, Plaintiffs cannot meet their prima-facie burden because their claims are ultimately based upon the existence of the FPUC program. As explained in section V.A.1 above, the FPUC program ended on September 6, 2021. And the claims based upon the existence of that program were declared moot with the Ohio Supreme Court's decision on November 22, 2022. *See* Section V.B.2 above. The consolidation of parties and the addition of a mandamus claim (that primarily seeks money damages this Court cannot award, *see* Section V.A.4. above) to their amended pleading do nothing to save it from futility. Accordingly, this Court may properly exercise its discretion to deny Plaintiffs leave to file their Consolidated Class Action Complaint.

VI. CONCLUSION

The end of the FPUC program 17 months ago, on September 6, 2021, means that Plaintiffs' claims are moot, as the Ohio Supreme Court held. Additionally, Plaintiffs seek relief that this Court

cannot award. Accordingly, the Consolidated Class Action Complaint must be dismissed. For the foregoing reasons, this Court should deny Plaintiffs' motion for leave or, alternatively, should dismiss Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that the foregoing was filed electronically on February 21, 2023. Notice of this filing will be sent to all counsel by operation of the Court's electronic filing system pursuant to Civ.R. 5(B)(2)(f) and (3).

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