

In the  
Supreme Court of Ohio

LARRY ENGEL, JR.,	:	Case No. 09-1735
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
UNIVERSITY OF TOLEDO COLLEGE OF	:	Tenth Appellate District
MEDICINE,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 09AP-53
	:	

REPLY BRIEF OF DEFENDANT-APPELLANT  
UNIVERSITY OF TOLEDO COLLEGE OF MEDICINE

JOHN B. FISHER\* (0055356)  
*\*Counsel of Record*  
Law Office of John B. Fisher, LLC  
5719 Olde Post Road  
Sylvania, Ohio 43560  
419-460-1372

Counsel for Plaintiff-Appellee,  
Larry Engel, Jr.

SUSAN HEALY ZITTERMAN (0056023)  
JOHN S. WASUNG (0050096)  
Kitch Drutchas Wagner Valitutti & Sherbrook  
405 Madison Avenue  
Suite 1500  
Toledo, Ohio 43604-1235  
419-243-2257  
419-243-7333 fax

Counsel for *Amicus Curiae*,  
Dr. Marek Skoskiewicz

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

BENJAMIN C. MIZER\* (0083089)  
Solicitor General  
*\*Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)  
Chief Deputy Solicitor General

BRANDON J. LESTER (0079884)  
Deputy Solicitor

ANNE BERRY STRAIT (0012256)  
Assistant Attorney General

30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[benjamin.mizer@ohioattorneygeneral.gov](mailto:benjamin.mizer@ohioattorneygeneral.gov)

Counsel for Defendant-Appellant,  
University of Toledo College of Medicine

FILED  
JUL 26 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

PAUL GIORGIANNI (0064806)\*

*\*Counsel of Record*

Giorgianni Law LLC

1538 Arlington Avenue

Columbus, Ohio 43212-2710

614-205-5550

614-481-8242 fax

THOMAS R. HOULIHAN (0070067)

Amer Cunningham Co., L.P.A.

Suite 1100, Key Building

159 South Main Street

Akron, Ohio 44308-1322

330-762-2411

330-762-9918 fax

PETER D. TRASKA (0079036)

Elk & Elk Co., Ltd.

6105 Parkland Boulevard

Mayfield Heights, Ohio 44124

440-442-6677

440-442-7944

Counsel for *Amicus Curiae*,

The Ohio Association for Justice

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## INTRODUCTION

To receive immunity under R.C. 9.86, an individual must satisfy two requirements. First, he must be a State officer or employee. Second, he must have been acting within the scope of his employment when the cause of action arose. This case concerns only the predicate question: whether volunteer instructors at Ohio's public medical schools are State officers or employees. They unquestionably are not, and that resolves this case. This action has nothing to do with the second step, the scope-of-employment question, which this Court addressed in a different case, *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208.

The plaintiff, Larry Engel, Jr., now joins the University in asking the Court to reverse the Tenth District's decision and concedes that volunteer instructors are not State "officers or employees" merely because they volunteer to allow medical students to observe their private practices. Engel Br. at 1–2, 5–12. He also admits that *Theobald* is irrelevant because this case concerns only the first prong of the immunity inquiry (whether Dr. Skoskiewicz was a State officer or employee). Engel Br. at 18 n.5 ("In *Theobald* this first prong was agreed to by all parties. In the case at bar the issue revolves around this first prong. . . .") and 21 ("there is no reason to apply a *Theobald* analysis to this case").

Though not a party to this action, Dr. Marek Skoskiewicz, the alleged tortfeasor, now stands alone (as Engel's purported amicus) in arguing that he and other volunteer instructors are entitled to immunity because they were "appointed" as volunteers and the immunity statutes cover those serving in "appointed office[s] or position[s] with the state." R.C. 109.36(A)(1)(a). He claims that this simple alignment of terms settles the question and cloaks volunteers with State officer or employee immunity. It does not. Statutory interpretation is not a word-match game. Rather, the meaning the Court assigns to statutory language must conform to the context of the law and the General Assembly's intent in enacting the entire provision. See R.C. 1.42;

*Medcorp., Inc. v. Ohio Dep't of Job & Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058, ¶ 9; *Freedom Rd. Found. v. Ohio Dep't of Liq. Control* (1997), 80 Ohio St. 3d 202, 205 n.1. Such a review here easily shows that, while the private physicians at issue were “appointed” as volunteer instructors, they were in no sense appointed as State “officers or employees” as those terms are used under Ohio law.

With no other arguments, save for some groundless umbrage at the facts, Dr. Skoskiewicz’s opposition fails. Thus, this Court should reverse the Tenth District’s decision and hold that volunteer instructors are not State officers or employees entitled to immunity under R.C. 9.86.

\* \* \* \* \*

After recommending reversal, and after conceding that *Theobald* is irrelevant, Engel, along with the Ohio Association for Justice (“OAJ”), as amicus, nevertheless urge the Court to go beyond the scope of this case and revisit the *Theobald* decision. The Court should decline that invitation. *Theobald* is not pertinent here at all, nor were these claims presented to or decided by the courts below.

#### ARGUMENT

**A. A volunteer instructor who treats his own patients in his own practice is not a State “officer or employee” under R.C. 9.86 and R.C. 109.36.**

Engel now agrees with the University that the Tenth District’s decision should be reversed and that a private physician who volunteers to host medical students is not an “officer or employee” of the State as those terms are used in R.C. 9.86 and R.C. 109.36. Engel Br. at 1–2, 5–12. Dr. Skoskiewicz alone disagrees, claiming that he was a State “officer or employee” because he was “appointed” as a volunteer, and R.C. 109.36(A)(1)(a) states that the terms “officer or employee” include those serving in an “appointed office or position with the state.”

Skoskiewicz Br. at 8–12. He also urges the Court to ignore well-settled indicia of employment, such as the employer’s ability to control the employee’s work, and he turns the notion of voluntary service on its head by claiming that immunity should be extended as compensation for his volunteer work. *Id.* at 12-15. These arguments are meritless.

First, it is beyond dispute that courts must examine and apply the plain language of statutes. See *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, ¶ 14. But simply observing that the word “appointed” appears both in R.C. 109.36(A)(1)(a) and the volunteer acknowledgment letters Dr. Skoskiewicz received from the University does not resolve the issue, and it denigrates the plain-language reading of a statute to a merely facile reading or word-match game. The plain-language reading of a statute should not equate to a facile reading. Under the plain language approach, the Court must examine the full enactment and determine what the phrase “appointed office or position” means *in this context*. See R.C. 1.42; *State v. Wilson* (1997), 77 Ohio St. 3d 334, 336. Thus, the question is not whether Dr. Skoskiewicz holds a letter from the University that includes the word “appointed,” but rather whether his so-called “appointment” as a volunteer falls within the meaning of the phrase “appointed office or position with the state,” R.C. 109.36(A)(1)(a), as used to define the term State “officer or employee” in R.C. 9.86. This context reveals that immunity does not extend to volunteer instructors like Dr. Skoskiewicz.

R.C. 109.36(A)(1) provides four definitions for the term State “officer or employee.” It covers individuals who: (a) serve “in an elected or appointed office or position with the state or [are] employed by the state”; (b) render medical or similar services under a contract with a state entity; (c) render “peer review, utilization review, or drug utilization review services” under such a contract; or (d) render medical services to patients in a state mental health institution, work as a

staff member at the institution, and provide these services under an agreement between the institution and a county mental health board.

These definitions have a common thread, and applying the statutory canon *noscitur a sociis*—where courts look to surrounding terms to clarify the meaning of a word in context, see *Ashland Chem. Co. v. Jones* (2001), 92 Ohio St. 3d 234, 236–37—it is clear that an “appointed office or position with the state” must involve some meaningful control by the State or other indicia of employment.

There is nothing radical about that principle. As both the University and the OAJ noted in their merit briefs, courts reviewing these cases have continually looked for factors such as the State’s control over the work performed in evaluating “officer or employee” status. See, e.g., *Walton v. Ohio Dep’t of Health* (10th Dist.), 162 Ohio App. 3d 65, 2005-Ohio-3375, ¶¶ 18–22; *Theobald v. Univ. of Cincinnati* (10th Dist.), 160 Ohio App. 3d 342, 2005-Ohio-1510, ¶¶ 20–51, *affirmed*, 111 Ohio St. 3d 541, 2006-Ohio-6208; *Potavin v. Univ. Med. Ctr.* (10th Dist. Apr. 19, 2001), 2001 Ohio App. Lexis 1787, \*8–15; *Latham v. Ohio State Univ. Hosp.* (10th Dist. 1991), 71 Ohio App. 3d 535, 537–39. While the University does not endorse Engel’s theory that the phrase “appointed office or position” is limited to gubernatorial-level appointments, Engel Br. at 12, individuals seeking immunity on those grounds must, at a minimum, be able to demonstrate that they were appointed to an office or position and that they labored under the State’s direction.

Dr. Skoskiewicz makes no attempt to show that the State had any control over his private medical practice. And there was none. Physicians like Dr. Skoskiewicz, though “appointed” as volunteer instructors, are not “appointed” as practicing *clinicians* in any respect, and so they are in no way subject to State control when they treat their own patients at their own practices. And this is true regardless of whether medical students are present or not.

In contrast to how they treat physicians who *are* university employees, the State medical schools do not pay these volunteer instructors any salary, control the terms of their practice, require payment of fees to the medical schools, or provide insurance coverage for them. Nor do the State universities subject these volunteer physicians to the oversight of the universities' quality assurance committees or require them to participate in the medical school's governance (which includes, for example, service on underwriting or residency training committees)—as they do with physicians who *are* university employees. In short, the University cannot control how entirely independent and private physicians like Dr. Skoskiewicz practice medicine, and there is nothing the University could have done to change how he treated Mr. Engel here. It therefore defies logic to say that the University should be liable for this private physician's medical acts.

Searching for a foothold, Dr. Skoskiewicz argues that *State ex rel. Sanquily v. Court of Common Pleas of Lucas County* (1991), 60 Ohio St. 3d 78, forecloses any examination of control or other indicia of employment. *Sanquily* does no such thing. There, two individuals sued Dr. Sanquily, who was directly employed by the Medical College of Ohio (which later became the University), in the Lucas County Court of Common Pleas. *Id.* at 78. Dr. Sanquily argued that the Court of Claims alone had jurisdiction over the case given his state employee immunity. *Id.* The common pleas court disagreed, finding that he was not entitled to invoke state employee immunity because he was a “loaned servant” at a private hospital when the injury occurred. *Id.* In granting Dr. Sanquily's request for a writ of prohibition, the Court noted that it was undisputed that he was a state employee; the parties only differed over whether he was acting within the scope of his employment when the injury occurred. *Id.* at 79. Under R.C. 2743.02(F), though, the Court of Claims has sole jurisdiction to determine whether an “officer or employee”

of the State is immune, and therefore, the case had to proceed through that process first. *Id.* In short, *Sanquily* does not forbid courts from looking to the indicia of employment in determining whether an individual is a State “officer or employee”; it merely states that the Court of Claims has exclusive, original jurisdiction to make this determination, a point the State has never disputed.

Beyond that failed parry, the doctor’s only remaining argument is that he deserves immunity as a policy matter, because he volunteered to teach students without compensation. In his view, “[i]t is ironic that the same institution that would appoint Dr. Skoskiewicz to its faculty, and thank him ‘in recognition and appreciation of [his] commitment to devote professional time and effort to official programs and activities of [the University]’ . . . now asserts that only paid faculty should benefit from immunity.” Skoskiewicz Br. at 14–15.

But there is nothing ironic about a volunteer going uncompensated. That is the *definition* of volunteerism. Indeed, it would be antithetical to the definition of “volunteer”—one who serves without compensation or benefits—to suggest that the State must remunerate him with one of the largest professional benefits that exists: malpractice liability coverage.

**B. Dr. Skoskiewicz’s factual arguments are meritless.**

Dr. Skoskiewicz broadly alleges that the University’s statement of the case both exceeded and mischaracterized the limited record. That is wrong.

This case proceeded through the lower courts on a set of joint stipulations. The University did not recite these stipulations verbatim in its brief, but it hewed closely to them in explaining the critical distinction between volunteer instructors like Dr. Skoskiewicz—who volunteer to allow medical students to observe them practicing medicine—and physicians who are directly employed by state universities, like those in *Theobald*, 111 Ohio St. 3d 541, 2006-Ohio-6208, at ¶¶ 14, 16.

Indeed, the stipulations readily establish the factual premises of the University's argument:

- (1) Regular faculty members at state medical schools are paid directly by the schools, and must conduct their clinical practices through practice plans operated and approved by the schools (9/5/08 Stip. of Facts, ¶ 4);
- (2) Volunteer instructors, by contrast, treat patients at their own practices, do not operate through school-approved practice plans, are not subject to state oversight of their clinical practices, and receive no payment or other fringe benefits from the schools; the universities simply enlist the assistance of volunteer instructors so that medical students can observe their practices and learn about real-world medicine through short rotations (*id.* at ¶¶ 2, 4, 5, 8);
- (3) "At no time relevant to this case was Dr. Skoskiewicz a member of the regular faculty" of the University (*id.* at ¶ 4). He was operating on his own patient (Engel), in his own practice (the Henry County Hospital), which is not affiliated at all with a state university or the State of Ohio (*id.* at ¶¶ 1–3).

In short, volunteer instructors like Dr. Skoskiewicz practice medicine under the rules of their own offices, wholly divorced from state control over their medical decisions. They are private practitioners through and through, not state employees, and the mere fact that they allow medical students to observe them practicing privately changes none of that. Dr. Skoskiewicz's unsupported quibbles contradict the truth as reflected in the joint stipulations.

While the University provided some additional context (like the total number of volunteer instructors across the State), its argument stands firmly on the fundamental differences between volunteer instructors and employed faculty illustrated in the record, and the University in no way urges this Court to exceed the record in its review. Nor is there any *need* to do so. The party asserting a physician's immunity bears the burden of proving that immunity is warranted. Engel never met that burden here. Indeed, the record is limited precisely because there *are* no facts that could show that Dr. Skoskiewicz's volunteer service was tantamount to a position as a State "officer or employee." To the contrary, the stipulations point only to one conclusion—that

volunteer instructors are *nothing* like the employed faculty members who receive immunity under R.C. 9.86.

**C. This case does not implicate *Theobald*.**

This Court's decision in *Theobald* has received fresh attention in recent months, due to events that occurred after the case was remanded. See *Theobald v. Univ. of Cincinnati* (10th Dist.), 2009-Ohio-5204, ¶¶ 9–22 (holding that Theobald's action against the State was barred on statute of limitations grounds). Engel and the OAJ, seeking to capitalize on this attention, urge the Court to reexamine various aspects of *Theobald*.

These requests are plainly beyond the scope of this case and the record below. As a preliminary matter, these arguments were never raised in or decided by the Court of Claims. And they are simply not pertinent here.

As Engel recounts in his brief, Engel Br. at 13–20, the plaintiff in *Theobald* sued various medical professionals for malpractice arising from treatment he received at University Hospital in Cincinnati. *Theobald*, 111 Ohio St. 3d 541, 2006-Ohio-6208, at ¶¶ 2, 5. By the time the case reached this Court, there was no dispute that the defendants were *employees* of the University. *Id.* at ¶ 14. Thus, the only question was the second prong of the immunity test—whether these individuals were acting within the scope of their employment when the injuries occurred (if so, immunity would attach and Theobald would have to seek relief in the Court of Claims). *Id.*

The Court reached the sensible (and unremarkable) conclusion that where a faculty employee's duties include educating students, and the physician is performing those duties when the injury occurs, he is acting within the scope of his university employment and is immune. *Id.* at ¶ 31. Because the record was not clear on that issue, however, the Court remanded for further proceedings. *Id.* at ¶ 33.

Here, by contrast, the only question is the first prong of the immunity test—whether volunteer instructors are State “officers or employees.” They are not, and therefore no grounds exist for addressing *Theobald*, a scope-of-employment case. Indeed, *Theobald* recognized its own irrelevance to the situation here: “If the . . . practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.” *Id.* at ¶ 30.

Engel concedes that *Theobald* is irrelevant to this case. Engel Br. at 18 n. 5 (“In *Theobald* this first prong was agreed to by all parties. In the case at bar the issue revolves around this first prong. . . .”) and 21 (“Since Dr. Skoskiewicz was never employed by [the University’s] alter-ego physician practice group, there is no reason to apply a *Theobald* analysis to this case.”). Nonetheless, both he and the OAJ ask the Court to use this case to denounce *Theobald* and adopt a different method for evaluating the scope-of-employment question. *Id.* at 21; OAJ Br. at 10-13. Equally off topic, Engel criticizes the one-year statute of limitations for medical claims against the State and invites the Court to judicially alter the statutory limitations period by extending that period for those plaintiffs who fail to preserve their rights against the State by filing in the Court of Claims. Engel Br. at 2, 21–27.

While issues inevitably arise as lower courts set out to apply this Court’s decisions, these questions must be developed through the lower courts before they are addressed by this Court (and sometimes, issues arise that are not redressable judicially, such as the statutory limitations issue). More to the point, such questions can only be evaluated by this Court *in the context of a case that actually presents those questions*—which this case does not, as Engel concedes. He and the OAJ seek nothing more than advisory opinions, which this Court does not issue. *State ex rel. White v. Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848, ¶ 18. Accordingly, their critique of *Theobald* is beside the point.

Moreover, even if *Theobald* were relevant, their critique is baseless. First, Engel describes *Theobald* as a “sea change” in the law of how a physician’s entitlement to immunity was to be determined.” Engel Br. at 1. Not so. The Court’s reasoning was modest and sound. Where an employee physician’s duties include educating students, he is acting within the scope of his employment—and is entitled to immunity—if the alleged injury occurs while he is performing those duties. *Theobald*, 111 Ohio St. 3d 541, 2006-Ohio-6208, at ¶ 31. This is a plain vanilla immunity analysis of the same kind that applies to all other State employees.

Second, Engel and the OAJ wrongly equate university-employed faculty members with private practitioners like Dr. Skoskiewicz. But the joint stipulations below expose the error in that comparison. Employed clinical faculty members—who are entitled to immunity—are hired and credentialed first and foremost as clinicians; their duties also include teaching and research. The universities pay them salaries, and as a condition of employment, they must conduct their practices through university-run practice plans, which are a series of not-for-profit corporations authorized a State university’s Board of Trustees and controlled or overseen by the Dean of the medical school. In a few instances, employed faculty members practice through a non-university practice plan, but these physicians have other contracts with the universities that replicate many of the financial arrangements and other controls achieved through the university practice plans. University Br. at 3-4. By contrast, truly private-practice physicians, like Dr. Skoskiewicz, have none of those attributes. They receive no salary from the universities; their practices are entirely private and independent of the State; they have no obligation to treat patients or generate fees for a State university; and the universities do nothing to control how they practice medicine. *Id.* at 4-5. In short, Engel and the OAJ’s criticisms of *Theobald* are premised on their erroneous

conflation of entirely private practitioners, like Dr. Skoskiewicz, with employed University faculty members.

Third, Engel and the OAJ's suggestion that extending immunity to medical school employees deprives plaintiffs of their right to recover for their injuries is unfounded. "If the Court of Claims determines that the employee is immune from personal liability, then *the state* has agreed to accept liability for that employee's actions." *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St. 3d 234, 2004-Ohio-824, ¶ 37 (emphasis added). At its core, *Theobald* is a venue decision. It requires plaintiffs to bring certain malpractice claims in the Court of Claims and to direct the claims against the State university, rather than the individual physician. *Theobald*, 111 Ohio St. 3d 541, 2006-Ohio-6208, at ¶ 13. Once in that court, however, these plaintiffs may recover the full measure of their economic damages (medical bills, lost wages, and future lost earnings), and up to \$250,000 for non-economic injuries (pain and suffering). See R.C. 3345.40(B)(3). While the Court of Claims imposes certain structural limitations (notably, the lack of a jury trial and punitive damages), these are the same limitations that apply to all other plaintiffs who allege that they were injured by a State employee and there is simply no legal basis for suggesting that state-employed physicians be stripped of the statutory right to immunity that they share with all other State employees. To the extent that the impulse behind Engel and the OAJ's anti-*Theobald* campaign is their speculative belief that plaintiffs (and their lawyers) would reap more favorable financial awards from suits litigated in a court of common pleas rather than those tried in the Court of Claims, this is a policy issue for the General Assembly. But there is no legal debate to be had over whether state-employed physicians—as State employees—are entitled to immunity under R.C. 9.86.

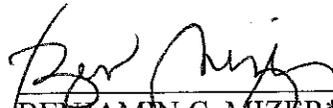
Finally, Engel and the OAJ raise concerns about the one-year statute of limitations for medical claims against the State and they invite the Court to don a legislative hat and judicially modify the statutory limitations period for those plaintiffs who fail to preserve their rights against the State by timely filing in the Court of Claims. As a preliminary matter, their desire to adjust the *statutory* limitations period for certain plaintiffs is not *judicially* redressable. These are policy issues for the General Assembly. But in any event, their attempt to pin these complaints on *Theobald* is misplaced. After remand from this Court, the lower courts held that Theobald's action against the University of Cincinnati was barred on statute of limitations grounds. *Theobald*, 2009-Ohio-5204, at ¶¶ 9–22. While unfortunate, this result was not due to any error or injustice in the *Theobald* opinion, as Engel and the OAJ suggest. As the Tenth District unanimously found on appeal of the statute of limitations issue, Theobald's action was barred *because his lawyer failed to file a timely action in the Court of Claims, even though he knew about the physicians' State-employee status long before the limitations period expired. Id.* at ¶ 12 (“[A]ppellants were aware that the status was being claimed more than one year before filing their action in the Court of Claims.”). In short, Mr. Theobald's procedural barrier was not caused by a legal error in this Court's *Theobald* ruling, and thus the suggestion by Engel and the OAJ that the Court revisit the opinion on these grounds is baseless.

## CONCLUSION

For all of the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

RICHARD CORDRAY (0038034)  
Attorney General of Ohio



---

BENJAMIN C. MIZER\* (0083089)  
Solicitor General

*\*Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)

Chief Deputy Solicitor General

BRANDON J. LESTER (0079884)

Deputy Solicitor

ANNE BERRY STRAIT (0012256)

Principal Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[benjamin.mizer@ohioattorneygeneral.gov](mailto:benjamin.mizer@ohioattorneygeneral.gov)

Counsel for Defendant-Appellant,  
University of Toledo College of Medicine

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Defendant-Appellant University of Toledo College of Medicine was served by U.S. mail this 26th day of July, 2010, on the following counsel:

John B. Fisher  
Law Office of John B. Fisher, LLC  
5719 Olde Post Road  
Sylvania, Ohio 43560

Counsel for Plaintiff-Appellee,  
Larry Engel, Jr.

Susan Healy Zitterman  
John S. Wasung  
Kitch Drutchas Wagner Valitutti &  
Sherbrook  
405 Madison Avenue  
Suite 1500  
Toledo, Ohio 43604-1235

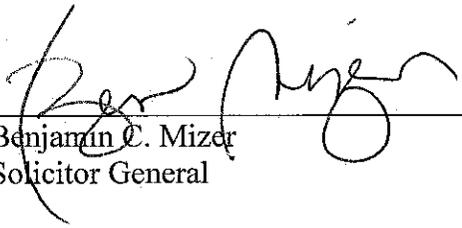
Counsel for *Amicus Curiae*,  
Dr. Marek Skoskiewicz

Paul Giorgianni  
Giorgianni Law LLC  
1538 Arlington Avenue  
Columbus, Ohio 43212-2710

Thomas R. Houlihan  
Amer Cunningham Co., L.P.A.  
Suite 1100, Key Building  
159 South Main Street  
Akron, Ohio 44308-1322

Peter D. Traska  
Elk & Elk Co., Ltd.  
6105 Parkland Boulevard  
Mayfield Heights, Ohio 44124

Counsel for *Amicus Curiae*,  
The Ohio Association for Justice



---

Benjamin C. Mizer  
Solicitor General