



Michael DeWine (0009181)  
Attorney General, State of Ohio

James A. King (0040270)  
(COUNSEL OF RECORD)  
L. Bradfield Hughes (0070997)  
Porter Wright Morris & Arthur LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-2051 (phone)  
(614) 227-2100 (facsimile)  
jking@porterwright.com  
bhughes@porterwright.com

*SPECIAL COUNSEL FOR RESPONDENT,  
DAVID GOODMAN, DIRECTOR, OHIO  
DEPARTMENT OF COMMERCE*

Victoria E. Ullmann (0031468)  
(COUNSEL OF RECORD)  
1135 Bryden Road  
Columbus, Ohio 43205  
(614) 235-2692  
Victoria\_ullman@hotmail.com

*COUNSEL FOR PROPOSED INTERVENORS,  
PROGRESSOHIO.ORG, SENATOR  
MICHAEL SKINDELL, AND  
REPRESENTATIVE DENNIS MURRAY, JR.*

**MEMORANDUM OF *AMICUS CURIAE* IN SUPPORT OF  
RELATOR JOBSOHIO'S MEMORANDUM CONTRA RESPONDENT'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

**I. STATEMENT OF AMICUS INTEREST**

The Ohio Manufacturers' Association (OMA) is a statewide association of approximately 1,600 manufacturing companies in Ohio. Its mission is to protect and grow Ohio manufacturing. The OMA and its members have a substantial interest in the constitutionality of the JobsOhio Legislation<sup>1</sup> because they anticipate that JobsOhio will play a critical role in expanding the manufacturing industry in Ohio over the next five years. In the next few years, a unique convergence of events is influencing a potentially large-scale global shift of manufacturing investment and jobs back to the North America. JobsOhio's innovative initiatives are critical for Ohio—as opposed to other competing locations in North America—to take advantage of this unique window of opportunity in the manufacturing sector.

Ohio is powered by manufacturing. Manufacturing is the largest sector of Ohio's economy, responsible for almost 17% of Ohio's GDP. *See* The Ohio Manufacturers' Association, *Ohio Manufacturing Counts* (2012).<sup>2</sup> Ohio manufacturing provides:

- More than 600,000 jobs for Ohio workers—ranking third nationally in manufacturing employment;
- At \$80 billion per year, Ohio manufacturing's contribution to Ohio's Gross State Product is more than 50% higher than the next largest private industry sector;
- An annual payroll of more than \$33 billion—the highest total annual wages of any non-government economic sector; and
- More than \$46 billion in products to more than 216 countries and territories—the

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<sup>1</sup> The term the “JobsOhio Legislation” refers to Am. Sub. H.B.1 (129<sup>th</sup> General Assembly), Am. Sub. H.B. 153 (129<sup>th</sup> General Assembly), R.C. Chapter 187 and R.C. Chapter 4313, collectively.

<sup>2</sup> *See* The Ohio Manufacturers' Association, *Ohio Manufacturing Counts: Facts About Ohio Manufacturing* (2012), available at <http://39a79f2ea113cef941255f3cc8eeba3798360cea.gripelements.com/pdf/leadership/oma-manufacturing-counts-2012.pdf> (accessed August 28, 2012).

ninth largest exporting state in the U.S.

*Id.*

Global manufacturing is at a critical juncture, presenting an opportunity for an Ohio manufacturing renaissance. China's overwhelming manufacturing cost advantage over the U.S. is shrinking. A recent report from the Boston Consulting Group concludes that rising Chinese wages, higher U.S. productivity, a weaker dollar, and other factors are closing the cost gap between the U.S. and China for many goods consumed in North America. The Boston Consulting Group ("BCG"), *Made in America, Again: Why Manufacturing Will Return to the U.S.* (2011), at 2.<sup>3</sup>

This combination of economic forces is fast eroding China's cost advantage as an export platform for the North American market. *Id.* at 3. Meanwhile, the U.S., with an increasingly flexible workforce and a resilient, innovative manufacturing sector, is becoming more attractive as a place to manufacture many goods consumed on this continent. *Id.* Indeed, BCG concludes that, by 2015—for many goods destined for North American consumers—manufacturing in some parts of the U.S. will be just as economical as manufacturing in China. *Id.*

This global cost shifting is significant because overall costs drive manufacturers' location choices. See Executive Office of the President, *A Framework for Revitalizing American Manufacturing* (December 2009), at 1.<sup>4</sup> In fact, a recent White House paper explains that: "In today's increasingly competitive global marketplace, manufacturing activities will be undertaken by private actors who will locate their factories where total all-in cost is lowest." *Id.*

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<sup>3</sup> The Boston Consulting Group, *Made in America, Again: Why Manufacturing Will Return to the U.S.* (2011), available at <http://www.bcg.com/documents/file84471.pdf> (accessed August 28, 2012).

<sup>4</sup> Executive Office of the President, *A Framework for Revitalizing American Manufacturing* (December 2009), available at <http://www.whitehouse.gov/sites/default/files/microsites/20091216-manufacturing-framework.pdf> (accessed August 28, 2012).

The result is a potentially large-scale rebalancing of global manufacturing. Although still in its early stages, this rebalancing is expected to accelerate in the next five years. *Id.* at 6. Over the next five years, North America will be the optimal choice for many manufacturing investments aimed at serving the North American market. *Id.* In fact, a September 2011 Booz & Company survey of global manufacturing reports that more than 65% of manufacturing survey respondents said that they are considering shifting manufacturing activities back from Asia and Latin America to the U.S., Canada, and Mexico. Booz & Company, *U.S. Manufacturing Competitiveness at a Critical Crossroads, Says Report by Booz & Company* (September 6, 2011).<sup>5</sup>

This presents a potential once-in-a-generation opportunity for Ohio to expand manufacturing in the state. But in order to capitalize on this narrow window of opportunity, Ohio needs to act urgently to set up the framework necessary to attract manufacturing companies moving their operations back to the United States.

This is why the JobsOhio Legislation is critical. The OMA anticipates that the following JobsOhio initiatives will play a vital role in capitalizing on this unique window of marketplace opportunity in the manufacturing sector:

- Increasing marketing efforts to bring more companies—including manufacturing companies—to Ohio;
- Increasing participation by business executives in the growth and marketing of Ohio as a business-friendly marketplace;
- Coordinating and streamlining regional economic development retention and expansion projects throughout the State through the JobsOhio Network; and
- Managing loan negotiations for various loan incentive programs designed to bring

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<sup>5</sup> Booz & Company, *U.S. Manufacturing Competitiveness at a Critical Crossroads, Says Report by Booz & Company* (September 6, 2011), available at <http://www.booz.com/global/home/press/article/49740178> (accessed August 28, 2012).

new business and retain existing businesses in Ohio.

See JobsOhio, *Strategic Framework* (2012).<sup>6</sup>

Sustainable funding is a keystone of JobsOhio's future success on each of these goals. Without a sustainable funding structure—accomplished by Respondent's execution of the Franchise and Transfer Agreement—JobsOhio cannot pursue the innovative job creation and retention programs it needs to reap the anticipated economic development benefits across the state.

Given the role JobsOhio can play in maintaining and growing the manufacturing industry in Ohio during this period of global rebalancing, the OMA has a strong interest in the constitutionality of the JobsOhio Legislation. The OMA agrees with Relator that the JobsOhio Legislation satisfies all requirements of the Ohio Constitution and present a clear legal duty upon Respondent to execute the Franchise and Transfer Agreement. This brief will focus on the following three constitutional issues raised in Respondent's Motion for Judgment on the Pleadings:

- 1) The JobsOhio Act<sup>7</sup> does not violate Article XIII, Section 1 of the Ohio Constitution as it is a general act—not a locally-focused “special act”—because JobsOhio's job creation and retention initiatives will impact every region of the State.
- 2) The JobsOhio Act does not violate the open courts requirement of Article I, Section 16 of the Ohio Constitution because the General Assembly provided in R.C. 187.09(C) a 60-day statute of limitations in which challenges maybe brought—and this shorter statute is necessary to attract manufacturing companies seeking to gain competitive benefits through a swift speed to market strategy.
- 3) The Transfer Act<sup>8</sup> does not violate the debt limits set forth in Article VIII of the Ohio Constitution because the Act does not create public debt, and even if the debts of JobsOhio and the State are conflated, the Act falls within the job-creation exception

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<sup>6</sup> JobsOhio, *Strategic Framework* (2012), available at [http://jobs-ohio.com/images/jobsohio\\_strategic\\_framework.pdf](http://jobs-ohio.com/images/jobsohio_strategic_framework.pdf) (accessed August 28, 2012).

<sup>7</sup> The term “JobsOhio Act” refers to R.C. Chapter 187.

<sup>8</sup> The term “Transfer Act” refers to R.C. Chapter 4313.

in Article VIII, Section 13.

Until Respondent executes the Franchise and Transfer Agreement, JobsOhio cannot issue its bonds, borrow money, or otherwise use the profits from the Liquor Enterprise to fund the paramount job creation and economic development activities necessary to capitalize on the unique marketplace opportunities in the manufacturing sector. For all of these reasons, *amicus curiae*, the OMA, respectfully urges this Court to issue a peremptory writ of mandamus compelling the Director to execute the Franchise and Transfer Agreement pursuant to R.C. 4313.02(C)(2).

## II. FACTUAL BACKGROUND

*Amicus curiae*, The Ohio Manufacturers' Association, adopts the fact recitations of Relator. Moreover, the OMA notes that the facts at issue in this action are undisputed. (Respondent's Motion for Judgment on the Pleadings, at 2) (noting that the Director admits "all material facts alleged in the Relator's Complaint."))

## III. LAW AND ARGUMENT

### A. **The JobsOhio Act Does Not Violate Article XIII, Section 1 of The Ohio Constitution, Which Mandates That "The General Assembly Shall Pass No Special Act Conferring Corporate Powers."**

Article XIII, Section 1 of the Ohio Constitution provides that "[t]he General Assembly shall pass no **special act** conferring corporate powers." Ohio Constitution, Article XIII, Section 1 (emphasis added.) The JobsOhio Act is not a "special act" as that term has been interpreted by this Court in the context of Article XIII. Thus, the Act does not violate Article XIII. *See State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, 280 (1950) ("Even a casual reading of the foregoing constitutional provision discloses that it is to apply only where corporate powers are conferred by 'special act.'").

This Court has previously set forth what constitutes a “special act”—as opposed to a general act—under Article XIII:

Within the meaning of Section 1 of Article XIII of the Constitution, a special act, as distinguished from an act of a general nature, is one that is **local and temporary** in its operation.

*Defenbacher*, 153 Ohio St. at 280 (emphasis added).

The Court has further explained what it means for an act to be “local” in the context of a special act:

If the subject does or may exist in, and affect the people of, every county in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of, every county, it is local or special.

*State ex rel. Saxbe v. Alexander*, 168 Ohio St. 404, syllabus (1959) (quoting *Hixson v. Burson*, 54 Ohio St. 470, 43 N.E. 1000, 1001) (internal quotation marks omitted).

The purpose of this provision is to ensure that all acts passed by the General Assembly will:

affect or be likely to affect the interests of the constituents of each and every individual member of the General Assembly, so that his interest in his constituents would call his attention to the effect of the proposed enactments upon them, as well as upon the people of other localities.

*Defenbacher*, 153 Ohio St. at 280.

In his Motion for Judgment on the Pleadings, Respondent provides several examples of cases in which this Court found legislation to be a “special act” violating Article XIII. But in each case—unlike the JobsOhio Act—the act at issue was decidedly local in its operation and effect:

Case	Legislative Act	General or Special
<i>State ex rel. Saxbe v. Alexander</i> , 168 Ohio St. 404 (1959)	Authorizing a public parking garage underneath the Ohio Statehouse to address off-street parking <i>in Columbus</i>	Special
<i>State ex rel. Knisely v. Jones</i> , 66 Ohio St. 453, 488, 64 N.E. 424 (1902)	For the organization and support of a police force <i>for the City of Toledo</i>	Special
<i>Cincinnati v. Trustees of Cincinnati Hosp.</i> , 66 Ohio St. 40, 64 N.E. 420 (1902)	Authorizing a local hospital board of trustees to raise funds for a hospital extension <i>in Cincinnati</i>	Special
<i>Platt v. Craig</i> , 66 Ohio St. 75, 63 N.E. 594 (1902)	Authorizing construction and repair of a bridge in “any city of the third grade of the first class” with a navigable river”—but <i>only the City of Toledo fell within this narrow definition within the statute</i>	Special
<i>State ex rel. Atty. Gen. v. Cincinnati</i> , 20 Ohio St. 18, 36 (1870)	Conferring corporate powers on the city council <i>in Cincinnati</i> , requiring that the rules and regulations governing <i>a local Cincinnati hospital</i> be submitted to city council	Special

In contrast, the Court found that an act creating the Ohio Turnpike Commission and appropriating money to the State Highway Department for a feasibility study is general in nature—and not a special act under Article XIII. *Defenbacher*, 153 Ohio St. at 280. The basis of the Court’s finding in *Defenbacher* was, in part, that the act was not local because “[n]othing in the act requires the commission to undertake, or prevents it from undertaking, projects in any particular locality of the state.” *Id.* at 281.

Similarly here, the JobsOhio Act is not local because (1) it will exist in, and affect the people of, every county in the State, and (2) as in *Defenbacher*, nothing in the Act requires JobsOhio to undertake, or prevents it from undertaking, projects in any particular locality of the state.

In fact, the OMA’s strong interest in the constitutional viability of the JobsOhio Act demonstrates just what a widespread effect the Act will have throughout Ohio. Manufacturing

employment is present in every one of Ohio's 88 counties and OMA members do business in every region in the State. See The Ohio Manufacturers' Association, *Ohio Manufacturing Counts: Facts About Ohio Manufacturing* (2012), at 1.<sup>9</sup> The OMA expects that the new jobs created, new jobs retained, new capital investment, and other critical economic development benefits stemming from JobsOhio will impact all OMA members and Ohio manufacturers in every Ohio region. Indeed, JobsOhio has regional support for businesses in *every* region in the State. See JobsOhio, *In Ohio* (explaining the JobsOhio Network and regional support contacts throughout Ohio).<sup>10</sup>

Further, the OMA anticipates that JobsOhio and the economic development projects that JobsOhio undertakes will positively affect each of the varied industries the OMA members and Ohio manufacturers represent throughout the State of Ohio. JobsOhio has targeted the following specific industry sectors—each of which will directly impact OMA members and Ohio manufacturers in all Ohio regions: energy, polymer and chemical, automotive, aerospace/aviation, advanced manufacturing, food processing and agribusiness, and biohealth. See *id.* (explaining the industry sectors targeted by JobsOhio).

OMA members and Ohio manufacturers work in each of these industries, and have a vested interest in the continued targeted growth of each of these industries throughout the State. See The Ohio Manufacturers' Association, *Ohio Manufacturing Counts: Facts About Ohio Manufacturing* (2012). Thus, as in *Defenbacher*, the statewide reach of the JobsOhio Act and the economic development benefits stemming from the Act undoubtedly interested every voting

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<sup>9</sup> See The Ohio Manufacturers' Association, *Ohio Manufacturing Counts: Facts About Ohio Manufacturing* (2012), available at <http://39a79f2ea113cef941255f3cc8eeba3798360cea.gripelements.com/pdf/leadership/oma-manufacturing-counts-2012.pdf> (accessed August 28, 2012).

<sup>10</sup> JobsOhio, *In Ohio*, available at <http://jobs-ohio.com/in-ohio/> (accessed August 28, 2012).

member of the General Assembly—in every region in the State. Because the JobsOhio Act is general in nature—and not a special act—the Court should find that it satisfies the constitutional requirements of Article XIII, Section 1.

**B. The JobsOhio Act Does Not Violate Article I, Section 16, Which Requires that Litigants Have a Right to a Remedy.**

Respondent next challenges the JobsOhio Act on the ground that it violates the open-courts requirement of the Ohio Constitution, which provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Constitution, Article I, Section 16.

Respondent contends that the 60-day statute of limitations in R.C. 187.09(C) is too short and does not afford litigants a meaningful remedy within the meaning of Article I, Section 16. (Respondent’s Motion for Judgment on the Pleadings, at 12.)

But as this Court noted in *Leininger v. Pioneer Nat’l Latex*, 115 Ohio St.3d 311, 2007-Ohio-1691, ¶ 32: “The period within which a claim must be brought, however, is a policy decision best left to the General Assembly.” *Id.* at 319. Here, the General Assembly has concluded that JobsOhio’s initiatives to create and retain jobs and businesses in Ohio require nimble and time-sensitive decision-making and, as a result, constitutional issues should be resolved promptly so that JobsOhio can move forward—one way or the other.

This need for swift decision-making is particularly salient in the manufacturing sector. Now more than ever, speed is a key to survival and success in manufacturing. *See* The Boston Consulting Group, *How Fast-Moving Consumer Goods Companies Use Speed as a Competitive*

*Weapon*, at 3 (April 20, 2012).<sup>11</sup> For a manufacturing company, for example, reducing time to market leads to numerous financial and nonfinancial benefits. *Id.* at 6. Enhanced agility has the potential to boost a company's top and bottom lines, and flexible and mobile consumers demand it. *Id.* Indeed, the best-in-class companies launch new products seven months faster than average. *Id.* Moreover, a product that gets to market early is less likely to face initial competition and gives a product more time to build market share. *Id.*

The 60-day statute of limitations in the JobsOhio Act enables JobsOhio to move at the speed of 21<sup>st</sup> Century business. If a company is choosing a site location to manufacture an innovation, it needs to work quickly in order to take advantage of speed to market competitive benefits. Ohio likewise needs to be able to work quickly to provide the company's leadership with supply chain analyses, demographic information, site-selection details, incentive offers, and to quickly connect company executives with the industry, funding and political partners needed to make a site selection decision. With a 60-day statute, JobsOhio can take the steps necessary to bring new manufacturing jobs to Ohio—without looking over its shoulder at potential constitutional challenges one or two years down the road. In today's business climate, one or two years might as well be a lifetime.

As this Court has done before, it should give deference to the General Assembly's public policy decision providing for a 60-day statute of limitations for constitutional challenges to the JobsOhio Act and hold that the JobsOhio Act satisfies Article 1, Section 16—presenting a clear legal duty upon Respondent to act.

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<sup>11</sup> The Boston Consulting Group, *How Fast-Moving Consumer Goods Companies Use Speed as a Competitive Weapon* (April 20, 2012), available at [https://www.bcgperspectives.com/Images/Speed\\_to\\_Win\\_Apr\\_2012\\_tcm80-104158.pdf](https://www.bcgperspectives.com/Images/Speed_to_Win_Apr_2012_tcm80-104158.pdf) (accessed August 28, 2012).

**C. The Transfer Act Will Not Cause the State to Incur Debt in Excess of the Limits Imposed by Article VIII of the Ohio Constitution.**

Article VIII, Sections 1, 2 and 3 place constitutional limits on the type and amount of debt the State may incur. Section 1 entitled “Public Debt” provides that “the State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts cannot exceed \$750,000.” Ohio Constitution, Article VIII, Section 1. But as Relator explains, Article VIII is not implicated here because the Transfer Act does not create any public debt, and even if it were to be construed as creating public debt, this debt falls under the job creation exception set forth in Article VIII, Section 13.

First, Relator explains in its Memorandum in Support of the Writ that the debt limit in Article VIII is not implicated here because the Transfer Act does not require the issuance of *any* public debt of the State. (JobsOhio Mem. in Supp. at 30.) Rather, the State will convey an asset—a franchise on the Liquor Enterprise—to JobsOhio in exchange for the \$1.4B Closing Payment. JobsOhio—and not the State—will take on the obligation to repay the bonds it issues to finance the Closing Payment.

This Court has previously considered what constitutes “public debt” of the State. Based on this Court’s prior decisions, public debt of the State is generally: (1) an obligation of the state, (2) to be repaid from general tax revenues, (3) which the State owes and promises to repay. *See State ex rel. Ohio Fund Management Board v. Walker*, 55 Ohio St.3d 1, 561 N.E. 927 (1990) (finding that the notes at issue were a debt of the State under Article VIII because the statute provided that the notes were “special obligations of the state,” to be “repaid from anticipated revenues, including tax revenues” kept in a special repayment fund, and the Treasurer was instructed by statute to “covenant on behalf of the state” to pay note service charges); *see also*

*State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 428 (1987) (proposed bond issuance to fund a government program was an obligation of the State under Article VIII because tax revenues were pledged for debt service).

Unlike the above-cited cases, the Franchise and Transfer Agreement (1) imposes no financial obligation upon the State going forward, (2) does not require the State to repay any outstanding obligations using general tax revenues, and (3) the State neither owes anything nor promises to pay anyone following execution of the Franchise Agreement and conveyance of the Liquor Enterprise franchise to JobsOhio.

Rather, JobsOhio—a private non-profit corporation—will incur its own debt to pay the \$1.4B Closing Payment to the State. R.C. 4313.02(A). JobOhio’s debt will be payable from and secured by Liquor Enterprise revenues, which JobsOhio will own as a result of its Franchise Agreement with the State authorized by R.C. 4313.02(A).

Second, even if the Transfer Act is construed to create public debt, it falls within the exception to debt limits found in Article VIII, Section 13. Under Section 13, state bonds and other obligations are not subject to the Article VIII debt limits where:

- (1) the State sells, leases, exchanges or “otherwise dispose[s] of property”;
- (2) in order “to create or preserve jobs and employment opportunities [or] to improve the economic welfare of the people of the state,” and
- (3) the State passes laws “to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and issuance of bonds or other obligations of, the state.”

Ohio Constitution, Article VIII, Section 13. The Transfer Act falls squarely within this Section 13 exemption.

Under the Transfer Act, the State will sell “property”—a franchise on the Liquor Enterprise—toward achieving its job creation and economic development purposes. R.C.

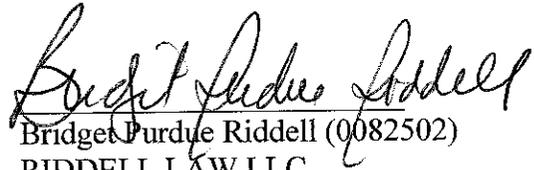
4313.02(A). Respondent questions whether a franchise on the Liquor Enterprise constitutes “property.” (Respondent’s Motion for Judgment on the Pleadings, at 25.) But that question is resolved by review of the Attorney General’s own opinion—1998 Ohio Atty. Gen. Op. No. 1998-034—which notes that the word “property” “can encompass everything that is owned,” including “everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.” *Id.* (citing *Black’s Law Dictionary* 1216 (6th ed. 1990)). Because a franchise on the Liquor Enterprise can be owned—and sold—it is “property” under Article VIII, Section 13.

What’s more, it is uncontroverted that the purpose of the Transfer Act is to create and preserve jobs in the State. (Complaint, at ¶ 11; Answer of Respondent, at ¶ 11.) As a result, the Transfer Act falls squarely within the debt limit exceptions contain in Article VIII, Section 13.

#### **IV. CONCLUSION**

In order to capitalize on unique global marketplace conditions in the manufacturing sector, JobsOhio must be nimble and to have the ability to act quickly to attract and retain manufacturing jobs and companies in Ohio. Because the JobsOhio Legislation meets all constitutional requirements, *amicus curiae* The Ohio Manufacturers’ Association urge the Court to issue a writ of mandamus compelling Respondent to execute the Franchise and Transfer Agreement on behalf of the State of Ohio, as required by R.C. 4313.02(C)(2).

Respectfully submitted,

A handwritten signature in black ink that reads "Bridget Purdue Riddell". The signature is written in a cursive style with a horizontal line drawn across the middle of the name.

Bridget Purdue Riddell (0082502)

RIDDELL LAW LLC

1829 Ashland Ave

Columbus, Ohio 43212

(614) 551-6559 (telephone)

(614) 453-8849 (facsimile)

Email: [bpurdue@gmail.com](mailto:bpurdue@gmail.com)

*Attorney for Amicus Curiae,  
the Ohio Manufacturers' Association*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *MEMORANDUM OF AMICUS CURIAE THE OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF RELATOR JOBSOHIO'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS* was sent via regular U.S. mail, postage prepaid this 29th day of August 2012, to the following:

Michael DeWine (0009181)  
Attorney General, State of Ohio

James A. King (0040270)  
(COUNSEL OF RECORD)  
L. Bradfield Hughes (0070997)  
Porter Wright Morris & Arthur LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-2051 (phone)  
(614) 227-2100 (facsimile)  
jking@porterwright.com  
bhughes@porterwright.com

*SPECIAL COUNSEL FOR RESPONDENT,  
DAVID GOODMAN, DIRECTOR, OHIO  
DEPARTMENT OF COMMERCE*

Victoria E. Ullmann (0031468)  
(COUNSEL OF RECORD)  
1135 Bryden Road  
Columbus, Ohio 43205  
(614) 235-2692  
Victoria\_ullman@hotmail.com

*COUNSEL FOR PROPOSED INTERVENORS,  
PROGRESSOHIO.ORG, SENATOR  
MICHAEL SKINDELL, AND  
REPRESENTATIVE DENNIS MURRAY, JR.*

Aneca E. Lasley (0072366),  
(Counsel of Record)  
Gregory W. Stype (0020557)  
SQUIRE SANDERS (US) LLP  
2000 Huntington Center  
41 South High Street  
Columbus, Ohio 43215  
Tel: (614) 365-2830  
Fax: (614) 365-2499  
aneca.lasley@squiresanders.com  
greg.stype@squiresanders.com

Douglas R. Cole (0070665)  
ORGAN COLE + STOCK LLP  
1335 Dublin Road, Suite 104D  
Columbus, OH 43215  
Tel: (614) 481-0902  
drocole@ocslawfirm.com

*COUNSEL FOR RELATOR JOBSOHIO*

  
Bridget Purdue Riddell (0082502)

