

MICHAEL DeWINE (0009181)
Attorney General, State of Ohio

Aaron D. Epstein
Pearl M. Chin
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
aaron.epstein@ohioattorneygeneral.gov
pearl.chin@ohioattorneygeneral.gov

James A. King (0040270)
(Counsel of Record)
L. Bradfield Hughes (0070997)
PORTER, WRIGHT, MORRIS & ARTHUR
LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2051
Facsimile: (614) 227-2100
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
Telephone: (614) 235-2692
victoria_ullman@hotmail.com

*Counsel for Proposed Intervenors
Progressohio.org, Senator Michael
Skindell, and Representative Dennis
Murray, Jr.*

I. INTRODUCTION AND STATEMENT OF INTEREST

The Ohio Bankers League (the “OBL”) is a non-profit trade association that represents the interests of Ohio’s commercial banks, savings banks, and savings associations and their affiliated organizations. The OBL’s 200 plus members comprise the overwhelming majority of all depository institutions doing business in Ohio, and include the full spectrum of FDIC-insured depository institutions.

OBL member institutions include small savings associations that are organized as mutual thrifts owned by their depositors, community banks that are the quintessential locally owned and operated businesses, as well as large regional and multistate holding companies with multiple bank and non-bank affiliates conducting business in Ohio. In all, these depository institutions directly employ more than 130,000 Ohioans. For over 120 years, the OBL has served as a valuable resource to financial institutions in Ohio and has advocated positions on behalf of its members in both the legislature and the courts.

Of particular concern to the OBL in this matter is Respondent’s assertion that recently-enacted Ohio Revised Code Chapter 4313 (the “Transfer Act”) violates the prohibition in Article VIII, Section 4 of the Ohio Constitution on the lending of credit by the State to “private” business ventures. For the reasons set forth below, it is of critical importance to the OBL, its members, and the general public that this Court adhere to its long-standing precedent and find that Article VIII, Section 4’s prohibition does not apply to the Transfer Act.

OBL member institutions provide a wide array of financial products and services to consumers and businesses large and small throughout the State. All of the OBL’s members are dependent upon a strong economic environment in order to stimulate demand for loans and other financial products and services, and the JobsOhio program can play a vital role in restarting Ohio’s economic engine. Without credit and access to financial services, businesses cannot start

or expand. An adverse decision on this issue would negatively impact the continued economic growth that Ohio desperately needs.

It is the OBL's understanding that to fund the payment to the State of Ohio for the Liquor Enterprise, and to finance certain other related expenses, JobsOhio intends to issue its own revenue bonds, which will represent special, limited obligations of JobsOhio, payable solely from the profits of the transferred Liquor Enterprise. Thus, the financing structure contemplated by the Transfer Act notably hinges on JobsOhio's ability to issue the bonds.

The issuance of bonds by state and local governments for the benefit of non-profit organizations through what so-called "conduit bond financing" is a common financing approach often utilized to fund major capital projects for nonprofit healthcare, educational, cultural, and other charitable organizations in Ohio and elsewhere. In a typical conduit bond financing, money is borrowed from a lender at lower-than-market, tax-exempt interest rates, *viz.* tax-free, municipal-bond interest, and lent to a nonprofit organization at the same, lower-than-market, tax-exempt interest rate. The lender or bondholder then looks solely to the credit of the exempt organization for repayment.

Such financing arrangements are similar to the financing structure being challenged by the Respondent. Indeed, the proposed JobsOhio bond issuance bears a close enough resemblance to conventional conduit bond financings for nonprofit entities that the OBL fears that a broad, adverse ruling could discourage these conduit financing arrangements. Such a ruling could ultimately impact not only the OBL's membership, which often participate in such transactions in a variety of capacities, but could also have the effect of further restricting access to credit, which is a vital component of the State's continuing economic recovery.

Indeed, the very purpose of the Transfer Act and related R.C. Chapter 187 (the “JobsOhio Act”) is to serve the public interest through job creation and the spurring of economic development, goals that are strongly supported by the OBL and its members. The financing structure contemplated by the Transfer Act is arguably even further removed from Article VIII, Section 4 than the wholly proper and routinely adopted conduit bond financing structures, since JobsOhio will itself be issuing the subject bonds, rather than the bonds being issued by a public authority. Thus, the anticipated financing structure clearly does not constitute an improper extension of credit by the State, and a finding to the contrary could carry with it serious implications for the broader Ohio economy.

For the foregoing reasons, this case is of vital importance to OBL, its member institutions, Ohio businesses, and the general public alike, and it is imperative that the Court correctly find that the Transfer Act is not an improper extension of credit by the State and does not violate Article VIII, Section 4 of the Ohio Constitution.

II. ARGUMENT

A. Financing Arrangements Like this One Have Been Held Constitutional and Are Vital to Lending and Economic Development

Among several other articulated concerns, Respondent argues that the Transfer Act “violates Article VIII, Section 4 of the Ohio Constitution because it authorizes the State to lend credit to an allegedly ‘private’ corporation.” Resp’t Mem. in Supp. of Mot. for J. on the Pleadings (“Respondent’s Memo”) at 18. Given this Court’s consistent interpretation of Article VIII, Section 4 and the nature of the financing structure at issue, Respondent’s assertion is simply incorrect. Analogous “conduit bond financing” and other, similar financing structures that involve a far more direct link to the State (i.e., where the bonds are being issued by express approval of a public body under a specific bond issuance statute; *see* R. C. Chapters 140

(nonprofit healthcare facilities), 3377 (nonprofit higher educational facilities), and 4582 (port authority financing of educational and cultural facilities)), along with other, more direct forms of State and local government assistance to nonprofits, have repeatedly been found legal and proper. Indeed, if the Court were to accept Respondent's proposition as true, the result could be felt far beyond this case and could negatively impact other development projects and lending across the State.

1. Given JobsOhio's public purpose, the Transfer Act does not violate Article VIII, Section 4 of the Ohio Constitution

As both Relator and Respondent have noted, Sections 4 and 6 of Article VIII of the Ohio Constitution were initially adopted to prevent state and municipal governments from investing public funds in highly speculative and risky private business enterprises. *See Walker v. Cincinnati*, 21 Ohio St. 14, 54 (1871). Article VIII, Section 4 does not, however, "prohibit such gift or loan to a public organization created for a public purpose." *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, 282 (1950) (citing *Kerns*, 104 Ohio St. 550). Indeed, "[i]t has been held on numerous occasions by the courts of this state and by the courts of other states that Section 4, Article VIII of our state Constitution and similar provisions of the Constitutions of other states enjoin the making of appropriations for private enterprises, but that the appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 150 (1955). As this Court has previously held, "the determination of what constitutes a public purpose is primarily a function of the legislative body ... and that such determination will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable." *Campanella*, 51 Ohio App. 2d at 246 (citations omitted).

As Relator has correctly pointed out, the fact that JobsOhio was created as a non-profit entity for the public purpose of furthering Ohio's economic development renders Article VIII, Section 4 inapplicable. *See* R.C. § 187.01. The Transfer Agreement requires JobsOhio to make a "closing" payment to the State upon the closing of the Transfer Agreement, in consideration for the franchise. To fund the closing payment, JobsOhio will then issue its own bonds or otherwise borrow money as permitted under R.C. § 1702.12(F)(5) of Ohio's non-profit corporation law. JobsOhio's bonds or other borrowing will be payable solely from and secured only by future Liquor Enterprise profits realized during the twenty-five year franchise period. Because a portion of the future profits from the Liquor Enterprise are also to be used to fund JobsOhio's job-creation and economic-development activities, JobsOhio lacks the funding that is essential to effectuate those public purposes unless and until the Transfer Agreement is executed and the franchise transfer has closed. As stated in the Transfer Act, this transaction is not a secured borrowing, but rather "an absolute conveyance and true sale," which JobsOhio will finance by issuing its own debt. *See* R.C. § 4313.02(A). To the extent JobsOhio might someday extend credit to a private company, such credit cannot be said to come from the State, and such a transaction would thus not be subject to Article VIII, Section 4.¹

2. *Conduit bonds and other similar financing structures are both routine and vital to Ohio's economic development*

With courts in Ohio and elsewhere having repeatedly found conduit bond financing and similar financing structures to be constitutional, such financings have become routine. *In State ex rel. Taft v. Campanella*, 50 Ohio St. 2d 237, 242 (8th Dist. 1977), the Eighth District Court of Appeals upheld the issuance of conduit revenue bonds for the improvement of private, non-profit

¹ Even if such credit were to come directly from the State, it would be permitted under Ohio Constitution Article VIII, Section 13, as held in *Duerk v. Donahey*, 67 Ohio St.2d 216 (1981).

hospital facilities. In finding no violation of Article VIII, Section 6, the court explained that “[t]he primary purpose of Section 6, Article VIII, is to prohibit the use of county funds or credit for private purposes which means that county funds or county credit shall not be used for economic gain by private interests.” *Campanella*, 50 Ohio St. 2d at 248. Distinguishing between private and public purposes, the court held the subject financing to be constitutional. *See id.* at 249; *see also State ex rel. Leaverton v. Kerns*, 104 Ohio St. 550 (1922).

Today, many public development and economic stimulus programs are financed through conduit bond financing or similar structures. Examples include the Ohio Higher Educational Facility Commission, which issues conduit bonds for private non-profit colleges and universities (*see* R.C. Chapter 3377) and also for private non-profit health care institutions (*see* R.C. Chapter 140). Ohio port authorities also issue conduit bonds for a broad array of capital projects for exempt organizations (*see* R.C. Chapter 4582). The availability of these bond financing programs provides critical development that would not be possible absent the ability of the State and local governments to provide such assistance to the private non-profit sector.

These common and routine conduit bond financing and other like financing structures are essential not only to the financial services industry, but to the overall economy and the public as a whole. Financial institutions often play a number of roles in conduit bond-financed transactions and others like them, which stimulate economic development and lending generally. Every day, banks throughout Ohio play an integral role in such financings by providing credit support, depository and escrow agent services, trust services, and a host of other products and services on behalf of not-for-profit organizations that engage in financing transactions. Without such financing, the OBL’s members and their employees would suffer, as would the economy and general public through the loss of critical development projects. Accordingly, the OBL

urges this Court to adhere to its long-established interpretation of Article VIII, Section 4 and find the transactions contemplated by the Transfer Act do not constitute an improper extension of credit by the State.

B. A Pronouncement that the Transfer Act Violates Article VIII, Section 4 Could Have a Broader Chilling Effect on Both Public and Private Financing

Of equal concern to the OBL is avoiding a broad ruling that could negatively impact the Ohio financial services industry as a whole. In addition to being a departure from established Ohio jurisprudence, a broad pronouncement that the Transfer Act violates Article VIII, Section 4 could do just that, and could have a severe chilling effect on both public *and private* financing throughout the State.

As noted above, this Court and others throughout the State and elsewhere have routinely found conduit bonds and similar financing structures to be constitutional, and financial institutions routinely participate in transactions much like the one at issue here as described above. *See Campanella*, 50 Ohio St. 2d at 248. A general pronouncement by this Court that the financing at issue in this case violates Article VIII, Section 4 of the Ohio Constitution could thus have far-reaching implications on borrowing across the State and could impact not only the parties here, but the OBL's members, their employees, and the general public they serve. Given that conduit bond financing generally involves the issuance of bonds by a public body rather than the direct issuance of bonds a private borrower like JobsOhio, conduit bond financing is arguably even closer to the prohibitions of Article VIII, Section 4 than the financing structure contemplated here, which means that an adverse ruling here could cast doubt on many other development projects.

In addition to potentially thwarting this valuable economic development initiative, delivering the message that financing arrangements like the one contemplated violate Article

VIII, Section 4 of the Ohio Constitution could have a severe chilling effect on Ohio's economic recovery efforts. Ohio's economy needs borrowers to have access to capital and liquidity, and for that to happen, lenders and borrowers need to be able to proceed with confidence, knowing that they are operating in an environment that will encourage, be conducive to, and foster lending and investment. Striking down the Transfer Act under Article VIII, Section 4 would send exactly the opposite message to borrowers, to Ohio businesses, and to potential employers by casting uncertainty over a whole range of essential financing structures and transactions.

C. The OBL Supports JobsOhio's Goals of Job Creation and Economic Growth

Finally, the OBL believes that JobsOhio will serve as an effective and important economic driver for creating new jobs, facilitating economic expansion, and encouraging new employers to come to the State. As the economy continues to recover and grow, so will the need for financing and financial services, which is obviously of great interest to the OBL's 200 plus members and their over 130,000 employees throughout the State. More importantly, however, the creation of jobs is vital to all industries and to the health of the State and its citizens in general. Despite Respondent's characterization of JobsOhio as a "private corporation," the OBL can think of no more important *public* goal at this time than the creation and preservation of Ohio jobs. The purpose of the JobsOhio and Transfer Acts—fostering job creation and economic development—aligns with sound public policy and is essential to a stable financial system and a healthy Ohio economy.

Indeed, the stated purpose and goal of JobsOhio is directly aligned with the interests of Ohio's banking community. The Financial services industry itself has been identified by JobsOhio as one of the key industry sectors in Ohio in which it intends to focus in fostering investment, growth and job creation. As a general matter, financial institutions generate revenue

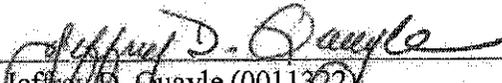
from the interest and fees charged on loans and other products and services sold, with a substantial amount of such revenue and earnings derived from commercial lending and related businesses. These activities have been, and will continue to be, materially affected by the overall health of the state and national economies. Any slow-down in growth or deterioration in general economic conditions will have a direct and meaningful impact on Ohio banks, resulting in elevated credit costs and non-performing asset levels, which in turn adversely affect the ability of banks to lend and borrowers to gain access to needed capital. Furthermore, as noted above, a narrow reading of Article VIII, Section 4 to prohibit the proposed JobsOhio financing structure could have unintended and possibly unforeseen consequences of limiting future project and related infrastructure finance, which would directly impact the financial services industry which regularly provide products and services for such transactions.

For the foregoing reasons, the OBL respectfully urges this Court to avoid a broad proclamation that could result in a step backward for Ohio's economic recovery and decline Respondent's invitation to overreach and expand the application of Article VIII, Section 4 of the Ohio Constitution.

III. CONCLUSION

For all of the foregoing reasons, *amicus curiae* Ohio Bankers League respectfully requests that the Court adhere to its previous interpretations of Article VIII, Section 4 of the Ohio Constitution and find that the financing structure contemplated by the Transfer Act is constitutional and does not amount to an improper extension of credit by the State.

Respectfully submitted,


Jeffrey D. Quayle (0011322)
Senior Vice President & General Counsel
Ohio Bankers League

4249 Easton Way Suite 150
Columbus, OH 43219-6170
Ph. 614-340-7603
Fax: 614-340-7596
jquayle@ohiobankersleague.com

*Counsel for Amicus Curiae
Ohio Bankers League*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 29th day of August, 2012, via U.S. Mail, postage prepaid, upon the following:

Aneca E. Lasley
Gregory W. Stype
SQUIRE SANDERS (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
aneca.lasley@squiresanders.com
greg.stype@squiresanders.com

Douglas R. Cole
ORGAN COLE + STOCK LLP
1335 Dublin Road, Suite 104D
Columbus, OH 43215
drcole@ocslawfirm.com

Attorneys for Relator JobsOhio

Victoria E. Ullmann
1135 Bryden Road
Columbus, Ohio 43205
victoria_ullman@hotmail.com

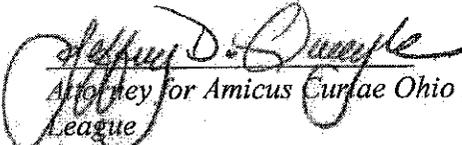
*Attorneys for Proposed Intervenors
Progressohio.org, Senator Michael
Skindell, and Representative Dennis
Murray, Jr.*

Richard Michael DeWine
Attorney General, State of Ohio

Aaron D. Epstein
Pearl M. Chin
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
aaron.epstein@ohioattorneygeneral.gov
pearl.chin@ohioattorneygeneral.gov

James A. King
L. Bradford Hughes
Michael A. Wehrkamp
C. Darcy Copeland
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus Ohio 43215
jking@porterwright.com
bhughes@porterwright.com
mwehrkamp@porterwright.com
dcopeland@porterwright.com

*Attorneys for Respondent David
Goodman*


Attorney for Amicus Curiae Ohio Bankers
League