

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.,  
JOBSONHIO  
41 South High Street, Suite 1500  
Columbus, Ohio 43215,

Relator,

v.

DAVID GOODMAN,  
DIRECTOR, OHIO DEPARTMENT  
OF COMMERCE,  
77 South High Street, 23rd Floor  
Columbus, Ohio 43215-6123

Respondent.

Case No. 12-1356

ORIGINAL ACTION IN  
MANDAMUS

MEMORANDUM OF *AMICI CURIAE* THE OHIO CHAMBER OF COMMERCE AND  
THE OHIO COUNCIL OF RETAIL MERCHANTS  
IN SUPPORT OF WRIT OF MANDAMUS

Linda Woggon (0059082)  
Ohio Chamber of Commerce  
230 East Town Street  
Columbus, OH 43215  
Tel: 614-228-4201  
Fax: 614-228-6403  
[lwoggon@ohiochamber.com](mailto:lwoggon@ohiochamber.com)

*Counsel for Amicus Ohio  
The Ohio Chamber of Commerce*

Frederick E. Mills (0008180)  
VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
Columbus, OH 43215  
Tel: 614-464-8395  
Fax: 614-719-5279  
[femills@vorys.com](mailto:femills@vorys.com)

*Counsel for Amicus Curiae  
The Ohio Council of Retail Merchants*

Aneca E. Lasley (0072366)  
(COUNSEL OF RECORD)  
Gregory W. Stype (0020557)  
SQUIRE SANDERS (US) LLP  
2000 Huntington Center  
41 South High Street  
Columbus, Ohio 43215-6197  
Tel: 614-365-2830  
Fax: 614-365-2499  
[aneca.lasley@squiresanders.com](mailto:aneca.lasley@squiresanders.com)  
[greg.stype@squiresanders.com](mailto:greg.stype@squiresanders.com)

Douglas R. Cole (0070665)  
ORGAN COLE + STOCK LLP  
1335 Dublin Road, Suite 104D  
Columbus, Ohio 43215  
Tel: 614-481-0902  
Fax: 614-481-0904  
[drcole@ocslawfirm.com](mailto:drcole@ocslawfirm.com)

*Counsel for Relator, JobsOhio*

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Michael DeWine (0009181)  
Attorney General, State of Ohio

James A. King (0040270)  
(COUNSEL OF RECORD)  
L. Bradford Hughes (0070997)  
PORTER, WRIGHT, MORRIS &  
ARTHUR LLP  
41 South High Street  
Columbus Ohio 43215  
Tel: 614-227-2051  
Fax: 614-227-2100  
[jking@porterwright.com](mailto:jking@porterwright.com)  
[bhughes@porterwright.com](mailto:bhughes@porterwright.com)

*Special Counsel for Respondent,  
David Goodman, Director,  
Ohio Department of Commerce*

Victoria E. Ullmann (0031468)  
1135 Bryden Road  
Columbus, OH 43205  
Tel: (614) 253-2692  
Fax: (614) 253-2692  
[victoria\\_ullmann@hotmail.com](mailto:victoria_ullmann@hotmail.com)

*Attorney for Proposed Intervenor  
ProgressOhio.org*

Michael J. Skindell (0039041)  
55 Public Square, Suite 1055  
Cleveland, OH 44113  
Tel: (216)-621-0070  
[mkindell@aol.com](mailto:mkindell@aol.com)

*Proposed Intervenor, Pro Se*

Dennis E. Murray (0038509)  
Murray & Murray Co., LPA  
111 East Shoreline Dr.  
Sandusky, OH 44870  
Tel: (419) 624-3126  
[dmj@murrayandmurray.com](mailto:dmj@murrayandmurray.com)

*Proposed Intervenor, Pro Se*

## **INTRODUCTION AND STATEMENT OF AMICUS INTEREST**

The Ohio Chamber of Commerce (the “Chamber”) represents members of virtually every industry throughout the State of Ohio, including manufacturing, retail, healthcare, transportation, and others. The Ohio Council of Retail Merchants (the “Council”) is a business trade association representing industries throughout the business supply-chain. The Chamber and the Council (collectively the “Amici”) support the relief requested in the Complaint filed by Relator JobsOhio. They urge this Court to find that R.C. Chapter 187 (the “JobsOhio Act”) and R.C. Chapter 4313 (the “Transfer Act”) (together, the “Legislation”) are constitutional and to order Respondent to execute the Franchise and Transfer Agreement on behalf of the State in accordance with R.C. § 4313.02(C)(2).

### **A. The Ohio Chamber of Commerce.**

The Chamber was founded in 1893 as a business advocacy organization in the State of Ohio. The Chamber is Ohio’s oldest, largest, and most diverse business association, representing over 6,000 Ohio companies. Its members range from small, family-owned businesses to international corporations, and they reflect all major industry sectors. The Chamber is led by a volunteer board of directors that consists of 66 business leaders from all over the State.

The Chamber is dedicated to presenting and protecting its members’ interests on important statewide issues and thereby promoting a favorable Ohio business climate. In its nearly 120 years of existence, through 60 Ohio General Assemblies and 31 Governors, the Chamber’s mission has remained unchanged:

As the state’s leading business advocate and resource, the Ohio Chamber of Commerce aggressively champions free enterprise, economic competitiveness and growth for the benefit of all Ohioans.

Consistent with its mission, the Chamber advocates for a free enterprise system where businesses flourish, creating jobs and allowing Ohioans to prosper. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, healthcare, environmental regulation, workers' compensation, and campaign finance. The Chamber's advocacy efforts are dedicated to creating a strong Ohio, including in particular a business climate conducive to economic growth and job creation. Respondent's unwarranted position in this action jeopardizes those goals.

**B. The Ohio Council of Retail Merchants**

The Council has been serving the interests of Ohio's retail and wholesale industries since it was founded in 1922. The Council is an alliance of leading trade associations representing more than 4,000 retailers, wholesalers, distributors, local enterprises, influential regional businesses, and large enterprise organizations. It was formed and continues to promote and support initiatives that pave a positive path for Ohio's retail community. In doing so, the Council works closely with policy-makers and leaders from other relevant industries to support a business environment that produces jobs for Ohioans while at the same time encouraging consumers to spend their dollars on retailers operating in Ohio.

**C. JobsOhio is Consistent with the Mission and Purpose of the Amici.**

For Ohio to succeed, the public and private sectors must work together. As this Court is well aware, businesses have a choice about whether to come to Ohio and whether to stay in Ohio, particularly in these difficult economic times. Part of the calculus that drives that decision for many businesses is whether Ohio's public and private sector work together effectively and efficiently. JobsOhio illustrates the type of lawful, synergistic public-private partnerships that

Ohio needs in order to promote economic development and job growth in this State. The Amici thus proudly support JobsOhio and the public purposes it serves: economic development, job creation, job retention, job training, and the recruitment of business to this State.

Respondent's refusal to execute the Franchise and Transfer Agreement is unwarranted, and the arguments advanced in support of his Motion For Judgment On The Pleadings ("Motion") raise substantial concerns for the Amici and their members (and the thousands of Ohioans they employ). Specifically, Respondent's articulated view of Article VIII, Section 4 of the Ohio Constitution is inconsistent with the well-established public purpose doctrine, which recognizes that public financial support to a private *non-profit* entity to be expended for a *public* purpose does not violate this constitutional provision. JobsOhio and its relationship with the State fit squarely within that doctrine. Accordingly, the Legislation does not violate any constitutional limitation on lending aid or credit to private entities.

In addition, Respondent's argument that the State is incurring debt as a result of the Legislation is based on an unreasonable and illogical interpretation of the Franchise and Transfer Agreement. In short, the State itself is not incurring any debt under the Agreement, and any debt incurred by JobsOhio is not State debt, as the State has no obligation for any debts that JobsOhio incurs. Accordingly, the Legislation cannot violate the limit on *State* debt that Article VIII of the Ohio Constitution imposes. Respondent's unjustified position on these matters, if adopted, would ultimately increase the cost of doing business in Ohio and discourage Ohio businesses from investing, growing, and hiring within this State.

Especially now, when the State is competing not only nationally, but globally, to recruit and retain businesses, it is critically important that the Court promptly determine the constitutionality of the Legislation. The Ohio Chamber of Commerce and the Ohio Council of

Retail Merchants as Amici Curiae respectfully request that this Court find the Legislation constitutional and order Respondent to execute the Franchise and Transfer Agreement.

## **I. STATEMENT OF FACTS**

The Amici adopt the facts set forth in Relator's Memorandum In Support of Writ of Mandamus ("Memorandum"). Capitalized terms not otherwise defined in this brief retain the meanings given to them in the Memorandum.

## **II. ARGUMENTS IN SUPPORT OF THE LEGISLATION**

### **A. The Legislation Does Not Violate Article VIII, Section 4 of the Ohio Constitution Because the Limitation against Lending Aid and Credit Does Not Apply to JobsOhio, a Non-Profit Entity Promoting Public Purposes.**

One issue of concern to the Amici is Respondent's contention that the Legislation violates the prohibition in Article VIII, Section 4 against lending aid and credit to private entities. This is particularly worrisome because if Respondent's expansive view of that prohibition receives this Court's imprimatur, the State's ability to compete in the global economy will be improperly hobbled at a time when the State and its agencies and instrumentalities require all lawful tools at their disposal to effectively meet citizen needs. This is especially true as pressure on the State's budget increases and the State looks to create opportunities for the public and private sectors to work together, not separately, to cost-effectively promote economic development, job creation, and recruitment of business to this State. The Legislation represents the type of proactive solution needed to reduce the cost of government, improve Ohio's competitive standing in the marketplace, and serve citizen needs.

This Court has repeatedly held that the prohibition under Article VIII, Section 4 of the Ohio Constitution does *not* apply when the State provides financial support to a non-profit corporation to effect a valid public purpose. The constitutional language provides that:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

It is well-settled, however, that this section does not proscribe the use of public funds in the private sector in all instances. For example, in *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St.3d 37 (2000), this Court recognized that Article VIII, Section 4's general purpose is to prevent the State from inviting "private interests to dip into the public till" at taxpayer expense. *Id.* at 39-40. Of particular importance here, this Court has long held that a "public purpose" exemption exists to Section 4's general proscription of the State's ability to lend aid or credit to private entities. *See Leaverton v. Kerns*, 104 Ohio St. 550 (1922).

So, for example, in *Leaverton*, this Court held that a transfer of county funds to a private, independent agricultural society did not violate Sections 4 or 6 of Article VIII of the Ohio Constitution. In so holding, the Court observed that these "sections of the Constitution ... forbidding financial aid, or the loan of the credit of the state ... forbid furnishing financial aid to any agricultural *business*," but did not prevent governmental aid to the non-profit corporation there to be used in support of a legitimate public purpose. *Leaverton*, 104 Ohio St. at 554 (emphasis added).

This Court has since revisited its holding in *Leaverton* on several occasions. Each time, it has reaffirmed the public purpose doctrine. *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268 (1950) ("Section 4 of Article VIII . . . does not prohibit the giving or loaning of the state's credit to or in aid of a public organization created for a public purpose."); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955) ("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. Ohio Congress of Parents & Teachers v. State Board of Education*, 111 Ohio St.3d 568 (2006) (“legislature [can] validly appropriate public funds to a private entity for a public purpose”); *see also Perkins v. Stockert*, 45 Ohio App.2d 211 (2nd Dist. 1975) (holding that funding community development authorities which in turn provide assistance to private, for-profit entities is constitutional because the authorities were created to serve a public purpose), *cited with approval by Ohio Congress of Parents & Teachers*, 111 Ohio St.3d 568. Thus, the Amici urge the Court to look to the *Leaverton* case and its progeny as its guide to deciding this matter.

Under the public purpose doctrine, it is clear that the Legislation and the relationships it creates between the State and JobsOhio are constitutional. JobsOhio is a non-profit corporation created to promote a variety of legitimate public purposes – “economic development, job creation, job retention, job training, and the recruitment of business to the state.” R.C. § 187.01; *see also State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 28 (1953) (courts should not disturb legislative determinations of what constitutes a public purpose, unless such determinations are “manifestly arbitrary or unreasonable”). Notably, job creation and economic development have long been recognized as legitimate public purposes. Several sections of the Revised Code and the Ohio Constitution authorize the State, municipalities, and counties to promote job creation and economic development in a variety of ways. *E.g.*, Ohio Const., Art. VIII, § 13; R.C. Chapter 165 (authorizing the issuance of industrial revenue bonds “in furtherance of the public purposes of the state to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of the state”); *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 48 (1964) (providing employment and assisting the development of industrial, commercial, distribution, and research activities are legitimate public purposes). Given the myriad programs

and initiatives to promote economic development and jobs within the State, it is axiomatic that such activities serve and promote legitimate public purposes. Thus, the transactions envisioned by the Transfer Act fit comfortably within the public purpose exception to Article VIII, Section 4.

While Respondent contends otherwise, his arguments are mistaken. As an initial matter, it appears that Respondent misunderstands Relator's arguments regarding Article VIII, Section 4. Respondent largely ignores Relator's chief argument that the public purpose doctrine applies to the instant case. Instead, Respondent incorrectly claims that Relator's arguments are based on the Court of Appeals decision in *Grendell v. Ohio EPA*, 146 Ohio App.3d 1 (9th Dist. 2001). In *Grendell*, the court held that Article VIII, Section 4 did not prevent the State's environmental protection agency from contracting with a for-profit corporation to provide e-check services in several northern Ohio counties. The court based its decision on the fact that the contract between the state and the private, for-profit corporation did not create a joint venture between the parties and, therefore, the State did not lend its aid or credit to the private, for-profit corporation.

The situation presented in *Grendell*, however, is different in kind from the issues in the present case. *Grendell* required the Court of Appeals to determine whether an arrangement between the state and a private, *for-profit* corporation created a joint venture in violation of Article VIII, Section 4. JobsOhio is a non-profit corporation. Thus, in this case, the Court need only decide whether "economic development, job creation, job retention, job training, and the recruitment of business to the state" (R.C. § 187.01) are legitimate public purposes. If they are, then the prohibition under Article VIII, Section 4 does not apply to the Legislation at all. *Leaverton*, 104 Ohio St. 550 (appropriation of funds to non-profit entity in promotion of a legitimate public purpose does not implicate Article VIII, Section 4). Because the public

purpose doctrine controls this case, Respondent's arguments regarding the State's and JobsOhio's supposed "joint venture" are irrelevant and misleading. Financial relationships between the State and non-profit corporations promoting public purposes do not implicate Article VIII, Section 4.

Respondent is likewise incorrect to suggest that *Leaverton* and its progeny have limited the public purpose doctrine to public institutions. To the contrary, this Court expressly held in *Defenbacher*, 164 Ohio St. at 151, that the State may appropriate public funds to a *private* corporation in pursuit of a public purpose. The relevant focus is on whether the funds will be used for a legitimate public purpose, not on whether the non-profit entity is "public" or "private." *See, e.g., id.* ("The ultimate question is . . . whether the enactment by the General Assembly of legislation appropriating funds . . . provides for the expenditure of funds for a public purpose.").

Ultimately, this case presents the Court with an important opportunity to reaffirm and apply its public purpose doctrine to the relationship between the State and JobsOhio established by the Legislation. The Court's reaffirmation of the doctrine will clarify the law as it pertains to proactive public-private solutions to complex economic challenges. For these reasons, the Amici respectfully suggest that the Court should find the Legislation constitutional and order Respondent to execute the Franchise and Transfer Agreement on behalf of the State, in accordance with R.C. § 4313.02(C)(2).

**B. The Legislation Does Not Violate the Debt Limit Imposed by Article VIII of the Ohio Constitution Because the State Is Not Incurring Debt.**

The Amici's members are also concerned about Respondent's argument under Article VIII that the State's *non-obligatory* option to cure a default under the Franchise and Transfer Agreement is equivalent to an obligatory "debt" incurred by the State. The troubling aspect of Respondent's argument is that it contradicts basic principles of contract interpretation and

misconstrues the Legislation as creating State debt when it does not. Simply put, a non-obligation is not an obligation, and to hold otherwise would create liability where none exists. The Court should reject Respondent's expansive view of State debt and conclude that the Legislation is constitutional.

It is well settled that the debt limits set forth in Article VIII of the Ohio Constitution apply *only* to debts incurred by or on behalf of *the State*. See, e.g., Ohio Const., Art. VIII, § 1 (“The state may contract debts ...”); id. § 2 (“In addition to the above limited power, the state may incur debts ...”). To use the words of Article VIII, Section 3, “[e]xcept the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created *by or on behalf of the state*.”

The Franchise and Transfer Agreement does not create a debt “by or on behalf of the state.” To the contrary, the Agreement plainly and unambiguously provides that the State Parties (i.e., the Divisions of Liquor Control and the Office of Budget and Management) *may* cure a default of JobsOhio, but they are *not obligated* to do so:

(b) if a Franchisee Default is by reason of the failure to pay any monies, the State Parties *may (without obligation to do so)* make payment on behalf of the Franchisee Parties of such monies, and any amount paid by the State Parties shall be payable by the Franchisee Parties to the State Parties within seven Business Days after written demand therefore; . . . .

(c) the State Parties *may* cure a Franchisee Default (*but this shall not obligate the State Parties to cure or attempt to cure a Franchisee Default or, after having commenced to cure or attempted to cure a Franchisee Default, to continue to do so*), and all costs and expenses reasonably incurred by the State Parties in curing or attempting to cure a Franchisee Default, shall be payable by the Franchisee Parties to the State Parties within seven Business Days of written demand; . . . .

Franchise and Transfer Agreement, Art. 17 (emphasis added).

In a desperate attempt to bring this non-obligatory language within the reach of Article VIII, Respondent argues that this language “presumably means” that, in the event that JobsOhio

defaults on its debts “the State *would pay* them.” Motion, p. 24 (emphasis added). But that is not a reasonable interpretation of the contract language, which unambiguously provides that the State’s option to cure is non-obligatory. See *Aultman Hosp. Assoc. v. Community Mut. Ins. Co.*, 46 Ohio St. 51, 54 (1989) (“Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.”).

Nor is Respondent correct that the non-obligatory nature of the cure option is *irrelevant* to the question of whether the State has incurred a debt. According to Respondent: “The mere fact that the State may ultimately not be called upon to pay JobsOhio’s indebtedness is of no consequence for purposes of Article VIII.” Motion, p. 24. To support his position, Respondent cites this Court’s decision in *State ex rel. Pub. Inst. Bldg. Auth. v. Griffith*, 135 Ohio St. 604 (1939). Unlike the present case, however, where the State has no obligation to service the debt of JobsOhio, *Griffith* involved the State’s “absolute and unconditional contractual *obligation* to pay” a rental fee of \$421,500 per annum to the Public Institutional Building Authority (“PIBA”) to service PIBA’s proposed bond debt. 135 Ohio St. at 618 (emphasis added). In addition, in *Griffith*, the State’s obligatory rental payments secured PIBA’s proposed bond debt, such that bondholders could look to the State as a source of relief if PIBA defaulted on its bond debt. *Id.* at 208. The distinction between the two cases is obvious and important: unlike the State’s rental payments in *Griffith*, the State’s cure option under the Franchise and Transfer Agreement is *not* obligatory and does *not* secure JobsOhio’s proposed bond debt.

Respondent also asserts, incorrectly, that the State incurs debt because “a major revenue stream in the form of liquor sales, which otherwise would have been deposited into the State treasury, will be pledged to service the \$1.4 billion debt of another entity, JobsOhio.” Motion,

pp. 25-26. This argument turns the entire transaction on its head, ignoring that the \$1.4 billion will be paid *to* the State, not *by* the State. The State's receipt of money, which it has no obligation to repay, is not a "debt." Respondent's cites this Court's decision in *State ex rel. Pub. Inst. Bldg. Auth. v. Neffner*, 137 Ohio St. 390 (1940), but *Neffner* does not support Respondent's argument. In *Neffner*, as in the related case *Griffith*, the State incurred debt because it was contractually *obligated to pay* rental fees to PIBA to service PIBA's bond debt, "thereby requiring the state to seek and secure revenues otherwise in order to meet its obligations to care for and support its wards." 137 Ohio St. at 399. Just the opposite is true in the present case, where JobsOhio will pay more than \$1.4 billion to the State for the franchise relating to the Liquor Enterprise, as well as paying on a going-forward basis all of the State's direct and indirect costs and expenses to continue operating the Liquor Enterprise. See Franchise and Transfer Agreement, Art. 3; Operations Services Agreement, Art. 2. Nothing in this arrangement, therefore, requires the State or its taxpayers "to seek and secure other funds to meet the State's obligations," as Respondent contends.

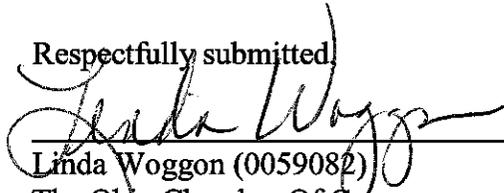
In short, that Transfer Agreement does not call for the State to incur a "debt" for purposes of Article VIII of the Ohio Constitution. Accordingly, the Court should reject Respondent's "State debt" argument, thereby allowing JobsOhio and the State to move forward with this transaction designed to allow JobsOhio to move forward with its goal of promoting economic development in the State.

### **III. CONCLUSION**

JobsOhio is a non-profit entity that serves the public purposes of fostering job creation and the State's economic development. Because the Legislation at issue in this case promotes legitimate public purposes and does not give credit or aid to a private, for-profit business, the

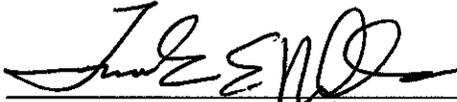
Legislation does not violate any constitutional limitation on lending aid or credit. In addition, the Legislation does not – and indeed, cannot – violate any constitutional limit on the amount of debt the State can incur, because the relationship between the State and JobsOhio does not create any State debt. Accordingly, the Ohio Chamber of Commerce and the Ohio Council of Retail Merchants respectfully request that this Court find that the Legislation is constitutional and order Respondent to execute the Franchise and Transfer Agreement on behalf of the State, in accordance with R.C. § 4313.02(C)(2).

Respectfully submitted



Linda Woggon (0059082)  
The Ohio Chamber Of Commerce  
230 E. Town Street  
Columbus, OH 43215  
Tel: 614-228-4201  
Fax: 614-228-6403  
[lwoggon@ohiochamber.com](mailto:lwoggon@ohiochamber.com)

*Counsel for Amicus Curiae  
The Ohio Chamber Of Commerce*



Frederick E. Mills (0008180)  
VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
Columbus, OH 43215  
Tel: 614-464-8395  
Fax: 614-719-5279  
[femills@vorys.com](mailto:femills@vorys.com)

*Counsel for Amicus Curiae  
The Ohio Council of Retail Merchants*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following on

August 31, 2012.

Aneca E. Lasley (0072366)  
(COUNSEL OF RECORD)  
Gregory W. Stype (0020557)  
SQUIRE SANDERS (US) LLP  
2000 Huntington Center  
41 South High Street  
Columbus, Ohio 43215-6197

Douglas R. Cole (0070665)  
ORGAN COLE + STOCK LLP  
1335 Dublin Road, Suite 104D  
Columbus, Ohio 43215

*Counsel for Relator, JobsOhio*

Michael J. Skindell (0039041)  
55 Public Square, Suite 1055  
Cleveland, OH 44113

*Proposed Intervenor, Pro Se*

Michael DeWine (0009181)  
Attorney General, State of Ohio

James A. King (0040270)  
(COUNSEL OF RECORD)  
L. Bradford Hughes (0070997)  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
41 South High Street  
Columbus Ohio 43215

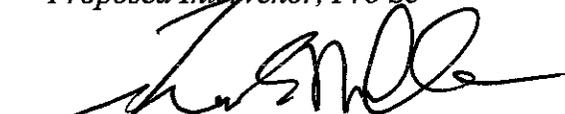
*Special Counsel for Respondent,  
David Goodman, Director,  
Ohio Department of Commerce*

Victoria E. Ullmann (0031468)  
1135 Bryden Road  
Columbus, OH 43205

*Attorney for Proposed Intervenor  
ProgressOhio.org*

Dennis E. Murray (0038509)  
Murray & Murray Co., LPA  
111 East Shoreline Dr.  
Sandusky, OH 44870

*Proposed Intervenor, Pro Se*

  
\_\_\_\_\_  
One of the Attorneys for Amici