

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Case No. 15-1782

Plaintiff-Appellee,

-vs-

On Appeal from
the Warren County
Court of Appeals, Twelfth
Appellate District

HAMZA SHALASH,

Court of Appeals
No. CA2014-12-146

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON
O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO**

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STATEMENT OF AMICUS INTEREST

Beginning with the Tenth District's mistaken ruling in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303, several Franklin County cases have addressed the legal question of whether the Revised Code criminalized the trafficking and possession of controlled substance analogs on or after October 17, 2011, and before December 20, 2012. Three such cases are currently being held by this Court pending the outcome of the present case. *State v. Mohammad*, 144 Ohio St.3d 1462, 2016-Ohio-172, 44 N.E.3d 290; *State v. Mobarak*, 144 Ohio St.3d 1458, 2016-Ohio-172, 44 N.E.3d 287; *State v. Mustafa*, 145 Ohio St.3d 1442, 1443, 2016-Ohio-1596, 48 N.E.3d 581, 582 (pending on certified-conflict and discretionary review).

Another case is pending in the Tenth District and will be on its way to this Court after the Tenth District adheres to *Smith*. *State v. Mobarak*, 10th Dist. No. 16AP-162.

In addition, the issue will affect more than just trafficking and possession cases in the October 2011 to December 2012 time frame, as it will continue to affect the operation of other drug statutes in R.C. Chapter 2925. While the December 2012 amendments directly inserted "analog" language into the trafficking and possession statutes, the General Assembly did not do so as to other drug statutes like R.C. 2925.02 (corruption of another or minor with drugs), R.C. 2925.04 (illegal manufacture), and R.C. 2925.041 (illegal assembly of precursors). The General Assembly was still counting on R.C. 3719.013 to incorporate the analog concept into these parts of the statutory scheme.

For example, under the flawed analysis in *Smith*, an analog trafficker can provide analogs to children and escape the heightened mandatory sentence for a second-degree felony that would otherwise apply to such offenses under R.C. 2925.02(C)(1).

In light of the pending Franklin County cases, and in the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the State.

STATEMENT OF FACTS

Amicus adopts by reference the procedural and factual history as set forth in the State's brief and paragraphs two through five of the Twelfth District's opinion.

ARGUMENT

Proposition of Law: As effective October 17, 2011, R.C. 3719.013 mandated that "controlled substance analogs" shall be treated as Schedule I controlled substances for purposes of any provision in the Revised Code. The trafficking statute was part of the Revised Code and therefore was subject to this broad incorporation of analogs into the Revised Code.

Certified-Conflict Question: Whether "controlled substance analogs" were criminalized as of October 17, 2011, the effective date of House Bill 64.

Sub.H.B. 64 was enacted by the General Assembly effective 10-17-11 in an effort to combat designer drugs having a substantially similar chemical structure and effect as drugs already listed in Schedule I or II. H.B. 64 banned the substances by defining what is deemed to be a "controlled substance analog" (see R.C. 3719.01(HH)), and by requiring such analogs to be treated as "controlled substances".

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

R.C. 3719.013.

Given the "shall be treated" provision in R.C. 3719.013, the legislative intent to penalize the trafficking and possession of analogs was clear as of 10-17-11. Any

provision in the entire Revised Code prohibiting “controlled substances” would be treated as a matter of law as including analogs within its reach. R.C. 3719.013 operated hand-in-glove with the “controlled substance” prohibitions in R.C. 2925.03 and 2925.11, thereby allowing prosecution for trafficking and possession of analogs.

In a series of cases, the Tenth District has used a “strict construction” analysis to erect artificial barriers to defeat the plain, broad language of R.C. 3719.013. Its arguments boil down to the contention that the analog definition and “shall be treated” provision were only set forth in R.C. Chapter 3719 and that nothing within R.C. Chapter 2925 itself formally incorporated analogs into the latter chapter. But these concerns do not withstand scrutiny: they misapply the doctrine of strict construction; they insert limiting language into the unqualified statutory language; and they fail to give full effect to the legislative intent.

The Twelfth District recognized the flaws in the Tenth District’s analysis and rightly declined to follow the Tenth District precedents. “The plain and clear language of R.C. 3719.013 incorporated controlled substance analogs into every other chapter of the Revised Code, including R.C. Chapter 2925.” *Shalash*, ¶ 24. The Twelfth District’s decision should be affirmed.

This issue of statutory meaning and construction is a question of law that is reviewed de novo. *State v. J.M.*, ___ Ohio St.3d ___, 2016-Ohio-2803, ¶ 9; *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶ 8.

A. Introduction

Under the version of R.C. 2925.03 in effect in January and February 2012 when defendant Shalash’s offenses occurred, trafficking in a “controlled substance” in

“Schedule I” was prohibited. Former R.C. 2925.03(A) & (C)(1)(a) – (f) (version eff. 10-17-11). The degree of the offense depended on the amount of the substance in relation to the “bulk amount.” *Id.*

Under the version of R.C. 2925.01 in effect in at that time, the terms “controlled substance” and “Schedule I” were defined as having the same meanings as in R.C. 3719.01. Former R.C. 2925.01(A) (version eff. 9-30-11).

Under the version of R.C. 3719.01 in effect at that time, the term “controlled substance analog” was specifically defined “[a]s used in this chapter”. R.C. 3719.01(HH)(1). But enacted at the same time was new R.C. 3719.013, which provided:

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

B. Strict Construction Does Not Aid Defendant

Defendant Shalash borrows heavily from the Tenth District’s decision in *Smith*, and therefore much of the following focuses on the several flaws in *Smith*.

Smith relied heavily on the concept of “strict construction,” contending that the State could prevail only if the statutory scheme “clearly” made it punishable to traffic and possess analogs. Claiming “ambiguity,” *Smith* proceeded to conclude that the statutes were not “clear” and therefore the charges were properly dismissed.

Smith erred in several respects as to “strict construction”, also known as the rule of lenity. The mere existence of real or possible “ambiguity” does not mean that the defendant prevails. “[T]his Court has never held that the rule of lenity automatically permits a defendant to win.” *Muscarello v. United States*, 524 U.S. 125, 139, 118 S.Ct.

1911, 141 L.Ed.2d 111 (1998). Even when the statutory language is “ambiguous,” which is not conceded here, the statutory text still must be *fully* analyzed to try to construe it.

Strict construction is not necessary “merely because it [is] possible to articulate a construction more narrow than that urged by the Government.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). “[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute * * *.” *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S.Ct. 1670, 1682, 182 L.Ed.2d 678 (2012).

Strict construction “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Chapman v. United States*, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (internal quotation marks and brackets omitted).

“[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended.” *Marachich v. Spears*, 133 S.Ct. 2191, 2209, 186 L.Ed.2d 275 (2013) (quoting another case). “Only where the language or history of [the statute] is uncertain after looking to the particular statutory language, the design of the statute as a whole and to its object and policy, does the rule of lenity serve to give further guidance.” *Id.* at 2209 (quoting in part another case).

Smith merely found there was an “ambiguity.” It did not try to resolve the

supposed ambiguity. Only grievous ambiguities that cannot be resolved with statutory construction are strictly construed against the State. The mere existence of an “ambiguity” at the start of the process does not dictate strict construction at the end of it.

This Court has said the same thing in other cases. The rule of lenity “comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers”. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 40 (quoting another case). “The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.” *State v. Sway*, 15 Ohio St.3d 112, 116, 472 N.E.2d 1065 (1984). “[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent.” *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20 (citation omitted). “[S]trict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed legislative intent, having due regard to the plain, ordinary and natural meaning.” *In re Clemons*, 168 Ohio St. 83, 87-88, 151 N.E.2d 553 (1958). “[C]ourts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized.” *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994).

Smith did not exhaust all of the textual clues in the statutory scheme and did not apply all pertinent canons of statutory construction. “Strict construction” provided no

basis to override the unqualified statutory language.

C. R.C. 3719.013 is Expansive in Having Analogs Apply to “Any Provision”

Although *Smith* quoted R.C. 3719.013, it made no effort to parse that language. R.C. 3719.013 specifically provided that analogs “shall be treated” as “controlled substances.” While *Smith* asserted that there was some “ambiguity” as to whether this requirement extended beyond R.C. Chapter 3719, the language itself answered this question. R.C. 3719.013 explicitly provided that the “shall be treated” requirement applied to “any provision of the *Revised Code*.” (Emphasis added)

The phrase “any provision” has an expansive meaning and broad reach. “Any” means “all”, i.e., “without limitation”. *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40, 78 N.E.2d 370 (1948). “The word *any* excludes selection or distinction.” *Citizens’ Bank v. Parker*, 192 U.S. 73, 81, 24 S.Ct. 181, 48 L.Ed. 346 (1904).

In *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 18, this Court addressed the statutory phrase “any other section of the Revised Code” and emphasized that the word “[a]ny” means “all” and that such “broad, sweeping language” must be accorded “broad sweeping application.”

In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 33, this Court addressed the phrase “any criminal offense” and recognized that, “Given the General Assembly’s use of the term ‘any’ in the phrase ‘any criminal offense,’ we presume that it intended to encompass ‘every’ and ‘all’ criminal offenses recognized by Ohio.”

In *Wachendorf*, this Court addressed the phrase “any territory” and held that “‘any territory’ as used in the statute means any or all territory, and that the Legislature intended to

include not only unplatted but platted lands as well * * *. To hold otherwise would be usurping the prerogative of the legislative branch of government. In other words, we would be compelled to delete the word ‘any’ before the word ‘territory’ and substitute therefor the word ‘unplatted.’” *Wachendorf*, 149 Ohio St. at 240. Placement of such a limitation would be for “the legislative and not the judicial branch of government.” *Id.*

By using the expansive phrase “any provision” in R.C. 3719.013, the General Assembly extended analogs to every and all provisions of the Revised Code that were relevant to “controlled substances.” It did not limit analogs to just R.C. Chapter 3719. But *Smith* failed to parse the word “any” and did not address the case law recognizing the broad reach of “any.” The phrase “any provision” in R.C. 3719.013 was broad, sweeping language that should be given broad, sweeping application. *Risner*, ¶ 18.

D. R.C. 3719.013 is Expansive in Having Analogs Apply to Entire “Revised Code”

Smith also failed to recognize the broad reach of the phrase “Revised Code”. As stated in R.C. 1.01, “All statutes of a permanent and general nature of the state as revised and consolidated into general provisions, titles, chapters, and sections shall be known and designated as the ‘Revised Code’ * * *.” This definition of “Revised Code” shows that the General Assembly was extending analogs to “all statutes” relevant to “controlled substances,” including the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11, which are both part of the “Revised Code.”

The Tenth District recently held that the phrase “[a]s used in the Revised Code” in R.C. 2901.01 is unambiguous, concluding that such phrase meant that the definitions in R.C. 2901.01 apply to “the entire Revised Code” and therefore apply to another statute in a different chapter because the other statute “is part of the Revised Code.” *State v. Clemens*,

10th Dist. No. 14AP-945, 2015-Ohio-3153, ¶ 17.

The language in R.C. 3719.013 is the key to the issue, and *Smith* failed to make any effort to parse the expansive terms “any provision” and “Revised Code.”

E. Canons of Statutory Construction Favor Broad, Sweeping Application

Various canons of statutory construction also went unaddressed by *Smith*. “It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent.” *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. “We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9 (citations omitted).

“We have held that a court may not add words to an unambiguous statute, but must apply the statute as written.” *Id.* at ¶ 15. If “[t]he statute does not limit its reach,” then courts should not do so. *Id.* at ¶¶ 10, 15. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). “We have long recognized that neither administrative agencies nor this court ‘may legislate to add a requirement to a statute enacted by the General Assembly.’” *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶ 15. “This court should not graft * * *

requirements to [the statute], because the statute has no text imposing them.” Id. at ¶ 19.

Accordingly, “[a] basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26, quoting *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988). The statute “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-73, 116 N.E. 516 (1917).

“[T]he General Assembly is not presumed to do a vain or useless thing[.] * * * [W]hen language is inserted in a statute it is inserted to accomplish some definite purpose.” *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997) (quotation omitted). Because it is presumed that “every word in a statute is designed to have *some* effect,” every part of the statute “shall be regarded.” *Ford Motor Co. v. Ohio Bureau of Employment Services*, 59 Ohio St.3d 188, 190, 571 N.E.2d 727 (1991) (emphasis sic). “[I]t is the duty of courts to accord meaning to each word of a legislative enactment if it is reasonably possible so to do. It is to be presumed that each word in a statute was placed there for a purpose.” *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio St. 249, 251, 70 N.E.2d 888 (1946).

Smith did not mention these canons and principles and did not seek to apply them. The phrase “any provision of the Revised Code” in R.C. 3719.013 was unqualified. It

was unlimited. It readily reached into the Criminal Code. And the use of the word “shall” indicated that it was mandatory. *Risner*, ¶ 16. Anywhere the term “controlled substance” would exist in any provision of the entire Revised Code, the term “controlled substance” must include analogs within its reach as a matter of law. “To hold otherwise would be usurping the prerogative of the legislative branch of government” by effectively deleting the phrases “any provision” and “Revised Code” from the statute. See *Wachendorf*, 149 Ohio St. at 240.

F. Expressio Unius Canon does not Create Ambiguity

The incomplete nature of the *Smith* analysis was evident in several other respects. The only canon of statutory construction referenced in *Smith* was the canon of “expressio unius est exclusio alterius,” which means the express inclusion of one thing implies the exclusion of another. While mentioning this canon, *Smith* still failed to fully resolve it, indicating only that the canon “arguably” applied. *Smith*, ¶ 12. The mere “arguable” application of a canon does not create a grievous ambiguity. *Lockhart v. United States*, 136 S.Ct. 958, 968 (2016) (“the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity”).

In addition, *Smith* failed to recognize that this canon is merely a rule of statutory construction that *sometimes* creates an inference that a listing of items excludes other items not listed. As this Court has recognized, the inference is drawn only when it is sensible to do so, and the maxim cannot be used to defeat apparent legislative intent or unambiguous text. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶¶ 35-36; *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12. This canon is “not an interpretive singularity but merely an aid to

statutory construction, which must yield whenever a contrary legislative intent is apparent.” *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455, 764 N.E.2d 418 (2002).

Such legislative intent is shown here by R.C. 3719.013, which provided overarching definitional language indicating that analogs must be treated as “controlled substances” for purposes of *any* provision in the entire Revised Code. R.C. 3719.013 *itself* incorporated analogs across the entire Revised Code whenever and wherever any statute was dealing with “controlled substances.” It would have been redundant and unnecessary to have a second incorporation through R.C. 2925.01.

G. Preamble to H.B. 64 Favors Broad, Sweeping Application

Another incomplete aspect of *Smith* arose from its incomplete quotation of the preamble to H.B. 64, which had enacted the definition of “controlled substance analog” in 2011 and enacted the accompanying “shall be treated” requirement in R.C. 3719.013. In discussing the preamble, *Smith* stated the following:

Moreover, the preamble to House Bill 64 indicated that one of the purposes was “to define a ‘controlled substance analog’ for purposes of the Controlled Substances Law,” suggesting that the definition created in the legislation was limited to that portion of the Revised Code. 2011 Sub.H.B. No. 64.

Smith, ¶ 12. While this passage again reflected that *Smith* was noting matters that were merely “suggest[ive]” of “ambiguity,” rather than actually trying to resolve such “ambiguity,” the passage was also highly selective in its quotation of the preamble. The preamble *also* stated that the purpose of the Act was “to enact section 3719.013” and “to treat controlled substance analogs as Schedule I controlled substances * * *.”

To claim that the narrow quote was “suggest[ive]” of an intent to limit analogs to R.C. Chapter 3719 constituted obvious error in light of the other parts of the preamble clearly referring to R.C. 3719.013 and referring to the intent “to treat controlled substance analogs as Schedule I controlled substances * * *.”

H. Obvious and Frequent Interplay Between Chapters 3719 and 2925

In addressing the prosecution’s reliance on R.C. 3719.013, *Smith* made several erroneous observations. *Smith* first “note[d] that Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement”, and cited R.C. 3719.02, 3719.05, and 3719.06 as examples of this “civil regulation” aspect. *Smith*, ¶ 14. But, actually, in R.C. 3719.99, R.C. Chapter 3719 sets forth criminal penalties for violations of several statutes in that chapter, including R.C. 3719.05 and .06, two of the statutes cited by *Smith*. Even these statutes were reflective of “criminal enforcement.”

Smith also cited R.C. 3719.02. While R.C. 3719.99 does not set forth a criminal penalty for violating that statute, compliance with the manufacturer-licensing requirements in R.C. 3719.02 serves as an exemption from criminal liability for trafficking and possession under Chapter 2925. See R.C. 2925.03(B)(1); R.C. 2925.11(B)(1). So, again, even R.C. 3719.02 is intimately connected to the operation of criminal statutes. *Smith*’s contrast between the “civil regulation” in Chapter 3719 and the “criminal enforcement” in Chapter 2925 simply does not withstand scrutiny.

It was problematic for *Smith* to try to draw a distinction between “civil regulation” in Chapter 3719 and “criminal enforcement” in Chapter 2925. “Civil” definitions and concepts will apply when the statutory law so provides. As stated in *State v. Dickinson*, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971):

[T]he definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute. The result may be desirable, but criminal statutes, unlike civil statutes, must be construed strictly against the state. Thus, *where two statutes do not expressly state that the word has the same meaning in both*, it is apparent that it might have different meanings. (Emphasis added)

While a “civil” definition does not necessarily carry over to the Criminal Code, *Dickinson* indicates that the General Assembly *can still* “expressly state that the word has the same meaning in both * * *.” In R.C. 3719.013, the General Assembly made such an express statement by providing that analogs shall be treated as controlled substances for purposes of *any* provision in the entire Revised Code. There was no ambiguity that would limit this provision to “civil” aspects of R.C. Chapter 3719.

There is an obvious and frequent interplay between the provisions in R.C. Chapter 3719 and R.C. Chapter 2925 so that both chapters are part of an integrated statutory scheme regulating controlled substances and controlled substance analogs. Calling R.C. Chapter 3719 “civil” is not accurate.

I. Analogs were Incorporated by R.C. 2925.01

Even if R.C. 3719.013 *had* been expressly limited to R.C. Chapter 3719, analogs *still* would have entered into the definition of “controlled substance” via R.C. 3719.01, which must be treated as including analogs when it refers to “controlled substance”. When R.C. 3719.01 referred to “controlled substance,” the provisions therein were required to be treated as including analogs as well. When R.C. 2925.01(A) then incorporated the definition of “controlled substance” from R.C. 3719.01, it was necessarily incorporating analogs into that chapter as well.

J. Location of R.C. 3719.013 is Immaterial to Legislative Intent

In a key part of its analysis, *Smith* emphasized that, “at the relevant time, there were no cross-references or any other indicators in Chapter 2925 to provide notice that the treatment of controlled substance analogs under Chapter 3719 also applied to Chapter 2925.” *Smith*, ¶14. *Smith* also emphasized that “House Bill 64 placed the controlled substance analog provisions in Chapter 3719 separate from the prohibitions and penalties set forth in Chapter 2925, and failed to incorporate any explicit cross-references in Chapter 2925 to the controlled substance analog provisions.” *Id.* ¶ 15.

These locational concerns were misplaced. As this Court has recognized, the inquiry into legislative intent cuts across *all* statutes, and courts cannot compartmentalize or cordon off entire chapters and sections from that inquiry.

[A]ll statutes which relate to the same general subject matter must be read in pari materia. And, in reading such statutes in pari materia, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.

Johnson’s Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St.3d 28, 35, 567 N.E.2d 1018 (1991) (citations omitted; emphasis added).

Courts must consider all such statutes even in the absence of cross-references between them. “Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be

read together to ascertain and effectuate if possible the legislative intent.” *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph two of the syllabus.

As this Court recently stated in *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, the lack of a cross-reference is insignificant. “When we construe statutes relating to the same subject matter, we consider them together to determine the General Assembly’s intent – even when the various provisions were enacted separately and make no reference to each other.” *South*, ¶ 8. “This requires us to harmonize provisions unless they irreconcilably conflict.” *Id.* “In doing so, ‘we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute.’” *Id.*

Smith erred by insisting on the need for a “cross-reference” between R.C. 3719.013 and R.C. Chapter 2925 and by insisting that such cross-reference must be located in R.C. Chapter 2925. There need not be any “cross-reference.” In any event, R.C. 3719.013 itself constituted a “cross-reference” incorporating analogs into other Revised Code sections.

All relevant parts of the Revised Code should be considered. A criminal offense need not be defined in a single section of the Revised Code but can be set forth in multiple sections of the “Revised Code.” R.C. 2901.03(B) (offense can be defined in “one or more sections of the Revised Code”). The General Assembly could set forth definitional sections in R.C. 3719.01 and R.C. 3719.013 and have those provisions apply analogs to the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11.

While a cross-reference located in R.C. Chapter 2925 would have been one way of accomplishing the General Assembly’s intent, nothing prevented the General Assembly from employing a different approach. Since R.C. 3719.013 accomplished the

General Assembly's intent of applying analogs to "controlled substance" provisions in Chapter 2925, there was no need to adopt a redundant "cross-reference" in Chapter 2925 too. The General Assembly need only state its intent once, not multiple times.

K. Not Confusing to Treat Analogs as "Controlled Substances"

Smith also contended that it was "confusing" that the analog definition provides that an analog is not a "controlled substance," thereby "seemingly contradicting R.C. 3719.013." *Smith*, ¶ 14. But, again, this passage showed the lack of effort to resolve the supposed ambiguity. It was "confusing" and a "seeming[] contradict[ion]," but *Smith* never concluded that the ambiguity was so pronounced and grievous that it could not be resolved by resort to statutory text and canons of construction.

The claim of "confusion" and "contradiction" does not pass muster. It is factually true that a "controlled substance analog" is not already a Scheduled "controlled substance" but rather a knock-off closely resembling a Scheduled controlled substance. But, in terms of law, the General Assembly chose to treat the analog as a "controlled substance" for purposes of any provision of the Revised Code. Treating the analog legally "as" a controlled substance was not the same thing as saying it was already a Scheduled controlled substance.

The General Assembly was creating parallel tracks. If the substance was already a Scheduled "controlled substance," then the specific scheduling would control in terms of how the trafficking and possession of that substance would be prosecuted and punished. But if the substance was not yet a Scheduled "controlled substance," and was instead a substance substantially mimicking something already in Schedule I or II, then the substance qualified as an analog and would be treated as a "controlled substance" in

Schedule I for purposes of prosecution and punishment for trafficking and possession. These parallel approaches were not confusing or contradictory but rather complimentary of one another, allowing the General Assembly to address the problem of the illicit drug market as a whole and thereby closing a loophole that had allowed analogs to escape prosecution and punishment on the state level.

Smith's “contradiction” contention also would mean that R.C. 3719.013 would be negated entirely, even within Chapter 3719. The supposed “contradiction” between “analog” and “controlled substance” would exist within that Chapter just as much as outside it. Negating R.C. 3719.013 in its entirety would violate the canon that the legislature intends every part of a statute to be effective and that all statutes in *pari materia* shall be harmonized.

L. General Assembly Could Adopt this Approach to Analogs

Equally unavailing is the claim by defendant Shalash that there are only three ways to amend the drug Schedules in R.C. 3719.41 and that R.C. 3719.013 must be held ineffectual because it did not hew to one of those three methods. R.C. 3719.013 was not amending the Schedules; it was instead providing that analogs were to be treated *as* “controlled substances” in “Schedule I”.

In any event, defendant errs in attempting to tie the hands of the General Assembly. Even though the General Assembly had proceeded previously by amending the drug Schedules directly and/or by allowing changes to be directly made to the Schedules through actions of the Board of Pharmacy or United States Attorney General, see R.C. 3719.43 and .44, the General Assembly of course had the prerogative to approach the matter differently as to analogs through its plenary legislative power. See

Part O, *infra*. An earlier General Assembly could not limit or bind future General Assemblies to the earlier approaches that had already been used. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745 , ¶ 16. R.C. 3719.013 is not objectionable because it did not fit within earlier approaches that focused on amending the Schedules directly.

Indeed, this was one of the problems that the General Assembly was seeking to avoid. The process of directly amending the drug Schedules could not keep up with the ingenuity of underground chemists who were seeking to evade the list of already-scheduled drugs by tinkering with chemical structures to create knock-off substances having a substantially similar effect. *United States v. Washam*, 312 F.3d 926, 933 (8th Cir. 2002) (“One of Congress’ purposes for passing the Analogue Statute was to prohibit innovative drugs that are not yet listed as controlled substances.”); *State v. Jackson*, 9th Dist. No. 27132, 2015-Ohio-5246, ¶ 37 (creativity of amateur chemists can outpace the ability of authorities to identify and catalog the substances). As a result, the federal government in 1986 and then Ohio in 2011 adopted their analog provisions so that the creation and trafficking and possession of these substantially-similar-but-unscheduled analog substances would be prohibited from the outset rather than waiting for a catch-up amendment to the drug Schedules.

M. McFadden Reads Federal Analog Provision in Same Way

The foregoing criticisms of *Smith* are substantially aided by the United States Supreme Court’s decision last year in *McFadden v. United States*, 135 S.Ct. 2298 (2015). *McFadden* addressed the federal analog provision in 21 U.S.C. 813, which provides that:

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

21 U.S.C. 813. From 10-17-11 through 12-19-12, R.C. 3719.013 provided:

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

As can be seen, the federal and Ohio statutes both contain a “shall be treated” requirement, mandating that analogs be treated as “controlled substances” in “schedule I.” Both applied this requirement across the board to their respective legal Codes, with the federal provision mandating application to “any Federal law” and the Ohio provision mandating application to “any provision of the Revised Code.” Except for immaterial differences in spelling and punctuation, the federal and Ohio provisions are identical. *Jackson*, ¶ 23 (“virtually identical”).

It is apparent that the Ohio statute was copied from the federal provision and therefore was meant to apply in the same fashion.

1.

In *McFadden*, the Court was addressing the mens rea that applies to the federal crime of distribution of a “controlled substance” in 21 U.S.C. 841. In analyzing that problem, the Court addressed the “shall be treated” requirement, emphasized how that requirement mandated that analogs are “controlled substances,” and discussed how the knowledge requirement as to “controlled substances” also applied to analogs. The *McFadden* Court again and again recognized that the “shall be treated” requirement resulted in analogs being deemed “controlled substances.”

The Court’s introduction recognized the interplay between the “shall be treated” requirement and the prohibition against distribution:

The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U.S.C. § 802(32)(A), *and then instructs courts to treat those analogues, if intended for human consumption, as controlled substances listed on schedule I for purposes of federal law*, § 813. The Controlled Substances Act (CSA) *in turn* makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. § 841(a)(1). The question presented in this case concerns the knowledge necessary for conviction under § 841(a)(1) *when the controlled substance at issue is in fact an analogue*.

We hold that § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with “a controlled substance.” When the substance is an analogue, that knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a “controlled substance analogue.” § 802(32)(A). * * *

McFadden, 135 S.Ct. at 2302 (Emphasis added)

The Court noted that the “shall be treated” requirement required that courts *must* turn to the statutes defining crimes involving “controlled substances”.

The Analogue Act *requires* a controlled substance analogue, if intended for human consumption, *to be treated “as a controlled substance in schedule I”* for purposes of federal law. § 1201, 100 Stat. 3207–13, 21 U.S.C. § 813. We therefore *must turn first* to the statute that addresses controlled substances, the CSA. The CSA makes it “unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” § 401(a)(1), 84 Stat. 1260, 21 U.S.C. §

841(a)(1). Under the most natural reading of this provision, the word “knowingly” applies not just to the statute’s verbs but also to the object of those verbs—“a controlled substance.” * * *

McFadden, 135 S.Ct. at 2303-2304 (Emphasis added)

After discussing how the knowledge requirement applied to “controlled substances,” the Court concluded that the “shall be treated” requirement was a “statutory command” that *extends* that very same knowledge requirement to analogs.

The Analogue Act *extends the framework of the CSA to analogous substances*. 21 U.S.C. § 813. The Act defines a “controlled substance analogue” as a substance * * *. It further provides, “A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.” § 813.

The question in this case is how the mental state requirement under the CSA for knowingly manufacturing, distributing, or possessing with intent to distribute “a controlled substance” applies when the controlled substance is in fact an analogue. The answer begins with § 841(a)(1), which expressly requires the Government to prove that a defendant knew he was dealing with “a controlled substance.” The Analogue Act *does not alter that provision, but rather instructs courts to treat controlled substance analogues “as ... controlled substance[s] in schedule I.”* § 813. Applying *this statutory command*, it follows that the Government must prove that a defendant knew that the substance with which he was dealing was “a controlled substance,” even in prosecutions involving an analogue.

That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules *or treated as such by operation of the Analogue Act*—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the

specific analogue he was dealing with, even if he did not know its legal status as an analogue. * * * A defendant need not know of the existence of the Analogue Act to know that he was dealing with “a controlled substance.”

McFadden, 135 S.Ct. at 2304-2305 (Emphasis added)

The Court characterized the “shall be treated” requirement as a “command” and criticized the lower courts for not adhering to it.

The Court of Appeals *did not adhere to § 813’s command to treat a controlled substance analogue “as a controlled substance in schedule I,”* and, accordingly, it did not apply the mental-state requirement in § 841(a)(1). * *
* Because that interpretation is inconsistent with the text and structure of the statutes, we decline to adopt it.

McFadden, 135 S.Ct. at 2305-2306 (Emphasis added)

The Court emphasized that the knowledge requirement in § 841 applied to “controlled substances,” and that such knowledge can be established “either by knowledge that a substance is listed *or treated as listed by operation of the Analogue Act*, §§ 802(6), 813, or by knowledge of the physical characteristics that give rise to *that treatment.*” *McFadden*, 135 S.Ct. at 2306 (Emphasis added)

The Court rejected the defendant’s claim that a stricter knowledge standard must be adopted to avoid constitutional vagueness problems. The Court held that the constitutional-avoidance canon is inapplicable “in the interpretation of an unambiguous statute such as this one.” *McFadden*, 135 S.Ct. at 2307.

2.

As a decision addressing the identical federal analog requirement, *McFadden* should carry great weight in addressing R.C. 3719.013, which was plainly modeled after the federal provision. See, e.g., *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-

Ohio-4985, 834 N.E.2d 791, ¶¶ 8, 13 (antitrust provisions patterned after federal provisions; “Ohio courts * * * have consistently interpreted the Valentine Act in accordance with federal judicial construction of the federal antitrust laws”); *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 15 (“Construing the similarly worded federal RICO statute, * * * federal circuit courts have similarly concluded * * *”); *State v. Schlosser*, 79 Ohio St.3d 329, 332, 681 N.E.2d 911 (1997) (“R.C. 2923.32 is based on the federal RICO statute”; “Thus, a review of the purpose behind the federal statute is instructive.”); *In re Morgan’s Estate*, 65 Ohio St.2d 101, 103-104, 419 N.E.2d 2 (1981) (“conscious modelling of the Ohio provisions on federal estate tax law”; “constructions of the federal provisions should be given great weight in interpreting the comparable Ohio sections”).

Accordingly, *McFadden* provides substantial support for the prosecution here. *McFadden* saw no difficulty in applying the analog concept to crimes like distribution. In fact, it directly relied on the “shall be treated” requirement to hold that the knowledge requirement applied to analogs in the same way that it applied to “controlled substances” generally. The federal provision mandated that courts treat analogs like “controlled substances” in “schedule I,” and *McFadden* determined that courts must follow this “statutory command” equating analogs with “controlled substances.”

As *McFadden* shows, the “shall be treated” requirement applies by operation of law. It plugs analogs into other statutes and as a result *extends* those statutes to include analogs. This is how *McFadden* concluded that the knowledge requirement in § 841 applied to analogs.

3.

McFadden provides further support for criticisms of *Smith*. As *McFadden* confirms, the statutory scheme is unambiguous. In fact, *McFadden* relied heavily on the “shall be treated” requirement as the chief basis for its decision to equate knowledge of “controlled substances” with knowledge of analogs. The Court views them as interchangeable and unambiguous. The same conclusion applies to R.C. 3719.013.

4.

McFadden also defeats *Smith*’s argument that it was “confusing” for R.C. 3719.013 to treat analogs as controlled substances. While analogs are not Scheduled “controlled substances,” R.C. 3719.013 operates to treat them as “controlled substances” listed in “schedule I” as a matter of law for purposes of all relevant statutes in the entire Revised Code.

McFadden recognized this exact point under the identical federal provision. It recognized that the federal drug prohibitions apply to “controlled substances” and that analogs must be “treated as such by operation of the Analogue Act” and are “treated as listed by operation of the Analogue Act”. *McFadden*, 135 S.Ct. at 2305-2306. The federal provision “instructs courts to treat those analogues * * * as controlled substances” and thereby “extends the framework of the CSA to analogous substances”. *Id.* at 2302, 2304. By operation of law, analogs are “controlled substances”, and there is no contradiction. *McFadden* treats the two as interchangeable. There is no confusion.

5.

McFadden also undercuts the suggestion in *Smith* that the “shall be treated” requirement created a potential “notice” problem. As *McFadden* recognizes, “ignorance

of the law is typically no defense to criminal prosecution,” and “[a] defendant need not know of the existence of the Analogue Act to know that he was dealing with ‘a controlled substance.’” *McFadden*, 135 S.Ct. at 2305.

There is no “notice” problem under Ohio law either. The enactment of R.C. 3719.013 gave sufficient notice. “It is an ancient maxim that all are conclusively presumed to know the law.” *State v. Pinkney*, 36 Ohio St.3d 190, 198, 522 N.E.2d 555 (1988). And “[i]t is well-settled that the mistake-of-law defense is not recognized in Ohio.” *Id.* at 198.

6.

Smith made various locational criticisms regarding how the “shall be treated” requirement was put in R.C. 3719.013 instead of in R.C. Chapter 2925. In the process, *Smith* attempted to contrast the “overall statutory structure” in federal law and Ohio law. But *McFadden’s* discussion of the federal provision draws no distinction based on location. *McFadden* noted that the “shall be treated” requirement applied “for purposes of federal law.” It recognized that the “shall be treated” language required that it “must turn first to the statute that addresses controlled substances, the CSA.” Thus, the controlling consideration was not location, but, rather, whether the other statute “addresses controlled substances”. The Court further emphasized that the term “controlled substance” includes “those drugs listed on the federal drug schedules or *treated as such* by operation of the Analogue Act.” (Emphasis added)

As shown by *McFadden*, the “shall be treated” requirement extends the analog concept to any such statute – wherever it might be found – because analogs are treated as “controlled substances” by operation of law. This makes perfect sense in *McFadden*

since the federal requirement applies for purposes of *any* federal law.

The same approach leads to the rejection of *Smith*'s locational contentions. Under Ohio law, both R.C. Chapters 2925 and 3719 address controlled substances. And under R.C. 3719.013, the analog concept extends by operation of law to *any* provision in the entire *Revised Code*. The analog concept therefore easily reaches the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11, both of which address "controlled substances". As *McFadden* states, courts *must turn* to such statutes as a matter of law.

Moreover, the locational criticisms violate the *in pari materia* doctrine. Under that doctrine, *all* statutes addressing the same subject matter in the Revised Code are reviewed, regardless of whether there are cross-references between them. The phrase "any provision of the Revised Code" readily reaches beyond R.C. Chapter 3719, and *Smith*'s effort to confine it thereto was violative of that plain statutory text.

Smith's locational and "structure" contrasts between federal and Ohio law are ultimately self-defeating. The General Assembly had already deviated from the "structure" of federal law by setting up the prohibition and regulation of controlled substances in at least two chapters, R.C. Chapter 2925 and R.C. Chapter 3719. By copying the federal "shall be treated" requirement into R.C. 3719.013 and by expressly indicating that this applied to *any* provision of the entire *Revised Code*, the General Assembly was signaling that the different "structuring" of Ohio law makes no difference.

As *McFadden* recognizes, federal law in sections 813 and 841 were operating in tandem to prohibit the distribution and possession of analogs. As *Smith* conceded at ¶ 6, the purpose of the federal analog provision was to make analogs "subject to the restrictions imposed on controlled substances." The General Assembly was adopting that

same approach by copying federal law on this point.

It is counterintuitive to think that the General Assembly intended to deviate from federal law in this regard. If anything, the General Assembly's copying of federal law was indicating that it wanted exactly what federal law had, i.e., a broad provision extending the "controlled substance" prohibitions to analogs, thereby subjecting analogs to all such similar prohibitions under Ohio law.

7.

The Tenth District in *Mobarak* wrongly brushed off *McFadden* by contending that *McFadden* "merely assumed" that analogs were included as controlled substances. *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007, ¶ 10. *McFadden* did not just "assume" that analogs must be treated as controlled substances. Rather, the Court specifically discussed the interplay between 21 U.S.C. 813 and the other federal drug statutes, and it held that Sec. 813 *mandated* that analogs be treated as controlled substances for purposes of any federal law. And, contrary to *Mobarak*, the *McFadden* Court *was* directly asked to interpret and apply Sec. 813 in that way. Brief in *McFadden v. U.S.*, 2015 WL 881768, at 6-7, 16, 21, 24, 25, 40-41.

N. December 2012 Amendments did not Disavow October 2011 Prohibition on Analogs

Effective on December 20, 2012, the General Assembly made certain amendments to the statutory scheme through Sub.H.B. 334. For purposes of prohibiting and punishing the trafficking and possession of controlled substance analogs, the General Assembly provided that the analogs would not be lumped in with other Schedule I substances. Rather, the analogs would be split out for separate prohibition and

punishment. The trafficking and possession statutes now expressly refer to “controlled substance analogs” in the prohibition, e.g., prohibiting trafficking in a “controlled substance or a controlled substance analog * * *” R.C. 2925.03(A)(1). The Act also provided a separate ladder of increasing punishments devoted to analogs based on gram weight (rather than bulk amount as before). R.C. 2925.03(C)(8) & R.C. 2925.11(C)(8).

The Act also amended R.C. 3719.013 to provide, as follows:

A-Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, a controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

The preamble to the bill indicated that the legislative intent was, inter alia, “to create the offenses of trafficking in and possession of controlled substance analogs * * *.”

Defendant Shalash argues that the preamble to the bill making the December 2012 amendments shows that the General Assembly was “creat[ing]” new prohibitions for analogs and that such “creat[ing]” implied there was no previous crime or punishment related to analogs. But this defense argument reads far too much into the preamble.

The preamble language in Sub.H.B. 334 merely acknowledged that analogs were being split out for separate prohibition and punishment under the trafficking and possession statutes. Under the preexisting scheme, analogs were treated as controlled substances and received punishments set forth for Schedule I substances. But now analogs would not be lumped in with Schedule I substances under these statutes and would be prohibited and punished *as analogs* as opposed to as Schedule I substances.

When the General Assembly indicated in the preamble that it was “creat[ing] the offenses of trafficking in and possession of controlled substance analogs”, it was

acknowledging that these statutes were now directly referring to analogs in terms of prohibition and punishment. These amendments merely represented a change in approach to analogs. The amendments did not mean that analogs entirely escaped prohibition and punishment before, and the General Assembly was not disavowing what it had done earlier.

In addition, the 2012 Act could not retroactively undo what the General Assembly had already done in its earlier legislation. Recall that *Smith* mistakenly omitted the language from the preamble to H.B. 64, which indicated that the 2011 Act was meant “to enact section 3719.013” and “to treat controlled substance analogs as Schedule I controlled substances * * *.” Defendant Shalash seeks to give undue weight to the “create” language in the second Act’s preamble while ignoring the “enact” and “treat” language in the first Act’s preamble that plainly supports the prosecution’s position.

“While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions.” *Coosaw Mining Co. v. State of S. Carolina*, 144 U.S. 550, 563, 12 S.Ct. 689, 36 L.Ed. 537 (1892). “[T]he preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous * * *.” *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 33 L.Ed. 302 (1889). “It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists.” *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007).

Accordingly, the preamble to the 2012 Act cannot change the meaning of the earlier explicit statutory text. There is no ambiguity regarding the reach of the 2011 Act,

which expressly incorporated the analog concept into the entire Revised Code to require that such analogs shall be treated as “controlled substances.” And even if the preambles from both Acts are consulted in *pari materia* with the statutory text, it is still clear that analogs *were* prohibited and punished by the first Act via the “shall be treated” language of R.C. 3719.013 and that the second Act merely changed the approach used regarding analogs. The word “create” in the second Act’s preamble merely reflected that analogs were now being directly referenced in the trafficking and possession statutes.

These arguments do not render the 2012 amendments superfluous. The 2012 amendments *did* change how analogs were approached. They were no longer “schedule I” for purposes of trafficking and possession, and they were now penalized based on gram weight. There was a meaning and a purpose to the amendments. Even so, the mere fact that some changes occurred as to trafficking and possession does not require the conclusion that there was absolutely no criminal prohibition or penalty in place before. Indeed, the General Assembly *kept* the language in R.C. 3719.013 treating analogs as controlled substances for all purposes except the trafficking and possession statutes.

Notably, in making Sub.H.B. 334 emergency legislation, the General Assembly indicated in Section 5 that it was creating “additional tools” for law enforcement in combatting synthetic drugs. This language shows that the General Assembly was building on what it had done earlier by providing “additional tools.” It was not saying that there had been no prohibitions or penalties in place for synthetic drugs before.

O. Imposing Locational Limitations on Unqualified Legislative Intent Violates Separation of Powers

Smith’s failure to give operative effect to R.C. 3719.013 was so violative of the

legislative intent as to violate the separation of powers. Even if a court may think it better or clearer if the General Assembly had included a cross-reference in Chapter 2925, an insistence on that approach amounts to an organizational and stylistic complaint, not a real doubt about the General Assembly's intent in R.C. 3719.013 to treat analogs as controlled substances for purposes of *any* provision of the entire Revised Code. In the end, *Smith* negated R.C. 3719.013 because it was not a "cross reference" in a specific location and because it was not in the "same portion" of law.

This result invades the prerogatives of the General Assembly and violates the separation of powers. It is not a mere truism that courts must follow the legislative intent. Rather, it is a basic building block of representative democracy that courts must honor the General Assembly's intent because the General Assembly has plenary law-making authority. As stated in the *Tobacco Use* case:

{¶ 10} The General Assembly has plenary power to enact legislation; it is limited only by the Ohio Constitution and the Constitution of the United States. Section 1, Article II, Ohio Constitution. See *Williams v. Scudder* (1921), 102 Ohio St. 305, 307, 131 N.E. 481. "[B]efore any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision." *Id.* See *Lehman v. McBride* (1863), 15 Ohio St. 573, 592 (when the power of the General Assembly to enact a law is questioned, the proper inquiry is whether the law is clearly prohibited by the Constitution). * * *

{¶ 11} The General Assembly's legislative power enables it to "pass any law unless it is specifically prohibited by the state or federal Constitutions." *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 162, 38 O.O.2d 404, 224 N.E.2d 906. See *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504, 37 N.E. 945 ("whatever limitation is placed upon the exercise of

that plenary grant of [legislative] power must be found in a clear prohibition by the constitution”). * * *

The General Assembly had the plenary power and prerogative to choose to express its legislative intent as it saw fit, including in R.C. 3719.013 rather than in a “cross reference” in Chapter 2925. No constitutional principle required that the General Assembly choose one manner of expression over another. A court cannot use an artificial stylistic or organizational rule to defeat the General Assembly’s expression of its unqualified legislative intent. The General Assembly could provide for the concept of “analogs” in R.C. Chapter 3719, and it could then plug the analog concept into the existing drug statutes throughout the Revised Code by legally equating analogs to “controlled substances” for purposes of prosecution and punishment.

The people “vested the legislative power of the state in the General Assembly,” and courts “must respect the fact that the authority to legislate is for the General Assembly alone * * *.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶¶ 43, 48, 52. “The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, * * *.” *Id.* ¶ 44 (quoting another case).

The Judicial Branch cannot disregard one manner of legislative expression merely because it believes that the General Assembly should have chosen a different manner of expression. Courts must honor the General Assembly’s legislative intent to treat analogs as controlled substances as of October 17, 2011, well before defendant’s acts in 2012.

The Judicial Branch is duty-bound as a matter of separation of powers to honor

the legislative intent, wherever that intent is expressed in the Revised Code. Indeed, the General Assembly could have expressed that intent in uncodified law, and such law would be binding on the courts. *Voinovich v. Board of Park Commrs.*, 42 Ohio St.2d 511, 330 N.E.2d 434 (1975); *In re McCrary*, 75 Ohio App.3d 601, 607, 600 N.E.2d 347 (12th Dist. 1991) (“duty to enforce the uncodified provisions of [Act] with the same vigor as a codified statutory provision”).

The Ohio Constitution requires only that laws be passed in “bill” form. Article II, Section 15(A), Ohio Constitution. A bill “becomes law” when the Governor approves the bill or when the General Assembly overrides the Governor's veto. Article II, Section 16, Ohio Constitution. This process of a bill becoming law must be distinguished from the process of placing those laws in codified form.

Codification of existing legislation is an entirely different, subsequent and largely ministerial matter, directed towards the proper and commendable goal of collecting the multitude of congressional enactments in force and organizing them in a readily-accessible manner. The “United States Code” is, of course, such a codification. Acts of Congress do not take effect or gain force by virtue of their codification into the United States Code; rather, they are simply organized in a comprehensive way under the rubric of appropriate titles, for ready reference.

United States v. Zuger, 602 F. Supp. 889, 891 (D.Conn. 1984), affirmed, 755 F.2d 915 (2nd Cir. 1985). Since inclusion of a statutory provision in the Revised Code is not necessary to the enforcement to such a statute, it follows that the placement of a statutory provision in one chapter as opposed to another should make no difference to its cognizability as law. The General Assembly has the prerogative to decide whether it will pass law in codified or uncodified form and has the prerogative as to where such law will

be placed within the codified law.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports the State here and urges that this Court affirm the judgment of the Twelfth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on May 23, 2016, to the following counsel of record: Kathryn M. Horvath, kathryn.horvath@warrencountyprosecutor.com, counsel for the State; Eric E. Murphy, eric.murphy@ohioattorneygeneral.gov, counsel for Amicus Curiae Ohio Attorney General Michael DeWine; and Terrence K. Scott, terrence.scott@odp.ohio.gov, counsel for defendant.

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