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In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-1782
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Warren County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
HAMZA SHALASH,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. CA2014-12-146

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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Connecticut Nat'l Bank v. Germain,
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D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health,
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Gozlon-Peretz v. United States,
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Harrison v. PPG Indus., Inc.,
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Hauser v. Dayton Police Dep't,
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Lesnau v. Andate Enters., Inc.,
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Marx v. Gen. Revenue Corp.,
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Morgan v. Ohio Adult Parole Auth.,
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Muscarello v. United States,
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People v. Becker,
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People v. Davis,
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People v. Silver,
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Proctor v. Kardassilaris,
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Risner v. Ohio Dep't of Natural Res.,
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Salinas v. United States,
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Summerville v. Forest Park,
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United States v. Granberry,
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United States v. Hodges,
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United States v. Klecker,
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United States v. Tyson Foods, Inc.,
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United States v. Vonn,
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Watkins v. Dep't of Youth Servs.,
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Cal. Health & Safety Code § 11055 23

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Cal. Health & Safety Code § 11352(a) 23

Cal. Health & Safety Code § 11378 23

Cal. Health & Safety Code § 11379(a) 23

Cal. Health & Safety Code § 11401(a) 23

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Tex. Health & Safety Code Ann § 481.002 23

Other Authorities

Abby Goodnough and Katie Zezima, *An Alarming New Stimulant, Legal in Many States*, N.Y. Times (July 16, 2011) 6

Alan Johnson, *State raids 3 shops in 'bath salts' crackdown*, The Columbus Dispatch (Feb. 2, 2013, 5:38 AM) 7

Alan Schwarz, *Arrest Underscores China's Role in the Making and Spread of a Lethal Drug*, N.Y. Times (May 28, 2015) 5, 6

An Alarming New Stimulant; Frances Robles, *Police in Florida Grapple with a Cheap and Dangerous New Drug*, N.Y. Times (May 24, 2015) 7

Arrests in Nationwide Crackdown on Synthetic Drugs Linked to Mideast, N.Y. Times (May 7, 2014) 5

Drug Enforcement Agency, Drugs of Abuse 2011 Edition: A DEA Resource Guide 5

Jake Schaller, *Not for Bathing: Bath Salts and the New Menace of Synthetic Drugs*, 16 J. Health Care L. & Pol'y 245 (2013) 5

Jennifer Smola, *Man gets life in prison after guilty plea to murders of mom, girlfriend*, The Columbus Dispatch (April 5, 2016, 12:16 AM) 7

Kathryn E. Brown, *Stranger than Fiction: Modern Designer Drugs and the Federal Controlled Substances Analogue Act*, 47 Ariz. St. L.J. 449 (2015) 4, 7

Nat'l Alliance for Model State Drug Laws, *Controlled Substance Analog Statutory Comparison and Compilation* (2012) 23

Office of Nat'l Drug Control Policy, Exec. Office of the President, *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.)* ..... *passim*

Office of the Ohio Attorney General Mike DeWine, Rid Your Community of Synthetic Drugs 3

Office of the Ohio Attorney General Mike DeWine, Synthetic Drugs News Conference (Nov. 14, 2012).....3, 9

Ohio Legislative Service Commission, *Bill Analysis of Sub. H.B. 334 as Reported by S. Health, Human Services, and Aging* (Dec. 10, 2012) 9, 10, 25

Ohio Legislative Service Commission, *Fiscal Note and Local Impact Statement to Sub. H.B. 64* (June 28, 2011) 24

Oliver Wendell Holmes, *The Theory of Legislative Interpretation*, 12 Harv. L. Rev. 417 (1899) 28

Summer Ballentine, *'Bath salts' led to two police shootings, one deadly, in past week*, The Columbus Dispatch (May 23, 2012, 8:13 PM).....7

Webster's Third New International Dictionary (1976).....15

Zunny Losoya, *Synthetic Drugs—Emergence, Legislation, and the Criminal and Legal Aftermath of Broad Regulation*, 66 SMU L. Rev. 401 (2013).....4, 5, 6, 7

INTRODUCTION

Appellant Hamza Shalash sold controlled substance analogs, also known as synthetic drugs, at the gas station he owned and operated. He conducted the sales off the books and hid thousands of vials of drugs in ceiling tiles, black bags, and back offices. The police warned him twice that a newly enacted law banned the sale of synthetic drugs, but Shalash refused to curtail his illegal activity. He was later arrested and charged with eight counts of aggravated trafficking in a controlled substance analog and one count of engaging in a pattern of corrupt activity. Although he had previously told police that he knew his actions were illegal, Shalash argued at trial that the law in effect at the time of his charges did not actually outlaw the controlled substance analogs he sold. The trial court rejected this argument, and the Twelfth District affirmed. This Court should affirm the Twelfth District's decision, as Shalash's claim disregards the text, context, and purpose of the analog statute.

First, the relevant law states that controlled substance analogs "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I." R.C. 3719.013. The statute's specification that it applies for purposes of the "the Revised Code" rather than a title, chapter, or section demonstrates its broad applicability. Moreover, the use of the expansive term "any" to modify "provision of the Revised Code" shows that the mandate applies to the Revised Code "indiscriminately" and "without restriction or limitation." *Davis v. Davis*, 115 Ohio St. 3d 180, 2007-Ohio-5049 ¶ 19 (citation and quotation marks omitted). Thus, when the Code outlawed trafficking in controlled substances, it also outlawed trafficking in analogs. In arguing otherwise, Shalash asks this Court to either rewrite or disregard the analog statute entirely.

Second, the context and structure of the statute reinforce the text. For one, the statute addresses the same subject matter as the drug-offense statutes, and should therefore be read in

pari materia with those statutes. Doing so means concluding that "a controlled substance analog . . . shall be treated . . . as a controlled substance," R.C. 3719.013, in the drug-offense statutes. Additionally, the analog statute appears in the same chapter as the most widely referenced controlled-substance provision, and was even given a proximate section number. This shows not only that the analog statute was meant to apply broadly, but that it was meant to apply to the most broadly applied controlled-substance provision. Furthermore, numerous provisions in the Revised Code, ranging from definitions to rules of statutory construction to provisions defining criminal offenses, apply to the entire Revised Code. This Court has applied those provisions faithfully in the past, and it should do the same here. Finally, the analog statute resembles the federal analog statute and other state analog laws banning trafficking in analogs. It should be interpreted consistently with those laws.

Third, the purpose of the analog provision also supports the text. The General Assembly realized that man-made drugs with effects similar to or more severe than controlled substances were escaping prosecution and causing significant harms to users and those who came into contact with them. It enacted the analog provision to give law enforcement the tools required to prosecute those who used and trafficked in those drugs. Adopting Shalash's interpretation would thwart that purpose entirely.

Finally, Shalash marshals several arguments in support of his claim that trafficking in analogs was not illegal at the time of his offenses, but what he does *not* do is engage with the text of the analog statute. He provides no theory at all about the meaning of the statute's unequivocal statement that analogs "shall be treated for purposes of *any provision of the Revised Code* as a controlled substance in schedule I." R.C. 3719.013 (emphasis added). Instead, he bypasses the text and relies largely on canons of construction like expressio unius and the rule of lenity.

These arguments all hinge on the fact that the drug-offense provisions did not reference analogs at the time of his offense. But lack of a cross reference cannot overcome plain text or clear contextual indicators of a statute's meaning, as this Court and the U.S. Supreme Court have held on numerous occasions. Additional problems plague each of Shalash's claims, but all share this fatal flaw. Shalash simply has no answer to the plain text of the statute.

In sum, while context and purpose also support the Twelfth District's ruling, this Court need look no further than the text of the analog statute to decide this case. The statute states that analogs shall be treated as controlled substances for purposes of "any provision of the Revised Code." *Id.* This Court should apply the statute as written.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General is concerned with prosecuting crime and maintaining public safety. The Attorney General's interest here is especially strong because he led the efforts to combat the proliferation of synthetic drugs by supporting the passage of House Bill 64 in 2011 and House Bill 334 in 2012. *See* Office of the Ohio Attorney General Mike DeWine, Synthetic Drugs News Conference (Nov. 14, 2012), http://tinyurl.com/n8tuapp.

The Attorney General, whose office includes the Bureau of Criminal Investigations, has attacked synthetic drugs on several fronts. His office has assisted in the criminal prosecution of several analog cases, and has also helped local law enforcement and prosecutors bring civil lawsuits against distributors of synthetic drugs under theories of public nuisance and fraudulent advertising and labeling. *See* Office of the Ohio Attorney General Mike DeWine, Rid Your Community of Synthetic Drugs, http://tinyurl.com/l7uethx; *see also State ex rel. DeWine v. Shadyside Party Ctr.*, 2014-Ohio-2357 (7th Dist.). The Attorney General takes an interest in any development that will hinder the State's ability to confront this public scourge.

STATEMENT OF THE CASE AND FACTS

A. Synthetic drugs represent an evolving threat to public health and safety.

Ohio labels substances or classes of substances "controlled" only after identifying them and considering factors such as their potential for abuse, pharmacological effects, and public health risks. *See* R.C. 3719.44(B). This scheduling process creates opportunities for clever chemists to alter the chemical structures of known drugs to evade prosecution. *See* Zunny Losoya, *Synthetic Drugs—Emergence, Legislation, and the Criminal and Legal Aftermath of Broad Regulation*, 66 SMU L. Rev. 401, 409 (2013). These man-made substances, known as "analogs" in the Revised Code and colloquially as "synthetic," "emerging," or "designer" drugs, mimic the effects of controlled substances and are often far more potent. *Id.* at 410.

Synthetic drugs, while constantly evolving, generally fall into several major categories. Two well-known examples are psychedelics, which include LSD, and opiods, which include fentanyl derivatives that can be up to 6,000 times more potent than morphine. *See* Kathryn E. Brown, *Stranger than Fiction: Modern Designer Drugs and the Federal Controlled Substances Analogue Act*, 47 Ariz. St. L.J. 449, 451-54 (2015). Most relevant to this case are the categories of synthetic cannabinoids and synthetic cathinones. Synthetic cannabinoids, which are intended to mimic marijuana, are often sprayed onto plant material and smoked. Office of Nat'l Drug Control Policy, Exec. Office of the President, *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.)*, http://tinyurl.com/d8dmw5y. The drugs "K2" and "spice" are commonly known synthetic cannabinoids. Synthetic cathinones, often called "bath salts," are related to amphetamines like ecstasy and cocaine. *Id.* "Cloud 9" is a commonly known synthetic cathinone.

It is worth clarifying that bath salts are not related to Epsom salts, as the Tenth District believed. *See State v. Mohammad*, 2015-Ohio-1234 ¶ 11 (10th Dist.) (conflating synthetic cathinones and Epsom salts); Losoya, *supra*, at 406 ("bath salts have no relation to the

therapeutic products sold in health stores or beauty and spa salons"); *see generally* Jake Schaller, *Not for Bathing: Bath Salts and the New Menace of Synthetic Drugs*, 16 J. Health Care L. & Pol'y 245 (2013). The term "bath salts" arose as an attempt to *mask* the true nature of the product. *See Synthetic Drugs*; Losoya, *supra*, at 408. The same substances are also referred to as "phone screen cleaner," *Synthetic Drugs*, but they are no better at cleaning iPhones than softening bath water. Similarly, synthetic cannabinoids are referred to as "spice," "incense," or "potpourri," *id.*, but they neither season food nor freshen air. All of those terms are simply generic names for synthetic drugs in the same way "soda" and "cola" are generic names for carbonated beverages. Likewise, names like "K2" and "Cloud 9" are brand names of synthetic drugs in the same way "Pepsi" and "Coca-Cola" are brand names of sodas. *See* Drug Enforcement Agency, Drugs of Abuse 2011 Edition: A DEA Resource Guide, 74, http://tinyurl.com/nlr36qc; *see also* Alan Schwarz, *Arrest Underscores China's Role in the Making and Spread of a Lethal Drug*, N.Y. Times (May 28, 2015), http://tinyurl.com/ohw7hhc (mentioning other names for synthetic drugs, including "Scooby Snax," "Black Diamond," "Stoopid," and "Platinum").

The scope of the synthetic drug trade is vast. It includes not only operations in the United States, but large-scale manufacturers in China and elsewhere that employ sophisticated chemists to create new drugs for sale in the U.S., as well as distributors in Middle Eastern countries. *See Arrest Underscores China's Role* ("China, with its large and poorly regulated pharmaceutical sector, could become to spice what Colombia or Peru has been for cocaine, or Afghanistan is to heroin"); *Arrests in Nationwide Crackdown on Synthetic Drugs Linked to Mideast*, N.Y. Times (May 7, 2014), http://tinyurl.com/zpy2zaj ("much of the [synthetic] drug profits go to countries in the Middle East, including Yemen, Jordan, Syria, and Lebanon"). In fact, "about 70 percent

of the spice sold in the United States was made from chemicals originating in [a] Chinese laboratory." *Arrest Underscores China's Role*. This lab and others have produced over 400 varieties of synthetic drugs, and "new ones appear[] weekly . . . ." *Id.*

Synthetic drugs pose acute hazards. Because their production is not standardized, it is difficult for users to estimate the effect a substance will have. Losoya, *supra*, at 404-05. The compounds have unpredictable physiological effects on the human body that are not well understood in the medical community, and are a significant threat to those who abuse them. *Id.* at 402. Doctors who have come into contact with bath-salt users, for example, have reported incidents of muscle failure, kidney failure, elevated blood pressure and heart rates, and body temperatures so hot "[y]ou could fry an egg on [the patient's] forehead.'" Abby Goodnough and Katie Zezima, *An Alarming New Stimulant, Legal in Many States*, N.Y. Times (July 16, 2011), http://tinyurl.com/3tkgwy4; *see also* Losoya, *supra*, at 405, 407. Users also experience psychosis, paranoia, hallucinations, and violent and suicidal behavior. *Synthetic Drugs*; Losoya, *supra*, at 405, 407. Often, they become "so agitated that they d[o] not respond to large doses of sedatives." *An Alarming New Stimulant*. Additionally, death can result from overdoses and other complications. *See Arrest Underscores China's Role*. One doctor summed up the effects of bath salts by noting that, "[i]f you take the worst attributes of meth, coke, PCP, LSD and ecstasy and put them together, . . . that's what we're seeing sometimes." *An Alarming New Stimulant*. Worse still, synthetic drugs disproportionately harm young people. A 2012 survey found that one in nine high school seniors had used synthetic cannabinoids in the past year, making them the second most frequently-used drug after marijuana. *See Synthetic Drugs*; *see also* Losoya, *supra*, at 406.

Synthetic drugs harm not only users, but also the family members, law enforcement, and medical personnel who are exposed to them. Stories of this nature are jarring:

> In April 2011, an Army Sergeant and medic shot and killed his wife and then took his own life while under the influence of "bath salts." The couple's five-year-old son was later found suffocated to death in their Washington home. Similarly, while paralyzed for hours after smoking synthetic marijuana with her friends and unable to move, a Kentucky teen could sense her friends frantically trying to rouse her, and she even overheard them contemplate throwing her body in a nearby river. In Waco, Texas, a twenty-two year old man tortured, killed, and ate his roommate's dog—all while high on "Spice."

Losoya, *supra*, at 401-02. Other individuals have jumped in front of traffic, broken into monasteries and stabbed priests, scratched themselves "to pieces," taken hostages, vandalized police offices, run naked through the street while declaring themselves Satan, and impaled themselves on fences. *See An Alarming New Stimulant*; Frances Robles, *Police in Florida Grapple with a Cheap and Dangerous New Drug*, N.Y. Times (May 24, 2015), http://tinyurl.com/lebzby2. Still other examples exist. *See, e.g.*, Brown, *supra*, at 449-50.

These stories are not confined to other States. In August 2011, the Ohio State Highway Patrol responded to a call from a man under the influence of bath salts who reported that raccoons were trying to set his house on fire; they discovered that he had used a hatchet to destroy the deck attached to his home in an effort to find the raccoons. *See* Alan Johnson, *State raids 3 shops in 'bath salts' crackdown*, The Columbus Dispatch (Feb. 2, 2013, 5:38 AM), http://tinyurl.com/ka4h5o6. In May 2012, a Columbus SWAT Officer shot and killed a deranged man who was allegedly high on bath salts as the man held a knife to his girlfriend's neck. Summer Ballentine, *'Bath salts' led to two police shootings, one deadly, in past week*, The Columbus Dispatch (May 23, 2012, 8:13 PM), http://tinyurl.com/lwnan8y. In September 2015, a man fatally shot his mother and girlfriend while high on bath salts. Jennifer Smola, *Man gets life*

in prison after guilty plea to murders of mom, girlfriend, The Columbus Dispatch (April 5, 2016, 12:16 AM), http://tinyurl.com/gp9yq97. Unfortunately, such examples are all too common.

B. House Bill 64, adopted in October 2011, defined controlled substance analogs and provided that they "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I."

Faced with the sudden rise of previously unknown drugs, the General Assembly passed House Bill 64 on October 17, 2011. This response was similar to those taken by the federal government and other States. The federal government first banned analogs through the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. § 802, and it has since passed additional laws to combat analogs. *See Synthetic Drugs*. Since 2010, the vast majority of States have also taken similar steps to control synthetic cannabinoids and cathinones. *Id.*

As relevant here, House Bill 64 did three key things. First, it scheduled the synthetic drugs that were known to law enforcement at the time, including certain cannabinoids (spice and K2), *see* R.C. 3719.41(35)-(39), and cathinones, *see* R.C. 3719.41(40)-(45). (All statutory references are to the statutes in effect at the time of Shalash's offense unless otherwise specified.) Second, House Bill 64 created the offenses of "trafficking in spice," *see* R.C. 2925.03(C)(8), and "possession of spice," *see* R.C. 2925.11(C)(8). Accordingly, the newly scheduled cathinones would be treated like any controlled substance in Schedule I, whereas the newly scheduled cannabinoids would be prosecuted under separate, unique offenses.

Third, House Bill 64 allowed "analogs"—unknown or yet-to-be-made versions of scheduled controlled substances—to be prosecuted in the same manner as controlled substances by mandating that analogs "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I." R.C. 3719.013. This provision reflected the General Assembly's realization that, due to the evolving nature of the synthetic-drug problem, the first two components of House Bill 64 would soon be outdated. Underground chemists were

continuously working to modify scheduled drugs to create unscheduled analogs. House Bill 64's analog provision provided law enforcement with a tool for combating these developments.

For a drug to be considered an analog, House Bill 64 required it to share a "substantially similar" structure with a controlled substance in Schedule I or II. R.C. 3719.01(HH)(1)(a). In addition, the statute required the prosecution to prove that: (1) "[t]he substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" that of a controlled substance; or (2) "[w]ith respect to a particular person, that person represents or intends the substance to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" that of a controlled substance. R.C. 3719.01(HH)(1)(b).

These changes made a difference. Until governments outlawed synthetic drugs, as Ohio did by passing House Bill 64, these substances could be purchased online, in retail shops, and in convenience stores like the one owned by Shalash. *See Synthetic Drugs*. After House Bill 64 went into effect in October 2011, medical centers observed a significant decline in the number of emergencies related to synthetic drugs. *See* Synthetic Drug News Conference.

C. House Bill 334, adopted in December 2012, amended the Revised Code so that analogs were scheduled on a class basis and created a separate penalty scheme with more severe punishment for analogs.

Although House Bill 64 provided law enforcement with important tools to fight synthetic drugs, it had certain shortcomings. First, although it added certain synthetic drugs to Schedule I, law enforcement began discovering substances that neither matched those scheduled substances nor qualified as analogs. These dangerous drugs were escaping prosecution. Second, House Bill 64 did not permit analog-specific sentencing because "a person who sells . . . a controlled substance analog . . . is prosecuted under the statute that applies to a person who traffics any schedule I controlled substance—aggravated trafficking in drugs." Ohio Legislative Service

Commission, *Bill Analysis of Sub. H.B. 334 as Reported by S. Health, Human Services, and Aging*, at 13 (Dec. 10, 2012), http://tinyurl.com/zamjpx5 ("*H.B. 334 Bill Analysis*"). As a result, sentences often did not reflect the novel dangers arising from analogs' lack of standardized production and unpredictable effects as compared to scheduled substances. To address these problems, the General Assembly passed House Bill 334 on December 20, 2012 at the urging of the Attorney General.

As relevant here, House Bill 334 made two changes. First, it expanded the reach of Schedule I by removing the individually identified synthetic compounds that had been added by House Bill 64 and replacing them with *classes* of molecular compounds. *See H.B. 334 Bill Analysis* at 19-26 (discussing controlled-substance schedules). The scheduling of compound classes, as opposed to individual compounds, provided law enforcement with flexibility to confront an ever-moving target.

Second, House Bill 334 provided for more stringent penalties for analog offenses. In order to achieve this result, it established the offenses of trafficking in and possession of analogs and enacted a penalty scheme corresponding to those offenses. *See* R.C. 2925.03(C)(8). It also amended Title 37 to reflect this change. *See* R.C. 3719.013; *see also H.B. 334 Bill Analysis* at 13 (House Bill 334 "[s]pecifies that . . . analogs must *continue* to be treated for purposes of any provision of Ohio law as Schedule I controlled substances except as specified in the bill's provisions governing the offenses of trafficking in and possession of controlled substance analogs.") (emphasis added). Under the new penalty scheme, analog-offense sentences are not based on multiples of a bulk amount and carry more significant penalties. *See H.B. 334 Bill Analysis* at 13-19 (comparing penalty schemes). For example, selling 50 grams of analogs constitutes a first-degree felony and warrants classification as a "major drug offender." R.C.

2925.03(C)(8)(g). In contrast, selling 50 grams of marijuana is a fifth-degree felony, R.C. 2925.03(C)(3)(a), selling 50 grams of cocaine is a first-degree felony but does not warrant classification as a "major drug offender," R.C. 2925.03(C)(4)(f), and selling 50 grams of L.S.D. is a second-degree felony, R.C. 2925.03(C)(5)(e). The new sentencing scheme reflects the novel hazards posed by controlled substance analogs.

D. The trial court rejected Shalash's argument that House Bill 64 did not criminalize the possession or sale of analogs, and the Twelfth District affirmed.

This case involves a major prosecution under House Bill 64. In November 2011, police learned that Hamza Shalash was selling synthetic drugs out of the Marathon gas station he owned and operated. *State v. Shalash*, 2014-Ohio-2584 ¶ 2 (12th Dist.). They warned Shalash that a newly enacted law banned the sale of synthetic drugs and instructed him to discontinue the practice, and Shalash agreed to do so. *Id.* When Shalash continued to sell synthetic drugs, the police returned to the gas station and seized between 1,200 and 1,500 vials of drugs they discovered in the storage-room ceiling during a search of the premises. *Id.* ¶ 3; Trial Tr. 129, 146. Undeterred, Shalash continued to sell synthetic drugs. *Shalash*, 2014-Ohio-2584 ¶ 4. The police later arrested him. A second search of the premises uncovered roughly 157 vials of synthetic drugs hidden in a black bag under the cash register and three black boxes behind a chair in the storage room. *Id.* ¶ 5; Trial Tr. 18-19, 132, 151. Shalash told the police he sold the drugs off the books and had made roughly $500,000. *Shalash*, 2014-Ohio-2584 ¶ 5. He also informed the police that he knew selling synthetic drugs was illegal but continued doing so because he needed the money. *Id.*

In May 2012, Shalash was indicted on eight counts of aggravated trafficking in controlled substances and one count of engaging in a pattern of corrupt activity. *State v. Shalash*, 2015-Ohio-3836 ¶ 2 (12th Dist.) (App. Op.). The Twelfth District reversed his first conviction

because the trial court failed to hold a *Daubert* hearing before denying his motion to exclude an expert witness. *Id.* ¶ 3. On remand, Shalash moved to dismiss on the ground that House Bill 64, which governed at the time of the sales underlying his charges, did not criminalize the sale of controlled substance analogs. *Id.* ¶¶ 5, 11. The trial court denied the motion, and Shalash subsequently pleaded no contest to the charges and received an 11-year prison sentence. *Id.* ¶ 5.

The Twelfth District affirmed on appeal. *Id.* ¶¶ 28, 57. The court reasoned that "[t]he plain and clear language of [the analog statute] incorporated controlled substance analogs into every other aspect of the Revised Code," and thus that "controlled substance analogs were criminalized at the time [Shalash] committed the offenses with which he was charged." *Id.* ¶ 24. The court rejected the Tenth District's contrary holdings in similar cases. *See State v. Smith*, 2014-Ohio-5303 (10th Dist.); *see also State v. Mobarak*, 2015-Ohio-3007 (10th Dist.); *State v. Mohammad*, 2015-Ohio-1234 (10th Dist.). The Twelfth District rejected the reasoning in those cases because they impermissibly applied the rule of lenity and other canons of construction without first determining that the statute was ambiguous. App. Op. ¶ 25.

The Twelfth District also rejected the Tenth District's allusion to one possible ambiguity. It noted that, while the analog statute resides in Chapter 3719, which governs controlled substances generally, rather than Chapter 2925, which governs criminal offenses, this did not detract from the plain text. *Id.* Moreover, the court found the distinction irrelevant due to the "frequent interplay and integration" between the chapters. *Id.* The court also rejected the Tenth District's reliance on the expressio unius canon to conclude that, because the General Assembly did not reference analogs in the criminal-offenses chapter, it meant to exclude them. *Id.* ¶ 26. The court noted that the canon "applies only when the items expressed in the list or group are members of an associated group or series that would justify an inference that the items not

mentioned were intentionally excluded by the legislature." *Id.* Due to the interplay between the statutes, reasoned the court, such an inference was inappropriate. *Id.* Finally, because the General Assembly intended for controlled substance analogs to "be treated for purposes of *any* provision of the Revised Code as a controlled substance in schedule I," the court noted, this explicit purpose superseded the expressio unius canon. *Id.* ¶ 27 (quoting R.C. 3719.013).

Following this ruling, the Twelfth District granted Shalash's motion to certify a conflict between its decision and the Tenth District's decisions in *Smith*, *Mohammad*, and *Mobarak*. This Court agreed that a conflict exists and instructed the parties to brief the question "whether 'controlled substance analogs' were criminalized as of October 17, 2011, the effective date of House Bill 64." *See* 2015-Ohio-5225.

The Court subsequently accepted appeals from three Tenth District decisions addressing similar issues and held the cases for the decision in this case. *See State v. Mustafa*, 2016-0201, 2016-0179; *State v. Mobarak*, 2015-1259; *State v. Mohammad*, 2015-0774. It also accepted and held an appeal from a Ninth District decision. *See State v. Jackson*, 2016-0118.

ARGUMENT

***Amicus Curiae*'s Proposition of Law:**

> *During the period of October 17, 2011 to December 19, 2012, provisions of the Revised Code that criminalized possession of and trafficking in Schedule I controlled substances also criminalized possession of and trafficking in controlled substance analogs.*

This case should proceed no further than the plain text of the analog statute. At the time of Shalash's offenses, that statute stated that controlled substance analogs "shall be treated for purposes of *any provisions of the Revised Code* as a controlled substance in schedule I." The statute's use of the expansive term "any" and specification of "the Revised Code" rather than specific titles or chapters leaves no ambiguity as to its scope. This Court should apply the statute as written by holding that, during the period of October 17, 2011 to December 19, 2012, analogs

were treated as controlled substances for purposes of the provisions criminalizing possession of and trafficking in controlled substances.

Context and purpose reinforce this view. The contextual clues include the fact that the analog statute addresses the same subject matter as the drug-offense statutes, suggesting that they should be read in pari materia; appears in the same chapter as the most widely referenced controlled-substance analog provision; uses broad language similar to other Ohio laws this Court has applied in the past; and uses language similar to that in the federal and state statutes outlawing the sale and possession of analogs. Regarding purpose, the General Assembly passed the law to criminalize dangerous man-made drugs designed to escape prosecution, and Shalash's interpretation runs directly contrary to that purpose.

Shalash's contrary arguments all depend on disregarding the text of the analog statute, which is perhaps why he declines almost entirely to discuss it. Instead of offering a theory about the meaning of the statute, he invokes tools of construction like expressio unius and the rule of lenity in an attempt to defeat the text. Those canons are inapplicable here for many reasons, but chief among them is that they cannot overcome the words of the statute. The statute says that analogs shall be treated as controlled substances for purposes of "any provision of the Revised Code." That text is unambiguous, and the Court should affirm on that basis.

A. During the relevant time, the plain text of the analog statute treated analogs as controlled substances for purposes of "any provision of the Revised Code," including criminal offenses.

This case should begin and end with the text of the controlled substance analog statute. In cases of statutory interpretation, the "starting point is the statute's text." *Spencer v. Freight Handlers, Inc.*, 131 Ohio St. 3d 316, 2012-Ohio-880 ¶ 16. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State v. Vanzandt*, 142 Ohio St. 3d 223, 2015-Ohio-236 ¶ 7 (citation and quotation

marks omitted); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, . . . the first canon is also the last: judicial inquiry is complete." (citations and quotation marks omitted)). Two aspects of the analog statute's text demonstrate its broad applicability.

First, the analog statute mandates that analogs "shall be treated for purposes of any provision of *the Revised Code* as a controlled substance in schedule I." R.C. 3719.013 (emphasis added). The statute's specification that this treatment of analogs applied to "the Revised Code" rather than specific titles, chapters, or sections of the Code reveals its breadth.

Second, the General Assembly went even further to ensure that its meaning was unmistakable. It could have simply stated that analogs would be treated as controlled substances "for purposes of the Revised Code." Instead, it said that this treatment applied "for purposes of *any provision of* the Revised Code." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *Davis v. Davis*, 115 Ohio St. 3d 180, 2007-Ohio-5049 ¶ 19. Because of its expansive meaning, the presence of the word "any" in a statute "undercuts" attempts to apply a "narrowing construction." *Salinas v. United States*, 522 U.S. 52, 57 (1997). Indeed, when the legislature "d[oes] not add any language limiting the breadth of that word," courts "must read [the statute] as referring to *all*" items in the phrase it modifies. *Gonzales*, 520 U.S. at 5; *see, e.g.*, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) ("the phrase, 'any other final action,' . . . must be construed to mean exactly what it says, namely, *any other* final action").

In the analog statute, "any" modifies "purposes of the Revised Code," and that phrase is not subject to any restrictions. Thus, construing the phrase expansively, the statute requires

analogs to be treated as controlled substances under the Revised Code provisions "indiscriminately" and "without restriction or limitation." *Davis*, 2007-Ohio-5049 ¶ 19 (citation and quotation marks omitted). As a result, when the Revised Code prohibited illegally corrupting a minor with a controlled substance, R.C. 2925.02, knowingly using a controlled substance, R.C. 2925.11, and selling a controlled substance, R.C. 2925.03(A), it also prohibited corrupting a minor with analogs and using or selling analogs. In other words, at all times relevant to this appeal, every prohibition applicable to controlled substances also applied to controlled substance analogs.

Here, Shalash was charged with eight counts of trafficking in controlled substances analogs and one count of engaging in a pattern of corrupt activity. App. Op. ¶ 2. Because the trafficking statute is a "provision of the Revised Code," analogs must "be treated for purposes" of that provision "as a controlled substance in schedule I." R.C. 3719.013. Thus, Shalash could be charged with selling or offering to sell analogs in the same manner that one could be charged with "[s]elling or offer[ing] to sell a controlled substance." R.C. 2925.03(A)(1).

Deviating from this straightforward interpretation would mean rewriting the analog statute altogether. The Court would have to, for example, read the statute as saying that analogs must be treated as controlled substances "for purposes of *some* provisions of the Revised Code," or "for purposes of any provision of *this title*," or "under certain circumstances." Such an approach, however, would flout nearly every textual canon recognized by this Court. For example, interpreting "any" to mean "some" would contravene "the rules of grammar and common usage." R.C. 1.42; *State v. Swidas*, 133 Ohio St. 3d 460, 2012-Ohio-4638 ¶ 17. Additionally, applying the statute to less than "any provision of the Revised Code" would require the Court to "delete words used or . . . insert words not used" in the statute. *Davis*, 2007-Ohio-

5049 ¶ 15 (citation and quotation marks omitted). Most importantly, this approach would contravene the principle that "[t]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Id.* (citation and quotation marks omitted). This Court should hesitate to inflict such damage on the text of the analog statute and interpretative principles generally.

B. The analog statute's context reinforces its applicability to "any provision of the Revised Code."

Context reinforces the analog provision's text. When examining a statute, a court looks at "words and phrases in context," *Fraley v. Estate of Oeding*, 138 Ohio St. 3d 250, 2014-Ohio-452 ¶ 16; *Mahoning Educ. Ass'n of Dev. Disabilities v. State Emp't Relations Bd.*, 137 Ohio St. 3d 257, 2013-Ohio-4654 ¶ 15, and views "the statute as a whole," *Risner v. Ohio Dep't of Natural Res.*, 144 Ohio St. 3d 278, 2015-Ohio-3731 ¶ 19; *Dodd v. Croskey*, 143 Ohio St. 3d 293, 2015-Ohio-2362 ¶ 30. *See also Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 552-53 (2000) (examining "structure" of statute). In this case, several internal structural features and one external feature demonstrate the expansive reach of the analog statute.

1. The analog provision addresses the same subject matter as the provisions criminalizing the trafficking in and possession of controlled substances, and should be read in pari materia with those provisions.

The analog provision should be read consistently with Ohio's criminal controlled-substance statutes. "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. Where statutes address the same subject matter, [they] must be construed in pari materia and harmonized so as to give full effect to the statutes." *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 490, 2015-Ohio-4551 ¶ 110 (citations and quotations marks omitted).

The analog provision and criminal provisions governing controlled-substance offenses address the same subject, namely controlled substances. Moreover, the drug-offense provisions reference the chapter in which the analog provision appears numerous times. As the Twelfth District noted, there is "frequent interplay and integration between" these provisions. *Shalash*, 2015-Ohio-3836 ¶¶ 25-26. Accordingly, the statutes must be interpreted consistently with one another. Doing so means treating analogs the same as controlled substances in the drug-offense provisions in conformity with the analog statute. *See* R.C. 3719.013 ("a controlled substance analog . . . shall be treated . . . as a controlled substance in schedule I").

This conclusion would not change for lack of cross references or because one statute is civil and the other is criminal. *See* Shalash Br. 9-10; *Smith*, 2014-Ohio-5303 ¶¶ 13-14. Regarding the former, this Court has stated on numerous occasions that the in pari materia doctrine applies "even when the various provisions were enacted separately and make no reference to each other." *State v. South*, 144 Ohio St. 3d 295, 2015-Ohio-3930 ¶ 8; *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900, ¶ 67; *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172 ¶ 20. Moreover, such a critique is inapplicable here anyhow because the analog provision *does* reference the criminal provisions by stating that it applies to "any provision of the Revised Code." R.C. 3719.013.

The distinction between criminal and civil provisions is also insufficient to render the in pari materia canon inapplicable. The canon applies to "*[a]ll provisions of the Revised Code* bearing upon the same subject matter." *Blair v. Sugarcreek Twp. Bd. of Trs.*, 132 Ohio St. 3d 151, 2012-Ohio-2165 ¶ 18 (emphasis added); *State v. Cook*, 128 Ohio St. 3d 120, 2010-Ohio-6305 ¶ 45; *State v. Chappell*, 127 Ohio St. 3d 376, 2010-Ohio-5991 ¶ 25. Indeed, the Court has construed criminal and civil provisions together in the past. *See, e.g.*, *Lesnau v. Andate Enters.*,

Inc., 93 Ohio St. 3d 467, 473 (2001) (reading civil statute allowing action against liquor permit holder for negligent acts of underage intoxicated person to whom permit holder sold alcohol in pari materia with criminal statute governing underage person's consumption of alcohol). Regardless, this critique also does not apply here, because the chapter in which the analog provision appears is not purely civil; it contains numerous criminal penalties. *See* R.C. 3719.99(A)-(D), (H).

2. The analog provision's placement within Chapter 3719 of the Revised Code demonstrates its broad applicability.

The General Assembly wedged the analog provision between R.C. 3719.01 and 3719.02 and labeled it R.C. 3719.013 to show its association with the former. This placement is significant, because in matters affecting controlled substances, all roads lead to R.C. 3719.01. At the time of House Bill 64's enactment, the Revised Code contained provisions addressing controlled substances in 15 of its 33 titles (titles 9, 15, 19, 21, 23, 27, 29, 31, 33, 37, 41, 45, 47, 51, 53). Most of the relevant chapters within those titles referred to R.C. 3719.01 for the meaning of controlled substances. *See, e.g.*, R.C. 955.012(A)(1); R.C. 1547.01(I)(4); R.C. 1923.01(C)(6); R.C. 4112.01(A)(20); R.C. 4510.01(I); R.C. 4725.01(D); R.C. 5111.172(C); R.C. 5321.01(G). That includes the criminal provisions, which frequently cited R.C. 3719.01. *See, e.g.*, R.C. 2901.01(A)(13)(a); R.C. 2925.01(A); R.C. 2929.01(F). Thus, it made perfect sense for the General Assembly to place the analog provision in the same chapter of the same title as the existing controlled-substances provision and to further associate it with that provision by attaching a proximate section number. It placed the broadest provision governing analogs adjacent to the most broadly referenced provision governing controlled substances because it intended the analog provision to have the broadest reach possible.

Moreover, Shalash does not contest that the analog provision *at least* applies in the context of Chapter 3719, and in fact suggests that it does. *See, e.g.*, Shalash Br. 6 (discussing analog provision in context of Title 37); *id.* at 8 (suggesting that analog provision applies to other civil provisions). Indeed, he must concede as much. If the analog provision did not even apply within the chapter where it appeared then it would have been a dead letter. And if it applied there, then it applied to R.C. 3719.01, meaning that analogs were treated as controlled substances within that provision. Thus, when other provisions in the Revised Code—including the criminal provisions in Title 29—looked to R.C. 3719.01 for the meaning of controlled substances, they adopted a meaning that included analogs. In other words, what the analog provision's text accomplished directly its placement in Chapter 3719 accomplished indirectly by ensuring that it applied to the provision relied upon by other provisions addressing controlled substances.

3. Numerous provisions utilizing identical or substantially similar language elsewhere in the Revised Code show that the phrase "any provision in the Revised Code" means exactly that.

There is nothing novel about the language used in the analog provision. At the time of Shalash's charges, the Revised Code contained numerous uses of the phrases "as used in the Revised Code" and "any provision of the Revised Code." Those phrases have been applied to definitions, R.C. 1.05, rules of statutory construction, R.C. 1.41, and provisions defining criminal offenses, R.C. 2901.04(D), among others. Prior to the conflicting cases addressing the analog statute, no court had ever held that one of those provisions did not, in fact, apply to the entire Revised Code. Indeed, this Court has applied those provisions without issue on prior occasions. *See, e.g.*, *State v. Chappell*, 127 Ohio St. 3d 376, 2010-Ohio-5991 ¶¶ 23-25 (applying R.C. 2901.04(D), which states that "[a]ny provision of the Revised Code that refers to" another provision "that defines or specifies a criminal offense shall be construed to also refer to an existing or former" state or federal law or municipal ordinance); *State v. Oxenrider*, 60 Ohio St.

2d 60, 61-62 (1979) (applying R.C. 1.05, which states that, "[a]s used in the Revised Code . . . 'imprisoned' means imprisonment in a . . . state penal or reformatory institution if the offense is a felony"). There is no reason to deviate from that approach in this case. Instead, the Court should continue to read provisions saying they apply to the entire Revised Code as applying to the entire Revised Code.

4. Ohio's controlled-substance-analog statute follows the federal statute and similar state statutes that broadly criminalize analogs.

The General Assembly passed House Bill 64 against a backdrop of similar federal and state laws. Those laws were enacted to prevent the possession and distribution of controlled substance analogs, and no court has interpreted such a law as failing to do so. The General Assembly knew this when it passed House Bill 64. *Cf. Case v. Los Angeles Plumber Prods. Co.*, 308 U.S. 106, 115 (1939) ("where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary"); *Hauser v. Dayton Police Dep't*, 140 Ohio St. 3d 268, 2014-Ohio-3636 ¶¶ 10-14 (pl. op.) (analyzing similar language in "comparable provisions" of federal statute to determine meaning of state statute). Had it intended a different result, it would have made that intention explicit rather than using language nearly identical to that in the federal and other state statutes.

The relevant federal statute, the Controlled Substance Analogue Enforcement Act, dates back to 1986. Congress passed the Act "to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances." *State v. Jackson*, 2015-Ohio-5246 ¶ 23 (9th Dist.) (quoting *United States v. Klecker*, 348 F.3d 69, 70 (4th Cir. 2003)); *see also United States v. Hodges*, 321 F.3d 429, 432 (3d Cir. 2003). In other words, the statute aimed to subject controlled substance analogs to the same restrictions applicable to controlled substances.

Congress placed the Act in the title governing food and drugs. Similar to House Bill 64, the Act defined controlled substance analogs, 21 U.S.C. § 802(32)(A), and stated that they "shall, to the extent intended for human consumption, be treated, for purposes of any Federal law as a controlled substance in schedule I," § 813. Courts have applied this provision to permit prosecutions for distributing analogs under the statute outlawing the distribution of controlled substances. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2302-03 (2015) (noting that analog provision permitted defendant to be convicted for distributing analogs under statute banning distribution of controlled substances); *id.* at 2305-06 ("The Court of Appeals did not adhere to § 813's command to treat a controlled substance analogue 'as a controlled substance in schedule I . . . .' Because that interpretation is inconsistent with the text and structure of the statutes, we decline to adopt it."); *United States v. Fisher*, 289 F.3d 1329, 1334 (11th Cir. 2002) ("[t]he statute makes plain that drugs which have been chemically designed to be similar to controlled substances, but which are not themselves listed on the controlled substance schedules, will nonetheless be considered as schedule I substances" (quoting *United States v. Granberry*, 916 F.2d 1008 (5th Cir. 1990))).

House Bill 64's language is "virtually identical" to the language in the federal statute. *Jackson*, 2015-Ohio-5246 ¶ 23; *see also Shalash*, 2014-Ohio-2584 ¶ 27 ("[t]he definition of 'controlled substance analog' in [the analog provision] is very similar to the definition of 'controlled substance analogue' in the [federal statute]"). The analog statute should be interpreted in light of these similarities. Just as courts apply as written the federal statute's stipulation that analogs shall be treated as controlled substances "for purposes of any Federal law," *see McFadden*, 135 S. Ct. at 2302-03, 2305-06; *Fisher*, 289 F.3d at 1334, this Court should take Ohio's mandate that analogs be treated as controlled substances "for purposes of any

provision of the Revised Code" at its word. And just as the federal statute has been construed consistently with its purpose of ensuring that analogs are subject to the same restrictions as controlled substances, *see Klecker*, 348 F.3d at 70; *Hodges*, 321 F.3d at 432; *Jackson*, 2015-Ohio-5246 ¶ 23, Ohio's statute should be interpreted to effectuate its similar purpose.

State laws provide additional support for this conclusion. Most States have passed laws resembling the federal analog statute. *See* Nat'l Alliance for Model State Drug Laws, *Controlled Substance Analog Statutory Comparison and Compilation* (2012), http://tinyurl.com/ju5txax (comparing state analog statutes). Like the federal statute, *see* 21 U.S.C. § 813, many state analog provisions appear in titles governing health, safety, food, and drugs rather than in titles governing criminal offenses, *see, e.g.*, Cal. Health & Safety Code § 11401(a); Tex. Health & Safety Code Ann § 481.002; *see generally Controlled Substance Analog Statutory Comparison*. And, while some States have included references to analogs elsewhere, no court has held that they are necessary when analog provisions explicitly apply to specific chapters or the state law in its entirety, and some courts have recognized that these references are *not* necessary.

Consider California. In that State, one provision defines controlled substance analogs and specifies that an analog "shall, for the purposes of" the chapter governing controlled-substance offenses, "be treated the same as the controlled substance classified in" Schedule I or II "of which it is an analog." Cal. Health & Safety Code § 11401(a). Schedule I and II do not mention analogs or the section defining them. *See* §§ 11054, 11055. Likewise, the provisions criminalizing the possession and distribution of controlled substances reference Schedule I and II but not the analog provision. *See, e.g.*, §§ 11351, 11352(a), 11378, 11379(a). Nevertheless, courts have recognized that the plain language of the analog provision mandates that analogs be treated as controlled substances for purposes of the provisions defining controlled-substance

offenses. *See, e.g.*, *Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1160 (C.D. Cal. 2008); *People v. Davis*, 303 P.3d 1179, 1182-83 (Cal. 2013); *People v. Becker*, 107 Cal. Rptr. 3d 856, 859-61 (Cal. Ct. App. 2010); *People v. Silver*, 281 Cal. Rptr. 354, 356-59 (Cal. Ct. App. 1991).

Like the federal statute, these laws reinforce the text and structure of Ohio's analog provision by revealing States' parallel efforts to combat a common problem. It would be curious indeed to conclude that the General Assembly, cognizant of the threat posed by the sale and use of synthetic drugs and the federal and state response to that problem, fashioned a statute using substantially similar language in an attempt *not* to outlaw trafficking in analogs.

C. The General Assembly's purpose in passing House Bill 64 reinforces the text.

The analog provision's purpose supports its text and context. When construing a statute, courts may consider "the purpose to be accomplished by the statute." *State v. Black*, 142 Ohio St. 3d 332, 2015-Ohio-513 ¶ 37. In this case, the General Assembly was aware when it passed House Bill 64 that new, man-made substances closely resembling scheduled substances were escaping prosecution because they did not conform to the precise definitions listed in Schedule I. Following Congress's example, the General Assembly passed House Bill 64 to provide law enforcement with tools to prosecute synthetic drugs specially designed to avoid prosecution. Clues from the legislative history make this purpose apparent.

This Court often looks to Ohio Legislative Service Commission documents to shed light on meaning. *See, e.g.*, *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177 ¶ 20; *State v. Limoli*, 140 Ohio St. 3d 188, 2014-Ohio-3072 ¶ 10; *State v. Taylor*, 138 Ohio St. 3d 194, 2014-Ohio-460 ¶ 17. In this case, the statement prepared for House Bill 64 indicates that the General Assembly intended to criminalize analogs by referencing the bill's effect of "making analogs of controlled substances subject to the *same criminal prohibitions* as other substances . . . ." Ohio

Legislative Service Commission, *Fiscal Note and Local Impact Statement to Sub. H.B. 64*, at 6 (June 28, 2011), http://tinyurl.com/jv6vjoy (emphasis added).

Additionally, when considering House Bill 334, the House report confirmed that, under House Bill 64, "a person who sells . . . a controlled substance analog . . . is prosecuted under the statute that applies to a person who traffics any schedule I controlled substance—aggravated trafficking in drugs." *H.B. 334 Bill Analysis* at 13. The report also noted that the analog provisions was meant to be "similar to one enacted by the Federal Analog Act" and that under the new law analogs would "*continue* to be treated for purposes of any provision of Ohio law as a schedule I controlled substance" except as otherwise specified. *Id.* (emphasis added).

Taken together, the legislative reports demonstrate what is apparent from the text: That the General Assembly intended to criminalize analogs for all purposes of the Revised Code. Indeed, it is hard to imagine what other purpose the General Assembly could have contemplated when it defined analogs and mandated that they be treated as Schedule I controlled substances, and Shalash declines to offer any alternative explanation.

D. Shalash's attempts to circumvent the plain text of the statute fail to convince.

Shalash offers no theory about what the analog statute means when it says that controlled substance analogs "shall be treated for purposes of *any provision of the Revised Code* as a controlled substance in schedule I." R.C. 3719.013 (emphasis added). Instead, he leapfrogs the text and looks to tools used for interpreting *ambiguous* statutes to find the meaning he wants. This disregard for the plain language of the analog statute alone dooms Shalash's case. *See Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 347 (1994) ("courts 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"). But even indulging his extra-textual approach leads to the same result, because Shalash misapplies the canons and other interpretive tools upon which he relies.

1. Shalash misapplies the expressio unius canon and, in doing so, fails to cite, let alone analyze the text or structure of, the analog statute.

In the first third of his argument section, Shalash neither analyzes nor cites the analog statute. Instead, he asserts that he could not have violated the controlled-substance trafficking statute because it "did not state a positive prohibition against trafficking in 'controlled substance analogs'" and because the title outlining criminal offenses adopted the definition of controlled substances from Chapter 3719 but did not adopt the definition of analogs or otherwise refer to them. Shalash Br. 5-7. He notes that these claims are "fully supported by the canon of statutory construction *expressio unius*," under which "the inclusion of one thing" in a statute implies the "exclusion of the other." Shalash Br. 6 (citation and quotation marks omitted). Implicit in his argument is the assumption that the plain text of a provision in one title of the Revised Code must be disregarded unless referenced by a provision in another title where it is to be applied. This argument is problematic for numerous reasons.

First, the plain text and clear contextual indicators may not be ignored for lack of a cross reference. Indeed, the expressio unius canon "may be employed only if the statute is ambiguous." *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838 ¶ 12; *see also Field v. Mans*, 516 U.S. 59, 67, 75 (1995) ("the negative pregnant argument . . . is weakest when it suggests results strangely at odds with other textual pointers"). Additionally, the canon must yield to the statutory context. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) ("The force of any negative implication . . . depends on context. . . . [T]he canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'" (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)));

Schussheim v. Schussheim, 137 Ohio St. 3d 133, 2013-Ohio-4529 ¶ 28 (expressio unius canon is "inapplicable when its use would defeat legislative intent" (citation omitted)); *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St. 3d 449, 455 (2002) (canon "must yield whenever a contrary legislative intent is apparent").

In this case, the text and context of the analog provision demonstrate its sweeping reach. The statute states that it applies to "any provision of the Revised Code." R.C. 3719.013. As discussed above, all contextual indicators—the statute's placement in the most broadly applied substance-control chapter, use of language similar to that in other provisions that apply to the entire Revised Code, and similarities to federal and state statutes outlawing the sale and possession of analogs—demonstrate that the statute meant what it said. The expressio unius canon cannot overcome these factors. Thus, because the analog statute's scope encompasses the criminal provisions, an express inclusion of analogs in those provisions was unnecessary.

This conclusion comports with the U.S. Supreme Court's long line of cases rejecting the notion that inferences drawn from statutory silence (here, lack of cross references) may defeat plain text or clear contextual clues. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013) (party's reliance on expressio unius canon to give "significan[ce]" to statute's "silence" unavailing because other statutory provisions "cut against its reading"). The Court expressed this sentiment most colorfully in *Harrison*, in which it rejected a party's reliance on what "Congress did *not* say" to interpret a statute and noted that "it would be a strange canon of statutory construction that would require Congress to state . . . that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." 446 U.S. at 591-92.

Shalash asks this Court to place dispositive weight on the dog's silence. He makes no attempt to explain what the General Assembly *did* say in the analog statute. Indeed, the text is fatal to his argument. Instead, he attempts to prove that the General Assembly didn't really mean what it said by focusing on what it did *not* say elsewhere. But "[t]he preeminent canon of statutory interpretation requires [this Court] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Miller v. Miller*, 132 Ohio St. 3d 424, 2012-Ohio-2928 ¶ 48 (citation and quotation marks omitted); *see also Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014) (Easterbrook, J.) ("Congress need not add 'we really mean it!' to make statutes effectual."). Shalash invites the Court to hold that omissions of ambiguous relevance trump unequivocal text. Rather than accepting the invitation to play Sherlock, this Court should look to the other Holmes. *Cf.* Oliver Wendell Holmes, *The Theory of Legislative Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

Second, even if the meaning of the analog statute was not clear from the factors discussed above, the expressio unius canon would still not apply. The canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Summerville v. Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280 ¶ 35 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). Here, the terms from Chapter 3719 incorporated into the criminal provisions were not members of an "associated group or series." The incorporated terms intermingled verbs ("administer"), adjectives ("hypodermic"), and nouns ("distributor"); included persons ("pharmacist") and things ("official written order"); and employed specific, drug-related terms ("controlled substance")

alongside sweeping, general words ("person"). The terms are not logically or categorically connected in any coherent way, and there is no "statutory language suggesting exclusiveness." *Id.* ¶ 36 (quoting *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). Accordingly, "the essential extrastatutory ingredient of an expression-exclusion demonstration"—"a series of two or more terms or things that should be understood to go hand in hand"—is missing here. *Id.* (quoting *Chevron*, 536 U.S. at 81).

Third, this Court's cases invoking the in pari materia canon demonstrate that the expressio unius canon was never meant to require courts to read statutes in silos. Those cases explicitly rejected the notion that related statutes should not be read in conjunction with one another for lack of a cross reference. *South*, 2015-Ohio-3930 ¶ 8 ("we construe statutes relating to the same subject matter . . . together . . . even when the various provisions were enacted separately and make no reference to each other"); *LetOhioVote.org*, 2009-Ohio-4900, ¶ 67; *D.A.B.E.*, 2002-Ohio-4172 ¶ 20. Shalash has offered no reason why that rationale should not apply here.

Fourth, Shalash's interpretation would render the analog statute superfluous. If every provision governing controlled substances was required to mention analogs for analogs to receive the same treatment as controlled substances, then an extra provision mandating that analogs be treated the same for purposes of the entire Revised Code would serve no purpose. Such a view of the analog statute would contravene the cardinal principle that "words in statutes should not be construed to be redundant, nor should any words be ignored." *D.A.B.E.*, 2002-Ohio-4172 ¶ 26 (citation and quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute." (citation and quotation marks omitted));

Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) ("the Court will avoid a reading which renders some words altogether redundant"). This Court should be especially hesitant to read the *entire* analog statute out of existence.

Finally, Shalash's extra-textual approach would require the General Assembly to undertake Herculean efforts each time it intended a statutory mandate to apply widely throughout the Revised Code. As mentioned above, prior to the passage of House Bill 64, the Revised Code contained controlled-substance provisions in 15 of its 33 titles. House Bill 64 placed the controlled-substance-analog provision in Title 37 but did not include references to analogs elsewhere. Under Shalash's view, the General Assembly could not simply apply that provision to the entire Revised Code, no matter how unequivocally it expressed its intent to do so. Instead, it was required to amend nearly half of the titles in the Revised Code to include references to the provision or to controlled substance analogs. Of course, the focus on titles is arbitrary. One could just as easily focus on chapters, or even sections. Why not require the General Assembly to amend the 150-plus sections that referenced controlled substances? After all, if the language "any provision of the Revised Code" does not actually suffice to apply a standard to any provision of the Revised Code, then why should it suffice to apply the standard to any provision of a title or chapter?

Consider the implications of Shalash's view of the statutory scheme in existence at the time of his charges. Under his interpretation, law enforcement canines could be used to track controlled substances but not analogs. *See* R.C. 955.012(A)(1), (3). Physicians could be forced to testify when criminal defendants' blood tested positive for controlled substances but not when it tested positive for analogs. *See* R.C. 2317.02(B)(1)(c). An individual committed rape by impairing a victim's ability to resist unwanted sexual intercourse with controlled substances, but

not when he used analogs for this purpose. *See* R.C. 2907.02(A)(1)(a); *see also* R.C. 2907.05(A)(2). The examples could go on.

This Court should reject Shalash's request that it disregard the text, context, and purpose of the analog statute, rendering it superfluous in the process and saddling the General Assembly with onerous new requirements for future legislative initiatives.

2. Contrary to Shalash's contentions, the analog provision is not a purely civil statute, and even if it was, it would still apply to the drug-offense provisions by its plain terms.

Shalash next turns to a second, equally inapplicable interpretive principle. He claims that "the definition of a phrase in a civil statute such as R.C. 3719.013 does not necessarily import the same meaning to the same phrase in interpreting a criminal statute, such as R.C. 2925.01(A)." Shalash Br. 8. For this proposition he relies on this Court's statement that the definition of a word in a civil and criminal statute "*might* have different meanings" when the statutes "do not expressly state that the word has the same meaning in both . . . ." *State v. Dickinson*, 28 Ohio St. 2d 65, 70 (1971) (emphasis added). This argument is problematic for several reasons.

First, neither the analog provision itself nor the chapter in which it appears is purely civil. The analog provision, by its terms, applies to "any provision of the Revised Code." R.C. 3719.013. That obviously includes criminal provisions. And the chapter in which the analog provision appears outlines criminal penalties for numerous offenses. *See* R.C. 3719.99(A)-(D), (H). Accordingly, *Dickinson* is inapplicable.

Second, *Dickinson* applies only when a statute does "not expressly state that the word has the same meaning in both" statutes. 28 Ohio St. 2d at 70. In this case, the analog provision states that analogs shall be treated as controlled substances for purposes of "any provision of the Revised Code." R.C. 3719.013. Again, this language encompasses criminal provisions. Thus,

unlike the statutes in *Dickinson*, the statute here did contain express language indicating its expansive applicability.

Finally, *Dickinson* says only that that when a civil statute does not expressly state that a word has the same meaning in a criminal statute it "might" indicate that the word has a different meaning in each statute or "does not necessarily" have the same meaning. 28 Ohio St. 2d at 70. It does not state that such a statute *never* applies. Indeed, a generalized presumption about meaning cannot override textual and contextual indicators showing that a statute applies to criminal provisions. When such indicators exist, courts should read statutes accordingly. Indeed, this Court's cases addressing the in pari materia canon support this conclusion. *See Blair*, 2012-Ohio-2165 ¶ 18 (canon applies to "[a]ll provisions of the Revised Code bearing upon the same subject matter"); *Lesnau*, 93 Ohio St. 3d at 473 (reading civil statute in pari materia with criminal statute).

In this case, the text and context of the analog statute show that it applies to the drug-offense provisions. The contextual factors supporting this conclusion include, among others, the statute's placement in the chapter relied upon by most other controlled-substance provisions in the Revised Code, including the criminal provisions, and its similarity to other federal and state laws outlawing the sale and possession of analogs. In *Dickinson*, the civil and criminal statutes addressing unborn children were not interrelated in this fashion, nor were there other contextual factors indicating that the meaning of terms in the civil statute should be applied to the criminal statutes. Accordingly, the case is readily distinguishable.

3. The vague distinction Shalash draws between "adding" analogs to or "defining" them within Schedule I and "treating" them as controlled substances for all purposes does not withstand scrutiny.

The few sentences Shalash devotes to the actual text of the analog statute raise more questions than they answer. He notes that the analog statute does "not add . . . any chemical to

the controlled-substance schedules" or "define 'controlled substance analogs' as 'controlled substances,'" but merely states "that a 'controlled substance analog' shall be treated as a schedule I 'controlled substance.'" Shalash Br. 9-10. He reasons that "[t]his distinction is significant because only trafficking in chemicals specifically included on the drug schedules was criminalized under R.C. 2925.03 during the relevant time period." Shalash Br. 10. For numerous reasons, these claims are unconvincing.

First, Shalash's brief foray into the text omits any theory about what the analog statute means if he is right. The unspoken assumption is that it means analogs shall be treated as controlled substances for purposes of any provision of the Revised Code *except for certain provisions*. His refusal to acknowledge this inevitable result or to offer an interpretation consistent with his claims that does not inflict damage on the plain text dooms his position.

Second, the source of the rules he cites is unclear. Shalash does not explain why the General Assembly had to "add" analogs to the drug schedules or "define" them as controlled substances rather than stating unequivocally that they shall be treated as controlled substances for all purposes in order to bring about the same result. He points to the drug-trafficking statute, but that statute contains no language suggesting that the "add" or "define" methods he identifies are the exclusive methods the General Assembly may use to criminalize analogs. In short, the requirement Shalash sees as self-evident is in fact non-existent.

Finally, even if Shalash *could* locate something resembling an "add" or "define" requirement, the General Assembly was free to change them. And it did exactly that by unambiguously stating that analogs shall be treated as controlled substances under "any provision of the Revised Code." R.C. 3719.013. Thus, at best, Shalash's claim is that a prior vague statutory requirement may be used to invalidate a subsequent unequivocal statute. That

conclusion is precisely backwards. *See Watkins v. Dep't of Youth Servs.*, 143 Ohio St. 3d 477, 2015-Ohio-1776 ¶ 19 (when statutes conflict, "the more recent and more specific enactment" prevails); *Summerville*, 2010 Ohio-6280 ¶ 4 (same). Thus, no matter how Shalash frames the requirements for outlawing analogs, he cannot escape the plain text of the statute.

4. The General Assembly's separate treatment of spice offenses is fully consistent with its treatment of analogs.

Shalash ends his brief with lengthy quotations from the Tenth District's *Smith* decision, Shalash Br. 11-12, that overlook the plain text of the analog statute and betray a misunderstanding of House Bill 64. He first quotes a passage noting that House Bill 64 added certain spices to Schedule I and created corresponding offenses for "trafficking in spice" and "possession of spice." 2014-Ohio-5303 ¶ 13. "By contrast," noted the court, House Bill 64 did not "expressly prohibit the sale or possession of controlled substance analogs and did not amend any part" of the criminal code "to explicitly refer to controlled substance analogs . . . ." *Id.*

This analysis is erroneous. For one, it does nothing to undermine the plain text of the analog statute, with which the Tenth District declined to engage. Moreover, there is nothing anomalous about the General Assembly's decision to include certain synthetic drugs in Schedule I after identifying them and determining their potential for abuse while simultaneously maintaining a broad ban on analogs that had not yet been identified or undergone the potential-for-abuse determination required for scheduling.

Nor is there anything anomalous about creating new offenses for trafficking in and possession of spice. The General Assembly did so in order to penalize certain identified synthetic cannabinoids more leniently than more dangerous controlled substances and their analogs. Specifically, it made the possession of spice a minor misdemeanor, R.C. 2925.11(C)(8), and trafficking in spice a felony in the fourth or fifth degree, R.C. 2925.03(C)(8). In contrast, it

treated the possession of most other controlled substances (and their analogs) as felonies of varying degrees. R.C. 2925.11(C)(1)-(7). And, depending on the amount of the drug involved, the Code often treated trafficking in other controlled substances (and their analogs) as felonies of the first, second, or third degree. R.C. 2925.03(C)(1)-(7).

The irony of the Tenth District's rationale, which Shalash urges this Court to adopt, is that it would result in precisely the opposite of what the statutory scheme was meant to accomplish. The General Assembly carved out more lenient treatment for spice offenses while maintaining harsher treatment for extraordinarily unsafe analogs by treating them as controlled substances. But the Tenth District concluded that, by prescribing more lenient treatment, the General Assembly in fact meant to treat spice *more harshly* by not criminalizing dangerous analogs at all. The Court should reject this tortured construction.

5. The distinctions Shalash draws between Ohio's analog provision and the federal analog provision are unconvincing.

Shalash also quotes a paragraph in which *Smith* erroneously contrasts Ohio's analog statute with the federal analog statute. Shalash Br. 11-12. The court notes that the federal provision appears in the same title that outlaws the sale and possession of controlled substances, whereas Ohio's provision appears in a different title. *Smith*, 2014-Ohio-5303 ¶ 15. That difference is irrelevant but easily explained.

It is irrelevant because it does nothing to undermine the plain text of the analog statute. Indeed, courts interpreting the federal statute and similar state statutes did not so much as mention the location of the analog provisions; they merely applied the plain text as written. *See, e.g.*, *McFadden*, 135 S. Ct. at 2302-03, 2305-06; *Fisher*, 289 F.3d at 1334; *Davis*, 303 P.3d at 1182-83. *Smith* looks everywhere but the text to interpret the text, seeking ambiguity in clarity. This Court should reject that puzzling approach.

The difference is also easily explained. Whereas the federal provisions defining controlled substances and other relevant terms and the provisions outlawing the sale and possession of controlled substances have always appeared within the same title, they have always appeared under different titles in the Revised Code. Thus, the General Assembly could not have placed the analog provision in the same title as both the provisions defining controlled substances and the drug-offense provisions without overhauling numerous parts of the Code.

Nor was it required to do so to bring about the same effects as the federal statute. The General Assembly used unequivocal language that tracked the federal statute when defining analogs and stating that they shall be treated as controlled substances for all purposes. *Compare* 21 U.S.C. §§ 802(32)(A), 813, *with* R.C. 3719.01(HH)(1), 3719.013. And, like Congress, the General Assembly placed those provisions in the same chapter that defined controlled substances. In other words, it did everything possible to make the analog provisions resemble the federal provisions short of tearing entire chapters from Title 37 and placing them in Title 29, which would have required it to amend hundreds of provisions elsewhere in the Code that reference those chapters. These textual and structural similarities are incompressible if they were intended to achieve something other than what the federal statute accomplished, namely outlawing the sale and possession of controlled substance analogs.

In addition to being unnecessary and impractical, placing the analog provision in the same title as the drug-offense provisions would have been counterproductive. As explained above, the General Assembly placed the analog provision in the most widely cited controlled-substance chapter to ensure its broad applicability to *all* provisions of the Revised Code. That includes the drug-offense provisions but also many others in different titles. *See, e.g.*, R.C. 3101.06 (marriage license may not be issued to applicant impaired by controlled substances);

R.C. 4112.02(H)(17)(d), (e) (landlord may refuse to rent to user or distributor of controlled substances); R.C. 4506.15(A)(1) (person may not operate commercial vehicle while impaired by controlled substances). Placing the provision under the title governing criminal offenses would have undercut this message, because the controlled-substance provisions in that title are not ubiquitously cited throughout the Code. Although the plain text of the analog statute would have sufficed to achieve the same result if the statute had been placed elsewhere, its current placement reinforces that message most effectively.

6. Shalash relies on the rule of lenity, an interpretative tool of "last resort," but it does not apply.

In addition to his more specific arguments, Shalash also erroneously references the rule of lenity several times in his brief. Shalash Br. 3, 7. That rule states that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A). But the rule only applies to ambiguous statutes. *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478 ¶¶ 38, 40; *State v. Snowder*, 87 Ohio St. 3d 335, 336-37 (1999); *State v. Rush*, 83 Ohio St. 3d 53, 58 n.5 (1998). Moreover, "[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning . . . ." *Elmore*, 2009-Ohio-3478 ¶ 40 (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991)); *State v. Stevens*, 139 Ohio St. 3d 247, 2014-Ohio-1932 ¶ 39 (Kennedy, J., concurring in part and dissenting in part); *see also State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583 ¶ 20 (the rule of lenity should not be used to give statutes "an artificially narrow interpretation that would defeat the apparent legislative intent"); *State v. Hurd*, 89 Ohio St. 3d 616, 366 (2000) (the rule "is not an obstinate rule which overrides common sense and evident statutory purpose" (quoting *State v. Sway*, 15 Ohio St. 3d 112, 115 (1984))).

This interpretation is consistent with precedent from the U.S. Supreme Court, to which this Court often looks when applying the rule of lenity. *See Elmore*, 2009-Ohio-3478 ¶¶ 38, 40 (citing seven Supreme Court cases); *Sway*, 15 Ohio St. 3d at 115; *Stevens*, 2014-Ohio-1932 ¶ 39 (Kennedy, J., concurring in part and dissenting in part). The Supreme Court has clarified that the rule of lenity should not be used to resolve a mere statutory ambiguity, but only a "grievous ambiguity." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (citation and quotation marks omitted). In other words, "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, . . . [a court] can make no more than a guess as to what Congress intended." *Id.* at 138 (citation and quotation marks omitted); *see also United States v. Kay*, 513 F.3d 432, 445 (5th Cir. 2007) ("To address potential statutory ambiguity, the Supreme Court has relied upon 'common usage,' dictionaries, the societal circumstances surrounding the passage of an act, legislative intent derived from the language of an act, and legislative history to clarify a law's meaning and thus avoid the rule of lenity."). For this reason, lower courts have widely dubbed the rule of lenity a tool of "last resort." *See, e.g.*, *Hernandez v. Holder*, 783 F.3d 189, 196 (4th Cir. 2015); *Kay*, 513 F.3d at 445; *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809, 813 (E.D. Tenn. 2003); *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

Applying those principles here means concluding that the rule of lenity is inapplicable. As explained above, the analog statute is unambiguous and, regardless, its context and purpose show that it applies to the entire Revised Code. *Smith*, the case upon which Shalash relies, is unresponsive to these points. In that case, the Tenth District invoked the rule of lenity at the outset of its analysis without making any effort to apply the statute's plain terms. Ignoring the all-encompassing wording of the analog statute, it asked why the statute did not cross reference analogs and why the General Assembly placed the provision where it did within the Code. *See*

Smith, 2014-Ohio-5303 ¶¶ 12, 14. As explained above, these criticisms are erroneous. Regardless, these quibbles about drafting techniques cannot invalidate the General Assembly's unambiguous command that analogs be treated as controlled substances for any purpose. *See Gozlon-Peretz*, 498 U.S. at 410 ("While § 1001 may have created some minor inconsistencies with other statutory provisions, its provisions . . . are not ambiguous. This case involves no ambiguity for the rule of lenity to resolve."); *In re Clemons*, 168 Ohio St. 83, 87 (1958) ("[M]ere verbal nicety or forced construction is not to be resorted to in order to exonerate persons committing acts plainly within the terms of the statute."). In urging this Court to apply the rule of lenity, Shalash asks not for a narrow *reading* but rather a narrow *rewriting* of the statute. This Court should reject that invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm the Twelfth District's judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served on the 25th day of May, 2016, by electronic and U.S. mail on the following:

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