In the
Supreme Court of Ohio

REBECCA BUDDENBERG,	:	Case No. 2018-1209
Plaintiff-Respondent,	:	On Review of Certified Questions from the United States District Court
v.	:	Northern District of Ohio, Eastern Division
ROBERT K. WEISDACK, *et al*.,	:	
Defendants-Petitioners.	:	Case No. 1:18-cv-00522

MERIT BRIEF OF *AMICUS CURIAE* THE STATE OF OHIO IN SUPPORT OF NEITHER PARTY

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INTRODUCTION

The Court is once again called upon to "faithfully apply" its "precedents on statutory construction" and affirm two principles: A statute's plain text controls, and the Court may not trump the General Assembly's policy choices. *Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434 ¶ 12. *Jacobson* employed those tenets when it held that "R.C. 2307.60 creates a civil cause of action for damages resulting from any criminal act." *Id.* While it reserved "what a plaintiff must do to prove a claim under R.C. 2307.60(A)(1)," *id.* ¶ 11, its plain-text approach provides the answer to the first certified question here. That question asks whether R.C. 2307.60 requires that the defendant be criminally convicted before plaintiffs may invoke its civil cause of action. The Court should hold that R.C. 2307.60 does *not* require such a conviction. The statute provides: "Anyone injured in person or property by *a criminal act* has, and may recover full damages in, a civil action unless specifically excepted by law." R.C. 2307.60(A)(1) (emphasis added). The ordinary meaning of "criminal act" encompasses conduct that violates the criminal law—whether or not that conduct ultimately gets criminally prosecuted. And, as in *Jacobson*, the Court's analysis need not go further than this plain meaning. 2016-Ohio-8434 ¶ 10.

If the Court considers more than the plain text, R.C. 2307.60's history also supports the ordinary meaning of "criminal act." While the common law of England suspended civil tort suits at least until criminal proceedings were completed, Francis Hilliard, *The Law of Torts* 62 (1866), American courts emphatically rejected this rule by allowing tort suits to proceed independent of criminal actions, *id.* at 57-58. The original 1877 version of R.C. 2307.60 merely codified this American rule by clarifying that Ohio's criminal code did not preempt suits for injuries caused by a "criminal act." But if "criminal act" has always meant only those acts for which the defendant has been *convicted*, this statute would have adopted the outdated *English* approach by saving only those tort suits that followed criminal convictions. That is an untenable view.

In conflict with the statute's language and history, Defendants argue that "criminal act" means "an act for which the defendant has been convicted" based on analogies to other statutes, lower-court decisions, and pure policy factors. The Court should not consider these arguments where, as here, the text is plain. Regardless, the arguments do not suffice to create an atextual criminal-conviction element. Many of the thinly reasoned lower-court cases predate *Jacobson*. And the Court has already declined to invoke policy arguments to undo the General Assembly's "definitive[]" choices. *Jacobson*, 2016-Ohio-8434 ¶ 12. It should stay the course here.

STATEMENT OF *AMICUS* INTEREST

The Attorney General, the State's chief law officer, R.C. 109.02, files this brief on behalf of the State of Ohio. The State has a narrow interest in this case limited only to the proper interpretation of R.C. 2307.60. It notes and discloses that Ohio and dozens of local governments have asserted claims under R.C. 2307.60 in suits against manufacturers and distributors of opioids. *See, e.g.*, Compl. ¶¶ 193-203, *State of Ohio ex rel. Mike DeWine v. Purdue Pharma L.P.*, No. 17-CI-261 (Ross Cty. Ct. Com. Pl. May 31, 2017); Corrected 2d Am. Compl. ¶¶ 1090-1107, *Cty. of Summit v. Purdue Pharma L.P.* (*In re Nat'l Prescription Opiate Litig.*), No. 1:18-op-45090 (N.D. Ohio May 29, 2018), ECF No. 513. The State in these cases has read R.C. 2307.60, in accordance with its text, not to require that plaintiffs await a conviction before bringing claims under the statute's civil cause of action for injuries caused by the defendant's criminal acts.

Apart from that narrow legal issue, however, the State has no further interest in this suit. It thus takes no position on the merits of the specific claims that Plaintiffs allege or on the second certified question concerning the proper interpretation of R.C. 2921.03.

STATEMENT OF THE CASE AND FACTS

This *amicus* brief does not add to the Statements of Facts in the parties' briefs because it focuses on a general legal question that does not depend on this case's specific facts.

ARGUMENT

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

> *Under R.C. 2307.60, a plaintiff does not need to wait for a criminal conviction before asserting a claim seeking recovery for injuries caused by a "criminal act."*

The Court should answer the first certified question by holding that R.C. 2307.60 does not require a plaintiff to prove an underlying criminal conviction in order to establish liability for injuries caused by a "criminal act." *First*, the statute's plain text compels this conclusion. *Second*, if the Court finds it necessary to inquire further (which it should not), the statute's history reinforces the text. *Third*, Defendants' contrary arguments are mistaken. Defendants are wrong about the ordinary meaning of the phrase "criminal act," and their reliance on other methods of interpretation is both unnecessary and misguided.

A. Under R.C. 2307.60's plain text, "criminal act" means conduct that violates a criminal prohibition; it does not mean "criminal conviction."

R.C. 2307.60's text does not require a criminal conviction. As always, the Court should begin with the statutory text, and it must apply the language's plain meaning when it is unambiguous. *Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434 ¶ 8. Here, in relevant part, R.C. 2307.60 provides: "Anyone injured in person or property by *a criminal act* has, and may recover full damages in, a civil action unless specifically excepted by law." R.C. 2307.60(A)(1) (emphasis added). This case asks whether the term "criminal act" requires, as a legal element, that the defendant have been convicted of the criminal offense on which the plaintiff's civil suit relies. The phrase—understood by its ordinary meaning and with reference to the rest of the statute—unambiguously carries no such element.

1. *Plain Text*. R.C. 2307.60 does not define "criminal act," so the Court "must be guided by the ordinary meaning of the words which the General Assembly used at the time that it used them." *Volz v. Volz*, 167 Ohio St. 141, 146 (1957); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). The modern version of R.C. 2307.60—under which the statute creates a civil cause of action for injuries—dates to 1985. *See* 140 Ohio Laws (Part II) 3783, 3787 (1985). The Court thus should look to how the phrase was understood at that time. *Cf. Wis. Cent.*, 138 S. Ct. at 2070-71; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 415-19 (2012) (discussing appropriate use of dictionaries).

Around that time, "criminal act" meant merely "the commission of a crime." *Black's Law Dictionary* 372 (6th ed. 1990). "Crime," in turn, meant "[a] positive or negative action in violation of penal law" and "[c]omission" meant the "doing or perpetration of [the] criminal act." *Id.* at 272, 370; *see also, e.g.*, *The Random House Dictionary of the English Language* 476 (2d ed. 1987) (defining "crime" as "an action . . . that is deemed injurious to the public welfare . . . and that is legally prohibited"). Taking these definitions together, "criminal *act*" unambiguously referred to the underlying criminal *conduct* that violated a criminal law, not to the subsequent criminal *proceedings* that might arise from that conduct. Under no fair reading could "criminal act" mean only "an act for which the defendant has already been criminally convicted."

The phrase "criminal act" has been used in unrelated contexts, and courts have generally agreed with this ordinary understanding of the phrase. As one court noted, "the plain meaning of the term 'criminal act' does not require an adjudication in a court of law," and it thus includes "acts which would amount to or constitute a crime." *Redux, Ltd. v. Commercial Union Ins. Co.*, No. 94-2144, 1995 U.S. Dist. LEXIS 2545, at *4-5 (D. Kansas Feb. 7, 1995); *see also In re Larson*, 340 B.R. 444, 448-49 (Bankr. D. Mass. 2006) (citing authorities that "recognize that the

phrase 'criminal act' does not require a conviction"); *cf. In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994) (applying a statutory definition of "criminal act" that required only "establish[ing] that the crime took place, not that the perpetrator was arrested or convicted").

2. *Context*. Other parts of R.C. 2307.60 confirm that "criminal act" should not be understood to mean an "act for which the defendant has been criminally convicted." "[A] statute must be considered as a whole," and words must not be "'disassociate[d] from [their] context.'" *Elec. Classroom of Tomorrow v. Ohio Dep't of Educ.*, __ Ohio St. 3d __, 2018-Ohio-3126 ¶ 11. Here, Subsection (A)(2) sheds light on the meaning of Subsection (A)(1).

Subsection (A)(2), effective in 2007, makes criminal convictions useful for plaintiffs pursuing civil actions based on certain types of criminal acts. *See* 151 Ohio Laws 2274, 2276 (2006). It states that some criminal judgments—those for "offense[s] of violence punishable by death or imprisonment in excess of one year"—may be "entered as evidence in any subsequent civil proceeding based on the criminal act." R.C. 2307.60(A)(2). In *some* instances—when the judgments were the result of a trial or guilty plea—such evidence will generally "preclude the offender from denying in the subsequent civil proceeding any fact essential to sustaining that judgment." *Id.* In other words, certain criminal convictions create a strong presumption of proof that the defendant engaged in the criminal act over which the plaintiff sues. Critically, however, Subsection (A)(2) does not *preclude* the establishment of the criminal act by *other means of proof*. It is permissive, not exclusive.

Subsection (A)(2) also covers only a narrow class of criminal acts within Subsection (A)(1)'s broader coverage; that mismatch again reflects that criminal convictions are unnecessary for plaintiffs to prove "a criminal act" in *all cases*. Subsection (A)(2) does not apply, for example, to felony offenses without a violence element. Nor does it apply when the

criminal judgment was "set aside" on appeal or arose from a no-contest plea. *Id.* Subsection (A)(1), by contrast, creates "a civil action" for injury "by a criminal act" without any discussion of types of criminal proceedings. This distinction shows that Subsection (A)(2) creates a shortcut for proving certain criminal acts when specified reliable circumstances arising out of criminal proceedings were present. *Cf.* R.C. 2307.60(A)(2) (providing for rebuttal of the presumption based on fairness concerns). But the narrow shortcut by no means limits the "criminal acts" that may form the basis for the civil action contemplated in Subsection (A)(1).

All told, the statute's plain text unambiguously permits civil suits (with the plaintiff obviously bearing the burden of proof) for injuries stemming from an act punishable under the criminal law, whether or not such an act has resulted in a criminal judgment. Because the language of R.C. 2307.60(A)(1) is unambiguous, the Court "need not dig further for the meaning of the statute." *Jacobson*, 2016-Ohio-8434 ¶ 10.

B. R.C. 2307.60's history supports the conclusion that "criminal act" does not mean an act for which there has been a criminal conviction.

R.C. 2307.60(A)'s unambiguous meaning makes resort to other interpretive methods unnecessary. *See id.* Nevertheless, the statute's history supports its plain meaning. "'Courts, in construing a statute, . . . may with propriety recur to the history of the time when it was passed[] . . . in order to ascertain the reason as well as the meaning of particular provisions in it.'" *State v. Sinks*, 42 Ohio St. 345, 352 (1884) (citation omitted); *see TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1518 (2017) (consulting "[t]he history of the relevant statutes" for "context"). Two aspects of R.C. 2307.60's history show that the statute does not require a criminal conviction to maintain a civil suit based on "a criminal act."

First, the modern statute's civil cause of action and its key phrase, "criminal act," have their roots in an 1877 provision in Ohio's code of criminal offenses. 74 Ohio Laws 240, 243

(1877). That provision made clear that the criminal code did not preempt tort suits based on injuries caused by the criminal conduct: "Nothing in [Ohio's code of criminal offenses] shall be construed to prevent a party injured in person or property, *by any criminal act*, from recovering full damages." *Id.* (emphasis added). Both the plain meaning of "criminal act" in 1877 and the underlying reason for this "savings" law show that it saved *all* tort suits predicated on a defendant's conduct that was both tortious and criminal.

Start with the plain meaning. In 1877, as today, the ordinary meaning of "criminal act" encompassed any act that was forbidden by criminal laws—not just acts that had been the subject of criminal convictions. One legal dictionary from the time defined "criminal act" as "equivalent to crime." 1 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 324 (1879). A "crime," in turn, was "[a]n act or omission forbidden by law, under threat of punishment," a definition which was not tied to a conviction. *Id.* at 322. Another contemporaneous dictionary defined "criminal" as "that [which] violates a human . . . law," and "act" as "something done; a deed." James Stormonth, *A Dictionary of the English Language* 11, 225 (1885). These definitions—"something done" that "violates a . . . law" or "an act or omission forbidden by law"—confirm that an "act" was considered "criminal" if it was *punishable* by criminal laws, whether or not a prosecutor opted to pursue a case to *conviction*.

The underlying reason for this 1877 savings law—to codify Ohio's rejection of an English common-law rule—also supports the plain meaning of the phrase "criminal act." Under English common law, tort suits originally "'merged'" with felony offenses, which meant that private parties could not pursue civil suits seeking damages for conduct that also violated a criminal statute. *See* Francis Hilliard, *The Law of Torts* 62 (1866) (discussing *Boston & Worcester R.R. Corp. v. Dana*, 67 Mass. 83 (1854)). In later English practice, those private tort

suits were just "'suspended until after the termination of a criminal prosecution against the offender.'" *Id.* (citation omitted); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382-84 (1970) (describing the English felony-merger doctrine).

By 1877, American courts had authoritatively rejected this English practice. "[T]he general rule of law" in the United States was that criminal and civil proceedings predicated on the same act could "be concurrently commenced and proceed *pari passu*"; "one [could] succeed either the institution or even the final result of the other." Hilliard, *supra*, at 57-58. Under the "prevailing American doctrine," courts held, "'no one should be delayed in obtaining a remedy for a private injury'" by reason of a criminal prosecution "'except in a case of the plainest public necessity.'" *Id.* at 62, 65 (quoting *Boston & Worcester*, 67 Mass. 83). This Court adopted this principle as a common-law matter in *Story v. Hammond*, 4 Ohio 376 (1831), and *Howk v. Minnick*, 19 Ohio St. 462 (1869). In *Howk*, a conversion action, the plaintiff contended that the defendant "feloniously" stole gold coins. 19 Ohio St. at 462. The Court was asked "whether the plaintiff's right of action . . . [was] suspended until the determination of a criminal prosecution against the offender." *Id.* at 464. It allowed the suit to proceed, holding that "[t]he doctrine of English law, that for goods stolen no action lies against the felon before the institution of criminal proceedings against him, is not in force in this State." *Id.* at syl. ¶ 1.

Thus, when R.C. 2307.60's predecessor statute was passed, it was established American law that the lack of a criminal conviction did not "prevent a party injured in person or property, by any criminal act, from recovering full damages." 74 Ohio Laws at 243. This statute merely codified the "Ohio common[-]law" principle that "a criminal action did not merge with a civil action." *Jacobson*, 2016-Ohio-8434 ¶ 21 (Kennedy, J., concurring in judgment). If "criminal act" were interpreted to require a conviction, by contrast, the statute would have adopted the

outdated *English* approach, not the prevailing *American* one. Under that view, the statute would have saved only those tort suits brought *after* a conviction, allowing the criminal law potentially to "'suspend[]'" any tort suit before then. Hilliard, *supra*, at 62 (citation omitted). That would have been a surprising discovery for the 1877 General Assembly.

While the modern statute has now drifted far from its common-law "anti-preemption" roots, *see Jacobson*, 2016-Ohio-8434 ¶¶ 21-26 (Kennedy, J., concurring in judgment), that evolution has not produced any change in the meaning of "criminal act." The 1985 amendments turned this savings law into "a civil cause of action for damages," while retaining that key phrase. *Id.* ¶ 10 (majority op.). R.C. 2307.60 is no longer premised on saving *existing* common-law claims, as it had long done. *E.g.*, *Schmidt v. State Aerial Farm Statistics, Inc.*, 62 Ohio App. 2d 48, 49 (6th Dist. 1978). But these later amendments did not alter the background principle that a criminal conviction is unnecessary for a private individual to vindicate a private injury that results from conduct that is also criminal.

Second, from 1877 through 2007, the statute *prohibited* plaintiffs from using any record of conviction in a civil suit unless the conviction had been "obtained by confession in open court." 74 Ohio Laws at 243. This limit appears to have stemmed from evidentiary principles that "exclude[d] a verdict in a criminal proceeding from being evidence in one of a civil nature.'" Hilliard, *supra*, at 57-58 n.(*a*) (quoting 1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 216 (1826)). Historically, "a conviction upon indictment [was] not evidence for the plaintiff in an action for the same wrong" except "where, upon an indictment, the defendant *confesse*[*d*] his guilt," in which case "an attaint [was] out of the question." Starkie, *supra*, at 216-18. For much of the statute's history, then, it was presumed that many convictions would not even be *evidence* in later civil proceedings, let alone *elements*. This was true even after the

1985 amendments that changed the statute's nature. Although this limit fell away in the 2007 amendments that created Subsection (A)(2), 151 Ohio Laws at 2276, it was not replaced by text pointing in the opposite direction. As noted, *supra*, at 5-6, Subsection (A)(2) instead *allows* some convictions to be evidence of a criminal act in some circumstances. Nothing in the modern text affirmatively *requires* a criminal conviction before proceeding on the civil cause of action.

C. Defendants cannot show that R.C. 2307.60 contains a criminal-conviction element.

Defendants make several mistaken arguments in favor of construing R.C. 2307.60 to require a criminal conviction. They misread the statute's text and history. They rely on thinly reasoned lower-court cases. And they invoke policy concerns to overcome the plain text.

1. Defendants' textual arguments are wrong.

Defendants wrongly argue (at 4-9) that R.C. 2307.60's text supports a criminal-conviction element, and that this conclusion is supported by the language used in related statutes, including R.C. 2307.61. These arguments lack merit.

R.C. 2307.60. To justify the view that "criminal act" requires a criminal conviction, Defendants make two arguments—one in reliance on a 2014 dictionary, and another turning on how the adjective "criminal" is deployed in the rest of the statute. Both arguments are mistaken.

For starters, Defendants cite (at 5) a 2014 dictionary for the definition of "criminal act." They misread the definition on which they rely; it too shows that the ordinary meaning of "criminal act" has not changed over 135 years. Defendants define "criminal act" as an "'unlawful act that subjects the actor to prosecution.'" Defs.' Br. 5 (quoting *Black's Law Dictionary* 30 (10th ed. 2014)). That is essentially the same as "[a]n act or omission forbidden by law, under threat of punishment." Abbott, *supra*, at 322. Yet Defendants claim (at 5) that their definition somehow proves that "for a crime to have been committed there must necessarily be a conviction." Not so. Being "subject to prosecution" means simply that prosecution is a

possibility for the action in question; it is not the same thing as being actually *convicted*. *See, e.g.*, *Black's*, *supra*, at 1651-52 (10th ed.).

Defendants next misconstrue the rest of R.C. 2307.60 to support their mistaken reading of "criminal act." They assert (at 6-7) that "the General Assembly referred to acts which had not been prosecuted as 'conduct,'" but reserved the adjective "criminal" for use "in conjunction with a conviction." While the statute, of course, must be read as a whole and its words construed in context, *Elec. Classroom of Tomorrow*, 2018-Ohio-3126 ¶ 11, this claimed distinction between "criminal conduct" and "conduct" is a chimera.

The claimed distinction arises from Subsection (B), which bars a plaintiff from pursuing a tort suit when the injury was caused by the plaintiff's own criminal acts against the defendant. Comparing R.C. 2307.60(B)(2)(a) with R.C. 2307.60(B)(2)(b) and (c), Defendants assert (at 7) that the General Assembly omitted the "criminal" modifier whenever referring to acts that had *not* been criminally punished, and used that "criminal" modifier whenever referring to acts that had led to a conviction. If anything, however, Subsection (B)'s distinction between "criminal conduct" and "conduct" supports the plain meaning of "criminal act." Defendants' view renders the adjective "criminal" in Subsection (B)(2)(a) pointless because the rest of the provision expresses the need for a conviction. *See* R.C. 2307.60(B)(2)(a) ("The person has been *convicted of or has pleaded guilty* to a felony, or to a misdemeanor that is an offense of violence, arising out of *criminal conduct* that was a proximate cause of" the claimed injury. (emphases added)). If the General Assembly intended Defendants' reading, it could have simply said "the person has engaged in *criminal conduct* (excluding nonviolent misdemeanors) that was a proximate cause of the injury." That the legislature separately expressed the "convicted" language shows that a criminal conviction and criminal conduct are not one and the same. Further, R.C.

2307.60(B)(2)(b) and (c) lack the adjective "criminal" because it is redundant under the ordinary meaning of the phrase "criminal conduct." (*E.g.*, ". . . engaged in *criminal* conduct that, if prosecuted, would constitute a felony.") At bottom, these statutory subtleties cannot justify Defendants' efforts to overcome the ordinary meaning of the phrase "criminal act." Indeed, they show in the precise context of this statute that the legislature knew how to express conviction requirements when it wanted to do so. It did not do so in Subsection (A)(1).

Other Statutes. Defendants next argue that statutes creating civil actions sometimes expressly *disclaim* the need for a criminal conviction and so use language that is "conspicuously missing from R.C. 2307.60." Defs.' Br. 7-8 (citing R.C. 2307.61(G)(1), R.C. 2307.62(C), and R.C. 2307.50(C)). If the Court interprets R.C. 2307.60(A) as lacking a conviction requirement, the argument goes, these disclaimers "would be vain, useless or superfluous." *Id.* at 8. Yet "reliance on an unrelated statute to construe another is a perilous endeavor," *Grimes v. Mich. Dep't of Transp.*, 715 N.W.2d 275, 287 (Mich. 2006), and the Court should not let other statutory language override R.C. 2307.60(A)'s plain text.

Two of the cited statutes, for example, disclaim a conviction requirement in the context of separate causes of action, so those disclaimers are not superfluous. Start with R.C. 2307.50, a provision that creates a civil action for "child stealing crimes." It contains no reference to R.C. 2307.60, so its disclaimer of a conviction requirement cannot be considered "useless." R.C. 2307.62's disclaimer also refers to a civil action *distinct* from the one created by R.C. 2307.60. *See* R.C. 2307.62(C) (specifying that "[a] person may commence a civil action *under this section* regardless of whether" the defendant "has pleaded guilty to or has been convicted of a violation of" one of the relevant statutes (emphasis added)). The Court should be wary of drawing inferences for the *entire Revised Code* from different laws sometimes passed by different

General Assemblies. Scalia & Garner, *supra*, at 172 ("Yet the presumption of consistent usage can hardly be said to apply across the whole *corpus juris*.").

While R.C. 2307.61 does adopt R.C. 2307.60(A)'s cause of action, it does not require the Court to depart from R.C. 2307.60(A)(1)'s plain text by imposing a conviction requirement. R.C. 2307.61 provides detailed rules for claims against those who willfully damage property or commit theft offenses, including rules for plaintiffs to seek attorney's fees by initially sending demand notices for swift resolution before litigation. The section originally immunized defendants from criminal prosecution if they compensated their victims in a timely fashion (and contemplated prosecution if they agreed to do so but then reneged). 140 Ohio Laws at 3789-91. It has since been amended to immunize defendants only from a later civil action. R.C. 2307.61(D). In this context, Subsection (G) clarifies the effects of the civil and criminal theft-offense proceedings. It states that "the trier of fact" in a civil action may conclude that a theft offense or property damage has occurred, "whether or not any person has pleaded guilty to or has been convicted of any criminal offense." R.C. 2307.61(G)(1). On the flipside, it now provides that "[t]his section does not affect the prosecution of any criminal action or proceeding . . . in connection with willful property damage or a theft offense." R.C. 2307.61(G)(2).

The language in R.C. 2307.61(G) is explanatory, not superfluous. It "performs a significant function simply by clarifying" how the *detailed* civil-action rules under R.C. 2307.61 interact with criminal actions, and vice versa. *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007). Whereas R.C. 2307.60 creates only a general civil action, R.C. 2307.61 provides specifics as to how its provisions apply for theft and property offenses. It is unsurprising, then, that it contains disclaimers that R.C. 2307.60(A)(1) does not. Indeed, consider how Defendants' superfluity logic would apply to R.C. 2307.61(G)(2), which explains

that theft-offense tort actions do not affect *criminal proceedings*. Under their view, the inclusion of this disclaimer in R.C. 2307.61—without any correlating disclaimer in R.C. 2307.60—means that criminal proceedings *are* affected by suits under R.C. 2307.60 (and under every other civil action that likewise fails to disclaim such effects). More generally, if Defendants' negative implication were correct, plaintiffs could not bring civil suits for crimes such as human trafficking (R.C. 2307.51), hazing (R.C. 2307.44), or identity fraud (R.C. 2307.611) unless a conviction occurred first, because those provisions also have no criminal-conviction *disclaimer* (even though they contain no criminal-conviction *requirement*). That is unlikely.

"In any event, canons of construction," like the rule against superfluity, "are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others"—that the plain text controls. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The superfluity rule is merely a tool for choosing between two plausible constructions of a statutory phrase. *Id.* Here, Defendants have offered no plausible construction of the phrase "criminal act" under which it only extends to acts that have resulted in criminal convictions. "It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction" of that phrase. *See Atl. Research Corp.*, 551 U.S. at 137. As one treatise notes, "[p]ut to a choice . . . a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage." Scalia & Garner, *supra*, at 176. The plain language should control here.

2. The lower-court decisions on which Defendants rely do not confront the statutory text and engage in a cursory analysis.

Defendants also claim (at 16) that, "with limited exception, every court that has directly considered" the question presented "has held that a criminal conviction is required" under R.C. 2307.60. Their authorities do not move the needle because, with one exception, they *all* predate

Jacobson. Until *Jacobson*, Ohio courts treated R.C. 2307.60, like its historical predecessor, as nothing more than an anti-preemption statute protecting against arguments that parallel criminal proceedings preempted civil tort suits. *Jacobson*, 2016-Ohio-8434 ¶ 89 (O'Donnell, J., dissenting) (listing cases). Since the statute was read as not even creating a cause of action, it did not matter what elements the then-nonexistent cause of action would require. *See id*. ¶ 11 (majority op.) (noting that the Court made "no ruling . . . beyond" holding that the statute creates civil causes of action). As for Defendants' one authority that postdates *Jacobson*, it does not even mention that case and simply points to the earlier decisions. *See Jane v. Patterson*, No. 1:16-cv-2195, 2017 U.S. Dist. LEXIS 55952, at *10 (N.D. Ohio Apr. 12, 2017).

What is more, the oldest statement on which Defendants rely is a cryptic passage that is best read as articulating the *party's* position, not the *court's*. *See Ivancic v. Cleveland Elec. Illuminating Co.*, 1993 Ohio App. LEXIS 4434, at *10 (8th Dist.), *cited by Tri-State Computer Exchange, Inc. v. Burt*, 2003-Ohio-3197 ¶ 23 (1st Dist.) (affirming in summary fashion on the basis of opinions that themselves applied a cursory analysis); *Hite v. Brown*, 100 Ohio App. 3d 606, 611 n.1 (8th Dist. 1995) (same). This cursory passage, and all the later cases that can be traced to it, provide no reason to depart from the plain text.

None of Defendants' cases, moreover, meaningfully engages with that text. Their most recent case says only that "allegations for civil recovery based on a criminal act 'are not viable in the absence of a criminal conviction.'" *Jane*, 2017 U.S. Dist. LEXIS 55952, at *10 (citation omitted). No statutory construction; no reasoning. Other cases are equally cursory. *See, e.g., A.A. v. Otsego Local Schs. Bd. of Educ.*, No. 3:15-cv-1747, 2016 U.S. Dist. LEXIS 176621, at *24 (N.D. Ohio Dec. 21, 2016) (claiming that an action under R.C. 2307.60 is "not viable in the absence of a criminal conviction"); *Ortiz v. Kazimer*, No. 1:11-cv-1521, 2015 U.S. Dist. LEXIS

38496, at *34-35 (N.D. Ohio March 26, 2015), *aff'd on other grounds*, 811 F.3d 848 (6th Cir. 2016) (stating that "[r]ecovery depends on the existence of a criminal conviction"); *Cook v. Criminger*, 2005-Ohio-1949 ¶ 15 (9th Dist.) (concluding summarily that a claim under Chapter 2307 is "misplaced" when "there is no evidence that [defendants] were ever charged, let alone convicted, of the criminal acts alleged").

Jacobson itself proves why these cases do not matter. There, the Court did not blink when ignoring cases from lower courts that could not be squared with the statute's text. *Cf. Jacobson*, 2016-Ohio-8434 ¶¶ 53-65 (Kennedy, J., concurring in judgment) (rejecting lower-court opinions that contained no "meaningful analysis of R.C. 2307.60"). Defendants' authorities did not examine the statute's text, so the Court should disregard them here too.

3. The Court may not elevate policy concerns over text, but the statute may be construed in other ways to limit frivolous suits against local governments.

Defendants lastly argue (at 18) that "there is no public policy reason to expand the right to recover under R.C. 2307.60 to include circumstances where there is no criminal conviction." Yet this Court's role is not to expand or restrict the statute's scope; it is to reasonably interpret what the General Assembly has written. As it has already said, "[t]he decision to create a civil cause of action for any person injured by a criminal act has been definitively made by the General Assembly," and the Court may not substitute its own policy views for the legislative judgment. *Jacobson*, 2016-Ohio-8434 ¶ 12. For that reason, it is irrelevant whether or not Ohio's statute is "unique" among other States. *See* Defs.' Br. 17.

That said, other statutory provisions could address this concern in a textually permissible way. General immunity principles, for example, could still apply to protect public defendants. Several Defendants in this case, for example, have asserted an immunity defense under "the provisions of sovereign immunity and/or Ohio Revised Code Chapter 2744." *See, e.g.*, District

Defendants' Answer to Second Amended Complaint at 18, *Buddenberg v. Weisdack*, No. 1:18-cv-522 (N.D. Ohio June 28, 2018), ECF No. 37.

Although immunity determinations are fact-specific, one general point bears noting. The availability of immunity to political subdivisions and their employees depends in part on whether "civil liability is expressly imposed upon" them by statute. *See* R.C. 2744.02(B)(5) (political subdivision); R.C. 2744.03(A)(6)(c) (employee); *O'Toole v. Denihan*, 118 Ohio St. 3d 374, 2008-Ohio-2574 ¶ 48. Here, R.C. 2307.60(A) says only that "[a]nyone injured . . . by a criminal act has . . . a civil action unless specifically excepted by law." This language contains "no indication whatsoever . . . that the General Assembly has abrogated the immunity provided to political subdivisions and their employees with an express imposition of liability." *O'Toole*, 2008-Ohio-2574 ¶ 67. At least one court has dismissed claims under R.C. 2307.60 against political-subdivision employees "as a matter of law" on these immunity grounds, *Sollenberger v. Sollenberger*, 173 F. Supp. 3d 608, 632-33 (S.D. Ohio 2016), showing that the statute itself cannot be a basis for depriving a public defendant of that immunity.

CONCLUSION

The Court should answer the first certified question in the negative and hold that R.C. 2307.60 does not require an underlying criminal conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Neither Party was served this 11th day of January, 2019, by U.S. mail and e-mail on the following:

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