

IN THE SUPREME COURT OF OHIO

IN RE: NATIONAL PRESCRIPTION :
OPIATE LITIGATION :
 :
TRUMBULL COUNTY, OH; : Case No. 2023-1155
LAKE COUNTY, OH; PLAINTIFFS' :
EXECUTIVE COMMITTEE :
 :
Respondents, : On Review of Certified
 : Question from the U.S.
 : Court of Appeals for
v. : the Sixth Circuit,
 : Case No. 22-3750 *et al.*
 :
PURDUE PHARMA L.P. *ET AL.*, :
 :
WALGREENS BOOTS ALLIANCE, INC., :
WALGREEN CO., WALGREEN :
EASTERN CO., INC; CVS PHARMACY, :
INC., OHIO CVS STORES, LLC, CVS :
TENNESSEE DISTRIBUTION, LLC, CVS :
RX SERVICES INC., CVS INDIANA, :
LLC; WALMART INC., :
Petitioners. :

***AMICUS CURIAE* BRIEF OF THE COUNTY
COMMISSIONERS ASSOCIATION OF OHIO,
THE OHIO ASSOCIATION OF COUNTY
BEHAVIORAL HEALTH AUTHORITIES, THE
OHIO MUNICIPAL LEAGUE, THE OHIO
TOWNSHIP ASSOCIATION, THE OHIO
MAYORS ALLIANCE, AND THE FRATERNAL
ORDER OF POLICE OF OHIO, INC. IN
SUPPORT OF RESPONDENTS**

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The County Commissioners Association of Ohio (CCAO) is a non-profit professional association of county commissioners that advances effective county government for Ohio through legislative advocacy, education and training, technical assistance and research, quality enterprise service programs, and greater citizen awareness and understanding of county government.

The Ohio Association of County Behavioral Health Authorities (CBHA) is a statewide non-profit organization that represents the interests of county Alcohol, Drug Addiction, and Mental Health Boards in Ohio.

The Ohio Municipal League (OML) was incorporated as an Ohio non-profit corporation in 1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. It currently represents 730 of Ohio's 931 cities and villages. The OML has six affiliated organizations: the Ohio Municipal Attorneys Association, the Municipal Finance Officers Association, the Ohio Mayors Association, the Ohio Association of Public Safety Directors, the Ohio City/County Management Association, and the Ohio Municipal Clerks Association. On a national basis, the OML is affiliated with the National League of Cities, the International Municipal Lawyers Association, the U.S. Conference of Mayors, and the International City/County Managers Association. The

OML represents the collective interest of Ohio cities and villages before the Ohio General Assembly and the state elected and administrative offices. In 1984, the OML established a Legal Advocacy Program funded by voluntary contributions of the members. This program allows the OML to serve as the voice of cities and villages before the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court by filing briefs *amicus curiae* on cases of special concern to municipal governments. The Ohio Municipal League has been accredited by the Ohio Supreme Court as a sponsor of both Continuing Legal Education Programs for attorneys and the required Mayors Court training for Mayors hearing all types of cases.

The Ohio Township Association (OTA) is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in eighty-seven (87) counties and has over 5,200 active members comprised of elected township trustees and township fiscal officers and over 4,000 associate members from Ohio's 1,308 townships. OTA communicates to Ohio and federal policymakers about important issues and resolutions regarding township operations and develops quality training and education programs for members.

The Ohio Mayors Alliance (OMA) is a bipartisan coalition of mayors in Ohio's 30 largest cities. Through local innovation and statewide collaboration, OMA advocates for and advances policies that bring communities and leaders together, ensure a high quality of life for our citizens, and strengthen the economic vibrancy of our communities and our state.

OMA has three grounding principles that inform its policy work and guide its organization: (1) to promote bipartisan solutions and statewide collaboration; (2) to preserve and advance local self-governance and support innovative local solutions; and (3) to protect the fiscal health of Ohio cities and support economic development.

The Fraternal Order of Police of Ohio, Inc. (FOP) is Ohio's largest organization of sworn law enforcement officers, with more than 22,000 members and close to 22 local lodges. The FOP, through many of its local lodges, represents officers at the local, county, and state level in all aspects of collective bargaining in addition to being a fraternal organization. The FOP is a non-profit organization dedicated to the advancement and protection of law enforcement officers and their families.

Amici have a unique perspective of the on-the-ground impact of the opioid crisis and the critical role that local governments have in addressing that public health epidemic.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio communities have been on the front lines of the opioid epidemic. Ohio was one of the first places where the opioid crisis began to spread in the late 1990s and early 2000s, and since then, it has consistently been one of the states hardest hit by the crisis.¹ Ohio communities have also been at the forefront of the opioid litigation, and as a result, some local governments have already been able to put opioid abatement funds to use. Cuyahoga County and Summit County, as trial bellwether plaintiffs in the first case track of *In re National Prescription Opiate Litigation*, settled their claims against certain opioid manufacturer and distributor defendants for approximately \$200 million dollars on the eve of trial in 2019. The principal claim alleged by Cuyahoga and Summit Counties was common law public nuisance. Since then, nationwide settlements against many of these same defendants have included both abatement funds and injunctive relief intended to change the defendants' behavior to halt the oversupply of opioids into communities.

As described in detail below, the abatement funds from the Cuyahoga and Summit settlements are already at work, and the use of these funds, along with other measures implemented by other counties throughout Ohio, illustrate the ways in which

¹ Jeremy Pelzer, *Ohio is among the national leaders in drug overdose deaths. Now, you can track the data in more detail*, Cleveland.com (Mar. 7, 2023 2:11 P.M.), <https://www.cleveland.com/news/2023/03/ohio-is-among-the-national-leaders-in-drug-overdose-deaths-now-you-can-track-the-data-in-more-detail.html>.

local governments in Ohio are using these resources to abate the opioid crisis that has so drastically interfered with public safety, health, and welfare in their communities for years. These actions are consistent with both the long-established common law of public nuisance and the self-governance powers afforded to political subdivisions in Ohio.

III. STATEMENT OF THE CASE AND FACTS

Amici rely on the statement of the case and facts contained in the parties' briefing.

IV. ARGUMENT

A. Local Governments in Ohio Are Using Opioid Funds to Abate the Public Nuisance Caused by the Opioid Crisis

In the opioid litigation, Ohio and its political subdivisions have used public nuisance claims to secure hundreds of millions of dollars in funding for prevention of and recovery from opioid addiction. Under the OneOhio plan, 30% of that money is distributed directly to local governments, and 55% goes to the OneOhio Recovery Foundation, which will work with local interests to support substance misuse prevention, treatment, and recovery efforts.² Those funds are anticipated to be

² *One Ohio Memorandum of Understanding* (“Memorandum of Understanding”) at 2, <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/One-Ohio-MOU-Signed-by-AG-and-Gov.aspx> (last visited Feb. 5, 2024).

disbursed over the course of eighteen years, and the first several tranches of settlement payments have already been distributed to political subdivisions across the State.³ These payments will be restricted to uses that are part of an agreed-upon list of core strategies and best practices for abating the epidemic.⁴ Many of these same strategies and practices are already being employed by counties and cities in Ohio. For example, Cuyahoga County and Summit County have been able to implement many of these strategies since receiving abatement funds from the opioid litigation, in which they were bellwether plaintiffs who engaged in extensive discovery and trial preparation, and their experiences illustrate the effectiveness of these abatement measures.

In Cuyahoga County, the opioid abatement funds were used to construct and open the Cuyahoga County Diversion Center, a 50-bed facility for adults who need a short-term stay to help stabilize their symptoms and connect them to behavioral health treatment. The Diversion Center provided services to its first client in May 2021, and in its first year, it received over 530 calls and completed over 260 admissions.⁵ The

³ Aneri Pattani, *Opioid settlement payouts are now public — and we know how much local governments got*, NPR (June 16, 2023 5:31 A.M.), <https://www.npr.org/sections/health-shots/2023/06/16/1182580973/opioid-settlement-fund-amounts>.

⁴ Memorandum of Understanding at 2–3.

⁵ *Cuyahoga County Diversion Center Reaches One Year, 530+ Calls*, Ctr. Health Affs. (May 5, 2022), <https://www.neohospitals.org/thecenterforhealthaffairs/mediacenter/newsreleases/2022/may/cuyahoga-county-diversion-center>.

Diversion Center is the first facility of its kind in Ohio. Initially, it was structured to take calls exclusively from law enforcement, who could refer individuals showing signs or symptoms of addiction or a mental illness to the Diversion Center to receive care and be connected to community services, rather than sending them to the county jail. Several months after its opening, in October 2021, the Diversion Center expanded eligibility to receive referrals from fire and emergency medical services, and then expanded again the following month to receive referrals from friends and family, as well as self-referrals. All admissions are first screened by FrontLine Service, a mental health nonprofit contracted by Cuyahoga County to take calls through a 24/7 hotline. As of December 2022, the center was admitting approximately twenty-three to twenty-eight people each day, with an average stay of between five and nine days.

Another recipient of opioid abatement funds is Stella Maris, a residential treatment center in Cleveland, which was founded in 1948 and is Ohio's oldest treatment center. Stella Maris provides addiction and mental health treatment services, including withdrawal management (detox), residential treatment, partial hospitalization, intensive outpatient treatment, recovery management, and supportive housing. In addition to this treatment continuum, Stella Maris offers "wraparound services" that include primary care medical services, trauma therapy, case management, family therapy, 12-step groups, medication assisted treatment, post-

acute withdrawal management, peer support, and workforce development programs. One of only two accredited detoxification programs in Cuyahoga County, Stella Maris serves clients with no insurance from Cuyahoga, Lorain, Geauga, Summit, Lake, and Ashtabula Counties through the Northeast Ohio Collaborative, and it currently serves approximately 5,000 clients a year. Stella Maris is one of the few places where clients can go for residential treatment after the short-term stay at the county Diversion Center.

There is a tremendous need for these services. The need became only more acute after St. Vincent Charity Medical Center in downtown Cleveland discontinued inpatient care in November 2022.⁶ According to Stella Maris’s CEO, as of July 2023, “We have a wait list for every single bed here, so our priority is providing more beds and increasing infrastructure.”⁷

As part of the earlier opioid settlements, Cuyahoga County and the Cuyahoga County Alcohol Drug Addiction and Mental Health Services (ADAMHS) Board allocated a total of \$11 million to Stella Maris. With these funds, Stella Maris has been

⁶ Ryan Haidet, *St. Vincent Charity Medical Center in Cleveland closes emergency department, ends inpatient care Friday*, WKYC Studios (Nov. 11, 2022 4:33 P.M.), <https://www.wkyc.com/article/news/health/st-vincent-charity-medical-center-cleveland-closes-emergency-department-ends-inpatient-care/95-e25c34e3-82f2-4da4-9982-559f0534b472>.

⁷ Douglas J. Guth, *Northeast Ohio has a head start in spending millions of opioid settlement money*, Crain’s (July 17, 2023 9:00 A.M.), <https://www.crainscleveland.com/crains-forum-opioids/heres-how-northeast-ohio-spending-opioid-settlement-money>.

able to expand its services in numerous meaningful ways, including the following: treating an additional 260 patients; hiring twenty-two new full-time employees, including a program manager, nurses, and other front-line staff; hiring twelve new part-time employees; renovating its Partial Hospitalization Program, enabling forty-eight patients to be served by the program at any given time; expanding its Intensive Outpatient Program and Medically Assisted Treatment Plans; and adding twelve new inpatient treatment beds, as part of a plan that will ultimately provide a total of thirty-two new inpatient treatment beds. Of the 260 additional patients, 164 were served in Stella Maris's new Inpatient Residential Treatment program beginning in 2020, which would not exist if not for the opioid settlement funding.⁸

The opioid funding was even more critical during the disruption of the COVID-19 pandemic and corresponding impact on local government budgets. As Stella Maris's CEO wrote in a guest column published on *Cleveland.com*:

Without the roughly \$11 million from the opioid settlements [] we would not have been able to avoid disruptions in our care, and we definitely would not have been able to expand our essential services. Instead of struggling to keep the doors open during the pandemic,

⁸ *Capitalizing on opioid settlement funds to fill pandemic gaps: Daniel Lettenberger-Klein*, Cleveland.com (Nov. 3, 2023 5:49 P.M.), <https://www.cleveland.com/opinion/2023/11/capitalizing-on-opioid-settlement-funds-to-fill-pandemic-gaps-daniel-lettenberger-klein.html>.

Stella Maris has grown its services and will continue to grow to serve more in need throughout our community.⁹

In Summit County, the opioid abatement funds have helped expand programs at hospital emergency rooms, which often serve as a point of entry for patients needing addiction services. In 2021, the Summit County Council used opioid abatement funds to provide a \$1 million grant to the Summa Foundation on behalf of Summa Health to expand its First Step program to an additional emergency department in Green and also approved a \$1 million grant to the Cleveland Clinic Foundation on behalf of Cleveland Clinic Akron General to establish the Recovery's in Reach Program at its emergency departments throughout Summit County.¹⁰ These programs will connect emergency room patients identified as needing help with addiction with follow-up services and supportive care, including peer recovery coaches.¹¹ Summit County also dedicated abatement funds to harm reduction strategies, including needle exchange programs, fentanyl test strips, and naloxone.¹²

⁹ *Id.*

¹⁰ Emily Mills, *Using opioid settlement dollars, Summit County funding addiction programs in county ERs*, Akron Beacon J. (July 4, 2021 6:01 A.M.), <https://www.beaconjournal.com/story/news/local/2021/07/04/summit-county-ohio-opioid-settlement-drug-addiction-programs-emergency-rooms-summa-akron-general/7790332002/>.

¹¹ *Id.*

¹² *How did Cuyahoga and Summit counties spend their litigation money?*, Johns Hopkins Bloomberg Sch. Pub. Health, <https://opioidprinciples.jhsph.edu/how-did-cuyahoga-and-summit-counties-spend-their-litigation-money/> (last visited Feb. 5, 2024).

Other Ohio local governments have also successfully implemented similar strategies, further illustrating how these measures can address the interference with public health and safety caused by the oversupply of opioids. Hancock County, for example, in 2013 initiated efforts to build a recovery-oriented system of care, led by the Hancock County ADAMHS Board. These efforts have resulted in a network of programs including a syringe service program, multiple recovery homes, a drug court to steer individuals into recovery rather than jail, and peer counselors, who can work one-on-one to assist individuals in recovery while offering the powerful example of having been through similar experiences themselves. The syringe service program, called the Bloodborne Infectious Disease Prevention Program, is run by Hancock County Public Health, and offers new syringes and clean works, fentanyl test strips, Narcan, Hepatitis C, and HIV testing, vaccinations, free sharps containers, safer sex supplies, and referrals to services.¹³ The program opened in July 2020. The County also partners with a peer-led recovery nonprofit called FOCUS: Recovery and Wellness Community to expand peer recovery support services and recovery housing. Outreach workers within Hancock County prioritize locating and supporting overdose survivors and people with substance use disorder who are being released from jail or

¹³ Sydney Tavens, *A talk with the harm reduction heroes running Ohio's newest syringe service program in Findlay*, Harm Reduction Ohio (July 16, 2021), <https://www.harmreductionohio.org/a-talk-with-the-people-running-ohios-newest-syringe-service-program-in-findlay-ohio/>.

prison. For example, the Findlay Police Department, in partnership with the Family Resource Center, the local behavioral health center, deploys a Quick Response Team, which visits a survivor of an opioid overdose within 72 hours to offer education and referrals to drug treatment agencies for assessment, detoxification, ongoing addiction treatment and aftercare, and naloxone. In addition to these programs, beginning in 2015, the Hancock County ADAMHS Board worked with the University of Findlay to create an academic minor in Substance Use Disorder and a chemical dependency counselor assistant certification program, which helps address workforce needs.¹⁴ The courses on substance use disorder can be taken individually and are available not only to University of Findlay students but also to the community at large. The results of these community-centered interventions are promising—Hancock County lost twenty-eight lives to overdoses in 2022, but as of November 3, 2023, there had only been eight suspected or confirmed overdose deaths in the County in 2023.¹⁵

¹⁴ *Substance Use Disorder Courses Now Offered at the University of Findlay*, Univ. Findlay (July 20, 2017), <https://newsroom.findlay.edu/substance-use-disorder-courses-now-offered-at-the-university-of-findlay/>; Geoff Mulvihill & Carla K. Johnson, *As billions roll in to fight the US opioid epidemic, one county shows how recovery can work*, Associated Press (Nov. 3, 2023 2:57 A.M.), <https://apnews.com/article/opioids-settlement-money-recovery-addiction-d186d72250f35056892bc9d70b5ab2c3>.

¹⁵ Geoff Mulvihill & Carla K. Johnson, *As billions roll in to fight the US opioid epidemic, one county shows how recovery can work*, Associated Press (Nov. 3, 2023 2:57 A.M.), <https://apnews.com/article/opioids-settlement-money-recovery-addiction-d186d72250f35056892bc9d70b5ab2c3/>.

In Hamilton County, county commissioners budgeted \$1.6 million in opioid abatement funds in 2023 for projects and services including the following: \$50,000 for primary medical care services—including care for xylazine wounds—at the Hamilton County Public Health safer drug use site in Corryville; \$300,000 to the Hamilton County Justice Center to pay the salary of an addiction services coordinator to guide inmates with addiction to community services as they are released from the jail and to build counseling space in the jail’s care pods, which are spaces designated for inmates with addiction to receive treatment services as they complete their sentences; \$300,000 for workforce development for people with substance use disorders; \$272,250 for recovery housing; and \$50,000 for criminal justice involved personnel, comprehensive case management, and reentry support.¹⁶

In Jefferson County, similar strategies led to a 50% reduction in overdose fatalities in 2023 compared to 2022.¹⁷ Jefferson County’s Prevention and Recovery Executive Director identified two priority initiatives that the County will continue in 2024 with assistance from opioid abatement funds: connecting people being released

¹⁶ Terry DeMio, *A ‘grassroots’ process: How Hamilton County will spend \$1.6 million in opioid settlements*, Cincinnati Enquirer (Nov. 27, 2023 10:20 P.M.), <https://www.cincinnati.com/story/news/2023/11/27/hamilton-ohio-opioid-settlement-2023/71500927007/>.

¹⁷ Chloë Mesogitis, *Success in Jefferson County’s opioid fight: Overdose fatalities cut in half in 2023*, WTOV9 (Jan. 3, 2024), <https://wtov9.com/news/local/success-in-jefferson-countys-opioid-fight-overdose-fatalities-cut-in-half-in-2023>.

from jail to recovery services and supports, and having a quick response team that includes peer support reaching overdose survivors.¹⁸

The time, energy, and resources needed for long-term recovery and abatement of the opioid crisis are substantial. The availability of opioid abatement funds is critical to Ohio local governments' ability to address the opioid epidemic in our communities and repair the harm to public health and public safety caused by the oversupply of opioids.

B. The Power to Abate Public Nuisances Related to Products Is Consistent with the Historical Common Law of Public Nuisance

The actions Ohio local governments are taking to combat the opioid epidemic are consistent with their well-established power to protect public health in their jurisdictions utilizing actions to abate public nuisances. In Ohio, local governments' power to abate nuisances in their communities has been consistently upheld in a variety of contexts.¹⁹ *See, e.g., State ex rel. Ohio Hair Prods. Co. v. Rendigs, Bldg. Comm'r,*

¹⁸ *Id.*

¹⁹ Historically, a wide range of activities have been deemed public nuisances, including many involving manufacturing or products. Blackstone's Commentaries provided categories of recognized public nuisances by the 18th century. Among them were "offensive trade and manufactures," as well as eavesdropping, or being a "common scold," conduct that is not in any way related to real property. William Blackstone, *Commentaries on the Laws of England – Book the Fourth* at 167–69 (London 16th ed. 1825). In addition, food and drug manufacturers who made and distributed unsafe products were included in

120 N.E. 836, 838 (Ohio 1918) (animal hide processing); *Vill. W. Jefferson v. Robinson*, 205 N.E.2d 382, 385 (Ohio 1965) (door-to-door encyclopedia sales); *Benjamin v. City of Columbus*, 146 N.E.2d 854, 858 (Ohio 1957) (pinball machines); *Kaiser v. Walsh*, 17 Ohio Dec. 324, 324 (Ohio Com. Pl. 1906), *aff'd*, 89 N.E. 1121 (Ohio 1909) (improperly stored milk); *Pizza v. Sunset Fireworks Co.*, No. L-84-210, 1985 WL 7139, at *3 (Ohio Ct. App. May 31, 1985) (retail sale of fireworks); *Widmer v. Fretti*, 116 N.E.2d 728, 733 (Ohio Ct. App. 1952) (gambling). As the court in *Kaiser* explained, “[t]here are some things which are public nuisances by nature. Such are things which are harmful to the public health, as unwholesome food. . . . When the thing itself is not a nuisance as a house or animal, for instance, but the way in which it is used is a nuisance, then the thing cannot be destroyed; its illegal use must be punished.” *Kaiser*, 17 Ohio Dec. at 327–28.

Local governments may exercise their authority to determine otherwise lawful activity to be a nuisance, and courts ““will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare.”” *Rendigs*, 120 N.E. at 838 (quoting *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917)); *see also Vill. W. Jefferson*, 205 N.E.2d at 387–88.

William Sheppard’s list of recognized public nuisances from 1649. William Sheppard, *The Court Keepers Guide* at 44–46 (London 1649).

The opioid crisis has greatly harmed—and continues to harm—the public health, safety, morals, and general welfare of Ohio communities. Local governments’ actions to abate this crisis are consistent with their longstanding ability to abate public nuisances within their jurisdictions under the common law.

V. CONCLUSION

Ohio local governments are already taking significant steps to address the opioid crisis and are poised to strengthen and expand these actions with additional opioid abatement funds. These funds are critical to local governments’ ability to fully implement measures to abate the crisis—measures which are well within their authority under long-standing Ohio precedent. Amici respectfully urge this Court to answer the certified question in the negative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 7, 2024, the foregoing document was filed electronically using the Court's electronic filing system and that a copy of the foregoing document was served on the following counsel of record via electronic mail:

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