In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-0406
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
THOMAS C. SMITH,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case Nos. 14AP-154, 14AP-155

MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF JURISDICTION

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INTRODUCTION

The General Assembly passed House Bill 64 in October 2011 as part of a statewide effort to fight the alarming rise in synthetic drugs—compounds that closely resemble controlled substances and mimic their effects, but whose molecular structures are modified to skirt drug laws. The bill defined "controlled substance analogs" (certain synthetic drugs that are not specifically scheduled) and stated that they "shall be treated for purposes of any provision of the Revised Code as a controlled substance in Schedule I." Thus, whenever the Revised Code criminalized an activity related to a Schedule I controlled substance, it also criminalized that activity with respect to controlled substance analogs ("analogs").

Instead of applying this plain language, the lower court contorted the language to find that the General Assembly had not in fact criminalized possession of, and trafficking in, analogs until it passed Sub. H.B. 334 in December 2012. The decision below, which dismissed the indictment of an alleged large-scale distributor, dangerously misapplies rules of statutory construction and will have far-reaching consequences for Ohio. For the following reasons, this court should exercise jurisdiction and reverse the Tenth District.

First, the Tenth District's decision imperils Ohio's efforts at combatting synthetic drugs. Ohio has aggressively fought the rise of these drugs through legislation, education, criminal prosecutions, and civil litigation. Those efforts are working, but will be significantly set back by the Tenth District's ruling in two main ways. Looking backwards, several major prosecutions in Franklin County and around the State were based on conduct that occurred in 2012 and pursuant to Sub. H.B. 64. Looking forwards, several key provisions of Ohio's drug offense laws, as they relate to analogs, remain vulnerable to attack under the Tenth District's logic. These provisions include corruption of another with drugs (R.C. 2925.02), illegal manufacture (R.C. 2925.04), illegal assembly of precursors (R.C. 2925.041), and illegal funding (R.C. 2925.05).

Second, the Tenth District's decision creates incongruous results between courts throughout Ohio. The practical result is that Smith and others in Franklin County are walking free for analog offenses after the Tenth District's holding, while others around the State have been convicted and sentenced for the same conduct.

Finally, the Tenth District's ruling could expose the State to wrongful-imprisonment litigation under R.C. 2743.48. In Franklin County and around the State, defendants have been convicted of analog offenses based on conduct that occurred prior to the passage of Sub. H.B. 334. If the Tenth District's ruling stands, the State can expect to see wrongful-imprisonment suits from defendants who have in fact violated criminal statutes.

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 Sub. H.B. 64 in 2011 and Sub. H.B. 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 to 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.*, No. 13BE26, 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 will deem a substance to be "controlled" only after the substance has been identified and a determination has been made concerning its potential for abuse. *See generally* R.C. 3719.44(B). The scheduling process creates an opportunity for clever chemists to alter the chemical structures of known controlled substances to evade prosecution. These man-made substances, known variously as "synthetic," "emerging," or "designer" drugs, mimic the effects of known drugs and in many cases can be far more potent.

Generally speaking, synthetic drugs fall into several major categories. Most relevant to this case are the categories of synthetic cannabinoids and synthetic cathinones. Synthetic cannabinoids, which are intended to mimic the active ingredient in 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 referred to generally as "bath salts," are related to amphetamines. *Id.* "Cloud 9" is a commonly known synthetic cathinone. Although spice and bath salts are perhaps the most widely known synthetic drugs, there are many others, and new variations are constantly emerging. It is also worth noting that bath salts are not in any way related to Epsom salts. The term "bath salts" arose from efforts to sell drugs as a legitimate and legal product. *See Synthetic Drugs*. (The terms "K2", "Spice," and "Cloud 9" are brand names of synthetic drugs in the same way that "Pepsi" and "Coca-Cola" are brand names of colas. There are many other brand names. *See* Drug Enforcement Agency, Drugs of Abuse 2011 Edition: A DEA Resource Guide, 74, http://tinyurl.com/nlr36qc.)

Synthetic drugs are hazardous. Because their production is not standardized, it is difficult for users to estimate the effect any given substance will have. These compounds have an unpredictable physiological impact on the human body that is not well understood by the medical community, and are a significant threat to those who abuse them. Synthetic drugs not only harm users and poison Ohio's communities, but they also endanger law enforcement and medical personnel responding to disturbances created by synthetic drugs. Users of synthetic cathinones can experience extreme paranoia, hallucinations, and violent and suicidal behavior. *Synthetic Drugs*. 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. And in August 2011, the Ohio State Highway Patrol responded to a call from a man 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.

B. H.B. 64, adopted by the General Assembly 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 Sub. H.B. 64 in October 2011. *See* 2011 Ohio Laws 43 (Sub. H.B. 64). These actions were 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. In addition, the Synthetic Drug Abuse Prevention Act, signed into law in 2012, scheduled 26 synthetic cannabinoids and cathinones and provided the Drug Enforcement Administration

with greater emergency scheduling authority. *See Synthetic Drugs*. Since 2010, the vast majority of States have taken steps to control synthetic cannabinoids and cathinones. *Id.*

As relevant here, Sub. H.B. 64 did three key things. First, it scheduled the synthetic drugs that were known to law enforcement at the time of its passage. These included certain known cannabinoids (spice and K2), *see* R.C. 3719.41(35)-(39), and certain known cathinones, *see* R.C. 3719.41(40)-(45). Second, Sub. H.B. 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, Sub. H.B. 64 created a tool for law enforcement by allowing analogs—unknown iterations of scheduled controlled substances—to be prosecuted in the same manner as controlled substances. *See* R.C. 3719.013. Because of the nature of the synthetic-drug problem, the first two components of Sub. H.B. 64 would be outdated before the ink on the bill could dry. Underground chemists were already at work modifying the current and newly scheduled drugs to create unscheduled "analogs" to those substances. For a drug to be considered an analog, Sub. H.B. 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 substance had to meet one of two requirements: either (i) 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; or (ii) "with 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 these synthetic drugs, as Ohio did by passing Sub. H.B. 64, these substances could be purchased online, at convenience stores, and at small retail shops like the outlets owned by Smith. *See Synthetic Drugs*. But after Sub. H.B. 64 went into effect in October 2011, medical centers observed a significant decline in the number of emergencies related to bath salts. *See* Synthetic Drug News Conference.

C. H.B. 334, adopted by the General Assembly in December 2012, amended the Revised Code so that analogs were scheduled on a class basis, and created a separate offense and penalty scheme for analogs.

Although Sub. H.B. 64 provided law enforcement with significant tools to fight synthetic drugs, it had certain shortcomings. For example, although it enabled prosecutions of analogs, those prosecutions required burdens of proof and expert testimony much greater than a prosecution for a scheduled substance. In addition, law enforcement was discovering new substances that were *not* analogs to scheduled substances. These drugs—equally dangerous as those substances already scheduled—were escaping prosecution. Thus, at the urging of the Attorney General, on December 20, 2012, the General Assembly passed Sub. H.B. 334.

In relevant part, Sub. H.B. 334 removed the individually identified synthetic compounds that had been added to Schedule I by Sub. H.B. 64, and instead replaced them with *classes* of molecular compounds. *See* R.C. 3719.41(C)(67), (E)(7); *see also* Ohio B. An., 2012 H.B. 334 (discussing controlled substance schedules). The scheduling of compound classes, as opposed to individually identified compounds, provided law enforcement with flexibility to confront an ever-moving target.

Sub. H.B. 334 contained other relevant changes. Whereas Sub. H.B. 64 had treated analogs as Schedule I controlled substances for all purposes of the Revised Code, including for the offenses of possession and trafficking, Sub. H.B. 334 created the offenses of trafficking in and possession of analogs, and enacted an accompanying penalty scheme. *See* R.C.

2925.03(C)(8). Title 37 was also amended to reflect this change. *See* R.C. 3719.013; *see also* Ohio B. An., 2012 H.B. 334 ("Specifies 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).

D. The trial court dismissed the indictment against Smith, ruling that H.B. 64 did not criminalize the possession or sale of analogs, and the Tenth District affirmed.

This case involves a major prosecution under Sub. H.B. 64. Smith operates several shops in Columbus, Ohio, that sell what the Tenth District called "adult novelties." App. Op. ¶ 2. He was indicted in August 2012 and again in October 2012 on several counts of aggravated trafficking in and aggravated possession of drugs. *Id.* The drugs in question were alleged to be AM 2201 (spice) and a-PVP (bath salts), both controlled-substance analogs as then defined by R.C. 3719.01. *Id.* Because the violations were alleged to have occurred between February and July 2012, Sub. H.B. 64 governed. Smith moved to dismiss the indictments, contending that they failed to charge an offense because Ohio had not criminalized analogs. The trial court agreed, finding that Sub. H.B. 64's definition of an analog had not been incorporated into the criminal code, and dismissed the indictments and charges. The State appealed.

The Tenth District affirmed, applying various rules of statutory construction to hold that the possession and sale of analogs were not prohibited under Ohio law until Sub. H.B. 334 was passed in December 2012. The appeals court found ambiguous the mandate in R.C. 3719.013 that analogs "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I." It took issue with the location of the Sub. H.B. 64's amendments mainly in Chapter 3719, which addresses controlled substances, and not Chapter 2925, which governs drug offenses. *Id.* ¶¶ 12-15 ("House Bill 64 placed the controlled substance analog

provisions in Chapter 3719 separate from the prohibitions and penalties set forth in Chapter 2925, and failed to incorporate any explicit cross-references in Chapter 2925 to the controlled substance analog provisions."). The court applied the rule of lenity and the principle of expressio unius to construe the statute against the State and find that, "during the period from February through July of 2012, R.C. 2925.03 and 2925.11 did not adequately 'state a positive prohibition . . . and provide a penalty for violation of such prohibition' on the sale or possession of controlled substance analogs." *Id.* ¶ 16.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. The Tenth District's ruling undercuts efforts to fight synthetic drugs.

Ohio, like the federal government and most other States, has taken strong measures to fight synthetic drugs. Man-made substances like bath salts are hazardous not just to users, but also to the family members, law enforcement, and medical personnel who are exposed to users' violent behavior. Moreover, these substances are targeted at 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*. For two key reasons, the Tenth District's decision undercuts Ohio's efforts and, if allowed to stand, will have severe consequences for the State.

First, the Tenth District's decision will jeopardize ongoing prosecutions and appeals, and could even upend current prison sentences. Because analog prosecutions are difficult undertakings that require extensive expert testimony, many of the individuals prosecuted under Sub. H.B. 64—including Smith—were alleged to be key distributors. Thus, the impact of having their cases dismissed or their convictions overturned will be significant.

In Franklin County, four cases either have been dismissed or have motions to dismiss pending pursuant to the decision below. *See State v. Ahmad Mobarak*, No. 13CR-532 (motion to

dismiss pending); *State v. Edreese Mustafa*, No. 13CR-537 (motion to dismiss pending); *State v. Mohammad Mustafa*, No. 13CR-536 (motion to dismiss pending); *State v. Ghassan Mohammad*, No. 14AP-662 (dismissed by trial court, with appeal pending at Tenth District). In addition, secured convictions are now in jeopardy. Prior to the *Smith* decisions, several defendants in Franklin County were convicted of analog offenses. *See, e.g.*, *State v. Soleiman Mobarak*, No. 12CR-5582 (currently serving a 35-year prison sentence); *State v. Hasan Mobarak*, No. 12CR-5583 (currently serving a three-year prison sentence). Soleiman Mobarak has already filed a Motion for Post-Conviction Relief with the trial court, and is also asking the Tenth District to reverse his conviction pursuant to *Smith*. *See State v. Soleiman Mobarak*, No. 14AP-517.

Second, the decisions below will affect other provisions of the Revised Code that were not amended by Sub. H.B. 334. The Tenth District concluded that Ohio did not ban possession of or trafficking in analogs until the General Assembly added specific language concerning analogs into R.C. 2925.03 (trafficking) and 2925.11 (possession). *See* App. Op. ¶ 13. Yet the General Assembly has never added analog language to other provisions in Chapter 2925, including to the those governing corrupting another with drugs (R.C. 2925.02), illegal manufacture (R.C. 2925.04), illegal assembly (R.C. 2925.041), and illegal funding (R.C. 2925.05). This is because the addition of analog language is redundant; R.C. 3719.013 already stated that analogs shall be treated as controlled substances for *any* provision of Ohio law (except, after December 2012, where analogs had been singled out for special treatment). Under *Smith*, analog cases brought under these provisions are vulnerable to attack today.

B. The Tenth District's ruling creates incongruous results between districts in Ohio.

The decision below has a practical result that warrants jurisdiction. While other Ohio courts have entered convictions for analog offenses under Sub. H.B. 64, cases in Franklin County have been and could be dismissed as though Sub. H.B. 64 had never been signed into law.

In addition to the guilty pleas entered under Sub. H.B. 64, several defendants throughout Ohio were convicted of analog offenses following trials. Those cases are now in varying stages of appeal. Those results conflict with the Tenth District's ruling that Sub. H.B. 64 did not create a criminal offense. But these pending like cases should be treated alike.

C. The Tenth District's decision exposes Ohio to wrongful-imprisonment litigation with respect to convictions that were based on Sub. H .B. 64.

Finally, this Court should exercise jurisdiction over this case to protect the State from exposure to wrongful-imprisonment liability under R.C. 2743.48(A). As noted, various defendants from around the state of Ohio are now serving prison sentences for analog offenses, some of whom were convicted after a trial. The invalidation of the possession and trafficking offenses as they apply to analogs could open up possible wrongful-imprisonment litigation for those convictions. *Cf. Chessman v. State*, No. 25413, 2013-Ohio-2757 ¶¶ 20-22 (2d Dist.) (concluding that a defendant was eligible for wrongful imprisonment relief where the "charged offense" was not a valid crime under Ohio law). The Court should accept jurisdiction to prevent that collateral consequence.

ARGUMENT

<u>*Amicus Curiae*'s Proposition of Law:</u>

> *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.*

A. During the relevant time, the Revised Code stated that analogs should be treated as controlled substances in Schedule I for any purpose of the Revised Code, including criminal offenses.

The analysis should begin and end with the text of the Revised Code. "In construing a statute, a court's paramount concern is the legislative intent." *State ex rel. Solomon v. Police & Fireman's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St. 3d 62, 65 (1995). A statute

should be "construed according to the rules of grammar and common usage." R.C. 1.42; *State v. Swidas*, 133 Ohio St. 3d 460, 2012-Ohio-4638 ¶ 17. "If the meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 584 (1995).

Sub. H.B. 64, which controls here, defined analogs and provided that they "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). It does not say that for "some provisions," or under "only certain circumstances," analogs should be treated as controlled substances. The statute says that they should be treated as controlled substances for *any* provision. Thus, when R.C. 2925.03 prohibited selling or offering to sell a controlled substance, it also prohibited selling or offering to sell an analog. When R.C. 2925.11 prohibited knowingly obtaining, possessing, or using a controlled substance, it also prohibited knowingly obtaining, possessing, or using an analog. And today, when R.C. 2925.02 prohibits illegally corrupting a minor with a controlled substance, it also prohibits illegally corrupting a minor with an analog. In plain terms, therefore, at all times relevant to this appeal, the Revised Code prohibited the sale and possession of analogs.

B. The General Assembly's purpose in passing Sub. H.B. 64 reinforces the text.

The purpose of Sub. H.B. 64—to fight synthetic drugs by giving law enforcement tools to prosecute drugs that are specially designed to avoid prosecution—supports the textual analysis. When construing a statute, courts may consider "'the purpose to be accomplished.'" *Solomon*, 72 Ohio St. 3d at 65 (citation omitted). The General Assembly was aware in 2011 that new, man-made substances closely resembling scheduled substances were escaping prosecution and poisoning communities because they did not conform to the precise definitions listed in Schedule I. Following the example set by the federal government, Sub. H.B. 64 allowed prosecutors to bring drug charges for analogs. 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.

C. The Tenth District misapplied tools of statutory construction in a way that defeated the General Assembly's intent in passing H.B. 64.

The lower courts ignored the plain language of the text and used tools of statutory construction not to resolve ambiguities, but to beget them. Specifically, the Tenth District misapplied the rule of lenity and the expressio unius canon to misconstrue a criminal statute against the State. It applied these tools to thwart, not interpret, the statutory text, and favored those canons over others such as the rule that statutes must be read in pari materia. *See Klopfleisch*, 72 Ohio St. 3d at 585.

This statute does not involve an ambiguity. The General Assembly stated in plain terms that analogs are to be treated as Schedule I controlled substances for any purpose of Ohio law. The lower courts' interpretive exercises were therefore improper. "[C]ourts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 347 (1994). Even if there had been an ambiguity, the Tenth District resolved that uncertainty contrary to tools of construction that point to the State's reading of the statute.

First, the Tenth District misapplied the rule of lenity. That rule provides 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). It applies only where a statute is ambiguous, *see State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478 ¶ 40, and should not be used to give statutes "an artificially narrow interpretation that would defeat the apparent legislative intent," *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583 ¶ 20. It should enter

only "'at the end of the process …, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" *State v. Stevens*, 139 Ohio St. 3d 247, 2014-Ohio-1932 ¶ 39 (Kennedy, J., concurring in part and dissenting in part) (citation omitted).

The Tenth District erred when it invoked the rule of lenity at the outset of its analysis, without any effort to apply the statute's plain terms. Ignoring the all-encompassing wording of R.C. 3719.013 ("*any* purpose"), it instead asked why a definition was or was not cross-referenced, or why the General Assembly located a universally applicable provision in a specific chapter of the code. *See* App. Op. ¶¶ 12, 14. These minor quibbles cannot invalidate the General Assembly's command that analogs shall be treated as controlled substances in Schedule I for any purpose. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991) ("While § 1001 may have created some minor inconsistencies with other statutory provisions, its provisions for postconfinement supervision 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."). The result is not just a narrow construction against the State; the statute was gutted.

The Tenth District's opinion betrays a misunderstanding of Sub. H.B. 64 and is contrary to this Court's admonitions that the rule of lenity not be applied to create "an artificially narrow interpretation that would defeat the apparent legislative intent." *White*, 2012-Ohio-2583 ¶ 20. For example, the Tenth District observed that Sub. H.B. 64 had amended R.C. 2925.03 and 2925.11 to create specific offenses for possession of spice (a minor misdemeanor) and trafficking in spice (a felony of the fourth or fifth degree). *See* App. Op. ¶ 13. "By contrast, the General Assembly did not amend R.C. 2925.03 or 2925.11 to expressly prohibit the sale or possession of

… analogs." *Id.* The Tenth District therefore concluded—oddly—that extraordinarily unsafe analogs were not at all prohibited. In fact, the General Assembly was treating analogs "as a controlled substance in schedule I," meaning that violations of R.C. 2925.03 and 2925.11 would result in much *harsher* consequences. Stated differently, the General Assembly was carving out more *lenient* treatment for spice offenses. The puzzling result of the Tenth District's decision is that spice was more severely punished than analogs that were not punished at all.

Second, the Tenth District misapplied the expressio unius canon. The lower court examined the list of definitions that specifically governed Chapter 2925 and observed that the General Assembly had incorporated some definitions from Chapter 3719 into 2925, but not others (including the term "controlled substance analog"). *See* App. Op. ¶ 12. It then reasoned that, because the General Assembly had neglected to define "controlled substance analog" in Chapter 2925, it had *excluded* analogs from applying in the context of the criminal drug offense statutes. *Id.* That maneuver was not faithful to the expressio unius canon.

"'The cannon of *expressio unius est exclusio alterius* 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 (citation omitted). Here, the terms the Tenth District analyzed were not members of an "associated group or series." The terms from Chapter 3719 incorporated into R.C. 2925.01 included the verbs "administer," "dispense," and "distribute," among other terms. They are not logically or categorically connected except insofar as they relate to drugs. And the omission of the term "controlled substance analog" cannot, by mere inference, overcome the express command that analogs be treated as controlled substances for any purpose of the Revised Code.

Indeed, the sweeping reach of R.C. 3719.013 made an express inclusion of an analog definition in Chapter 2925 unnecessary.

Assuming for the sake of argument that R.C. 3719.013 *was* ambiguous, "statutes relating to the same general subject matter must be read in pari materia, and in construing these statutes in pari materia, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes." *Klopfleisch*, 72 Ohio St. 3d at 585. There can be no dispute that Chapter 3719, which deals with controlled substances, relates to the same general subject matter as Chapter 2925, which covers drug offenses and repeatedly refers to the controlled substances located in Chapter 3719. The Tenth District's interpretation of R.C. 3719.013 stripped it of all force and effect, thus violating the in pari materia rule of construction.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this case and reverse.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Jurisdiction was served on March 13, 2015, by U.S. mail on the following:

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