APPLICATION FOR NOMINATION TO THE

FLORIDA SUPREME COURT

Instructions: *Respond fully to the questions asked below. Please make all efforts to include your full answer to each question in this document. You may attach additional pages, as necessary, however it is discouraged. In addition to the application, you must provide a recent color photograph to help identify yourself.*

Full Name: John Matthew Guard **Social Security No.:** [redacted]

Florida Bar No.: 374600 **Date Admitted to Practice in Florida:** 10/2/2000

1. Please state your current employer and title, including any professional position and any public or judicial office you hold, your business address and telephone number.

I am Senior Counselor to the Attorney General of the State of Florida, PL-01, The Capitol, Tallahassee, Florida 32399, 813-798-4468.

2. Please state your current residential address, including city, county, and zip code. Indicate how long you have resided at this location and how long you have lived in Florida. Additionally, please provide a telephone number where you can be reached (preferably a cell phone number), and your preferred email address.

[redacted]**Plant City, Hillsborough County, Florida, 33563. I have resided at that address since August 2024, and I have lived in Florida for forty-seven years. My telephone number is (813) 789-4468. My preferred email address is johnmguard@hotmail.com.**

3. State your birthdate and place of birth.

October 28, 1975, in Lakeland, Polk County, Florida

4. Are you a registered voter in Florida (Y/N)?

Yes.

5. Please list all courts (including state bar admissions) and administrative bodies having special admissions requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have ever been suspended or resigned. Please explain the reason for any lapse in membership.

State of Florida, 2000

United States Court of Appeals for the Eleventh Circuit, 2002

United States District Court for the Middle District of Florida, 2000

United States District Court for the Northern District of Florida, 2002

United States District Court for the Southern District of Florida, 2002

I allowed my membership in the United States Court of Appeals for the Eleventh Circuit to lapse after I had not been involved in an appeal with that court for more than ten years. My membership in the Middle District of Florida lapsed briefly when I failed to pay a bi-annual fee. I paid the fee as soon as I realized the lapse and reapplied for membership.

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias.

No.

EDUCATION:

7. List in reverse chronological order each secondary school, college, university, law school or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, the date the degree was received, class standing, and graduating GPA (if your class standing or graduating GPA is unknown, please request the same from such school).

2000 — 1997, Tulane University, School of Law, Juris Doctor (*summa cum laude*), 2000, 3.834 GPA, class rank 3/287

1997 — 1993, Florida State University, Bachelor of Arts, 1997, 3.44 GPA

1994, Polk State College, summer classes, no degree conferred

1992, University of South Florida, summer high school program, no degree conferred

8. List and describe any organizations, clubs, fraternities or sororities, and extracurricular activities you engaged in during your higher education. For each, list any positions or titles you held and the dates of participation.

Tulane Law Review, August 1998-May 2000, Notes & Comments Editor

Phi Delta Phi, August 1998-May 2000, President (1999-2000)

Golden Key Honor Society, Florida State University, 1997

FSU Honors Program, 1993-1997

Phi Delta Theta Fraternity, 1993-1997, Pledge Master (1997), Vice President (1996), Treasurer (1995)

EMPLOYMENT:

9. List in reverse chronological order all full-time jobs or employment (including internships and clerkships) you have held since the age of 21. Include the name and address of the employer, job title(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

January 2019— August 2025; December 2025— Present
State of Florida, Department of Legal Affairs, Office of Attorney General
The Capitol, Plaza Level-01
Tallahassee, Florida 32399
Senior Counselor to the Attorney General (December 2025—Present)
Chief Deputy Attorney General (February 2025 – June 2025)
Acting Attorney General (January 21, 2025 – February 17, 2025)
Chief Deputy Attorney General (January 2019 – January 21, 2025)

November 2018— January 2019
Ashley Moody, Attorney General-elect
The Capitol, Plaza Level-01
Tallahassee, Florida 32399
Executive Director of Transition

June 2012— January 7, 2019
Quarles & Brady LLP
101 East Kennedy Boulevard, Suite 3400
Tampa, Florida 33602
Partner

March 2009— June 2012
United States Attorney's Office, Middle District of Florida, Jacksonville Division
300 North Hogan Street, Room 700
Jacksonville, Florida 32202
Assistant United States Attorney, Criminal

September 2004— March 2009
Holland & Knight LLP
100 N. Tampa Street, Suite 4100
Tampa, Florida 33602
Associate

December 2002— August 2004
The Honorable James S. Moody, Jr.,
United States District Court Judge for the Middle District of Florida
801 North Florida Avenue
Tampa, Florida 33602
Law Clerk

August 2000 — December 2002
Holland & Knight LLP
100 North Tampa Street, Suite 4100
Tampa, Florida 33602
Associate

May— August 1999
Holland & Knight LLP
100 N. Tampa Street, Suite 4100
Tampa, Florida 33602
Summer Associate

July 1998— April 1999
Courtenay, Forstall, Hunter & Fontana LLP
1010 Common Street
New Orleans, Louisiana 70112
Law Clerk

May— July 1998
The Honorable J. Marion Moorman
Public Defender for the Tenth Judicial Circuit in and for Polk County, Florida
255 North Broadway Avenue, 3rd Floor
Bartow, Florida 33831
Summer Law Clerk

May—August 1997
The Honorable Richard M. Weiss
Clerk of Court for Polk County, Florida
255 N. Broadway Ave., 1st Floor
Bartow, FL 33831-9000
Intern

10. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I currently serve as Senior Counselor to the Attorney General where I advise the Attorney General on and am involved in complex, large consumer protection, antitrust, and other civil litigation matters. From August until November 2025, I was awaiting confirmation as a United States District Court Judge and was not practicing law. My nomination remains pending in the United States Senate. From 2019 until June 2025, while I served as Florida's Chief Deputy Attorney General and Acting Attorney General, I had a wide-ranging practice that required me to become more familiar with multiple areas of civil and criminal law, including: antitrust; consumer

protection; capital (death penalty); federal and Florida constitutional law; federal and Florida's false claims Act; Florida criminal law; Florida real property law; and Florida and federal environmental laws. While most of my practice involved managing other lawyers, I have handled three to four matters a year as lead or primary counsel. Those matters have typically been some of the most significant matters in the Office of Attorney General, like the State of Florida's opioid epidemic litigation.

My practice at the Office of Attorney General was significantly different from my prior practice. From 2000 until 2002 and again after I returned from clerking from 2004 until 2009, I was an associate at a national law firm. As an associate, I worked on cases with an increasing level of involvement in both the bankruptcy and litigation areas, including matters in the following subject areas: antitrust; business torts; class actions; contract interpretation; environmental law; intellectual property; and labor law (non-compete agreements). I regularly accepted pro bono representations through Holland & Knight LLP's pro bono program for individuals, which largely consisted of real estate related litigation. From 2009 until 2012, I was an Assistant United States Attorney, where I served as a federal prosecutor. As a federal prosecutor, I handled a wide variety of criminal cases, including various types of fraud, narcotics, unlawful firearms, and violent crime matters. From 2012 until 2019, I was a partner at a national law firm. As a partner, I was responsible for cases and investigations, including matters in the following subject areas: business torts; contract interpretation; the False Claims Act; federal and state law enforcement investigations and compliance-related issues; insurance; intellectual property; real property; trust and estates; and Florida's version of the Uniform Commercial Code.

11. What percentage of your appearance in court in the last five years or in the last five years of practice (include the dates) was:

Court		Area of Practice	
Federal Appellate	_____ %	Civil	100 %
Federal Trial	50 %	Criminal	_____ %
Federal Other	_____ %	Family	_____ %
State Appellate	_____ %	Probate	_____ %
State Trial	50 %	Other	_____ %
State Administrative	_____ %		
State Other	_____ %		
TOTAL	100 %	TOTAL	100 %

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation:

The appearances in court have changed depending on where I was employed as have the areas of practice over the course of my career. When I was a federal prosecutor, I appeared exclusively in United States District Court and my area of practice was exclusively criminal law. When I worked at Quarles & Brady LLP, my area of practice would have included approximately fifteen percent on probate matters.

12. In your lifetime, how many (number) of the cases that you tried to verdict, judgment, or final decision were:

Jury?	9	Non-jury?	15
Arbitration?	1	Administrative Bodies?	
Appellate?	3		

13. Please list every case that you have argued (or substantially participated) in front of the United States Supreme Court, a United States Circuit Court, the Florida Supreme Court, or a Florida District Court of Appeal, providing the case name, jurisdiction, case number, date of argument, and the name(s), e-mail address(es), and telephone number(s) for opposing appellate counsel. If there is a published opinion, please also include that citation.

In re Advisory Opinion to the Attorney General re: Right to Competitive Energy Market for Customers of Investor-Owned Utilities, SC19-328, August 28, 2019, 287 So. 3d 1256 (Fla. 2020), Glenn Burhans Jr., (850)-329-4850, gburhans@stearnsweaver.com; and Kenneth Sukhia, ksukhia@sukhilawfirm.com.

Bono v. Carroll, 2D16-1680, 2D15-3462, 2D-3455, D. Michael Lins, (813) 386-5768, mike@linslawgroup.com; Phillip Baumann, (813) 223-2202, pab@estatelawflorida.com; and Michael Kangas, (813) 223-2202, mrk@estatelawflorida.com.

La Gorce Palace Condominium Assn. v. Deutsche Bank Natl. Trust Co., 3D14-2816, 3D16-1891, April 18, 2017, Richard Alayon, (305) 221-2110, ralayon@alayonlaw.com; Juan Ramirez, Jr., (305) 479-0150, jr@adrmiami.com; and Armando Alfonso, (305) 775-0063, armandoalfonsoesq@gmail.com.

Popesku v. U.S. Bank, N.A., 2D14-4279, 2D14-5905, November 4, 2015, Gregg Horowitz, P.O. Box 2927, Sarasota, FL 34230-2927, (941) 365-2094, Gregg.horowitz@verizon.net.

Springer v. Bank of America, N.A., 2D14-1860, June 9, 2015, Mark P. Stopa, Disbarred 2019, (727) 851-9551.

Paul v. Deutsche Bank National Trust Co., 3D13-3200, Arthur Morburger, Disbarred 2022, (786) 626-2526.

Barnett v. Paradise of Port Richey, Inc., 2D02-776, August 21, 2002, Segundo Fernandez, (850) 521-0700, sfernandez@ohfc.com; and Timothy Atkinson, (850) 521-0700, tatkinson@ohfc.com.

Hastings v. NACS, Inc., 2D00-3896, Elizabeth Wheeler, (813) 685-0050, ewheeler.bergwheeler@verizon.net.

14. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended, or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

15. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain full.

No.

16. For your last six cases, which were tried to verdict or handled on appeal, either before a jury, judge, appellate panel, arbitration panel or any other administrative hearing officer, list the names, e-mail addresses, and telephone numbers of the trial/appellate counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Given the nature of my legal practice for the last seven years, please see my answers to questions 19 and 21.

17. For your last six cases, which were either settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Given the nature of my legal practice for the last seven years, please see my answers to questions 19 and 21.

18. During the last five years, on average, how many times per month have you appeared in Court or at administrative hearings? If during any period you have appeared in court with greater frequency than during the last five years, indicate the period during which you appeared with greater frequency and succinctly explain.

Since joining the Attorney General's Office in 2019, I have held a supervisory or managerial role. Most of my duties are litigation-related, but I appeared in court less frequently than I did in the prior two decades of my career. Despite having a more supervisory or managerial role, I acted as

chief counsel in several matters each year. In those matters, I tried a case to verdict, argued a case in the Florida Supreme Court, and handled a number of motion hearings in both federal and state court.

Until 2019, when I joined the Office of Attorney General for the State of Florida, my practice was exclusively litigation related. I appeared in court frequently. During my time as an Assistant United States Attorney, it was not infrequent that I was in court multiple times a day.

19. If Questions 16, 17, and 18 do not apply to your practice, please list your last six major transactions or other legal matters that were resolved, listing the names, e-mail addresses, and telephone numbers of the other party counsel.

1. ***Office of the Attorney General, State of Florida, Department of Legal Affairs v. JUUL Labs, Inc.*, case no. 23-CA-015721 (13th Jud. Cir. Florida).**

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George Lemieux
Gunster LLP
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2. ***In re Purdue Pharma L.P.*, case no. 19-23649 (Bankr. S.D.N.Y.). Reported opinions include: 633 B.R. 53 (Bankr. S.D.N.Y. 2021), revd. 635 B.R. 26 (S.D.N.Y. 2021), revd. 69 F.4th 45 (2d Cir. 2023), revd. 603 U.S. 204 (2024).**

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Luther Strange
Luther Strange & Associates
3125 Independence Dr., Suite 114
Homewood, AL 35209
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U.S. Department of Justice:

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Assistant United States Attorney
U.S. Attorney's Office for the Southern District of New York
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(212) 637-2719
Lawrence.fogelman@usdoj.gov

U.S. Trustee:

Paul Schwartzberg
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United States Trustee
(212) 510-0500 ext. 221

3. ***State of Florida v. United States, et al.*, case no. 3:21-cv-01066-TKW-ZCB (N.D. Fla.), 2022 WL 2431443 (Jan. 18, 2022); 2022 WL 2431414 (N.D. Fla. May 4, 2022); 2022 WL 2431442 (N.D. Fla. June 6, 2022); 342 F.R.D. 153 (N.D. Fla. July 12, 2022); 2022 WL 4021934 (N.D. Fla. Sep. 2, 2022); 2023 WL 2399883 (N.D. Fla. Mar. 8, 2023) (containing Final Judgment).**

Counsel for the State of Florida:

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MSC 0525
Washington, DC 20528
(240) 492-2420
James.percival@hq.dhs.gov

Natalie P. Christmas
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Anita J. Patel
State of Florida, Office of Attorney General
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Counsel for the United States:

Joseph A. Darrow
(formerly with the U.S. Department of Justice, Civil Division)
300 S. Grand Ave., Ste. 1700
Los Angeles, CA 90071
(213) 229-2368
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4. ***Planned Parenthood of Southwest and Central Florida, et al. v. State of Florida*, case no. 2022CA00912 (2d Cir. Fla.), DCA NO. 1D22-2034 (Fla. 1st DCA), SC22-1050, 22-1127 (Fla.); 2022 WL 2436704 (2d Cir. Fla. Jul. 5, 2022); 2022 WL 2680000 (2d Cir. Fla. July 12, 2022); 342 So. 3d 863 (Fla. 1st DCA 2022); 344 So. 3d 637 (Fla. 1st DCA 2022); 384 So. 3d 67 (Fla. 2024).**

Counsel for Planned Parenthood and other Plaintiffs:

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Chicago, IL 60654
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5. ***State of Florida, Office of the Attorney General, Department of Legal Affairs v. Walmart Inc.*, case no. 2023-CA-3233 (6th Jud. Cir. Florida).**

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6. ***State of Florida, Office of the Attorney General, Department of Legal Affairs v. Purdue Pharma L.P., et al.*, case no. 2018-CA-1438 (6th Jud. Cir. Florida).**

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20. During the last five years, if your practice was greater than 50% personal injury, workers' compensation or professional malpractice, what percentage of your work was in representation of plaintiffs or defendants?

Not applicable.

21. List and describe the five most significant cases which you personally litigated giving the case style, number, court and judge, the date of the case, the names, e-mail addresses, and telephone numbers of the other attorneys involved, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant.

1. ***State of Florida, Office of the Attorney General, Department of Legal Affairs v. Purdue Pharma L.P., et al.*, case no. 2018-CA-1438 (6th Jud. Cir. Florida).**

I represented the State of Florida, Office of Attorney General, Department of Legal Affairs from January 2019 until we settled with Walgreen Co. at trial in May 2022. I was ultimately responsible for the conduct of this litigation. I had routine meetings to discuss all aspects of the case, claims, discovery, and the eventual trial with Walgreens. Among the many motions that I argued, I argued a motion regarding the Attorney General's possession, custody, and control over documents belonging to the Governor's office and the Governor's agencies. I also led most of the settlement negotiations for the State of Florida

and negotiated an allocation agreement with over two hundred cities and counties who took part in the various opioid-related settlements. In addition to negotiating five corporate settlements, I was one of a small group of lawyers for the states who negotiated a nationwide, $26 billion settlement with four of the defendants (McKesson, Cardinal Health, AmerisourceBergen, and Johnson & Johnson). That settlement required negotiation among 56 states and territories who all had to agree on allocation of settlement proceeds and negotiation of a default allocation agreement with subdivisions throughout the United States. In the end, the State of Florida will recover, through the various settlements, more than $3.15 billion to abate the opioid epidemic that has devastated the State of Florida. The case was litigated before Judge Kimberly Sharpe Byrd.

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2. ***In re Purdue Pharma L.P.*, case no. 19-23649 (Bankr. S.D.N.Y.). Reported opinions include: 633 B.R. 53 (Bankr. S.D.N.Y. 2021), revd. 635 B.R. 26 (S.D.N.Y. 2021), revd. 69 F.4th 45 (2d Cir. 2023), revd. 603 U.S. 204 (2024).**

I represented the State of Florida in the Purdue Pharma L.P. ("Purdue") bankruptcy. Purdue was a manufacturer of branded oxycodone products that engaged in an extensive false marketing campaign to drive the sales of its products. Even after one of its subsidiaries pled guilty to misbranding in 2007, it continued to engage in false and deceptive marketing that was a substantial factor in the opioid epidemic in this country and in Florida. Purdue was a defendant in the opioid litigation when Attorney General Moody took office. Soon thereafter, Purdue let it be known that it would be filing for bankruptcy. Beginning in March 2019 and continuing until June 2025, I have been the principal lawyer representing the State of Florida in connection with the Purdue bankruptcy. Florida was one of the three lead states in a twenty-six-state group that reached a settlement with Purdue pre-bankruptcy that became the basis of a consensual plan. Post-bankruptcy filing, Florida served on the Ad Hoc Committee Governmental and other Contingent Litigation Claimants (the "Ad Hoc") and I served on a smaller steering committee within the Ad Hoc charged with on a day-to-day basis negotiating with other creditor constituencies and formulating a plan of reorganization. I testified on behalf of the Ad Hoc in favor of the original plan of reorganization. I argued multiple motions during the bankruptcy case relating to issues important to the states. The plan was confirmed. After the Supreme Court reversed the confirmation order, I subsequently continued negotiating a new, even more complicated plan of reorganization. Over an almost five-year period, I worked with other constituencies to negotiate two multi-billion dollar plans of reorganization that would see nearly $5 billion paid to non-federal government creditors. Florida should recover somewhere between $200 to 400 million. The new plan was confirmed in November 2025. The judge assigned to the matter originally was Judge Robert Drain. Judge Drain retired. Judge Sean Lane is now handling this matter.

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3. ***State of Florida v. United States, et al.*, case no. 3:21-cv-01066-TKW-ZCB (N.D. Fla.), 2022 WL 2431443 (Jan. 18, 2022); 2022 WL 2431414 (N.D. Fla. May 4, 2022); 2022 WL 2431442 (N.D. Fla. June 6, 2022); 342 F.R.D. 153 (N.D. Fla. July 12, 2022); 2022 WL 4021934 (N.D. Fla. Sep. 2, 2022); 2023 WL 2399883 (N.D. Fla. Mar. 8, 2023) (containing Final Judgment).**

I represented the State of Florida against the United States, President Joseph Biden, Department of Homeland Security Secretary Alejandro Mayorkas, ICE Director Tae Johnson and other federal officials, alleging that the United States promulgated an unlawful immigration policy of releasing aliens that federal law requires to be detained. I took all the depositions, including the Chief of the United States Border Patrol and the Executive Associate Director of ICE's Enforcement and Removal Operations Division. I was lead counsel and tried the case, handling the admission of a substantial portion of the evidence and cross-examined the United States's witnesses at trial. The Court concluded that the United States had an unlawful release policy in violation of the Administrative Procedures Act. Judge T. K. Wetherell II presided over the case.

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4. ***Planned Parenthood of Southwest and Central Florida, et al. v. State of Florida*, case no. 2022CA00912 (2d Cir. Fla.), DCA NO. 1D22-2034 (Fla. 1st DCA), SC22-1050, 22-1127 (Fla.); 2022 WL 2436704 (2d Cir. Fla. Jul. 5, 2022); 2022 WL 2680000 (2d Cir. Fla. July 12, 2022); 342 So. 3d 863 (Fla. 1st DCA 2022); 344 So. 3d 637 (Fla. 1st DCA 2022); 384 So. 3d 67 (Fla. 2024).**

I represented the State of Florida, the Florida Department of Health, and the Florida Agency for Health Care Administration in litigation challenging Florida's fifteen-week abortion ban under the Florida Constitution after the U.S. Supreme Court decision in *Dobbs*. I supervised the litigation strategy in this case and took the depositions of plaintiffs' fact and expert witnesses at the trial court level. I also cross-examined all plaintiffs' witnesses at the preliminary injunction hearing. I supervised and directed the litigation strategy at the intermediate appellate court and the Florida Supreme Court. The Florida Supreme Court concluded that the Florida Constitution's right to privacy did not include a constitutional right to abortion.

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5. ***Office of the Attorney General, Department of Legal Affairs v. Halifax Hospital Medical Center, et al.*, case no. 2022-CA-000541 (Fla. 2d Jud. Cir.), case nos. No. 1D2023-1327, No. 1D2023-1394, No. 1D2023-1481, No. 1D2023-1484, No. 1D2023-1500, No. 1D2023-1529, No. 1D2023-1570 (Fla. 1st DCA). Reported opinions include: 393 So. 3d 1253 (Fla. 1st DCA 2024).**

I represented the Office of the Attorney General in this case brought against several hospital districts and two school districts to contest the releases contained in Florida's opioid settlements. The subdivisions in this litigation claimed that the Attorney General did not have the constitutional, statutory or common law authority to release subdivision claims in the opioid settlements. This lawsuit construed the powers of the Attorney General to resolve litigation by the state, its departments, and its subdivisions. I successfully handled the summary judgment argument and drafted most of the motion for summary judgment and related filings. The case is pending in the Florida Supreme Court. The trial court judge was John Cooper.

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22. Attach at least two, but no more than three, examples of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach a writing sample for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

See attached. I was the principal drafter of both.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE

23. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved, the dates of service or dates of candidacy, and any election results.

No.

24. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name(s) of the commission, the approximate date(s) of each submission, and indicate if your name was certified to the Governor's Office for consideration.

Yes. I submitted a questionnaire to the Second District Court of Appeal Judicial Nominating Commission in December 2025. I will be interviewed on December 17, 2025, by that nominating commission. I submitted three or four questionnaires to the Thirteenth Circuit Judicial Nominating Commission between 2012 and 2014. My name was not certified to the Governor's Office.

25. List any prior quasi-judicial service, including the agency or entity, dates of service, position(s) held, and a brief description of the issues you heard.

Attorney General Moody designated me with quasi-judicial authority to resolve cases under Florida Statutes §381.00317, which was in effect until June 30, 2023. Section 381.00317 made it unlawful under Florida law to terminate an employee under certain defined circumstance for not obtaining a Covid-19 vaccine.

26. If you have prior judicial or quasi-judicial experience, please list the following information:

(i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;
(ii) the approximate number and nature of the cases you handled during your tenure;
(iii) the citations of any published opinions; and
(iv) descriptions of the five most significant cases you have tried or heard, identifying the citation or style, attorneys involved, dates of the case, and the reason you believe these cases to be significant.

In my quasi-judicial capacity under Section 381.00317, I handled several hundred complaints for violation of that statute. I evaluated each of those several hundred complaints to determine if they stated a prima facie case. Most complaints failed to state a prima facie case and were closed. I concluded that approximately fifteen complaints stated a prima facie case and sent those cases to an administrative law judge to conduct an evidentiary hearing. No attorneys appeared in front of me. All those fifteen cases subsequently settled, and I entered closing orders. No orders were published, challenged or appealed.

27. Provide citations and a brief summary of all of your orders or opinions where your decision was reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, attach copies of the opinions.

None of my orders were challenged on appeal and the Department of Administrative Hearings did not enter any substantive orders related to any case.

28. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, attach copies of the opinions.

I would not deem any of my orders to be significant opinions and none were officially reported.

29. Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give the date, describe the complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

No.

30. Have you ever held an attorney in contempt? If so, for each instance state the name of the attorney, case style for the matter in question, approximate date and describe the circumstances.

No.

31. Have you ever held or been a candidate for any other public office? If so, state the office, location, dates of service or candidacy, and any election results.

I have never been a candidate for public office.

NON-LEGAL BUSINESS INVOLVEMENT

32. If you are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Not applicable.

33. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, explain and provide dates. If you received any compensation of any kind outside the practice of law during this time, please list the amount of compensation received.

No.

POSSIBLE BIAS OR PREJUDICE

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you, as a general proposition, believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

None.

PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES

35. List the titles, publishers, and dates of any books, articles, reports, letters to the editor, editorial pieces, or other published materials you have written or edited, including materials published only on the Internet. Attach a copy of each listed or provide a URL at which a copy can be accessed.

Letter from Acting Attorney General John Guard and 24 Attorneys General to United States Senate Majority Leader John Thune and United States Senate Minority Leader Chuck Schumer re: Pass the HALT Fentanyl Act (February 12, 2025). Copy supplied.

Letter from Acting Attorney General John Guard and 22 Attorneys General to Director Brandon Taylor and Dr. Tameka Owens re: Dietary Guidelines (February 10, 2025). Copy supplied.

Letter from Acting Attorney General John Guard and 16 Attorneys General to United States Senate Majority Leader John Thune and United States House of Representatives Speaker Mike Johnson re: COVID response (February 5, 2025). Copy supplied.

Comment, "Impotent Figureheads"? State Sovereignty, Federalism and the Constitutionality of Section 2 of the Voting Rights Act after *Lopez v. Monterey County* and *City of Boerne v. Flores*, 74 TUL. L. REV. 329 (1999). Copy supplied.

Note, *Hal Antillen N.V. v. Mount Ymitos MS*: Strangers in the Night, the Starboard-to-Starboard Passing Custom in the Southwest Pass, 73 TUL. L. REV. 2143 (1999). Copy supplied.

36. List any reports, memoranda or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. Provide the name of the entity, the date published, and a summary of the document. To the extent you have the document, please attach a copy or provide a URL at which a copy can be accessed.

None.

37. List any speeches or talks you have delivered, including commencement speeches, remarks, interviews, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place they were delivered, the sponsor of the presentation, and a summary of the presentation. If there are any readily available press reports, a transcript or recording, please attach a copy or provide a URL at which a copy can be accessed.

November 16, 2023: Panelist, "How Litigation with State AG Offices Differs from Traditional Litigation," Government Investigations & Civil Litigation Institute, Annual Conference, Palm Springs, CA.

November 6, 2023: Presenter "Permissible Uses," Florida Statewide Council on Opioid Abatement, via Teams, Tallahassee, Florida.

August 31, 2023: Presenter, "Opioid Settlements," Florida Statewide Council on Opioid Abatement, via Teams, Tallahassee, Florida.

May 10, 2023: Panelist, "State Attorney General and Deputies Perspectives," Spring Consumer Protection Conference, National Association of Attorneys General, Tampa, Florida.

April 26, 2023: Speaker, National Crime Victims' Rights Week Ceremony, Tallahassee, FL. Video recording of the ceremony available at https://thefloridachannel.org/videos/4-26-23-national-crime-victims-rights-week-ceremony/.

April 7, 2023: Speaker, 40th Annual Special Olympics Law Enforcement Torch Run, Tallahassee, Florida. I have no notes, transcript, or recording. The address for Special Olympics Florida is 1915 Don Wickham Drive, Clermont, Florida 34711.

January 24, 2023: Presenter, "Opioid Settlements," Florida Sheriffs Association, Ponte Vedra Beach, St. Johns County.

November 8, 2022: Panelist, "Lessons Learned from the Opioid Litigation," Government Investigations & Civil Litigation Institute, Annual Conference, Miami, Florida.

August 26, 2022: Presenter, "Florida's Opioid Crisis: The surge of fentanyl and the State's response," Project Opioid, via Teams, Orlando, Florida.

July 21, 2022: Presenter, "Florida's Opioid Crisis: The surge of fentanyl and the State's response" Board of Directors for Florida Healthy Kids, via Teams, Tallahassee, Florida.

September 24, 2021: Presenter, "Distributors and Johnson & Johnson: Highlights," Project Opioid, via Teams, Orlando, Florida.

August 25, 2021: Presenter, "Distributors and Johnson & Johnson Opioid Settlement: Settlement Highlights," Florida Board of Pharmacy, Tampa, Florida.

August 6, 2021: Presenter, "Distributors and Johnson & Johnson: Settlement Highlights," Florida County Attorneys at the request of the Florida Association of Counties, via Teams, Tallahassee, Florida.

July 1, 2021: Presenter, "Opioid Litigation: Settlements and Allocation Approach," Florida Association of Counties Annual Meeting, Orlando, Florida.

38. Have you ever taught a course at an institution of higher education or a bar association? If so, provide the course title, a description of the course subject matter, the institution at which you taught, and the dates of teaching. If you have a syllabus for each course, please provide.

No.

39. List any fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement. Include the date received and the presenting entity or organization.

Degree from Tulane University, School of Law conferred *summa cum laude* (2000)

Order of the Coif, Tulane University, School of Law (2000)

Dean's Medal, Tulane University, School of Law (2000), Highest Grade Point Average, Third Year of Law School

George Dewey Nelson Memorial Award, Tulane University, School of Law (2000), Highest Grade Point Average among those Tulane students studying its common law curriculum

Broflin, Heller, Steinberg & Berins Law Review Award, Tulane University, School of Law (2000), Most Outstanding Contribution

Tulane Law School Scholarship, Tulane University, School of Law (1998 – 2000)

Tulane Law Review, Tulane University, School of Law (1998 – 2000)
Notes and Comments Editor (1999 – 2000)

Phi Delta Phi, Tulane University, School of Law (1998 – 2000)
President (1999 – 2000)

Degree conferred from Florida State University (1997)

Golden Key Honor Society, Florida State University (1996 – 1997)

Florida State University Honors Program Scholarship, Florida State University (1993 – 1997)

Florida Academic Scholarship, Florida State University (1993 – 1997)

40. Do you have a Martindale-Hubbell rating? If so, what is it and when was it earned?

No.

41. List all bar associations, legal, and judicial-related committees of which you are or have been a member. For each, please provide dates of membership or participation. Also, for each indicate any office you have held and the dates of office.

American Bar Association (2000 – 2002)
Federal Bar Association (2000 – 2002, 2004 – 2009)
Hillsborough County Bar Association (2000 – 2002, 2004 – 2009, and 2012 – 2014)
Jacksonville Bar Association (2010 – 2012)
Tampa Bay Bankruptcy Bar Association (2000 – 2002)

42. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in the previous question to which you belong, or to which you have belonged since graduating law school. For each, please provide dates of membership or participation and indicate any office you have held and the dates of office.

Boy Scouts of America (2021 – present)
Greater Tampa Bay Area Council, Executive Committee Member (2024 – present)
Scoutmaster, Troop 4B (2023 – June 2025)
Troop Committee, Member (2021 – 2023)
Federalist Society (2023 – present)
Florida State University Alumni Association (2000 – present)
National Rifle Association (2024 – present)
Rotary International (2012 – 2013)
Seminole Boosters (2000 – 2012)

43. Do you now or have you ever belonged to a club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion (other than a church, synagogue, mosque or other religious institution), national origin, or sex (other than an educational institution, fraternity or sorority)? If so, state the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

I have been an adult volunteer for what was known as Boy Scouts of America. At the time I started volunteering, Boy Scouts limited its membership to Boys. Though, Boy Scouts allowed both men and women to volunteer.

44. Please describe any significant pro bono legal work you have done in the past 10 years, giving dates of service.

While at Quarles & Brady LLP (2016-2019), I worked on several pro bono matters at the request of Tampa Bay bankruptcy judges. The matters involved *pro se* bankruptcy petitioners who were sued by creditors claiming that significant debts were not dischargeable. Two of the matters ended up in a final evidentiary hearing. I supervised associates during those matters and helped prepare and assist with the defense at the evidentiary hearings.

45. Please describe any hobbies or other vocational interests.

I enjoy travelling and playing golf.

46. Please state whether you have served or currently serve in the military, including your dates of service, branch, highest rank, and type of discharge.

I have not served in the military.

47. Please provide links to all social media and blog accounts you currently maintain, including, but not limited to, Facebook, Twitter, LinkedIn, and Instagram.

Twitter: **@Jguard98920**

LinkedIn: **John Guard- www.linkedin.com%2Fin%2Fjohn-guard-304639163%3Futm_source%3Dshare%26utm_campaign%3Dshare_via%26utm_content%3Dprofile%26utm_medium%3Dios_app&data=05%7C02%7C%7C9ce704b5b5d04f10e92508de208e928c%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C638983993873251195%7CUnknown%7CTWFpbGZsb3d8eyJFbXB0eU1hcGkiOnRydWUsIlYiOiIwLjAuMDAwMCIsIlAiOiJXaW4zMiIsIkFOIjoiTWFpbCIsIldUIjoyfQ%3D%3D%7C0%7C%7C%7C&sdata=V6%2Bvdgg7Sc6rYP9QTu7ySz2C5hqAxZ7VrrjkSvZdueo%3D&reserved=0**

Facebook: John Guard

FAMILY BACKGROUND

48. Please state your current marital status. If you are currently married, please list your spouse's name, current occupation, including employer, and the date of the marriage. If you have ever been divorced, please state for each former spouse their name, current address, current telephone number, the date and place of the divorce and court and case number information.

I am married. My wife is Tina Lenor Repp. My wife is a retired Special Agent of the Federal Bureau of Investigation and now serves as a Commissioner on the Florida Gaming Control Commission. We were married on April 15, 2014.

49. If you have children, please list their names and ages. If your children are over 18 years of age, please list their current occupation, residential address, and a current telephone number.

Mason A. Repp, 15.

CRIMINAL AND MISCELLANEOUS ACTIONS

50. Have you ever been convicted of a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

51. Have you ever pled nolo contendere or guilty to a crime which is a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

52. Have you ever been arrested, regardless of whether charges were filed? If so, please list and provide sufficient details surrounding the arrest, the approximate date and jurisdiction.

No.

53. Have you ever been a party to a lawsuit, either as the plaintiff, defendant, petitioner, or respondent? If so, please supply the case style, jurisdiction/county in which the lawsuit was filed, case number, your status in the case, and describe the nature and disposition of the matter.

No.

54. To your knowledge, has there ever been a complaint made or filed alleging malpractice as a result of action or inaction on your part?

No.

55. To the extent you are aware, have you or your professional liability carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the name of the client(s), approximate dates, nature of the claims, the disposition and any amounts involved.

No.

56. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, provide the particulars of each finding or investigation.

No.

57. To your knowledge, within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers, clients, or the like, ever filed a formal complaint or accusation of misconduct including, but not limited to, any allegations involving sexual harassment, creating a hostile work environment or conditions, or discriminatory behavior against you with any regulatory or investigatory agency or with your employer? If so, please state the date of complaint or accusation, specifics surrounding the complaint or accusation, and the resolution or disposition.

Not to my knowledge.

58. Are you currently the subject of an investigation which could result in civil, administrative, or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation, and the expected completion date of the investigation.

No. In July 2025, I met with an investigator with the State Attorney for the Second Circuit because I was a witness in connection to the transfer of $10 million to the Hope Florida Foundation from a settlement agreement with Centene Corporation. My involvement in that settlement was limited to signing a settlement agreement after obtaining the Attorney General's approval and a handful of emails. In October, the State Attorney contacted and told me that I was

a witness in the matter, not a target, and that I had fully cooperated and provided truthful and complete information. I expect that investigation to be completed shortly.

59. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you, this includes any corporation or business entity that you were involved with? If so, please provide the case style, case number, approximate date of disposition, and any relevant details surrounding the bankruptcy.

No.

60. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

61. Please explain whether you have complied with all legally required tax return filings. To the extent you have ever had to pay a tax penalty or a tax lien was filed against you, please explain giving the date, the amounts, disposition, and current status.

I have filed my taxes for each year.

HEALTH

62. Are you currently addicted to or dependent upon the use of narcotics, drugs, or alcohol?

No.

63. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism? If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.] Please describe such treatment or diagnosis.

No.

64. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner: experiencing periods of no sleep for two or three nights, experiencing periods of hyperactivity, spending money profusely with extremely poor judgment, suffering from extreme loss of appetite, issuing checks without sufficient funds, defaulting on a loan, experiencing frequent mood swings, uncontrollable tiredness, falling asleep without warning in the middle of an activity. If yes, please explain.

No.

65. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner? If yes please explain the limitation or impairment and any treatment, program or counseling sought or prescribed.

No.

66. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, provide full details as to court, date, and circumstances

No..

67. During the last ten years, have you unlawfully used controlled substances, narcotic drugs, or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal or State law provisions.)

No.

68. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned, or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs, or illegal drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action

No.

69. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal, and the reason why you refused to submit to such a test.

No.

70. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No.

SUPPLEMENTAL INFORMATION

71. Describe any additional education or experiences you have which could assist you in holding judicial office.

72. Explain the particular contribution you believe your selection would bring to this position and provide any additional information you feel would be helpful to the Commission and Governor in evaluating your application.

I believe that I bring a unique set of experiences that could be helpful to the Florida Supreme Court. I have practiced law for more than twenty-five years, handling a wide variety of civil and criminal cases during that time. I have tried cases before juries and understand practically what that entails. Because of my time as Chief Deputy, I have great familiarity with the Florida Supreme Court, its jurisdiction, and its role. The Attorney General is the most frequent litigant and counsel before the Florida Supreme Court, including death penalty appeals, citizen initiative challenges, and redistricting. I personally litigated a citizen initiative case before the court and was involved with numerous other initiative cases. Because of my role, I supervised lawyers handling death penalty appeals and the decennial redistricting. My role required me to become familiar with the current issues, the process, and the standards that apply to each. I was also heavily involved in the public policy issues that face Florida's courts. It was part of my job to advocate and lobby in the legislature on behalf of the Office of Attorney General whether that was for the office's budget or changes to Florida law, like the Uniform Bail Schedule, which the Florida Supreme Court sets. Finally, I administered a state agency. I have experience running a large enterprise and the issues that such an enterprise experience. I believe that my background and experiences make me prepared and well suited to handle the role of a Florida Supreme Court justice.

REFERENCES

73. List the names, addresses, e-mail addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for a judicial position and of whom inquiry may be made by the Commission and the Governor.

Ashley Moody, United States Senator, SR 387, Russell Senate Office Building, Washington, DC 20002, (813) 514-7314, justin_roth@moody.senate.gov;

Laurel Moore Lee, Congresswoman, 1118 Longworth House Office Building, Washington, DC 20515-0004, (813) 765-5828 , laurel.m.lee@mail.house.gov;

James Uthmeier, Attorney General for the State of Florida, PL-01, The Capitol, Tallahassee, FL 32399, (850) 225-5299, cate.mcneill@myfloridalegal.com;

Ryan Newman, General Counsel, Executive Office of the Governor, 400 S. Monroe St., Tallahassee, FL32399, (512) 567-9121, ryan.newman@eog.myflorida.com;

Henry Whitaker, Counselor to the Attorney General of the United States, 950 Pennsylvania Ave. NW, Washington DC 20530, (202) 641-4450, henry.whitaker@usdoj.gov;

James Percival II, General Counsel for the United States Department of Homeland Security, 2707 Martin Luther King Jr Ave. SE, MSC 0525, Washington, DC 20528, (831) 818-4526, james.percival@hq.dhs.gov;

Patricia Conners, 106 E. College Ave., Suite 700, Tallahassee, FL 32301. (850) 354-7622, tconners@stearnsweaver.com;

Daniel Bell, 950 Pennsylvania Ave. NW, Washington, DC 20530, (786) 473-2923, Daniel.bell@usdoj.gov;

Nathan Berman, Zuckerman Spaeder LLP, 101 E. Kennedy Blvd., Suite 1200, Tampa, FL 33602, (813) 221-1010, nberman@zuckerman.com; **and**

Kelli Edson, Quarles & Brady LLP, 101 E. Kennedy Blvd., Suite 3400, Tampa, FL 33602, (813) 387-0268, kelli.edson@quarles.com.

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 8th day of December, 2025

John Guard

Printed Name

Signature

State of Florida
County of Hillsborough

Sworn to (or affirmed) and subscribed before me by means of
☑physical presence OR ☐online notarization
this 8th day of December, 2025

By_____
☐Personally known ____
☑Produced ID____
Type of Identification DL License: [redacted]

Signature Notary Public

VICTOR D. ZELAYA
Commission # HH 701898
Expires July 23, 2029

Printed name of Notary Public

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: $170,956.79

Last Three Years: $197,371.55 $187,459.07 $168,006.12

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: $170,956.79

Last Three Years: $197,371.55 $187,459.07 $168,006.12

3. State the gross amount of income or loses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current Year-To-Date: $0

Last Three Years: Real Property Sale $1,489,566 $0 $0

4. State the amount you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current Year-To-Date: $0

Last Three Years: Real Property $622,590 $0 $0

5. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current Year-To-Date: $0

Last Three Years: Real Property $622,590 $0 $0

FORM 6
FULL AND PUBLIC
DISCLOSURE OF
FINANCIAL INTEREST

PART A – NET WORTH

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of 11/11, 20 25 was $ 1,548,914.30

PART B - ASSETS

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds $1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is $ 30,000

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
See Attached Schedule	

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
	0.00

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
	0.00

PART D - INCOME

You may ***EITHER*** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments,* ***OR*** (2) file a sworn statement identifying each separate source and amount of income which exceeds $1,000 including secondary sources of income, by completing the remainder of Part D, below.

☐ I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.
(if you check this box and attach a copy of your latest tax return, you need *not* complete the remainder of Part D.]

PRIMARY SOURCE OF INCOME (See Instructions on page 5):

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
State of Florida	PL-01, The Capitol, Tallahassee	$197,371.55

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSINESS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
N/A			

PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY	N/A		
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE ☑

OATH

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

John Gaard

SIGNATURE

STATE OF FLORIDA

COUNTY OF Hillsborough

Sworn to (or affirmed) and subscribed before me this 11th day of November, 2025 by John Guard

(Signature of Notary Public—State of Florida)

Ryan M. Donoghue

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known_____ *OR* Produced Identification DL

Type of Identification Produced FL DL

RYAN MATTHEW DONOGHUE
MY COMMISSION # HH 573453
EXPIRES: September 22, 2028

STATEMENT OF ASSETS
AS OF NOVEMBER 11, 2025

Personal Residence- [redacted].	$430,000.00
Automobiles	$ 50,000.00
Household Goods	$ 30,000.00
Bank of America, N.A. Accounts	$ 67,133.51
Marcus by Goldman Sachs Accounts	$524,348.25
Retirement Account- JP Morgan Large Cap Growth Fund R6	$233,342.79
Retirement Account- Vanguard Targeted Retirement 2040 Trust II	$125,555.02
IRA-T Rowe Price Health	$ 29,137.45
IRA- T Rowe Price Spectrum	$ 11,916.94
Thrift Savings Plan (G Fund)	$ 47,480.34
Total	**$1,548,914.30**

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: 12/8/25

JNC Submitting To: Florida Supreme Court

Name (please print): John Guard

Current Occupation: Lawyer

Telephone Number: 813-789-4468 Attorney No.: 374600

Gender (check one): ☑ Male ☐ Female

Ethnic Origin (check one):
- ☐ White, non-Hispanic
- ☐ Hispanic
- ☐ Black
- ☐ American Indian/Alaskan Native
- ☐ Asian/Pacific Islander

County of Residence: Hillsborough

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR
FDLE TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

John Guard

Printed Name of Applicant

Signature of Applicant

Date: 12/8/25

Filing # 160677136 E-Filed 11/04/2022 03:27:55 PM

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Plaintiff, CASE NO.: 2022 CA 000541

v.

SARASOTA COUNTY PUBLIC HOSPITAL DISTRICT,
d/b/a Memorial Healthcare System, Inc.,
LEE MEMORIAL HEALTH SYSTEM,
d/b/a Lee Health,
NORTH BROWARD HOSPITAL DISTRICT,
d/b/a Broward Health,
HALIFAX HOSPITAL MEDICAL CENTER,
d/b/a Halifax Health,
WEST VOLUSIA HOSPITAL AUTHORITY,
SCHOOL BOARD OF MIAMI-DADE COUNTY, and
SCHOOL BOARD OF PUTNAM COUNTY.

Defendants.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

Pursuant to Rule 1.510(a) of the Florida Rules of Civil Procedure, the Office of the Attorney General, Department of Legal Affairs, State of Florida (the "Office of Attorney General") moves for summary judgment on its claims against Sarasota County Public Hospital District ("Memorial Healthcare"), Lee Memorial Health System ("Lee Health"), North Broward Hospital District ("Broward Health"), Halifax Hospital Medical Center ("Halifax Health"), and South Broward Hospital District ("South Broward") (collectively, Memorial Healthcare, Lee Health, Halifax Health, and South Broward are referred to as the "Hospital Defendants"), the School Board of Miami-Dade County ("SBMD"), and the School Board of Putnam County

("SBPC") (collectively, SBMD and SBPC are referred to as the "School Defendants" and the School Defendants and the Hospital Defendants are, collectively, referred to as the "Defendants") and seeks judgment against the Defendants on their affirmative defenses and counterclaims (the "Motion") and states the following in support of its Motion:

INTRODUCTION

"A State's chief legal officer without the authority to conduct the State's litigation would be no legal officer at all."[1] Ashley Moody (the "Attorney General") received 4,232,532 votes across the State of Florida (the "State") in 2018 and was elected Florida's Attorney General.[2] The Defendants in this case, all political subdivisions of the State, seek to usurp and impair the Attorney General's constitutional, statutory, and common law powers, threatening to render the elected Attorney General just another government attorney. The Defendants' assertion of either superiority to or equality with the State in litigation is unsupported by law. The Defendants' assertion of independence from the State is also inconsistent with the incontrovertible fact that the Defendants each derive their authority and their existence from the State. Finally, the Defendants' assertion that the State's litigation does not bind them is inconsistent with Florida statutes and also court decisions that have repeatedly held that the Attorney General has broad authority (and is granted significant deference) to bring and settle matters of public interest.

Putting aside the lack of legal support and the law arrayed against them, the practical problem with the Defendants' position in this case is that the State is subdivided into 67

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[1] *Barati v. State*, 198 So. 3d 69, 84-85 (Fla. 1st DCA 2016) (concluding the Attorney General had the authority to dismiss a *qui tam* action over the objection of a plaintiff).

[2] https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE= (last visited June 3, 2022); Request for Judicial Notice, ¶1.

counties,[3] 411 cities, towns, and villages,[4] 67 school boards,[5] and 1,870 special districts.[6] Many of those 2,415 political subdivisions overlap and represent the same Floridians. Defendants' position would mean that the State seeking to abate an epidemic, killing twenty-three Floridians a day,[7] cannot release any subdivision's claim on behalf of its citizens and each of the 2,415 overlapping subdivisions must do so independently. No statewide legal problem could ever be resolved if the Defendants' assertion were true and the law in this State.

While this case is about settlements, it is also one of life or death. Roughly four years earlier, when the then Attorney General, Pamela Jo Bondi, began the State's opioid litigation, the Florida Medical Examiners Commission (the "Commission") disclosed that 2,773 Floridians had died from opioid related deaths in the first half of 2018 alone.[8] What was then declared by former Governor Scott a public health emergency[9] has only gotten worse: In the first half of 2021, opioids took more than 4,140 lives—a nearly 50% increase in deaths compared to 2018.[10]

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[3] Fla. Stat., Ch. 7 (2022); Request for Judicial Notice, ¶2.

[4] http://floridaleagueofcities.com/research-resources/municipal-directory (last visited October 31, 2022); Request for Judicial Notice, ¶3.

[5] Fla. Stat. § 1001.30; Request for Judicial Notice, ¶4.

[6] http://specialdistrictreports.floridajobs.org/webreports/StateTotals.aspx (last visited October 31, 2022); Request for Judicial Notice, ¶5.

[7] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2021-Interim-Drug-Report-FINAL.aspx (last visited October 31, 2022); *also* Declaration of John Guard, Ex. C. The Commission recently published a report disclosing 4,140 opioid related deaths in the first half of 2021, roughly twenty-three Floridians a day. *Id.*

[8] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2018-Interim-Drug-Report-FINAL.aspx (last October 31, 2022); Declaration of John Guard, Ex. C.

[9] https://www.flgov.com/wp-content/uploads/2017/05/17146.pdf (last visited October 31, 2022); Request for Judicial Notice, ¶9.

[10] Declaration of John Guard, Ex. C.

In the face of that worsening crisis, the current Attorney General entered a series of historic opioid settlements promising recovery of more than three billion ($3,000,000,000) dollars for the State and its political subdivisions (the "Opioid Settlements"). Those monies must be appropriated by the legislature and others who directly receive settlement funds to abate an ongoing public nuisance, the opioid epidemic.

In the end, this dispute is about who should control funds that are critical to addressing statewide harms. If the Defendants wish to receive settlement proceeds from the Opioid Settlements, the Defendants should execute the participation forms associated with each of the Opioid Settlements and seek monies from the legislature or the counties and cities where the settlement funds will be received. As the evidence will show, the Defendants each already seek monies from the legislature, and this Court should make clear that Defendants cannot try to undermine a historic settlement in an effort to jump other subdivisions in line. Accordingly, the Court should grant summary judgment for the Office of the Attorney General and declare that she may settle opioid claims on behalf of the subdivisions.

LEGAL STANDARD

Florida Rule of Civil Procedure 1.510(a) provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). This rule is "applied in accordance with the federal summary judgment standard." *See id.*; *see also In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 317 So.3d 72, 74 (Fla. 2021). Courts may grant summary judgment when, as here, "the only question a court must decide is a question of law." *Glob. Travel Int'l, Inc. v. Mount Vernon Fire Ins. Co.*, 2021 WL 6070579, at *1 (M.D. Fla. Dec. 21, 2021) (citing *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011)).

UNDISPUTED FACTS

A. THE OPIOID EPIDEMIC NATIONWIDE

1. There is an opioid epidemic in the United States.[11] From 1999-2020, more than 564,000 Americans died from an opioid overdose.[12]

2. On October 26, 2017, President Trump declared the opioid epidemic a National Public Health Emergency.[13]

3. In 2020, nearly seventy-five percent, 70,029, of the 93,655 drug overdose deaths in the United States involved an opioid, a thirty percent increase in deaths from 2019.[14]

4. In 2021, there were 107,622 drug overdose deaths with 80,816 deaths involving an opioid, a fifteen percent increase in deaths from 2020.[15]

5. The opioid epidemic began with increased deaths from prescription opioids in or about 1999 and progressed in three marked phases over the last two plus decades: (1) prescription opioid pill abuse and diversion; (2) use of illicit opioids such as heroin; and (3) expansion of synthetic opioids.[16]

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[11] *See* United States Centers for Disease Control and Prevention, The Three Waves of Opioid Overdose Deaths, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited October 31, 2022); Request for Judicial Notice, ¶6.

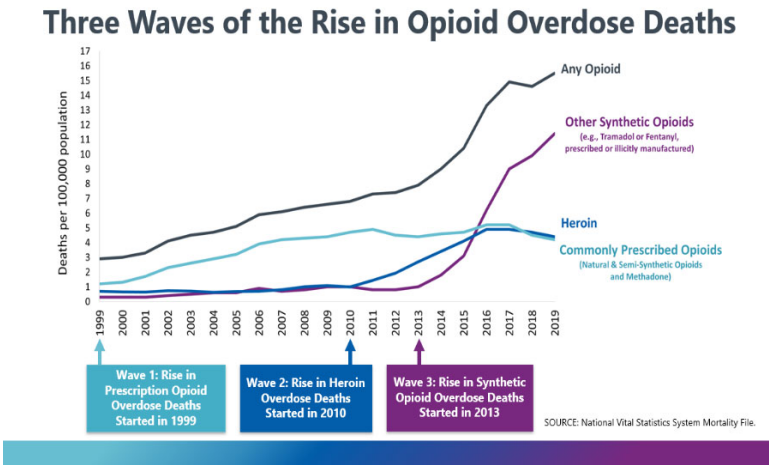
[12] *Id.*

[13] https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-heads-executive-departments-agencies/ (last visited October 31, 2022); Request for Judicial Notice, ¶10.

[14] *See* U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 - But Are Still Up 15% (cdc.gov) (last visited October 31, 2022); Request for Judicial Notice, ¶11.

[15] *See* U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 - But Are Still Up 15% (cdc.gov) (last visited October 31, 2022); Request for Judicial Notice, ¶12.

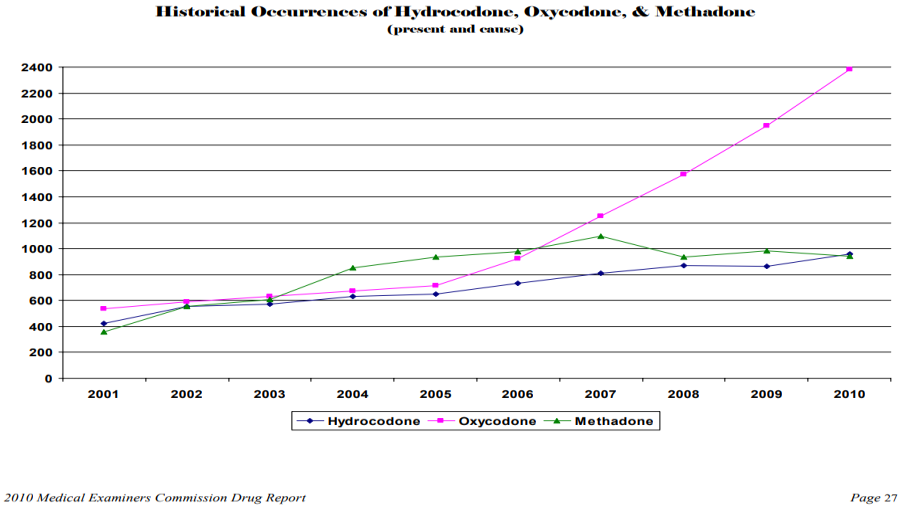
[16] *See* United States Centers for Disease Control and Prevention, The Three Waves of Opioid Overdose Deaths, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited October 31, 2022); Request for Judicial Notice, ¶13.



Id.

B. FLORIDA'S OPIOID EPIDEMIC

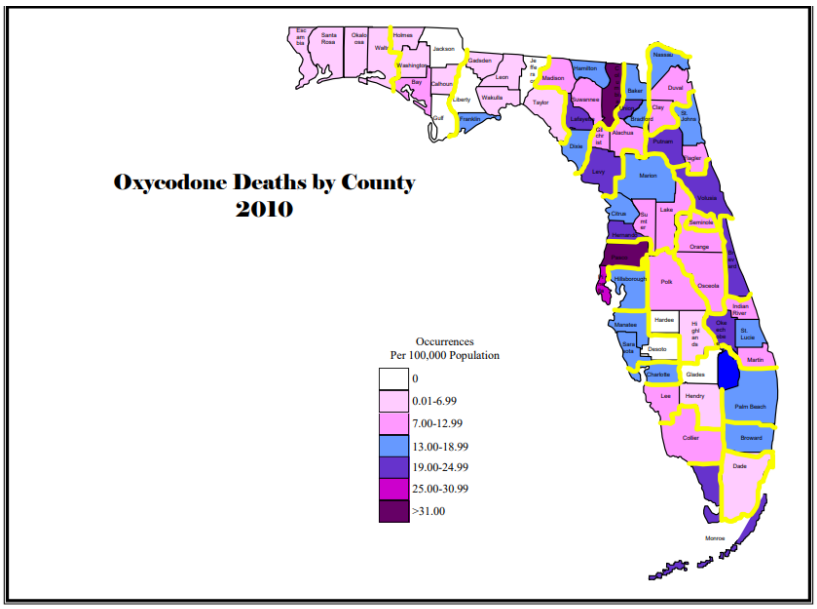
6. The State of Florida's opioid epidemic is a microcosm of the national opioid epidemic. In the late 1990s until 2010, prescription opioids, like oxycodone, drove drug overdose deaths in Florida.[17]



[17] See http://myfloridalegal.com/webfiles.nsf/WF/KGRG-8MMR9J/$file/2010DrugReport.pd f (last visited October 31, 2022); Declaration of John Guard, Ex. C.

Id.

7. The opioid overdose problem was not limited to one county or even one area of the State. *Id.* The map below shows a substantial number of oxycodone, a common prescription opioid abused, deaths in counties across the State.



Id.

8. After the legislature took a series of actions targeting prescription opioids,[18] including creating Florida's Prescription Drug Monitoring Program, the number of overdoses related to prescription opioids decreased, but not to pre-2000 levels.[19] The table below shows the decline in oxycodone related deaths from 2010 through 2015.

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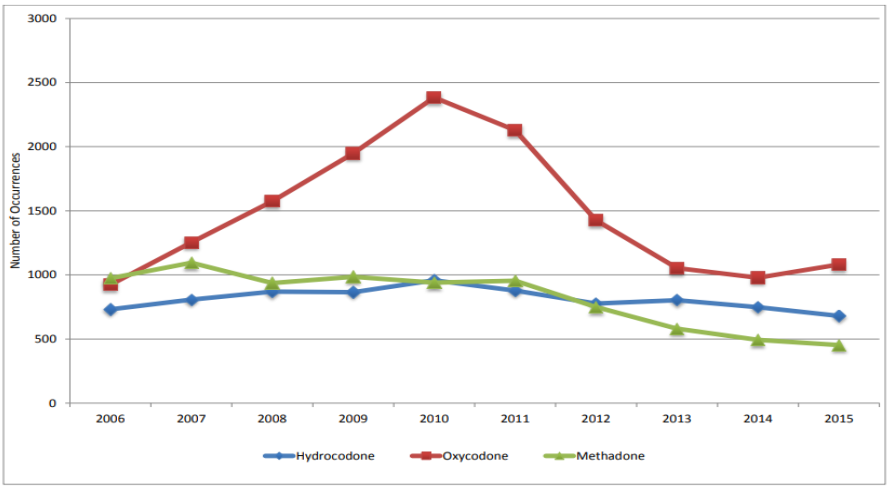
[18] See, e.g., CS/CS/HB 7095 (2011) (regulating "pill mills"); CS\CS\SB 440 (2009) (creating Florida's Prescription Drug Monitoring Program); CS/CS/CS/CS/SB 462 (2009); Request for Judicial Notice ¶¶7-8.

[19] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2015-Annual-Drug-Report.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C.

Occurrences of Hydrocodone, Oxycodone, and Methadone
(Present and Cause)
2006 to 2015

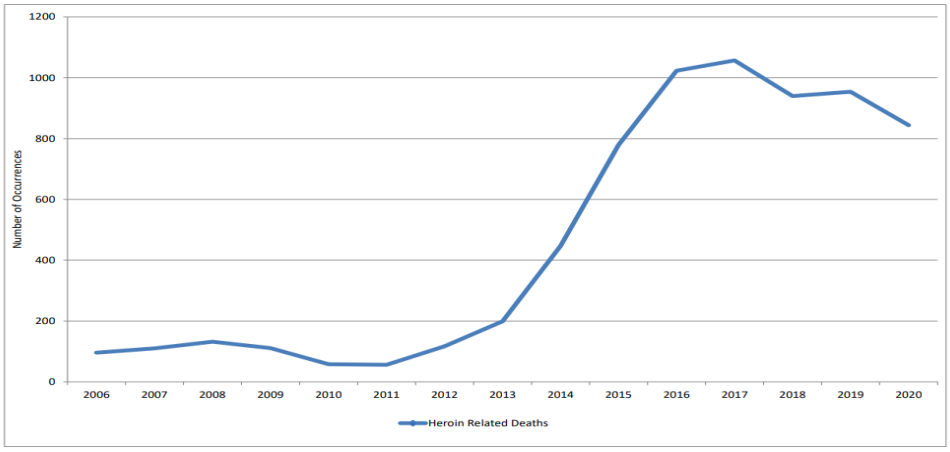


2015 Medical Examiners Commission Drug Report *Page 25*

Id.

9. As the deaths fell from prescription opioids after 2010, heroin related drug overdoses deaths rose.[20] The table below shows heroin deaths increasing from 2011 through 2017.

Historical Overview of Heroin Occurrences
(Present and Cause)
2006 to 2020

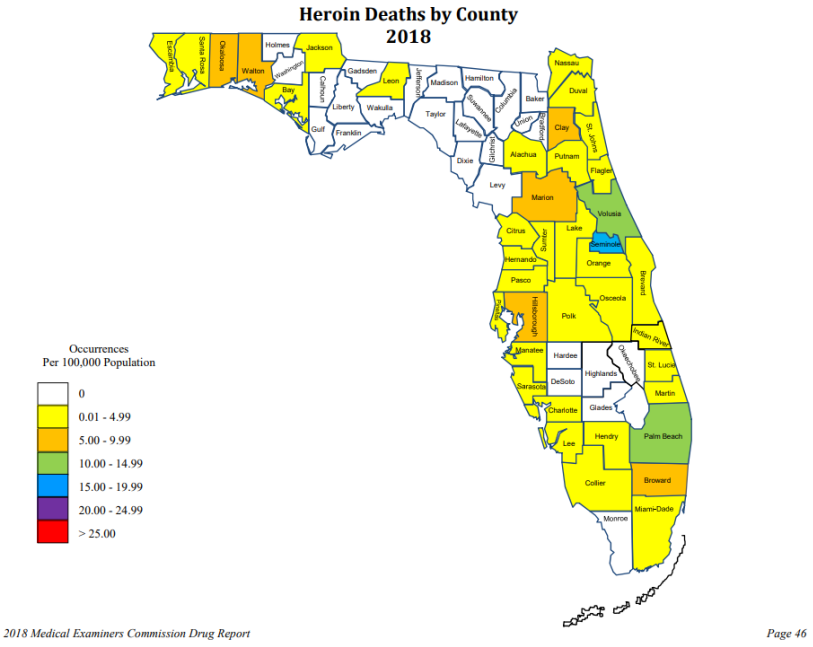


2020 Medical Examiners Commission Drug Report *Page 48*

20 https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2020-Annual-Drug-Report-FINAL.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C.

Id.

10. Like with prescription opioids, the heroin-related overdose deaths were not limited to one county or one area of the State but spread throughout the State. While there was significant overlap, the increase in heroin overdose deaths did not match exactly with the areas where there were the most prescription opioid overdose deaths previously.[21]



Id.

11. Heroin overdose deaths in the State were quickly overtaken by fentanyl overdose deaths.[22] Though, heroin overdose deaths remain more than four times what they were in 2011.[23]

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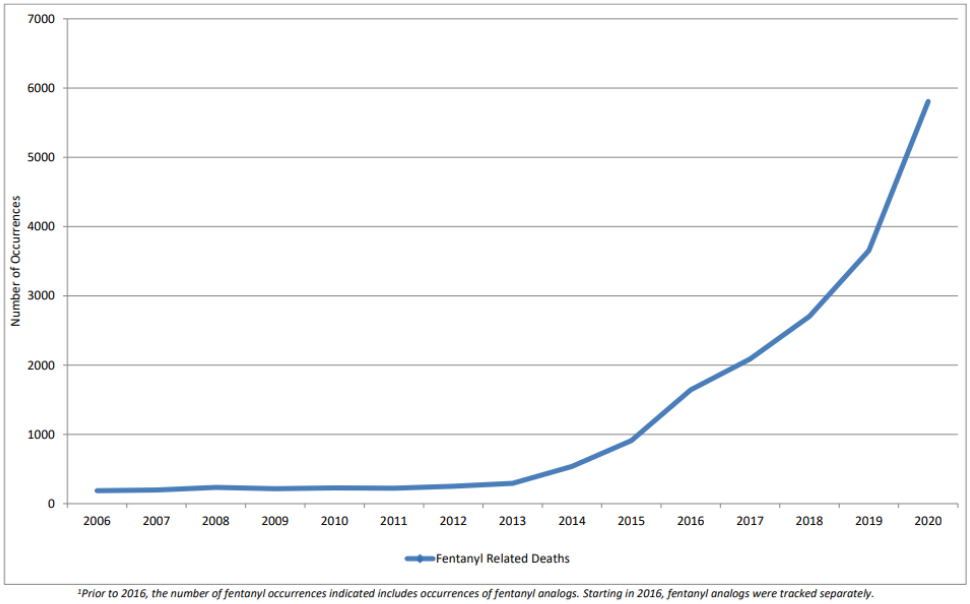
21 https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2018-Annual-Drug-Report.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C..

22 https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2020-Annual-Drug-Report-FINAL.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C..

23 *Id.*

Historical Overview of Fentanyl Occurrences[1]
(Present and Cause)
2006 to 2020



[1]Prior to 2016, the number of fentanyl occurrences indicated includes occurrences of fentanyl analogs. Starting in 2016, fentanyl analogs were tracked separately.

2020 Medical Examiners Commission Drug Report *Page 33*

Id.

12. On May 3, 2017, then Governor Rick Scott caused the opioid epidemic to be declared a public health emergency in the State.[24] In 2017, there were 6,178 opioid-related deaths in Florida.[25]

13. In January 2018, the Office of Attorney General solicited request for proposals for counsel to represent the State in connection with litigation related to the opioid epidemic with the request for proposal closing on January 31, 2018.[26]

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24 https://flgov.com/wp-content/uploads/2017/05/17146.pdf (last visited October 31, 2022); Request for Judicial Notice, ¶9.

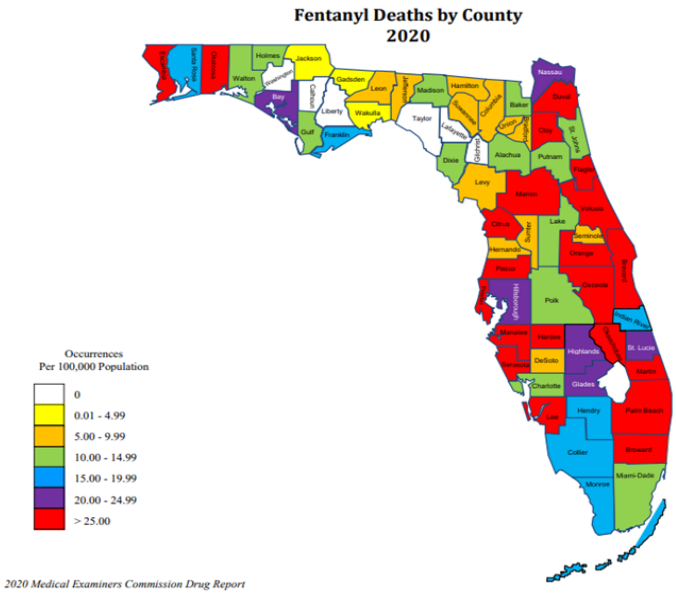
25 https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2017-Annual-Drug-Report.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C.

26 http://myfloridalegal.com/webfiles.nsf/WF/MNOS-AUXRAX/$file/OAGRequestforProposalFinal.pdf#:~:text=The%20State%20of%20Florida%2C%20Department%20of%20Legal%20Affairs%2C,possible%20establishment%20of%20a%20contract%20in%20this%20context. (last visited October 31, 2022); Declaration of John Guard, ¶26.

14. In 2018, there were 5,576 opioid-related deaths reported in the State or just over fifteen opioid-related overdose deaths a day.[27]

15. In 2020, the last year for which a final annual report has been released by the Commission, there were 7,842 opioid-related deaths reported or almost twenty-one and a half opioid-related overdose deaths a day.[28]

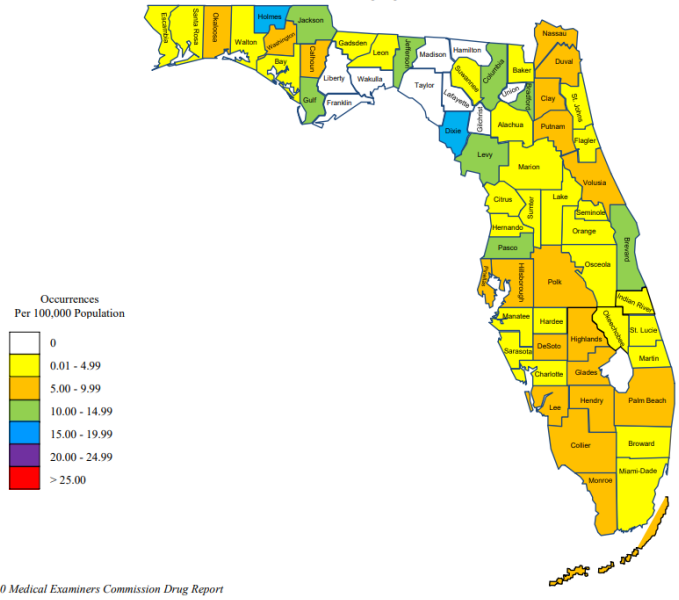
16. While fentanyl is the largest cause of overdose deaths in 2020, like in other recent years, those deaths no matter the type of opioids occurred across the State and not in one locale, county, or special district.



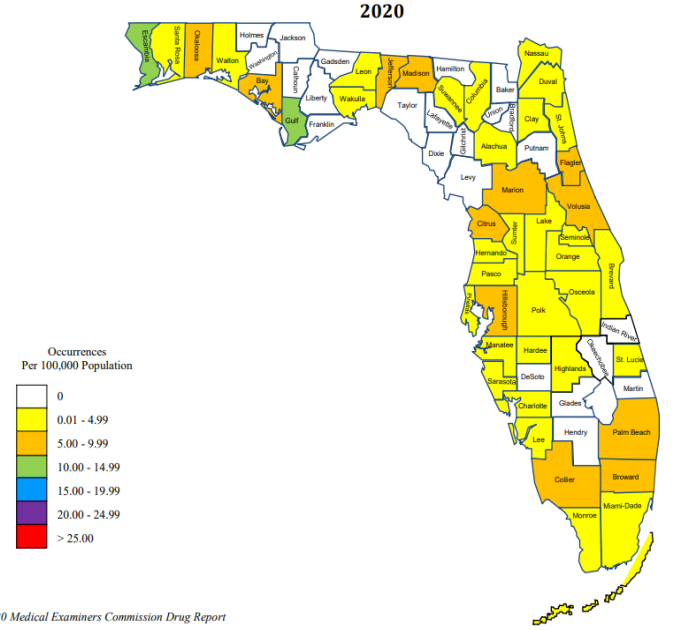
[27] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2018-Annual-Drug-Report.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C.

[28] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2020-Annual-Drug-Report-FINAL.aspx (last viewed October 31, 2022); Declaration of John Guard, Ex. C.

Oxycodone Deaths by County
2020



Heroin Deaths by County
2020



Id.

17. In the last publicly reported information by the Commission, there were 4,140 opioid-related deaths reported in the first half of 2021 or roughly twenty-three Floridians dying everyday of an opioid-related drug overdose.[29]

C. The State's Opioid Complaint

18. On May 15, 2018, the Office of Attorney General filed its initial complaint (the "Opioid Litigation") in the Sixth Judicial Circuit in and for Pasco County, Florida (the "State Court"). In its initial complaint of the Opioid Litigation, the Office of Attorney General brought claims against certain manufacturers and distributors who made and distributed opioids in Florida, including Purdue Pharma L.P., Purdue Pharma, Inc., The Purdue Frederick Co., Inc. (collectively, "Purdue"), Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc. (collectively, "Endo"), Janssen Pharmaceuticals, Inc., Johnson & Johnson (collectively, "Johnson & Johnson"), Cephalon, Inc., Teva Pharmaceuticals USA, Inc. (collectively, "Teva"), Allergan Finance, LLC, Actavis Pharma, Inc., Actavis LLC (collectively, "Allergan"), Insys Therapeutics, Inc. ("Insys"), AmerisourceBergen Drug Corp. ("ABDC"), Cardinal Health, Inc. ("Cardinal"), McKesson Corp. ("McKesson" and collectively ABDC, Cardinal, and McKesson are referred to as the "Distributors"), and Mallinckrodt LLC ("Mallinckrodt"). The Complaint alleged violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida's Racketeer Influenced and Corrupt Organization Act ("Florida RICO"), public nuisance, and negligence.

19. On November 16, 2018, the Office of Attorney General amended its complaint in the Opioid Litigation and added claims against two pharmacy chains who dispensed opioids in Florida, namely Walgreen Co. ("Walgreens"), CVS Healthcare Corp., and CVS Pharmacy, Inc.

[29] https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2021-Interim-Drug-Report-FINAL.aspx (last visited October 31, 2022); Declaration of John Guard, Ex. C.

(collectively, "CVS" and collectively, Purdue, Endo, Johnson & Johnson, Teva, Insys, the Distributors, Mallinckrodt, Walgreens and CVS are referred to as the "Opioid Defendants"), alleging similar causes of action as those in the initial complaint.

D. The Defendants

20. After the Attorney General filed her initial complaint, around one hundred Florida cities, counties, and other political subdivisions filed separate lawsuits, most which were transferred into the National Prescription Opiate Multidistrict Litigation (the "MDL") pending in federal court in the Northern District of Ohio.[30] Declaration of John Guard, ¶32.

Event	**Date**
Attorney General announces Request for Proposal	January 2018
Attorney General files State lawsuit	May 15, 2018
Sarasota Memorial files	September 18, 2018
Lee Health files	July 15, 2021
Broward Health files	September 16, 2019
Halifax Health files	September 16, 2019
School Board of Miami-Dade County files	September 30, 2019
School Board of Putnam County files	May 27, 2022

Id., ¶¶32-38.

21. The court responsible for the MDL appointed a Plaintiff's Executive Committee (the "PEC"), which included a lawyer representing hospitals, to coordinate litigation and settlement efforts amongst what would become almost three thousand subdivisions nationwide. Request for Judicial Notice, ¶15. Some of the Defendants actions were transferred into the MDL.

[30] *See* https://www.ohnd.uscourts.gov/sites/ohnd/files/2804TransferOrder.pdf (last viewed October 31, 2022); Request for Judicial Notice ¶14. A handful of subdivisions filed just prior to the State, but after the State had advertised a request for proposal for outside counsel to file the Opioid Litigation and counsel had been chosen. All the Defendants in this suit filed after the Office of Attorney General.

Even those Defendants whose actions were not transferred to the MDL, were represented by counsel on the PEC. *Id.*, ¶¶16-18.

22. The Florida counties, cities, and other political subdivisions sued utilizing public nuisance and similar theories as the State and made similar allegations against the Opioid Defendants alleging similar harms and damages to the identical citizens represented by the Office of Attorney General.[31] Declaration of John Guard, Ex. E.

1. Hospital Defendants

23. Memorial Healthcare,[32] Lee Health,[33] Broward Health,[34] Halifax Health,[35] and South Broward[36] are each independent special districts under Florida law[37] who provide health care services in a geographically defined part of the State. Originally, each of the Hospital Defendants were established to provide healthcare to the indigent.

24. The State each year appropriates money that is subsequently paid to each of the Hospital Defendants. The monies appropriated and paid include: (1) payments from Medicaid for Fee for Service ("FFS"); (2) payments from Medicaid for claims to managed care

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[31] The Florida subdivisions were not alone as thousands of lawsuits by political subdivisions of other states nationwide were filed.

[32] https://www.smh.com/Home/About-Us/State-of-Florida-Special-Districts-Required-Reporting-of-Information (last visited October 31, 2022); https://www.smh.com/Portals/0/Documents/Financial/SMH-Charter.pdf (last visited October 31, 2022).

[33] https://www.leehealth.org/about-us/our-leadership/special-district-information (last visited October 31, 2022).

[34] https://www.browardhealth.org/pages/NBHD (last visited October 31, 2022).

[35] https://halifaxhealth.org/about-us/our-history/ (last visited October 31, 2022).

[36] https://www.mhs.net/about/special-district-information (last visited October 31, 2022).

[37] An "independent special district" is a special a district that does not meet the requirements to be a dependent special district. Fla. Stat. §189.012(3). A "dependent special district" is a special district under the governance or control of a single municipality or single county. Fla. Stat. §189.012(2). Being an "independent" special district does not connote that the district is free from the authority or control of the State. Instead, it reflects that the special district is free from control by other subdivisions.

organizations ("MCO"); (3) low income pool payments ("LIP"); (4) disproportionate share hospital program payments for treating a disproportionate share of indigent patients; and (5) payments for being a teaching hospital, which are referred to as graduate medical education ("GME") payments.

25. The Hospital Defendants received from over $700 million to almost $1 billion in payments from the State each year for the last six fiscal years. The below table contains the payments made by the State to each of the Hospital Defendants' since 2016.

Medicaid Provider ID	Hospital Name	SFY 16-17	SFY 17-18	SFY 18-19	SFY 19-20	SFY 20-21	SFY 21-22	Total per Hospital
012040500	BROWARD HEALTH CORAL SPRINGS	$ 24,488,150	$ 26,224,132	$ 43,600,390	$ 22,800,778	$ 25,009,187	$ 29,931,022	**$ 172,053,658**
010821900	BROWARD HEALTH IMPERIAL POINT	$ 9,260,810	$ 10,506,458	$ 14,583,630	$ 9,009,138	$ 9,666,074	$ 11,390,709	**$ 64,416,819**
010012900	BROWARD HEALTH MEDICAL CENTER	$ 55,341,696	$ 42,516,642	$ 46,920,667	$ 69,537,430	$ 63,439,955	$ 100,440,713	**$ 378,197,103**
010021800	BROWARD HEALTH NORTH	$ 40,673,235	$ 36,924,516	$ 35,048,235	$ 27,996,586	$ 28,378,677	$ 25,934,581	**$ 194,955,829**
011971700	CAPE CORAL HOSPITAL	$ 13,148,780	$ 35,823,663	$ 20,202,197	$ 23,357,296	$ 25,760,746	$ 33,305,989	**$ 151,598,671**
011134100	GULF COAST MEDICAL CENTER LEE MEMORIAL HEALTH SYSTEM	$ 17,719,680	$ 42,193,419	$ 27,666,944	$ 25,884,639	$ 33,538,492	$ 41,079,347	**$ 188,082,520**
010184200	HALIFAX HEALTH MEDICAL CENTER	$ 53,568,259	$ 62,639,672	$ 74,489,146	$ 62,325,986	$ 62,927,488	$ 91,465,348	**$ 407,415,899**
010110900	LEE MEMORIAL HOSPITAL	$ 181,848,546	$ 125,082,976	$ 144,239,751	$ 126,457,610	$ 158,590,879	$ 180,494,706	**$ 916,714,468**
010345400	MEMORIAL HOSPITAL MIRAMAR	$ 22,679,344	$ 18,572,462	$ 32,354,198	$ 15,937,076	$ 17,202,307	$ 24,494,123	**$ 131,239,509**
010222900	MEMORIAL HOSPITAL PEMBROKE	$ 30,043,437	$ 23,855,478	$ 34,979,157	$ 17,736,129	$ 20,248,885	$ 24,743,515	**$ 151,606,601**
010252100	MEMORIAL HOSPITAL WEST	$ 43,416,260	$ 48,069,812	$ 82,576,617	$ 41,784,050	$ 46,440,634	$ 54,905,436	**$ 317,192,810**
010020000	MEMORIAL REGIONAL HOSPITAL	$ 263,425,347	$ 237,062,442	$ 314,624,259	$ 218,934,284	$ 218,608,225	$ 270,525,609	**$ 1,523,180,166**
010176100	SARASOTA MEMORIAL HOSPITAL	$ 47,882,292	$ 59,730,352	$ 75,817,509	$ 61,971,858	$ 71,431,796	$ 91,011,597	**$ 407,845,404**
	Total per SFY	**$ 803,495,838**	**$ 769,202,022**	**$ 947,102,698**	**$ 723,732,859**	**$ 781,243,344**	**$ 979,722,695**	**$ 5,004,499,456**

26. Memorial Healthcare was first established in 1949.[38] It was recodified by Chapter 2003-359, Laws of Florida, as amended by Chapter 2005-304, Laws of Florida.[39] It is an independent special district existing completely within Sarasota County.[40]

[38] https://www.smh.com/Home/About-Us/State-of-Florida-Special-Districts-Required-Reporting-of-Information (last visited October 31, 2022).

[39] https://www.smh.com/Portals/0/Documents/Financial/SMH-Charter.pdf (last visited October 31, 2022).

[40] *Id.*

27. Lee Health was first established in 1916.[41] It was recodified by Chapter 2000-439, Laws of Florida.[42] It is an independent special district located within Lee County.[43]

28. Broward Health was first established in 1951.[44] It was recodified by Chapter 2006-347, Laws of Florida, and subsequently amended in Chapter 2007-299, Laws of Florida.[45] It is an independent special district located in the northern part of Broward County.[46]

29. Halifax Health was first established in 1925.[47] It was recreated by Chapter 2003-374, Laws of Florida. It is an independent special district located in Volusia County.

30. South Broward was first established in 1947.[48] It was recreated by Chapter 2004-397, Laws of Florida.[49] It is an independent special district in the southern portion of Broward County.[50]

31. With the exception of South Broward, the Hospital Defendants filed suit after the Attorney General asserting similar misconduct and claims by the Opioid Defendants and seeking damages on behalf of Florida's citizens within their districts.

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41 https://www.leehealth.org/about-us/get-to-know-lee-health/lee-health-fast-facts (last visited October 31, 2022).

42 https://www.leehealth.org/getmedia/744d98de-1c71-4d23-8bca-638dcd5b1ec7/EnablingLegislationHB1615clear.pdf (last visited October 31, 2022).

43 *Id.*

44 https://www.browardhealth.org/pages/nbhd (last visited October 31, 2022).

45 *Id.*

46 *Id.*

47 *Halifax Hospital Medical Center v. State,* 278 So. 3d 545, 546 (Fla. 2019).

48 https://www.mhs.net/about/special-district-information (last visited October 31, 2022).

49 https://www.mhs.net/-/media/mhs/files/about-us/special-district-posting/charter-sbhd.ashx?la=en&hash=7EDC3752FE81482FAE7A71222B1A4537 (last visited October 31, 2022).

50 *Id.*

32. South Broward intervened in this action as a party defendant despite never filing suit and many of its claims being likely barred by the statute of limitations.

2. School Defendants

33. Article IX, §4 of Florida's Constitution creates a school district in each of the State's counties.[51] The Florida Constitution further establishes a school board in each school district.[52] SBMD and SBPC are the school boards for the school districts in Miami-Dade County and Putnam County, respectively.

34. SBMD and SBPC are charged with operating, controlling, and supervising free public education services to children in their respective counties.[53]

35. The legislature appropriates monies each year to SBMD and SBPC, including monies for each child receiving exceptional student education services in its district.

36. SBMD filed an action asserting similar claims against the Opioid Defendants after the Office of Attorney General.

37. SBPC filed an action asserting similar claims against the Opioid Defendants after the Attorney General had announced settlements of part of the Opioid Litigation.

E. The Opioid Litigation and Settlements

38. After filing the Opioid Litigation, the Office of Attorney General became involved in nationwide discussions between the States and the PEC in addition to managing its litigation. The resulting historically complex challenge to manage litigation and potentially settle on a nationwide basis opioid-related claims consumed thousands of hours of the Attorney

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51 Fla. Const. Art. IX, §4.

52 *Id.*

53 *Id.*

General, the Office of Attorney General, and its outside counsel's time and effort. For nearly three years, the Office of Attorney General litigated extensively with the Opioid Defendants. It took one defendant (Walgreens) to trial, and at the same time negotiated with the remaining Opioid Defendants to provide the relief that the State and its citizens desperately need to abate the ongoing opioid epidemic.

39. In addition to litigation and settlement negotiations, four of the Opioid Defendants have now filed for bankruptcy: Purdue; Mallinckrodt; Insys; and Endo. Request for Judicial Notice, ¶¶25-28. Without settlements, almost all of the Opioid Defendants faced some prospect of bankruptcy resulting in diminished recoveries for all parties. Yet, again, the State led negotiating a plan of reorganization with respect to Purdue and its owners, the Sackler family. In addition to Purdue, the State was heavily involved in the other bankruptcies, including having its Chief Deputy Attorney General testify in the Mallinckrodt case.

40. After years of litigation and negotiation, the Attorney General finalized settlement agreements with (1) Johnson & Johnson (the "JJ Settlement");[54] (2) the Distributors (the "Distributor Settlement");[55] (3) Endo (the "Endo Settlement");[56] (4) CVS (the "CVS Settlement");[57] (5) Teva (the "Teva Settlement");[58] (6) Allergan (the "Allergan Settlement");[59] and (7) after almost four weeks of a jury trial, Walgreens (the "Walgreens Settlement")[60]

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54 *See* Declaration of John Guard, Ex. H.

55 *Id.*, Ex. G.

56 *Id.*, Ex. I.

57 *Id.*, Ex. L.

58 *Id.*, Ex. J.

59 *Id.*, Ex. K.

60 *Id.*, Ex. M.

(collectively, the JJ Settlement, the Distributor Settlement, the Endo Settlement, the CVS Settlement, the Teva Settlement, the Allergan Settlement, and the Walgreens Settlement are referred to collectively as the "Opioid Settlements").

41. On or about July 21, 2021, the first two of the settlements, the JJ Settlement and the Distributor Settlement were announced. On the announcement date or soon thereafter the PEC created a website that contained information, https://nationalopioidsettlement.com/, including a copy of the respective settlement agreement available to the Defendants and the public. In addition, the Attorney General issued a press release detailing the JJ Settlement and Distributor Settlement.[61] The Attorney General had previously launched an opioid settlement portal on her website that also contained settlement-related information and documents.[62] Within a few days, anyone who clicked on the "learn more" button in the opioid settlement portal on the Attorney General's website would have been taken to a page with links to the various agreements. *Id.*, ¶48.

42. The JJ Settlement and Distributor Settlement arose out of a multi-state negotiation between a bi-partisan group of States, including the State of Florida, members of the PEC, and JJ and the Distributors. *Id.*, ¶49.

43. After the JJ Settlement and Distributor Settlement were announced the agreements contemplated the signing on of subdivisions before the agreements were finalized. *Id.*, ¶50.

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[61] https://www.myfloridalegal.com/newsrel.nsf/newsreleases/3E0B4F544646DBC1852587190063384F.

[62] https://myfloridalegal.com/opioidsettlement.

44. On or about February 25, 2022, the JJ Settlement and Distributor Settlement were finalized. *Id.*, ¶51. As of October 31, 2022, 267 subdivisions have signed on to both the JJ Settlement and the Distributor Settlement. *Id.*, ¶52.

45. As the sign-on process for the JJ Settlement and the Distributor Settlement occurred, having had their summary judgment motions denied in the Opioid Litigation, the remaining defendants, except Walgreens, settled with the Attorney General before trial began. Walgreens went to trial with the Attorney General for four weeks and settled prior to the Attorney General resting her case. With each settlement, the Attorney General has updated her portal with settlement-related information and documents, including all the settlement agreements. *Id.*, ¶55.

1. The Distributor Settlement

46. On July 21, 2021, the Distributor Settlement was announced. Under the terms of the 571-page Distributor Settlement, the State of Florida, participating counties, and participating cities will receive up to $1,303,588,941.75 paid over eighteen years. A copy of the Distributor Settlement is attached to the Copy of the Consent Judgment entered by the State Court is attached as Exhibit G to the Declaration of John M. Guard. Substantially all the monies paid by the Distributors must be utilized to abate the opioid epidemic within a state.

47. The amount paid under the Distributor Settlement varies based on a complicated set of incentives that pay more for the more subdivision participation a state provides the Distributors. The Distributor Settlement allows for several different pathways for a state to earn those incentives. Under the Distributor Settlement, if a state enacts a legislative bar[63] or obtains a

[63] Some Defendants make much of the fact that several bills were introduced in the legislature to bar claims of subdivisions during the 2021 session, claiming that these bills are proof that the Attorney General lacks settlement authority. Far from reflecting that the Attorney General lacks the asserted authority; the proposed legislation reflects the legislature attempting to maximize the amounts under the Distributor Settlement.

ruling from a court that non-participating subdivisions' claims are barred against the Distributors, also known as a judicial bar, a state and its participating subdivision receive the full amount. If a bar could not be obtained, the Distributor Settlement allows a state to earn three incentives which, in total, comprise the full settlement amount. A state can earn these incentives by (1) signing on subdivisions litigating against the Distributors, known as Incentive Payment B; (2) signing on cities or counties that have a population greater than 30,000 whether litigating or not, known as Incentive Payment C; and (3) keeping subdivisions from filing claims against the Distributors after the agreement is final or causing later-filed claims to be dismissed pursuant to a motion to dismiss, known as Incentive Payment D.

48. The percentage of the population participating in the Distributor Settlement determines how much of Incentive Payment B and Incentive Payment C a state receives. For example, Incentive B pays more when more of a state's eligible population participates in the settlement:

Percentage of Litigating Subdivision Population that is Incentive B Eligible Population	**Incentive Payment B Eligibility Percentage**
Up to 85%	0%
85%+	30%
86%+	40%
91%+	50%
95%+	60%
99%+	95%
100%	100%

Distributor Settlement, at 20.

49. To calculate incentives, the Distributor Settlement utilizes population for cities, counties, and special districts (like a hospital district or a school district). But, unlike cities or counties, the Distributor Settlement does not treat special districts the same as a city or county. Instead, the Distributor Settlement utilizes the number of students in a school district eligible for

certain exceptional student education programs and 25% of discharges in the case of hospital districts as the population of those subdivisions. The provision reads:

> *Population of Special Districts*. For any purpose in this Agreement in which the population of a Special District is used other than Section IV.F.1.b: (a) School Districts' population will be measured by the number of students enrolled who are eligible under the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act of 1973; (b) Health Districts' and Hospital Districts' population will be measured at twenty-five percent (25%) of discharges; and (c) all other Special Districts' (including Fire Districts' and Library Districts') population will be measured at ten percent (10%) of the population served. The Settling Distributors and the Enforcement Committee shall meet and confer in order to agree on data sources for purposes of this Section prior to the Preliminary Agreement Date.

Distributor Settlement, at 54.

50. The result reflects that, by the time school districts and hospital districts are reached, governments representing the same Floridians as those that are in a special district have released the same claims arising out of the same facts and occurrences two or three times. For example, in the case of SBMD, the State, Miami-Dade County, and the City of Miami (or whatever other municipality where a student resides) will have released their claims against the Opioid Defendants. The result of the different definition and treatment is that, while the special and school districts count, the special and school districts do not count as much as cities or counties.

51. As to what effect the Defendants can have under the Distributor Settlement, except South Broward and SBPC, the Defendants may cause reductions to Incentive Payment B by preventing the State from reaching 100% participating litigating subdivision population, allowing the State to only recover a lesser percentage of Incentive Payment B. Currently, the number of subdivisions participating in the Distributor Settlement means that the State has more

than 99% of the litigating population participating in the Distributor Settlement. In other words, because the State does not have SBMD or the other litigating defendants (the Defendants other than SBPC and South Broward) participating in the settlement, it does not have 100% of the litigating population participating in the settlement for Incentive B purposes and the State only qualifies for 95% of that particular incentive.

52. South Broward and SBPC, on the other hand, could implicate the State's Incentive Payment D, as neither were litigating against the Distributors at the time of the Distributor Settlement.

53. After the announcement, there was a sign-on of subdivisions. As of October 31, 2022, 267 subdivisions, including all 97 litigating counties and cities, have signed on to the Distributor Settlement. Given that level of participation, the Defendants (except for South Broward and SBPC) are currently reducing the settlement by $16,294,861.77 over eighteen years. South Broward and SBPC could reduce the settlement by up to $65,179,447.09 paid in years six through eighteen if South Broward Filed an action and either South Broward or SBPC survived a motion to dismiss.

54. In addition to the incentive payment structure, the Distributor Settlement has a complicated suspension and setoff structure. Under that structure, South Broward and SBPC could trigger a dollar-for-dollar reduction if they receive a judgment against the Distributors.

55. As part of the Distributor Settlement, the Attorney General was required to release to the maximum extent of her power opioid-related claims of—among other state-related entities—subdivisions, including the Defendants. The Distributor Settlement included in the definitions applicable to the release the following language:

> III. "Releasors." ***With respect to Released Claims***, (1) each Settling State; (2) each Participating Subdivision; and (3) ***without***

> ***limitation and to the maximum extent of the power of each Settling State's Attorney General*** and/or Participating Subdivision to release Claims, (a) ***the Settling State's*** and Participating Subdivision's ***departments, agencies, divisions, boards, commissions, Subdivisions, districts, instrumentalities of any kind*** and attorneys, including its Attorney General, and any person in his or her official capacity whether elected or appointed to serve any of the foregoing and any agency, person, or other entity claiming by or through any of the foregoing, (b) ***any public entities, public instrumentalities, public educational institutions, unincorporated districts, fire districts, irrigation districts, and other Special Districts in a Settling State***, and (c) any person or entity acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or other capacity seeking relief on behalf of or generally applicable to the general public with respect to a Settling State or Subdivision in a Settling State, whether or not any of them participate in this Agreement. The inclusion of a specific reference to a type of entity in this definition shall not be construed as meaning that the entity is not a Subdivision. Each Settling State's Attorney General represents that he or she has or has obtained (or will obtain no later than the Initial Participation Date) the authority set forth in Section XI.G. In addition to being a Releasor as provided herein, a Participating Subdivision shall also provide the Subdivision Settlement Participation Form referenced in Section VII providing for a release to the fullest extent of the Participating Subdivision's authority.

Distributor Settlement at 8-9 (emphasis added).

2. The JJ Settlement

56. On July 21, 2021, the JJ Settlement was also announced. Under the terms of the 508-page JJ Settlement, the State, participating counties, and participating cities will receive up to $299,628,185.54 paid over ten years. A copy of the JJ Settlement is attached to the Certified Copy of the Judgment entered by the State Court is attached as Exhibit H to the Declaration of John M. Guard. Substantially all the monies paid by JJ must be utilized to abate the opioid epidemic within a state.

57. The amount paid under the JJ Settlement varies based on a slightly different set of complicated incentives that pay more for the more subdivision participation in the settlement a state provides Johnson & Johnson. While similar to the Distributor Settlement, the JJ Settlement has several material differences to the Distributor Settlement. Though, like the Distributor Settlement, it allows for several different pathways for a state to earn those incentives in full. Under the Distributor Settlement, if a state enacts a legislative bar or obtains a ruling from a court that non-participating subdivisions' claims are barred against the Distributors (a judicial bar), the state and its participating subdivisions receive nearly the full amount within 90 days of the bar.[64] If a bar could not be obtained, the JJ Settlement allows a state to earn three incentives which, in total, comprise the full settlement amount. A state can earn these incentives by: (1) signing on subdivisions litigating against the JJ, known as Incentive Payment B; (2) signing on cities and counties that have a population greater than 30,000 whether litigating or not and having the ten largest subdivisions signed on, known as Incentive Payment C; and (3) keeping special districts from filing claims against the JJ after the agreement is final or causing later filed claims to be dismissed pursuant to a motion to dismiss, known as Incentive Payment D.

58. For purposes of calculating incentives, the JJ Settlement is similar to the Distributor Settlement.

59. Like with the Distributor Settlement, except South Broward and SBPC, the Defendants could cause reductions to Incentive Payment B by increasing the percentage of the State's non-participating population. South Broward and SBPC, on the other hand, could

[64] Again, some Defendants make much of the fact that several bills were introduced in the legislature to bar claims of subdivisions during the 2021 session. Far from reflecting that the Attorney General lacks the asserted authority, the legislature could have simply been attempting to recover the full amount of the JJ Settlement immediately.

implicate the State's Incentive Payment D, as neither were litigating against the JJ at the time of the JJ Settlement.

60. After the announcement, there was a sign-on of subdivisions. As of October 31, 2022, 267 subdivisions, including all 97 litigating counties and cities, have signed on to the JJ Settlement. Given that level of participation, the Defendants, except for South Broward and SBPC, are currently reducing the settlement by $8,890,735.99 approximately over ten years. South Broward and SBPC could reduce the settlement by up to $14,981,380.60 approximately paid after year six if they survived a motion to dismiss in the MDL.

61. Like with the Distributor Settlement, the JJ Settlement contains a similar release, which to the maximum extent of the power of each settling State's Attorney General purports to release subdivision claims arising out of opioid related misconduct. JJ Settlement at 9.

3. The Other Settlements

62. The Endo Settlement, the Teva Settlement, the Allergan Settlement, the CVS Settlement, and the Walgreens Settlement were negotiated directly between each of those defendants individually and the State. Given the success that the State had at signing-on subdivisions with the Distributor Settlement and the JJ Settlement, the remaining settlements do not contain the convoluted, complicated structures of the Distributor Settlement or JJ Settlement. The five later settlements contain nearly identical terms. *See* Declaration of John Guard, Exs. I-M.

63. Excluding fees and costs, those five settlements call for the payment of $1,414,114,999.00 over varying time periods. Endo was paid in a single year. CVS and Walgreens are paying over eighteen years. The value of each settlement is listed below:

Endo	$	55,000,000.00
Allergan	$	122,000,000.00

Teva	$	177,114,999.00
CVS	$	440,000,000.00
Walgreens	$	620,000,000.00
Total	$	1,414,114,999.00

64. A copy of the Endo Settlement is attached to the Copy of the Consent Judgment entered by the State Court is attached as Exhibit I to the Declaration of John M. Guard. Substantially all the monies paid by Endo must be utilized to abate the opioid epidemic within the State.

65. A copy of the Allergan Settlement is attached to the Copy of the Consent Judgment entered by the State Court is attached as Exhibit K to the Declaration of John M. Guard. Substantially all the monies paid by Allergan must be utilized to abate the opioid epidemic within the State.

66. A copy of the Teva Settlement is attached to the Certified Copy of the Consent Judgment entered by the State Court is attached as Exhibit J to the Declaration of John M. Guard. Substantially all the monies paid by Teva must be utilized to abate the opioid epidemic within the State.

67. A copy of the CVS Settlement is attached to the Certified Copy of the Consent Judgment entered by the State Court is attached as Exhibit L to the Declaration of John M. Guard. Substantially all the monies paid by CVS must be utilized to abate the opioid epidemic within the State.

68. A copy of the Walgreens Settlement is attached to the Certified Copy of the Consent Judgment entered by the State Court is attached as Exhibit M to the Declaration of John M. Guard. Substantially all the monies paid by Walgreens must be utilized to abate the opioid epidemic within the State.

69. The Endo Settlement, the Allergan Settlement, the Teva Settlement, the CVS Settlement, and the Walgreens Settlement are largely the same with the exceptions largely being with the injunctive relief agreed to by the particular Opioid Defendant. Like with the Distributor Settlement and the JJ Settlement, the remaining Opioid Defendants received a broad release of claims, including potentially the claims of the State's subdivisions. The definition of Releasor includes the same definition as in the Distributor Settlement and the JJ Settlement. It reads:

> (dd) "Releasors" means with respect to Released Claims:(1) the State; (2)each Participating Subdivision; and (3) without limitation and to the maximum extent of the power of each of the State, the Florida Attorney General and/or Participating Subdivision to release Claims, (a) the State of Florida's and each Subdivision's departments, agencies, divisions, boards, commissions, Subdivisions, districts, instrumentalities of any kind and any person in his or her official capacity, whether elected or appointed to lead or serve any of the foregoing, and any agency, person or entity claiming by or through any of the foregoing; (b) any public entities, public instrumentalities, public educational institutions, unincorporated districts, fire districts, irrigation districts, water districts, law enforcement districts, emergency services districts, school districts, hospital districts and other special districts in the State of Florida, and (c) any person or entity acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or other capacity seeking relief on behalf of or generally applicable to the general public with respect to the State of Florida or any Subdivision in the State of Florida, whether or not any of them participates in this Agreement. Nothing in this definition shall be construed to limit the definition of "Subdivision" in subsection A(gg) below.

Endo Settlement at 8.

70. While cities and counties not joining could reduce the amount of each of these settlements, school districts or hospital districts signing on have no effect on the amount. Unlike the Distributor Settlement and JJ Settlement and in lieu of the complicated incentive structure, the Attorney General agreed to file this suit and also seek a legislative bar.

71. As of October 31, 2022, over 245 subdivisions, including all the litigating counties and cities, have signed on to the Endo Settlement, Allergan Settlement, Teva Settlement, CVS Settlement, and the Walgreens Settlement.

72. The State Court at this point has entered final judgment against each of the above Opioid Defendants.

73. All the Opioid Settlements also contain injunctive relief to prevent the same misconduct as was alleged in the complaint.

4. The Florida Opioid Allocation and Statewide Response Agreement

74. In the course of negotiating the JJ Settlement and the Distributor Settlement over two hundred forty cities and counties joined what is known as the Florida Opioid Allocation and Statewide Response Agreement (the "Allocation Agreement").[65] The other settlements incorporated the Allocation Agreement and utilized a similar participation agreement and distribution structure. A copy of the Allocation Agreement is attached as Exhibit N to the Declaration of John M. Guard.

75. Under the Allocation Agreement, the State and Florida and its counties and cities agreed to a structure and limitations on the use of monies from the Opioid Settlements. Under the structure, settlement monies were split roughly in half with slightly more monies going to the counties and cities at the beginning of the settlements with more monies going to the State towards the end of the settlements. The State and the cities and counties who agreed to participate in the Allocation Agreement agreed to spend all settlement monies with limited

[65] The Allocation Agreement is attached as an exhibit to the Endo Settlement, the Teva Settlement, the Allergan Settlement, the CVS Settlement, and the Walgreens Settlement. It is also available at https://nationalopioidsettlement.com/wp-content/uploads/2021/11/FL-Opioid-AllocSW-Resp-Agreement.pdf. The nationalopioidsettlement.com website again was built by and maintained by the PEC.

exception on abating the opioid crisis. The State and its cities and counties agreed to a non-exclusive thirteen-page list of programs that settlement proceeds could be expended upon, including abatement strategies that can be used with the Defendants. These include treatment for neonatal abstinence syndrome, services for pregnant and postpartum women, programs to treat opioid use disorder and support for people in treatment and recovery and connecting people in need of addiction treatment. All these are vital remediation programs that the State, cities and counties could effectuate with the Defendants, if they chose to participate in the settlements.[66] If the Defendants choose not to participate, then the Defendants are ineligible from receiving funds.

DISCUSSION

This Court should grant the Office of Attorney General summary judgment because, as matter of law, the Attorney General had the authority to release the Defendants opioid-related claims and, in fact, did so.

I. The Attorney General Has Inherent Power to Release Defendants' Claims

A. The Attorney General's Powers

Florida and federal courts have found that the Attorney General's powers are exceedingly broad and ancient. *State ex rel. Shevin v. Exxon Corp.,* 526 F.2d 266, 268 (5th Cir. 1976) (analyzing the power of Florida's Attorney General). In *Shevin*, the former Fifth Circuit commented that the Attorney General's power was "older than the United States and older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion." *Shevin,* 526 F.2d at 268; *see also State ex rel Shevin v.*

[66] The Office of Attorney General originally sued West Volusia Hospital District in this case. After service of the Complaint, West Volusia Hospital District chose to sign on to the Opioid Settlements and the Allocation Agreement, and the claim against West Volusia Hospital District was subsequently dismissed.

Yarborough, 257 So.2d 891, 893 (Fla. 1972) (stating the Attorney General "inherited many powers and duties from the King's Counsellor at Common Law"). To effectuate these duties, the Attorney General (and her office) was, in addition to constitutional or statutory powers, bestowed with sweeping common law powers to protect the public. This inheritance of powers is well-steeped in the tradition of this country. As the Florida Supreme Court has recognized, "[t]he office of Attorney General has existed both in this country and in England for a great while. The office is vested by the common law with a great variety of duties in the administration of the government." *State ex rel Landis v. S.H. Kress & Co.,* 155 So.823, 827 (Fla. 1934).

Florida Courts have, dating back to the founding of this State, consistently reaffirmed that the source of the Attorney General's power derives from the crown:

> The Attorney-General is the attorney and legal guardian of the people, ***or of the crown, according to the form of government***. His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, ***and the protection of the people***, whenever directed by the proper authority, or when occasion arises . . . ***Our Legislature has not seen fit to make any change in the common law rule***. The office of the Attorney-General is a public trust. It is a legal presumption that he will do his duty, that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. ***The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control.***

State v. Gleason, 12 Fla. 190, 213-14 (Fla. 1868) (emphasis added). From this well-established tradition, Florida has bestowed the Attorney General with the full set of historic powers incident to the office. *See* Fla. Stat. §§ 16.01(2), (7). "As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. *Shevin,* 526 F.2d at 268 (internal footnotes omitted). "[T]he duties of such an office are so

numerous and varied that it has not been the policy of the legislatures of the states to specifically enumerate them." *Kress*, 155 So. at 827.

B. From the State's Earliest Days, the Florida Attorney General Has Been the Legal Representative of the People, Bestowed With Sweeping Common Law Powers to Protect the Public

The Florida Constitution declares that the Attorney General is a member of the cabinet, and she "shall be the chief state legal officer" Fla. Const. Art IV, §§10(a), 10(b). The Attorney General's duties extend to matters of statewide concern. The Attorney General "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which ***the state*** may be a party, ***or in anywise interested***, in the Supreme Court and district courts of appeal of this state"; and "[s]hall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States." Fla. Stat. §§ 16.01(4), (5) (emphasis added).[67] "When occasion arises 'it is [her] duty to use means most effectual to the enforcement of the laws, and the protection of the people.' The Attorney General is the principal law officer of the state." *Thompson v. Wainwright,* 714 F.2d 1495, 1500 (11th Cir. 1983) (quoting *Gleason*, 12 Fla. at 212).

Critically, the Attorney General "shall have and perform all powers and duties incident or usual to such office." Fla. Stat. § 16.01(7). Florida courts have, repeatedly, interpreted this provision within its plain language and intent to mean that the Attorney General retains all of the

[67] *See, e.g., State ex rel. Boyles v. Fla. Parole & Prob. Comm'n,* 436 So.2d 207, 210 (Fla. 1st DCA 1983) ("In cases such as the one at bar, where the injury is to the public, the Attorney General has standing as a representative of the people. The Attorney General, as chief law officer of the State, may appear in and attend to all suits or actions in which the State may be 'in anywise interested.' He is the 'people's attorney' and may properly intervene in a matter to represent the people in the courts.") (internal citations omitted).

historic, sovereign common law powers and duties to represent and protect the people of Florida and their interests; this is settled law in Florida. *See, e.g., Shevin v. Exxon,* 526 F.2d at 270:

> Finally, and most importantly, the Florida Supreme Court has consistently recognized the continuing existence of the Attorney General's common law powers. . . . This affirmation of the existence of the Attorney General's common law powers does not stand alone in Florida jurisprudence. It is echoed in case after case from *Gleason* to the 1972 decision in *State ex rel. Shevin v. Yarborough* . . . We conclude that there simply is no question that such powers exist.

"The Attorney General has the power and it is [her] duty among the many devolving upon [her] by the common law to prosecute all actions necessary for the protection and defense of the property and revenue of the state." *Kress,* 155 So. at 827. "As the chief law officer of the state, it is [her] duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time." *Id*.

In addition to these broad grants of power, the legislature has made repeated grants of specific authority.[68] As is most relevant to this case, the legislature specifically granted the Attorney General authority to enforce consumer protection laws, including the authority to bring an action "on behalf of one or more consumers or *governmental entities* for the actual damages caused by an act or practice in violation of this part." Fla. Stat. §501.207(1)(c) (emphasis adde). Under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), the Attorney General is the enforcing authority in circumstances like this, because the violations alleged in the relevant opioid lawsuits in the state affect "more than one judicial circuit." Fla. Stat. § 501.203.[69]

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[68] In addition, the legislature has granted the Attorney General authority to pursue other actions, including: (1) false claims on the government (Fla. Stat. §68.082 (defining state for purposes of the false claims act as "the government of the state or any department, division, bureau, commission, regional planning agency, board, district, authority, agency, or other instrumentality of the state.); (2) antitrust claims (Fla. Stat. §542.27 ("The Attorney General is authorized to institute or intervene in civil proceedings … on behalf of the state, its departments, agencies, and units of government"); (3) public nuisance claims (Fla. Stat. §§60.05, 60.06, 823.05).

[69] Moreover, the enforcing authority for matters affecting only one judicial circuit is *not* the Defendant subdivisions in this case—it is the applicable state attorney's office. *Id.*

Likewise, the legislature also granted the Attorney General authority to bring civil Racketeering Influenced Corrupt Organizations Act ("RICO") actions, including to intervene in RICO actions brought by private individuals if the Attorney General found that the action is of "general public importance."[70] Fla. Stat. §895.05(9), (10).[71]

Although the Attorney General's power may be limited by the Florida Legislature, absent an explicit statutory limitation, the Attorney General's undertakings are presumed to be lawful sovereign actions.[72] "As the chief law officer of the state, it is [her] duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time." *Kress,* 155 So. at 827. "Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the Attorney General of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires." *Shevin v. Exxon,* 526 F.2d. at

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[70] Section 895.05(7) provides that "[t]he state, including any of its agencies, instrumentalities, subdivisions, or municipalities" has a cause of action for treble damages under RICO. Fla. Stat. §895.05(7). Thus, both the Attorney General and Defendant subdivisions are permitted to bring this specific type of RICO action and seek this single remedy. The Attorney General, however, is even granted additional powers under RICO, including the power to "upon timely application, intervene in any civil action or proceeding [by a subdivision] . . . if it certifies that, in its opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding." Fla. Stat. § 895.05(10). Additionally, Under RICO, the Attorney General is listed as an "investigative agency" with specific powers to investigate and bring claims. Fla. Stat. § 895.02(5). As an investigative agency, the Attorney General is given express authority to bring civil actions under RICO for civil forfeiture. Fla. Stat. § 895.05(2)(b); Subdivisions, including Defendants, cannot bring a civil forfeiture case under RICO.

[71] Other provisions of RICO are similarly unavailing for Defendants: the Attorney General may bring an action for injunctive relief and civil penalties; Defendant subdivisions cannot. Fla. Stat. § 895.05(9). This section even explicitly empowers the Attorney General to petition the court for entry of a consent decree or for approval of a settlement agreement.

[72] Subdivisions' statutory authority to sue does not supersede the Attorney General's broad, sovereign common law powers, absent a clear legislative edict to the contrary. No such legislative edicts exist in this case regarding any statutory claim; thus Defendants' claims were validly released by the Attorney General. Separately, where a subdivision may have concurrent statutory authority to bring claims, the Attorney General's claims are the superior claims, and as such she may release subdivisions' claims pursuant to a statewide settlement.

268. "And the attorney general has wide discretion in making the determination as to the public interest." *Id.* at 269. Furthermore, "[t]his is particularly true where, as in Florida and most of our states, the Attorney General is an official independently elected by the people." *Id.* at 268 n.6. [73]

Florida courts have correctly espoused this policy of deference to the Attorney General in matters of public interest. "It is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in any litigation or quasijudicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest." *Id.* at 271 (quoting *State ex rel. Shevin v. Yarborough*, 257 So.3d 891, 894 (Fla. 1972) (Ervin, J., concurring)). This power and duty to act in matters of the public interest "is as broad as the 'protection and defense of the property and revenue of the state,' and, indeed, the public interest requires." *Id.* (quoting *Kress*, 155 So. at 827).

C. The Attorney General's Common Law Powers Include the Power to Litigate and Settle Claims for the State and its Subdivisions, Particularly Regarding Matters of Statewide Concern

The Attorney General is the appropriate entity to bring and settle legal matters of urgent statewide concern. The Attorney General is elected via statewide election and wields sovereign power independently. Each of the Governor, the Florida Legislature, and the Attorney General wield independent sovereign power in Florida. And "as the chief legal representative of the state, [the Attorney General] may institute all legal proceedings necessary to protect the interests of the state," *Shevin*, 526 F.2d at 271 n.19, and may even "institut[e] suits . . . *without specific*

[73] *See also State v. Bryan,* 39 So. 929, 947 (Fla. 1905) ("This discretion is vested in the Attorney General; if he exercises it improperly, there is another tribunal, the people, or their grand inquest, the Assembly, to punish him.").

authorization of the individual government entities who allegedly have sustained the legal injuries asserted." *Id.* at 274 (emphasis added); *see also Nash Cnty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 495 (4th Cir. 1981) ("At common law, an attorney general, in the absence of some restriction on powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions to recover damages (whether under state or federal law) alleged to have been sustained by any such agency or political subdivision, even though those subdivisions may not have affirmatively authorized suit.").

With respect to public nuisance-like claims, like the claims brought by the Defendants, the Florida Supreme Court has been clear that it is the Attorney General's duty to abate and prevent nuisances. In *Kress*, the Florida Supreme Court stated:

> *The Attorney General has the power and it is [her] duty* among the many devolving upon [her] by the common law to prosecute all actions necessary for the protection and defense of the property and revenue of the state . . . *to* . . . *prevent public nuisances* . . . . As the chief law officer of the state, it is [her] duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.

155 So. at 827 (emphasis added).

As a general principle, when the duties of the Attorney General and a subordinate entity of the State conflict, the Attorney General receives great deference to use her authority in matters of public interest. In *Yarborough,* the respondent Public Service Commission objected to the Attorney General's intervention on behalf of Florida consumers in a dispute over electrical rates. 257 So.2d 891 (Fla. 1972). The Public Service Commission argued that the Attorney General did not have powers to advocate for all affected consumers in Florida. The Florida Supreme Court held that the Attorney General's appearance before that specific tribunal was proper and discussed the scope of the Attorney General's powers and duties. Although the Public Service

Commission had independent *statutory* authority to bring the lawsuit, the Court recognized the Attorney General may intervene *even over the objections* of the agency, reasoning that the Attorney General "represents the general public interest in all rate cases" because "there is no statute which *prohibits* the Attorney General from representing the State of Florida as a consumer, and offering such evidence and argument as will benefit its citizens." *Id.* at 893 (emphasis added).[74] The concurrence in *Yarborough* provides further reasoning:

> I think it is appropriate to leave to the Attorney General's sound and reasonable discretion, as has always been the rule, [her] exercise of the right of legal advocacy . . . subject to the legislature's power to withdraw or to curtail this right whenever it sees fit . . . . It is better for [her] to abuse the authority in a rare instance than for state agencies exercising quasi-judicial authority to be held to have the power to eliminate [her] from appearing before them at their pleasure. This court has always respected the authority of the Attorney General to be heard in those matters before it when [she] appeared alleging [she] represented the *public interest.* (Ervin, J., concurring).

Id. at 897 (emphasis added). Citing additional precedent,[75] the concurrence reiterated that absent clear statutory language to the contrary, the Attorney General may intervene in matters of public interest, even when a political subdivision is granted authority to bring actions. It is inarguable that the opioid crisis investigation and litigation, which the Attorney General has fought vigorously for over four years, is a matter of statewide concern and in the public interest.

The concurrence in *Yarborough* further solidifies that this case falls within the Attorney General's litigation authority. As a statewide elected official who is subject to having her power limited by the Florida Legislature, the Attorney General is, simultaneously, democratically

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[74] "Generally speaking, the Attorney General is Chief Counsel for the State which in final analysis is the people." *Id.*

[75] *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976); *State ex rel Moodie v. Bryan*, 39 So. 929 (Fla. 1905); *State ex rel Landis v. S.H. Kress & Co*., 155 So. 823 (Fla. 1934); *State ex rel. Davis v. Love*, 126 So. 374; (Fla. 1930); *State ex rel. Cirm v. Juvenal*, 159 So. 663 (Fla. 1935); *Barr v. Watts*, 70 So.2d 347 (Fla. 1954); *Ervin v. Collins*, 85 So. 2d 852 (Fla. 1956); S*tate ex rel. Ervin v. Jacksonville Expressway Authority*, 139 So.2d 135 (Fla. 1962).

accountable and retains latitude to respond, as sovereign, to new and novel crises such as the opioid crisis:

> Neither the Legislature nor the courts has ever undertaken to delineate or set the outer limits of the Attorney General's litigation power, although in a few specific instances the Legislature has curtailed his role. Usually, legislative intervention has been unnecessary. In most instances the Attorney General's legal participation has been accepted by the public. In some instances, however, his legal efforts or 'crusades' have been rebuffed in the courts or were abandoned because they lost public favor, being deemed unduly partisan or politically motivated. There is thus a 'built in' check on his litigation role, in addition to the legislative power to curtail it. *No doubt the reason neither the Legislature nor the people have ever undertaken to delineate or set fixed limits upon the general role of the state's chief legal officer is that they consider his legal authority to cope with new problems and emergencies affecting the public interest should not be circumscribed, realizing his excesses, if any, are always subject to the checks before mentioned*.

Id. at 896 (emphasis added).

1. Court decisions confirm the Attorney General's power to bring and resolve claims.

The court in *Shevin v. Exxon* was presented with a related question: whether the Attorney General may institute actions under federal law to recover damages sustained by departments, agencies, and political subdivisions that have not affirmatively authorized the Attorney General to bring suit for recovery on their behalf. 526 F.2d at 270. The court stated the Attorney General retained the power, and indeed had the duty, to "prosecute all actions necessary for the protection and defense of the property and the revenue of the state." *Id.*[76] Additionally, the court analyzed whether the Attorney General could initiate actions on behalf of state instrumentalities "without affirmative authorization" to recover damages on those instrumentalities' behalf. *Shevin,* 526 F.2d at 272. The court concluded that because it could find no legislation barring the Attorney

[76] *See also id.* at n.10: "We must reject any argument by defendants that the right to 'prosecute' an action does not include the right to institute the action. That term typically is used to refer, as a unit, to the institution and maintenance to a conclusion of a legal proceeding."

General from bringing an action on behalf of subdivisions without their consent, the Attorney General may act. *Id.* at 273-74.

The First District Court of Appeal in *Barati v. State* considered the similar issue of the Attorney General's power to dismiss an action in which she had not intervened. 198 So. 3d at 72. In *Barati*, the Attorney General filed a notice of voluntary dismissal in an action to which she was not a party, citing the Attorney General's power to dismiss false claims suits under Florida Statutes §68.084(2)(a). *Id.* The First District did not rely solely on the plain language of Section 68.084(2)(a) in aggreging with the Attorney General's assertion, but concluded that the Attorney General had authority to dismiss such an action in part based on "the constitutional authority of the executive branch vested in the Attorney General of the State of Florida to act as the State's chief legal officer." *Id.* at 84. The court reasoned that "[c]onducting and terminating legal actions brought in the name of and for the benefit of the State is the sine qua non of the State's chief legal officer." *Id.*

Similar to *Barati*, it follows that, if the Attorney General has the power to *bring litigation* on behalf of the people of Florida and its subdivisions, she must also be able to *settle litigation* on behalf of the people of Florida and its subdivisions—including the subordinate, copycat claims brought by Defendants. *See Abramson v. Fla. Psych. Ass'n*, 634 So.2d 610, 612 (Fla. 1994) ("[T]he power of a public body to settle litigation is incident to and implied from its power to sue and be sued."); *In re Certified Question,* 638 N.W.2d 409, 414 (Mich. 2002) ("[I]nherent in the Attorney General's authority to sue on behalf of a county in matters of state interest, is the Attorney General's authority to settle such a suit. Given that the Attorney General has the authority to bring claims, it inevitably follows that the Attorney General has the authority to settle and release such claims.").

2. *Res judicata* decisions support the Attorney General's power to bind subdivisions.

Florida's law on *res judicata* further supports the Attorney General's power to settle Defendants' claims. In *Engle v. Liggett Group, Inc.*, the Florida Supreme Court considered whether the State's historic settlement with tobacco companies barred punitive damages claims of individual smokers.[77] 945 So. 2d 1246, 1259 (Fla. 2006). In concluding that it did not, the Florida Supreme Court differentiated between public interest and public nuisance-based claims with claims brought for personal injuries. *Id*. The Florida Supreme Court left in place a long line of Florida decisions[78] that reasoned that government entity settlements in matters of interests of concern common to all citizens barred subsequent claims, including public nuisance claims like those asserted by the Defendants in their underlying actions.[79]

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[77] The *Engle* decision was not surprising. For more than one hundred years the Florida Supreme Court has restricted the ability of private entities to recover for public wrongs. *Brown v. Florida Chautauqua Ass'n*, 52 So. 802, 804 (Fla. 1910) ("*[P]ublic wrongs are redressed at the suit of proper officials***,** and individuals are not permitted to maintain separate judicial proceedings to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong.") (emphasis added). The Florida Supreme Court has also held for more than one hundred thirty years that judgments on matters of general interest to all people are binding not only on those named in the suit. *Sauls v. Freeman*, 4 So. 525, 531 (Fla. 1888).

[78] *See, e.g., Young v. Miami Beach Improvement Co.*, 46 So. 2d 26, 30 (Fla. 1950); *State ex rel. Walker v. Gessner*, 26 So. 2d 896, 897 (Fla. 1946); *Sauls*, 4 So. at 531; *Castro v. Sun Bank of Bal Harbour*, 370 So. 2d 392, 393 (Fla. 3d DCA1979) (concluding that settlement in suit brought by state barred subsequent claims by individuals asserting similar claims); *City of New Port Richey v. State ex rel. O'Malley*, 145 So. 903, 905 (Fla. 2d DCA 1962); *also Eggers v. City of Key West*, 2007 WL 9702450, at *3 (S.D. Fla. Feb. 26, 2007) (concluding "[a]pplicable Florida law states that a judgment in an action brought against a public entity that adjudicates matters of general interest to the citizens of the jurisdiction is binding on all citizens of that jurisdiction."); *Aerojet-General Corp. v. Askew*, 366 F. Supp. 901, 908-11 (N.D. Fla. 1973) (concluding that prior suit against state barred county suit on similar claims).

[79] In one of those cases, *Castro v. Sun Bank of Bal Harbour, N.A.*, the Third District Court of Appeal affirmed summary judgment against a subsequent group of plaintiffs alleging a nuisance. 370 So. 2d at 393. The State and the City of Miami had previously sued and settled a nuisance action relating to the same subject matter. The Third District concluded that the subsequent group of plaintiffs were bound by the prior judgment and their action was barred even though they were not formal parties because they "were citizens of the State of Florida and the City of Miami at the time of the litigation…." *Id.*

Subsequent to *Engle*, the Third District concluded that a prior state administrative action acted as *res judicata* on a subsequent private action seeking injunctive relief.[80] In *Alderwoods*, the state brought an administrative action against a company who owned a cemetery that was subsequently settled, resulting in entry of a final order requiring the defendant to take certain action. *Id.* In reversing a class certification order, the Third District stated "[w]hen the government brings an action in its *parens patriae* capacity, res judicata will bar litigation by private individuals seeking to redress acts that were settled in that prior action, even if the private individuals were not formal parties thereto." *Id.* at 504. The Third District differentiated claims involving injuries to "'purely private interests'" from rights of the public, concluding that suits to protect purely private interests were not barred. *Id.* (quoting *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993)).

Unlike the plaintiffs in *Engle* or *Alderwoods*, the Defendants are all governmental entities, asserting claims on behalf of their citizens.[81] Indeed, Defendants have expressly invoked whatever *parens patriae* authority that they possess.[82] Without conceding that any entity other

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[80] *Alderwoods Group, Inc. v. Garcia*, 119 So. 3d 497, 504-06 (Fla. 3d DCA 2013).

[81] The Defendants have to rely on *parens patriae* to avoid their cases from potentially being dismissed as derivative, lacking standing or other causation issues. Nine United States Courts of Appeal, including the Eleventh Circuit, the circuit where their cases will eventually end up, have held that the claims like those of the Defendants are derivative, raising questions of proximate cause and standing. *See, e.g.*, *United Food and Commercial Workers Unions, Employers Health and Welfare Fund*, Case No. 99-13476, 2000 WL 1190787 (11th Cir. Aug. 22, 2000); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Allegheny Gen. Hosp. v. Philip Morris*, 228 F.3d 429 (3d Cir. 2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F. 3d 912 (3d Cir. 2000); *Ass'n of Washington Pub. Hosp. Dists. v Phillip Morris*, 241 F.3d 696 (9th Cir 2001); *Lyons v. Philip Morris Inc.*, Case No. 99-2843, 2000 WL 1234272 (8th Cir. Sept. 1, 2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999); *Perry v. Am. Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001).

[82] *See, e.g.,* Sarasota County Public Hospital District Complaint at 2 ("Plaintiff brings this civil action to eliminate the hazard to public health and safety caused by the opioid epidemic, to abate the nuisance caused thereby, and to recoup the moneys that have been spent . . .); Halifax Health and Broward Health Complaint at 338 (Defendants'

than the State has *parens patriae* authority, the Office of Attorney General would simply note that the fact that Florida law allows *res judicata* to bar public interest claims filed by subsequent private parties who were not formal parties to the original action belies the Defendants' assertions that the Attorney General's completed action does not bar their claims. A long line of case law going back more than one hundred thirty-four years suggests that a settlement or judgment relating to public nuisance and public interest claims bars subsequent claims by other entities, including other governmental actors and entities.[83] Whether viewed through the lens of the Attorney General having the authority to release subdivision claims or the legal effect that the Attorney General's settlement bars other governmental claims, the result is the same: the Defendants claims are barred.

3. Decisions from Florida and other courts confirm that the Attorney General is the best party to deal with public matters for citizens.

And, even if this Court does not decide the *res judicata* effect of the State's settlements, the practical reality is that the State is the party best suited to represent the public interest in matters affecting residents or political subdivisions statewide. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603-04 (1982) ("'[I]f the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.'"

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conduct "has harmed and will continue to harm the public health services of and public peace of Plaintiffs . . . Has harmed and will continue to harm the communities and neighborhoods which Plaintiffs serve."); Lee Memorial Complaint at 121 ("Each of the Manufacturing Defendants and Wholesaler *Defendants owed Plaintiff, acting on its own behalf and on behalf of its patients* . . . ."); PCSB Complaint at 3 ("Plaintiff brings this action on behalf of itself and a state class of all independent public school districts in Florida. Plaintiff and the proposed Class bear the steadily rising costs of providing special education and related services to children who were exposed to opioid use in utero . . . to children damaged by living in households afflicted by opioids, and to children addicted to opioids.").

[83] *See, e.g., Young*, 46 So. 2d at 30; *State ex rel. Walker*, 26 So. 2d at 897; *Sauls*, 4 So. at 531; *Castro*, 370 So. 2d at 393 (concluding that settlement in suit brought by state barred subsequent claims by individuals asserting similar claims); *City of New Port Richey*, 145 So. at 905; *also Eggers*, 2007 WL 9702450, at *3 (concluding "[a]pplicable Florida law states that a judgment in an action brought against a public entity that adjudicates matters of general interest to the citizens of the jurisdiction is binding on all citizens of that jurisdiction."); *Aerojet-General Corp.*, 366 F. Supp. at 908-11 (concluding that prior suit against state barred county suit on similar claims).

(quoting *Missouri v. Illinois*, 180 U.S. 208, 241 (1901))); *Bondi v. Tucker*, 93 So.3d 1106, 1109 (Fla. 1st DCA 2012) (The Attorney General "has broad authority to litigate matters in the public interest.").[84] This is in large part because of her inherent duty to consider and represent the interests of *all* constituents when negotiating binding settlements:

> Unlike the situations in which we fear that a party may be attempting [to] profit at the expense of unrepresented individuals, e.g., class actions and shareholder derivative suits, we here have as plaintiff the government department charged with seeing that the laws are enforced. We therefore need not fear that the pecuniary interests of the plaintiff and defendant will tempt them to agree to a settlement unfair to unrepresented persons, but can safely assume that the interests of all affected have been considered.

United States v. City of Miami, 614 F.2d 1322, 1332 (5th Cir. 1980). In this case, the Attorney General entered into the settlements at issue in good faith and with sovereign authority. Such speculation of unfairness which may be raised by Defendants should be treated with skepticism. The court should presume that the Attorney General bargained for and achieved a maximally beneficial agreement for the State of Florida at large, following years of hard-fought negotiations and substantial litigation, and she did.

There are 2,415 political subdivisions in the State, almost all of those entities have been granted the power to sue and be sued in their name, like the Defendants. If, as the Defendants contend, because of such a grant, each subdivision must settle in order for the harm to Floridians to be released, then no defendant would ever resolve a matter of statewide concern with any governmental entity in Florida. History does not support such a construction. It instead shows instance upon instance of deference to the Attorney General's litigation authority, as established

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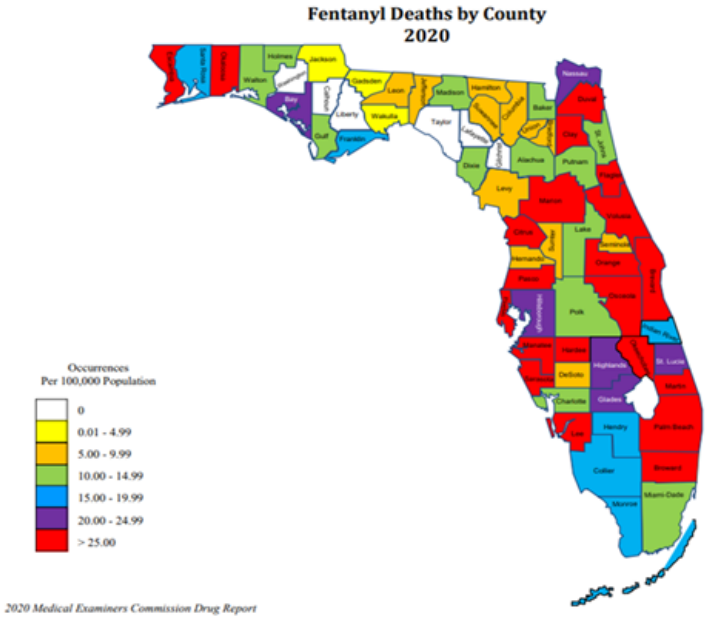
[84] *See also Nash Cnty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 496 (4th Cir. 1981) ("It would seem self-evident that common sense dictates that when an alleged wrong affects governmental units on a state-wide basis, the state should seek redress on their behalf as well as on its own rather than parceling out the actions among local agencies.").

by the Florida Constitution, the Florida Legislature, and over a century of clear judicial precedent. That deference has borne fruit for Florida and the protection of its citizens. For example, the Attorney General's efforts to consolidate litigation and settlement talks following the Deepwater Horizon disaster led to an expeditious settlement totaling over two billion dollars for economic loss in addition to remediation costs.[85] Additionally, in the 1990s, Florida reached an historic tobacco settlement that continues to pay Florida hundreds of millions of dollars every year to counteract the ongoing harms caused by tobacco use and addiction.[86] The opioid crisis is another example. It is not seriously disputed that the opioid epidemic is having a serious impact on all of Florida. The below map illustrates the problem faced by the State.



[85] *See* Press Release, *Deepwater Horizon*, available at https://www.myfloridalegal.com/pages.nsf/Main/C4768D64BA1B622F85257F0300420F98.

[86] *See* John Schwartz, *Cigarette Makers Settle Florida Suit for $11.3 Billion*, WASH. POST, Aug. 26, 1997, available at https://www.washingtonpost.com/archive/politics/1997/08/26/cigarette-makers-settle-florida-suit-for-113-billion/f074e97e-5f91-4be0-9167-91af3475ace9.

A high number of deaths are happening in every region of the State. Only six of sixty-seven counties, all of which are rural and have relatively lower populations, appear to be untouched from the spike in overdose deaths. The problem must be solved or resolved on a statewide basis. No solution would occur if all 2,415 subdivisions had to agree to the resolution individually. Thousands of Floridians would die while each subdivision postured. Here, the Opioid Settlements entered by the State have been joined by more than two-hundred forty-five subdivisions.[87] The exercise of such power is precisely within the constitutional, common law, and statutory structure created for the Attorney General, and the policy created by this legal framework continues to provide crucial deference and flexibility for the Attorney General to use sovereign power to protect Floridians.

D. The Claims of the Subdivisions are Subordinate to the Statewide Harms Vindicated by the Attorney General in the Opioid Settlements

The Defendants do not wield sovereign power like that of the Attorney General. In contrast to the limited, non-sovereign duties that subdivisions discharge, the Florida Attorney General carries out the sovereign interests of Florida as a whole and on behalf of its citizens.

Florida courts have adopted and expanded on precedent from the Supreme Court of the United States to describe the subordinate relationship of Florida subdivisions to the sovereign State of Florida. *See, e.g.*, *Thomas v. State of Florida*, 583 So.2d 336, 341 (Fla. 5th DCA 1991) ("[T]he relationship between a municipality and a sovereign state whose legislature has created the municipality. . . . is one of a creature and its creator. The city has no sovereign power and exists and exercises all governmental power at the will of the state legislature."); *Lowe v.*

[87] Each of the Defendants resides in a county that has released its claims and joined the Opioid Settlements and released their citizens' claims. Each of the Defendants resides in a county where almost all of whose cities with populations greater than 10,000 people have likewise joined the Opioid Settlements and released those same citizens' claims, yet again.

Broward Cnty., 766 So.2d 1199, 1204 (Fla. 4th DCA 2000) ("As political subdivisions of the state, counties 'derive their sovereign powers exclusively from the state.' "). The Florida Constitution provides additional support: "Counties may be created, abolished or changed by law." Fla. Const. Art. VIII, Section 1(a).

The Supreme Court of the United States, a century ago, stated: "The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379 (1886). A state's subdivisions, including cities, counties, school boards, and hospital districts, are thus subordinate to larger sovereign state interests whenever there is a conflict and there is no legislative proclamation to the contrary.

Political subdivisions, including Defendants here, are simultaneously *part of* and *subordinate to* the State. "Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities." *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). Rather, they are "regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental function," and all local government authority is derived from the State. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 107-08 (1967). Political subdivisions are not sovereigns—they are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991). This "near-limitless sovereignty" to "design [a] governing structure as it sees fit," means that a State "may give certain powers to cities, later assign the same powers to counties, and even reclaim

them for itself." *Schuette v. Coal. to Defend*, 572 U.S. 291, 327-28 (2014) (Scalia, J., concurring).

Even a political subdivision's *existence* is subject to the supremacy and will of the State. *See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."); *see also Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 47 (1994) ("[U]ltimate control of every state-created entity resides with the State" and "[p]olitical subdivisions exist solely at the whim and behest of their State."). *See also* Fla. Const. Art. VIII, Section 1(a) ("Counties may be created, abolished or changed by law."). In short: "Ours is a 'dual system of government' . . . which has no place for sovereign cities." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982) (internal citations omitted).

Given this subordinated structure, when there is conflict (or overlap) between sovereign state interests and insular subdivision interests, the sovereign's interest necessarily must be deemed to be the superior interest, for it subsumes in its entirety the subdivision's interest. Allowing Defendants to continue pursuing their subordinate opioid claims threatens Florida's sovereign interest in vindicating its citizens' rights—all of its citizens' rights—when confronted with societal harms such as the opioid crisis.[88] These are collective harms. They do not flow in an insular fashion to individual subdivisions, the harms cross city and county lines. Indeed, the

[88] *See, e.g.*, *United States v. City of Miami*, 614 F.2d 1322, 1332 (5th Cir. 1980) ("Unlike the situations in which we fear that a party may be attempting [to] profit at the expense of unrepresented individuals, e.g., class actions and shareholder derivative suits, we here have as plaintiff the government department charged with seeing that the laws are enforced. We therefore need not fear that the pecuniary interests of the plaintiff and defendant will tempt them to agree to a settlement unfair to unrepresented persons, but can safely assume that the interests of all affected have been considered."

settlement considers such statewide harms by applying a mixture of statewide and local solutions, a framework to which nearly all affected parties (states and subdivisions alike) have agreed. Defendants' continued pursuit of their opioid claims in contravention of the Opioid Settlements jeopardizes the flow of tens of millions of dollars that will aid in the abatement of the opioid epidemic throughout Florida.

E. Applying these Principles, The Attorney General has the Power to Release Defendants' Claims, and She Exercised that Power in the Opioid Settlements

The Attorney General has the power to release subdivisions' subordinate claims including Defendants' claims against the Opioids Defendants. As discussed *supra*, clear precedent supports that: (1) the Attorney General has a duty to safeguard the people of Florida and protect other sovereign interests, as vested by common law, the Florida Constitution, and the Florida Legislature; (2) the Attorney General can enter an action over the objection of a political subdivision that has specific statutory authority to bring a claim; (3) the Attorney General may bring claims on behalf of Florida agencies and subdivisions without their affirmative consent; and (4) unlike the Attorney General, political subdivisions exist as creatures of the State and do not have sovereign power or duties either locally or statewide. Consequently, the Attorney General must also possess the power to release the subdivisions' claims when she is acting in the public interest regarding a matter of statewide concern.

This issue has been considered in cases outside of Florida. In *Nash Cty. Bd. of Ed. v. Biltmore Co.,* an antitrust suit brought by a county school district against various local and national dairy companies was held to be barred by a settlement entered into by the North Carolina Attorney General. 640 F.2d 484 (4th Cir. 1981). The North Carolina Attorney General's settlement purported to release public school districts' claims in the State. Shortly

after the Attorney General entered a consent decree with the defendants, the Nash County Board of Education brought an independent action. The District Court granted summary judgment in favor of the defendants on the basis of *res judicata. Id.* at 486. On appeal, the school district claimed it could not be bound to the consent decree because it did not consent. The Fourth Circuit found the *Attorney General's* consent sufficient to bind the school districts. *Id.* at 487. The court found the subdivisions' claims involved the same allegations of unlawful conduct, alleged the same injury, and sought similar relief as the Attorney General's lawsuit. *Id.* at 495. The court stated: "at common law, an attorney general, in the absence of some restriction on his powers by statute or constitution, has complete authority as the representative of the State or any of its political subdivisions to recover damages (whether under state or federal law) alleged to have been sustained by any such agency or political sub-divisions, even though those subdivisions may not have affirmatively authorized suit." *Id.* at 494 (internal citations omitted).[89]

Here, as there, no restriction exists on Plaintiff's powers to settle opioid claims on the subdivisions' behalf, and therefore the Attorney General's release of Defendants' claims was properly effectuated.

Additionally, the school district in *Biltmore* argued that because it had its own independent statutory authority to bring litigation, the Attorney General could not settle the school district's claims. The court rejected this argument, stating: "It would seem self-evident that common sense dictates that when an alleged wrong affects governmental units on a state-wide basis, the state should seek redress on their behalf as well as on its own rather than parceling out the actions among local agencies." *Id*. at 496. In this case, should a Defendant

[89] *Biltmore* directs the reader to *Shevin v. Exxon* "for an excellent discussion of this common law authority." *Id.*

subdivision raise this issue, the same reasoning applies—none of Defendants' statutory causes of action in their complaints against Opioid Defendants preclude the Attorney General from settling those cases as part of a statewide action.[90]

Biltmore concludes with additional reasoning analogous to the Florida precedent that counsels against allowing subdivisions to interfere with the Attorney General's sovereign efforts to resolve matters of statewide concern:

> The Attorney General as legal representative of the sovereign and its constitutional subdivisions had both common law and statutory power to bind the State and the subdivisions by his acts. Moreover, it goes without saying that the Attorney General is not limited in his authority to settle or compromise claims by a requirement of consultation with those agencies which might be tangentially affected by a proposed settlement.
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> . . .
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> To impose a requirement that the Attorney General to whom authority was granted expressly by statute, must consult with and obtain the consent of every school district before he may exercise his statutory authority would not only be a voiding of the Attorney General's statutory authority but, in addition, would be the creation of a cumbersome system leading to almost ludicrous results. By engrafting this restriction upon the Attorney General's authority, the State's legal representative, in attempting to exercise his statutory authority, would be buffeted from hither to yon according to the whims of various local agency directors. Clearly the Attorney General's failure to consult with the Board prior to settlement in no way denigrates the legal significance of the consent decree.

Id.[91]

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[90] *See People ex rel Devine v. Time Consumer marketing, Inc.*, 782 N.E.2d 761 (Ill. Ct. App. 2002) (Attorney General's concurrent claims over single county's State Attorney's office deemed superior, and Attorney General may settle all claims); *In re Certified Question*, 638 N.W.2d 409 (Mich. 2002) (Attorney General's concurrent authority to sue deemed superior claim and sufficient over counties' claims, even though counties had specific constitutional edict that counties' power be "liberally construed in their favor.").

[91] Other courts have held that the supremacy of Attorneys General claims over subdivisions' claims support an efficient administration of justice. Judicial economy is served when the Attorney General releases (and courts subsequently bar) subordinate political subdivisions' redundant litigation. The Attorney General can bring finality and expediency to a diaspora of litigation and can facilitate proper recovery across all affected political subdivisions. *See, e.g.*, *Illinois v. Associated Milk Producers*, *Inc.*, 351 F. Supp. 436, 440 (N.D. Ill. 1972) ("Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State.").

Other courts have interpreted the Attorney General's power to settle claims broadly—not requiring uniform overlap in causes of actions, remedies sought, or the nature of the settlement recovery. In *New Hampshire v. Dover*, the New Hampshire Supreme Court held that a parallel products liability suit brought by the cities of Dover and Portsmouth against producers of the chemical compound must be dismissed in favor of the New Hampshire Attorney General's suit asserting the same claims. 891 A.2d 524 (N.H. 2006). The court first found that the Attorney General was suing to protect the "general health and well-being of its residents" with respect to the statewide water supply. *Id.* at 529. As a result, the attorney general was deemed to represent all New Hampshire citizens unless subdivisions could demonstrate a "compelling interest" in maintaining separate suits. *Id.* at 530-31. The cities argued that they had demonstrated such an interest because the Attorney General's suit: (1) named fewer defendants than the cities' lawsuits; (2) failed to allege as many legal theories as the cities alleged; (3) failed to seek certain remedies sought by the cities; and (4) was subject to defenses not applicable to the cities. *See id.* at 531. The cities also complained that the attorney general "promised to use any recovery to establish a public fund to be managed by the attorney general instead of distributing it to cities in accordance with individual damages." *Id.* The court rejected each argument, further noting:

> There is no reason for the Court to conclude, on the facts presented, that the State will not seek to obtain full compensation for all communities, including the Cities. *While the compensation sought may not be the same as that which the cities would desire, a difference of that nature does not demonstrate an interest that is not properly represented by the State*.

Id. (emphasis added). The Court held that the cities "failed to show a sufficient reason why the State cannot adequately represent them," and therefore concluded that their "suits must yield to the State's suit." *Id.* at 534.

The facts in this case warrant the same analyses and the same conclusion: Defendant subdivisions may object to the *terms* of the Attorney General's settlements, but (1) she had the power to enter into the settlements nonetheless, (2) the settlements are in the best interest of Florida, its citizens, and its subdivisions; (3) even if seven (out of hundreds of) subdivisions are unhappy with the specific result, they cannot credibly argue that their unhappiness is evidence that the Attorney General does not have authority to release their claims; and (4) there are no other compelling interests that five hospitals and one school board could possibly have to maintain their separate suits above the urgent public interests at stake in this case.

Another similar case, *In re Certified Question*,[92] involved a Michigan Attorney General settlement in the 1990s tobacco litigation, and counties objected to the attorney general's settlement and release of subdivisions' claims. The tobacco settlement at issue in this case had offset provisions that afforded tobacco defendants the right to offset any subsequent recovery by subdivisions against future payments sent to the state. Similarly, the opioid settlements here include reductions in total payments if the Attorney General is not able to secure a full bar on subdivisions' claims. *See, e.g.*, JJ Settlement, at 22-29; Distributor Settlement, at 18-24.

There, as here, Michigan counties had concurrent power to sue; Michigan even had an additional constitutional requirement that county power should be "liberally construed in [counties'] favor." *Id.* at 413. Concurrently, the attorney general in Michigan retained "broad authority to bring actions that are in the interest of the state of Michigan" and the power to litigate under this law "on behalf of the people of the state." *Id.* at 413-14. The court concluded that the attorney general's authority must include the ability "to represent the people of a county

[92] 638 N.W.2d 409 (Mich. 2002). The certified question in that case was nearly identical to the issue here: "Does the Michigan Attorney General have the authority to bind/release claims of a Michigan county as part of a settlement agreement in an action that the Attorney General brought on behalf of the State of Michigan?" *Id.* at 412.

who are a part of these same people." *Id.* at 414. When the Attorney General, wielding sovereign state power, "expresses its position on issues clearly of state interest, subdivisions are subordinate to the state's position." *Id.* at 415. The court concluded that "the Attorney General acted to bind the state as a whole in a matter clearly of state interest." *Id*. "While counties have broad authority to sue and settle with regard to matters of *local interest*, the Attorney General has broad authority to sue and settle with regard to matters of *state interest, including the power to settle such litigation with binding effect on Michigan's political subdivisions.*" *Id.* at 414 (emphasis added).

Another case involving concurrent authority to bring claims, *People ex rel Devine v. Time Consumer Marketing, Inc.*,[93] involved the Illinois Attorney General settling and releasing statutory consumer-protection claims statewide, including claims brought by the state attorney in Cook County. There, over the state attorney's objections, the appellate court ruled that the attorney general's statutory power to bring and settle claims, in addition to the attorney general's common law powers implicit in the attorney general's status as the chief legal officer of the state, necessarily included the power to release the state attorney's concurrent claims. *See id.* at 766-68.

The undisputed facts in this case track the cases discussed immediately *supra*. Like the tobacco litigation of the 1990s, the Opioid Settlements are complex, and the relief is historic and desperately needed in every corner of every state. State Attorneys General ratified a complex national framework that contemplated and balanced the risks of blowback by holdout subdivisions. Like the court held in *In re Certified Question*, the act of releasing Defendants' subordinate opioid claims is within the purview of the Attorney General's sovereign

[93] 782 N.E.2d 761 (Ill. Ct. App. 2002).

constitutional and common-law authority to litigate and settle issues of statewide concern. Even where counties have express concurrent statutory and constitutional authority to bring claims, such authority does not impede the Attorney General's superior sovereign authority to represent the interests of the State, its counties, and its citizens. A contrary ruling would nullify these important and well-settled sovereign powers and would impede the state's ability to protect the state and its citizens' welfare.

The Attorney General has the power to bring, control, and resolve lawsuits to protect the public interest in matters of statewide concern, which includes the power to release Defendants' subordinate claims. "As the state's chief legal office, the attorney-general has the power, both under common law and by statute, to make any disposition of the state's litigation that [she] deems for its best interest. [She] may abandon, discontinue, dismiss or compromise it." *Ex parte King,* 59 So.3d 21, 27 n.4 (Ala. 2010). "In addition to having the authority to initiate and manage an action, the Attorney General may elect not to pursue a claim or to compromise or settle a suit when he [or she] determines that continued litigation would be adverse to the public interest." *Id.* Where (as here) the State brings a lawsuit on behalf of the public interest to safeguard the health, safety or welfare of its citizens, "[t]here is a presumption that the state will adequately represent the position of its citizens," and later suits asserting the same public interests will be precluded. *Alaska Sport Fishing Ass'n v. Exxon Corp.,* 34 F.3d 769, 773 (9th Cir. 2003).[94]

[94] *See also Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("[W]hen a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment."); *Badgley v. City of New York*, 606 F.2d 358, 364 (2d Cir. 1979) (concluding that "Pennsylvania represented all of its citizens . . . and that the terms of the decree are thus conclusive upon all Pennsylvania citizens and bind their rights.").

II. The Defendants' Counterclaims fail as a matter of law.

In response to the Amended Complaint, each of the Defendants, other than Halifax, filed counterclaims. These Defendants sued the Office of Attorney General for declaratory relief claiming that the Attorney General did not have authority to release their claims. Memorial Healthcare, Lee Health, and Broward Health sued the Office of Attorney General claiming that releasing their claims constitutes a constitutional taking. South Broward sued the Office of Attorney General claiming that the State was being unjustly enriched. As discussed below, the Office of Attorney General is entitled to summary judgment on each of the counterclaims.

A. The declaratory judgment actions fail as a matter of law.

For the reasons argued above in Section I, the Attorney General is entitled to summary judgment on the declaratory judgment claims of Memorial Healthcare, Lee Health, Broward Health, South Broward, SBMD, and SBPC as the Attorney General had the authority to release the Defendants claims as a matter of law.

B. The takings counterclaims fail as a matter of law.

As to the taking claims, Memorial Healthcare's, Lee Health's, and Broward Health's takings claims fail as a matter of law. A political subdivision cannot maintain a takings action against the State. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923).[95] In *City of Trenton*, the

[95] Florida's takings clause is coextensive with the Fifth Amendment's and may properly be analyzed with cases interpreting the Federal Constitution. *E.g., Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) ("Because Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis."); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2012) ("This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively."), *rev'd on other grounds*, 570 U.S. 595 (2013); *Highlands–In–The–Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1180 (Fla. 2d DCA 2017) (holding "because [developer] did not establish an unconstitutional taking under the U.S. Constitution, it has failed to establish an unconstitutional taking under the Florida Constitution").

State of New Jersey assessed a fee against the city for its use of water. The City of Trenton alleged that New Jersey committed a taking against it by assessing the fee for its use of the water. The Supreme Court held that the city as a political subdivision of the state had no constitutional claim for a taking against the state. *Id.* at 192. This is because:

> The number, nature, and duration of the powers conferred upon [political subdivisions] and the territory over which they shall be exercised rests in the absolute discretion of the state…The state therefore, at its pleasure, may modify or withdraw all such powers, *may take without compensation such property*, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.* In all these respects, the state is supreme…"

City of Trenton, 262 U.S. at 186 (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)) (emphasis added).

The Court in *City of Trenton* was "clear and unequivocal: these provisions of the Constitution do not apply against the state in favor of its own [political subdivisions]." *Bd. Of Levee Com'rs of the Orleans Levee Bd. v. Huls*, 852 F.2d 140, 142 (5th Cir. 1988) ("[A]s between the state and its agency, property is placed under the control of the agency for supervision and administration, the land to all practical intents and purposes being still the property of the state").

While the analysis of the takings claim can begin and end with *City of Trenton*, it is noteworthy just how consistently the Supreme Court has foreclosed the takings claims by subdivisions. As far back as the early nineteenth century, the Supreme Court in *Dartmouth College v. Woodward* held that a subdivision's claims were barred against a state.[96] Chief Justice John Marshall stated:

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[96] The plaintiff, Dartmouth College, brought an action in trover, seeking compensation for property taken when New Hampshire attempted to legislatively convert it to Dartmouth University. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 518-51 (1819).

> If the act of incorporation [of Dartmouth College] be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may according to its own judgment, *unrestrained by any limitation of its power imposed by the constitution of the United States.*

Id. at 17 U.S. at 629-30 (emphasis added).[97]

Federal and Florida state courts have consistently held that political subdivisions cannot maintain actions against the State of Florida. As the former Fifth Circuit stated, "[e]ver since the Supreme Court's landmark decision in *Dartmouth College v. Woodward* it has been apparent that public entities which are political subdivisions of states *do not possess constitutional rights*, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) (emphasis added) (rejecting civil rights lawsuit brought by the City of Safety Harbor, Florida, regarding the annexation of a portion of Safety Harbor for the City of Clearwater).[98] Florida courts have followed the reasoning of *City of Trenton* and repeatedly held that Florida's constitution (as well as the federal Constitution) do not provide subdivision with constitutional rights.[99]

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[97] The court found Dartmouth College to be a private entity and, therefore, potentially eligible to recover damages for their converted property.

[98] The reasoning in *City of Trenton* and *Dartmouth College* has only been expanded over time. In 2009, the Supreme Court doubled down, explicitly holding that "a political subdivision, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 1101 (2009) (internal quotation marks omitted) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). In *Ysursa*, the Court reiterated that political subdivisions of states "never were and never have been considered as sovereign entities." *Id.* at 1100 (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)). Instead, political subdivisions are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.* (citations omitted). As a result, the "State may withhold, grant or withdraw powers and privileges [from political subdivisions] as it sees fit." *Id.* (citations omitted).

[99] *See*, *e.g.*, *Shelby v. City of Pensacola*, 151 So. 53, 55 (Fla. 1933) ("It is an established principle of constitutional law that those constitutional restraints imposed by the Federal Constitution against state action do not

Memorial Healthcare, Lee Health, and Broward Health ask the Court to ignore all of these precedents and depart from these fundamental principles. There is no reason to do so. At its core, the takings clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40 (1960). This principle has no application whatsoever to Memorial Healthcare, Lee Health, and Broward Health who, despite their best efforts to ignore it, *are also part of Florida government*.[100] It is neither unfair nor unjust for Memorial Healthcare, Lee Health, and Broward Health to bear the public burden of providing health services. As government "safety net" hospitals, their *raison d'être* is to bear such burdens. (Counterclaim ¶¶ 8-9.)

Moreover, if more than two hundred years of unbroken Supreme Court precedent categorically barring their claim were not enough, the Memorial Healthcare's, Lee Health's, and Broward Health's takings claim fails for another fundamental reason: The Attorney General "merely assert[ed] a 'pre-existing limitation upon'" any property interests the Memorial Healthcare, Lee Health, and Broward Health may have had in their causes of action. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) (quoting *Lucas v. S.C. Coastal Council*, 505

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apply against the state in favor of its own municipality, in so far as equal protection of the laws and due process of the law under the Fourteenth Amendment are concerned.") (citing *City of Trenton*, 262 U.S. 182); *State ex rel. Green v. City of Pensacola*, 126 So. 2d 566 (Fla. 1961) (stating "the 'equality' provisions of the Federal and State Constitutions do not constitute restraints upon the state in the control of its own municipalities"); *Dep't of Comm'y Affairs v. Holmes County*, 668 So. 2d 1096 (1st DCA 1996) ("Being political subdivisions of the State of Florida, the Plaintiff Counties are not a 'person' entitled to protection under the due process clause of the federal or state constitution.") (citing *City of Trenton*, 262 U.S. 182).

[100] It should be noted that Memorial Healthcare, Lee Health, and Broward Health have a fundamental misunderstanding of the phrase "independent special districts." They repeatedly insinuate that such districts are distinct and independent from State Government. (Counterclaim ¶ 24, *see also* ¶¶ 21-22, 54, 61, and 64). However, the word "independent" in that phrase refers very specifically to independence from a municipality or county, not to independence from the State. *See* Fla. Stat. § 189.012.

U.S. 1003, 1028–29 (1992)). Such "government-authorized" action does "not amount to [a] taking[.]" *Id.*

Indeed, the U.S. Supreme Court has long recognized that a government actor does not "take" when it merely acts consistent with "restrictions . . . place[d] upon" property by "background principles of the State's law." *Lucas*, 505 U.S. at 1029. Such background restrictions "inhere in the [property's] title itself," *id.*, so a government actor does not take when it acts consistent with such restrictions—the "taken" property right "never" belonged to the plaintiff "in the first place." *Cedar Point*, 141 S. Ct. at 2079. For example, the government commits no taking when it enters private land to conduct a valid search, because a property owner has "no right to exclude an official engaged in a reasonable search." *Id.*; *see also Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993) (government committed no taking because plaintiffs lacked "the right to exclude . . . the Government"); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 272 (5th Cir. 2012) (similar); *United States v. Fuller*, 409 U.S. 488, 492 (1973) (similar).

So too here. For purposes of their takings counterclaim, the Memorial Healthcare, Lee Health, and Broward Health presume that this Court has held the "Attorney General has the legal right to extinguish the claims of the Hospital Districts and that such claims are extinguished by the Settlement Agreements." Counterclaim ¶ 66. But if that is so, her power to settle such claims was a "pre-existing limitation upon [the Hospital Districts'] title" to their causes of action. *See Cedar Point*, 141 S. Ct. at 2079. Because the Memorial Healthcare, Lee Health, and Broward Health had no right to prevent her from settling their claims, her exercise of her "longstanding" settlement authority did "not amount to [a] taking[.]" *See id.*

Memorial Healthcare's, Lee Health's, and Broward Health's takings claims are entirely without merit. It flies in the face of controlling Supreme Court precedent that was introduced by Justice Marshall in the early 19th century, unequivocally endorsed by the Taft Court in the 20th century, and recently enlarged by the Roberts Court in the 21st century. One need not even look beyond the text of the Florida Constitution's takings clause, which is nearly identical to the U.S. Constitution's takings clause, to determine the fate of the Memorial Healthcare's, Lee Health's, and Broward Health's argument: "[n]o *private property* shall be taken except for a public purpose and with full compensation therefor paid…" Article X, Section 6(a) (emphasis added). The property here is decidedly not private but is public property. The court should grant summary judgment in favor of the State.

C. The South Broward's unjust enrichment and constructive trust claim fails.

1. The Office of the Attorney General has sovereign immunity against South Broward's monetary claims.

The Office of the Attorney General has sovereign immunity against South Broward's claims for monetary relief. Sovereign immunity is the "privilege of the sovereign not to be sued without its consent." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011). "In Florida, sovereign immunity is the rule rather than the exception." *Pan–Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla.1984). There is no express waiver of sovereign immunity for unjust enrichment claims. *See Lee Memorial Health System v. Hilderbrand,* 304 So. 3d 58, 62 (Fla. 2d DCA 2020) (concluding that sovereign immunity barred an unjust enrichment claim); *City of Fort Lauderdale v. Israel* 178 So. 3d 444, 447 (Fla. 4th DCA 2015) (holding that an unjust enrichment claim was barred "with no written contract" to defeat the [government entity's] sovereign immunity claim…."). No written contract exists between South Broward and the Office of Attorney General. Therefore, the Office of Attorney General is entitled to summary

judgment on South Broward's unjust enrichment claim.

2. South Broward's claims fail as a matter of law.

In addition to being barred by sovereign immunity, South Broward's unjust enrichment claim fails because South Broward did not confer a direct benefit on the Office of Attorney General. Under Florida law to state a claim for unjust enrichment, a plaintiff must plead and prove that:

> (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

14th & Heinberg, LLC v. Terhaar and Cronley General Contractors, Inc., 43 So. 3d 877, 881 (Fla. 1st DCA 2010) (citing *Golden v. Woodward*, 15 So. 3d 664, 670 (Fla. 1st DCA 2009)). Critically, the necessary benefit must be a *direct benefit* conferred from plaintiff to defendant. *See Extraordinary Tile Servs., LLC v. Florida Power & Light Co*., 1 So.3d 400, 404 (Fla. 3d DCA 2009).

South Broward failed to plead and cannot prove that it conferred a benefit on the Office of the Attorney General. South Broward alleges that it conveyed a benefit on the Office of the Attorney General as follows:

> [South Broward], acting on its on [sic] behalf and on behalf of its inhabitants, ***conferred on the [Office of the Attorney General]*** benefit [sic], including, inter alia, ***payments for opioids*** manufactured and distributed by the Settling Defendants for sale to [South Broward], which benefit was known to and accepted by the AG and the Settling Defendants, ***which inured to the profits of each company*** and for which retention of such benefit is inequitable based on the Settling Defendants [sic] false and misleading marketing and omissions of and failure to state material facts in connection with marketing opioids, as set forth herein.

South Broward Counterclaim ¶ 46 (emphasis added). In other words, South Broward alleges it conferred a benefit on the Office of the Attorney General by conferring a benefit on the Opioid

Defendants subsequently sued by the Office of Attorney General. Even if its alleged benefit were plausible, South Broward admits in its counterclaim that the alleged benefit "inured to the profits of" the Opioid Defendants, not the State of Florida. *Id.* Finally, even if South Broward could satisfy the direct benefit requirement, which it cannot, it fails the fourth element. To begin with, a plaintiff cannot establish an inequitable enrichment if it received "adequate consideration" for the benefit conferred. *Pincus v. Am. Traffic Sols., Inc.*, 333 So. 3d 1095, 1098 (Fla. 2022). That is what happened here: South Broward paid money to Defendants (i.e., conferred a benefit), and received opioids in exchange (received consideration). But more to the point, the circumstances regarding the Office of the Attorney General settling and releasing statewide opioid claims on behalf of subordinate political subdivisions are not inequitable. As a government safety net hospital, South Broward's sole reason to exist is to convey benefits to the public at the behest of, and on behalf of, the State. The State has paid South Broward hundreds of millions of dollars each year for its services. Accordingly, the State is entitled to summary judgment on South Broward's unjust enrichment claim.

3. The remedy of a "constructive trust" is invalid on its face.

Even if South Broward could plead its unjust enrichment claim and its unjust enrichment claim were not barred by sovereign immunity, the remedy it seeks is unavailable as a matter of law. "[A] constructive trust is not a traditional cause of action, but an equitable remedy that must be based upon an established cause of action," such as unjust enrichment. *Diamond "S" Development Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008).[101] A constructive trust requires the plaintiff to demonstrate "clear and convincing proof of (1) a

[101] South Broward's demand for a constructive trust fails because the predicate claim for unjust enrichment fails. Diamond "S" Development Corp., 989 So. 2d at 697.

promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship, and (4) unjust enrichment." *Bank of America v. Bank of Salem*, 48 So. 3d 155, 158 (Fla. 1st DCA 2010) (citing *Gersh v. Cofman,* 769 So. 2d 407, 409 (Fla. 4th DCA 2000). A constructive trust is an extraordinary remedy appropriate "when property is acquired through fraud, undue influence, or breach of fiduciary duty. *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st DCA 2008) (citations omitted); *see also Est. of Kester v. Rocco*, 117 So. 3d 1196, 1201 (Fla. 1st DCA 2013). "Moreover, as a general rule, a mere promise of future conduct will not serve as a predicate for a claim of fraud sufficient to support the imposition of a constructive trust." *Bank of America*, 48 So. 3d at 158.

Here, South Broward resorts to naked, conclusory assertions that are refuted by the existing evidence. First, South Broward alleges that "the AG promised [South Broward] to settle claims against Opioid manufacturers, distributors, and dispensaries in favor of [South Broward] and on its behalf." South Broward Counterclaim ¶ 26. The communications alleged in its Counterclaim did not happen. Indeed, South Broward admits that very fact when it alleges that the Office of the Attorney General "never communicated" with it about settlements. South Broward Counterclaim ¶ 14. The allegations listing various flavors of confidential relationships and flatly asserting the existence of such relationships (such as an attorney-client relationship) is flawed in the same manner.[102] The Office of Attorney General never formed such a relationship. Accordingly, the Office of Attorney General is entitled to summary judgment as a matter of law on South Broward's constructive trust claim or remedy.

[102] If these allegations are intended to be factual assertations regarding communications and agreements between the parties (rather than conclusory legal statements), the Office of the Attorney General is prepared to seek sanctions for making unfounded factual allegations.

III. The affirmative defenses asserted by the Defendants fail.

In response to the Amended Complaint, the Defendants haves asserted four types of defenses: (1) defenses based on the federal or State constitution; (2) traditional tort and contractual defenses, like waiver, estoppel, and laches; (3) equitable defenses; and (4) defenses claiming that the Office of Attorney General is somehow violating state statutes. The Office of Attorney General is entitled to summary judgment on each type of defense.

A. Federal and State Constitutional Affirmative Defenses

1. The defenses raising purported violations of the due process and takings clauses fail.

Several of the Defendants have asserted that the Attorney General's settlement of these claims amounts to a deprivation of due process or a taking by the State. Neither of those amounts to an avoidance of or defense to the Office of Attorney General's claims in this case, these claims fail for the same reasons discussed in Section II.B. Defendants are all government entities, and a political subdivision cannot maintain a takings action or constitutional claims against its state. *Supra* Section II, B.

2. There is no separation of powers concern.

Bizarrely, Broward Health asserts that the Opioid Settlements somehow violate Florida's separation of powers doctrine. If Broward Health's argument rests on the idea that special districts fall within Florida's separation-of-powers clause, it is mistaken. Article II, Section 3 of the Florida Constitution states that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches" and that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches." But local governments are not part of "the state government" as that term is used in the Florida Constitution—the Constitution textually divorces the two. Article II, Section 5(a), for example, distinguishes between "office[s]

under the *government of the state*" and those under "the counties and municipalities therein." (emphasis added). Similarly, Article I, Section 24(b) distinguishes between "collegial public bod[ies] of the executive branch of *state government*" and "collegial public bod[ies] of a county [or] municipality." (emphasis added). That is why the Florida Supreme Court has recognized that this clause "identifies the branches of our state government" and "was not intended to apply to local government entities and officials." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). And for good reason—the separation-of-powers clause protects the allocation of power among co-equal branches, yet a local government is not a co-equal branch; it is instead a creature of the State and subject to the State's "all pervasive power." *Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985).

If Broward Health's argument is instead that the Attorney General infringed the legislature's power, it is unclear how Broward has standing to raise such a claim. But in any event, there can be no separation-of-powers violation where the purportedly infringed branch, the legislative branch, has ratified the settlement, passed a law establishing a trust fund to handle the settlement proceeds, and expressly limited expenditures of those funds to abate the opioid crisis. Fla. Stat. §17.42. As explained in Section I, the settlements are within the constitutional, statutory and common law powers of the Attorney General. Accordingly, this Court should grant the Office of Attorney General summary judgment on Broward Health's separation of powers defense.

3. There is no impairment of contract.

South Broward asserts that the Office of Attorney General somehow is impairing South Broward's bonds and that impairment violates Article I, Section 10 of the Florida Constitution. Initially, it is unclear how South Broward could claim any impairment as it never sued any of the

Opioid Defendants. It had no expectation of receiving a single penny of the proceeds from the Opioid Lawsuit, except from a legislative appropriation. And, even if it now sued, most of its claims would be barred by the applicable statute of limitations,[103] except for its public nuisance claim,[104] and its public nuisance claim at this point is barred by well-established law.[105] Putting that aside, it is unclear how South Broward, a government entity, can claim a violation of Article I, Section 10 of the Florida Constitution. *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1190-91 (Fla. 2017) (stating that Article I, Section 10 is a "right[] belong[ing] to the people … as against the government.") (quoting *Citrus County Hosp. Bd. V. Citrus Mem'l Health Found., Inc.*, 150 So. 3d 1102, 1106 (Fla. 2014)). Second, the Opioid Settlements are not themselves laws, and Article I, Section 10 by its unambiguous terms only prohibits a "law impairing the obligation of contracts…." Accordingly, the Office of Attorney General is entitled to summary judgment on South Broward's contractual impairment defense.

B. Waiver, estoppel, and laches fail.

The Defendants assert, with some variation, that the Office of Attorney General should have informed the Defendants that the Attorney General was going to release their claims so that

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[103] Fla. Stat. §95.11(3). The Office of Attorney General filed its lawsuit over four years ago, providing South Broward notice of the Opioid Defendants' misconduct.

[104] *See Brooks v. Patterson*, 31 So. 2d 472, 474 (Fla. 1947) (applying laches); *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 845 (Fla. 1927) (same); *also In re Nat'l Prescription Opiate Litig.,* 2019 WL 4194296, at *3 (N.D. Ohio Sept. 4, 2019) (applying Ohio law).

[105] *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26, 30 (Fla. 1950); *State ex rel. Walker v. Gessner*, 26 So. 2d 896, 897 (Fla. 1946); *Sauls*, 4 So. at 531; *Castro v. Sun Bank of Bal Harbour*, 370 So. 2d 392, 393 (Fla. 3d DCA1979) (concluding that settlement in suit brought by state barred subsequent claims by individuals asserting similar claims); *City of New Port Richey v. State ex rel. O'Malley*, 145 So. 903, 905 (Fla. 2d DCA 1962); *also Eggers v. City of Key West*, 2007 WL 9702450, at *3 (S.D. Fla. Feb. 26, 2007) (concluding "[a]pplicable Florida law states that a judgment in an action brought against a public entity that adjudicates matters of general interest to the citizens of the jurisdiction is binding on all citizens of that jurisdiction."); *Aerojet-General Corp. v. Askew*, 366 F. Supp. 901, 908-11 (N.D. Fla. 1973) (concluding that prior suit against state barred county suit on similar claims).

they would not have spent time filing or litigating their cases. They assert that this failure constitutes waiver, estoppel, or laches. First, the initial agreements involving the releases at issue were negotiated with representatives for the PEC. If the subdivisions' and hospitals' representatives on the PEC failed to fully inform the Defendants of the status of the potential settlements and other case developments, that is the MDL court's issue, not the State's issue. There is no basis contractually or otherwise supporting the notion that the Office of Attorney General had to notify all 2,415 subdivisions what it was going to do and get their permission. Such a duty finds no basis in Florida law and is contrary to the overwhelming case law cited in Section I regarding the Attorney General's authority. Further, the Office of Attorney General actually publicly took the position that hospitals and school districts did not have valid claims. *See* Brief for State of Florida, Omnibus Objection to the Request by [Claimants] for leave to file motions for class relief, at pp.8-13, *In re Purdue Pharma L.P.*, 19-23649-RDD, Bankr. S.D.N.Y., July 15, 2020). Any notion that the Defendants did not realize what the State's position is belied by what it filed in court. And, contrary to some assertions, the Office of Attorney General did not represent the Defendants as each had their own counsel.

Second, the Defendants' claims, as a matter of law, were going to be barred if the Office of Attorney General settled its claims prior to their commencing litigation.[106] Presumably, competent lawyers investigating their clients' claims would have provided their clients advice on what could happen if the Attorney General settled her claims. The result and the relief sought in

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[106] *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26, 30 (Fla. 1950); *State ex rel. Walker v. Gessner*, 26 So. 2d 896, 897 (Fla. 1946); *Sauls*, 4 So. at 531; *Castro v. Sun Bank of Bal Harbour*, 370 So. 2d 392, 393 (Fla. 3d DCA1979) (concluding that settlement in suit brought by state barred subsequent claims by individuals asserting similar claims); *City of New Port Richey v. State ex rel. O'Malley*, 145 So. 903, 905 (Fla. 2d DCA 1962); *also Eggers v. City of Key West*, 2007 WL 9702450, at *3 (S.D. Fla. Feb. 26, 2007) (concluding "[a]pplicable Florida law states that a judgment in an action brought against a public entity that adjudicates matters of general interest to the citizens of the jurisdiction is binding on all citizens of that jurisdiction."); *Aerojet-General Corp. v. Askew*, 366 F. Supp. 901, 908-11 (N.D. Fla. 1973) (concluding that prior suit against state barred county suit on similar claims) *also* Fla. Stat. §501.207.

this suit are a direct predictable result from existing law. Ignorance of the law by the Defendants or their counsel is not a defense.

Third, mere delay is insufficient as a matter of law to support a defense of waiver, estoppel or laches. *Avelo Mortgage, LLC v. Vero Ventures, LLC*, 254 So. 3d 439, 443 (Fla. 4th DCA 201*); *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. 5th DCA. Further, the Defendants are not clear whether the delay should be measured from: (1) the time that the Opioid Defendants initially sought a broader release from the State and the PEC; (2) the time that the Opioid Defendants, states, and the PEC agreed to the release; or (3) the time that the first settlement agreement was final. There was no prejudice from the first, so the Defendants' defense fails. As to the latter two, the delay was relatively short and there is no prejudice if the Court disagrees with the Office of Attorney General's position in this case.

Accordingly, the Office of Attorney General is entitled to summary judgment.

C. Unclean hands and *in pari delicto* fail.

South Broward and others less directly argue that the Office of Attorney General has unclean hands or acted *in pari delicto* because it owed a duty to or was the lawyer for all subdivisions. For the reasons stated in Sections I and II, the Office of Attorney General is entitled to summary judgment. The Office of Attorney General writes separately to further state that none of the Defendants were its clients. There is no document indicating formation of such a relationship, and there have been no facts that subjectively the Defendants had a reasonable belief that they were consulting with the Office of Attorney General, as an attorney, and manifested an intention to seek professional legal advice. *Mansur v. Podhurst Orseck, P.A.*, 994 So. 2d 435, 438 (Fla. 3d DCA 2008). All the Defendants, save South Broward, retained their own outside counsel to represent them in their opioid litigation. None of the Defendants, ever

contacted the Office of Attorney General, regarding representing them in opioid litigation. Accordingly, the Office of Attorney General is entitled to summary judgment.

D. FDUTPA and Civil RICO Statutes do not provide a defense.

Last some of the Defendants raise that the Opioid Settlements do not comply with FDUTPA or the Civil RICO statute because the Opioid Settlements contain limitations on how the monies may be used and provide monies to counties and cities. Again, putting aside that these contentions do not seem to avoid the Office of Attorney General's claim, as an initial matter, the legislature ratified payments to subdivisions called for under the Opioid Settlements, created the Opioid Settlement Clearing Trust Fund to receive settlement monies for both subdivisions and the State, and itself limited the use of settlement funds to abate the opioid crisis. Fla. Stat. §17.42. If the legislature, the appropriator under our system of state government, being informed of the Opioid Settlements enacts legislation ratifying how the monies should be spent, it is hard to see that the Defendants have any basis to object or that there is anything wrong because the monies did not go to general revenue fund of the State. Second, the Office of Attorney General did not just assert FDUTPA and Civil RICO claims against the Opioid Defendants. It asserted numerous common law claims including public nuisance. Those causes of action are not subject to the same limitations on the use of recovered monies. Indeed, one of the available remedies for a public nuisance cause of action is monies to abate the nuisance, which is exactly what the Opioid Settlements provide. Accordingly, to the extent that either of these contentions is an affirmative defense, the Office of Attorney General is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, this court should grant summary judgment in favor of Plaintiff Office of the Attorney General, State of Florida, Department of Legal Affairs and declare that the Attorney General had the power to release, and did release, Defendants' opioid claims in the Opioid Settlements.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2022, a true and correct copy of the foregoing was filed with the Clerk of Court using the Florida Courts e-Filing Portal, which will send a notice of electronic filing to all counsel of record registered to receive such notifications. If electronic notice is not indicated through the e-Filing Portal, a true and correct copy of the foregoing document was delivered via electronic mail or U.S. Mail.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
PURDUE PHARMA L.P., *et al.*,	:	Case No. 19-23649 (RDD)
Debtors.	:	(Jointly Administered)

THE STATE OF FLORIDA'S OMNIBUS OBJECTION TO THE REQUEST BY THE HOSPITAL CLAIMANTS, THE PRIVATE INSURANCE CLASS PLAINTIFFS, THE INDEPENDENT PUBLIC SCHOOL DISTRICTS, THE NAS GUARDIANS, AND THE CHEYENNE AND ARAPAHO TRIBES FOR LEAVE TO FILE MOTIONS FOR CLASS RELIEF

The State of Florida ("Florida") hereby submits this Omnibus Objection ("Objection") to the request by the Hospital Claimants, the Private Insurance Class Plaintiffs, the Independent Public School Districts ("IPSDs"), the NAS Guardians, and the Cheyenne and Arapaho Tribes seeking leave to file motions for class relief [ECF Nos. 1211, 1330, 1334, 1362, & 1363] and states the following in support of its Objection:

A. INTRODUCTION

In addition to the arguments made in the Public Claimants' Omnibus Objection, which Florida incorporates herein for the sake of brevity, Florida asserts that all five motions should be denied and each group should be barred from asserting class claims because each of their claims are either: (1) for personal injuries and not susceptible to class treatment; (2) derivative of other parties' claims and are too remote to survive scrutiny; or (3) require individualized, not group proof, which undermines the class arguments that have been advanced.

B. FACTUAL BACKGROUND

Five groups have filed motions for leave seeking the ability to file class claims. Two of the groups, the NAS Guardians[1] and the Cheyene and Arapaho Tribes (collectively with the other joining Native American tribes, the "Tribes"),[2] seek the ability to file a class proof of claim on

[1] The NAS Guardians seek certification of four classes of individuals. The classes sought certified are:

> Class 1: Legal Guardians of United States residents born after May 25, 2000, who were medically diagnosed with opioid-related "Neonatal Abstinence Syndrome" ("NAS") at or near birth and whose birth mother received a prescription for opioids or opiates prior to the birth and those opioids or opiates were manufactured and/or distributed by Purdue.
>
> Class 2: Legal Guardians of United States residents born after May 25, 2000, who were medically diagnosed with opioid-related NAS at or near birth and whose birth mother received a prescription for opioids or opiates prior to the birth and those opioids or opiates were manufactured and/or distributed by one or more of Purdue's RICO Marketing Claim or RICO Supply Chain Claim co-conspirators.
>
> Class 3: Legal Guardians of United States residents born after May 25, 2000, who were medically diagnosed with opioid-related NAS at or near birth and whose birth mother received a prescription for opioids or opiates in the ten months prior to the birth and those opioids or opiates were manufactured and/or distributed by Purdue.
> Class 4: Legal Guardians of United States residents born after May 25, 2000, who were medically diagnosed with opioid-related NAS at or near birth and whose birth mother received a prescription for opioids or opiates in the ten months prior to the birth and those opioids or opiates were manufactured and/or distributed by one or more of Purdue's RICO Marketing Claim or RICO Supply Chain Claim coconspirators.
>
> Expressly excluded from the Classes are any infants or children who were treated with opioids neonatally, other than for pharmacological weaning. Also excluded from the class are Legal Guardianships where a governmental agency, such as a public children services agency, has affirmatively assumed the duties of "custodian" of the child.

Motion [ECF No. 1362-1], at 28.

[2] The Tribes seek to certify a class:

> Individual members of all 574 federally recognized tribes within the boundaries of the United States of America, partially or wholly, as set forth in the list of federally recognized tribes updated annually by the Secretary of the Interior, the most recent version of which is published at 84 Fed. Reg. 1200, 1204, who have the following claims: (a) misuse, addiction, therapy, hospitalization, and/or overdose of opioids with accompanying personal injuries and, in some instances, wrongful death;(b) babies born to opiate addicted mothers with the babies and

behalf of injured individuals recovering what would be recognizable as personal injury related damages. More specifically, the NAS Guardians seek to file a claim for the cost of medical monitoring and surveillance[3] (Motion [ECF No. 1362-1], at 2), and the Tribes seek compensation for individual tribal members (Motion [ECF No. 1363-1], at 25). The remaining three groups seek to recover past and future costs caused by the opioid epidemic as follows: (i) the Hospitals seek to file a claim on behalf of almost all acute care hospitals, seeking what appears to be unrecouped costs to hospitals caring for opioid use disorder ("OUD") patients.[4] (*See* Motion [ECF No. 1330-1], at 352, ¶974) (stating "incurred massive costs by providing uncompensated care as a result of opioid-related conditions."); (ii) the Private Insurance Class Plaintiffs seek a class to recover increased health insurance costs. (*See* Motion [ECF No. 1321, at 5-6) (alleging "every purchaser of private health insurance in the United States paid higher premiums, co-payments, and

> children having personal injuries, physical disorders, Neonatal Abstinence Syndrome ("NAS"), mental disorders, and lifetime care and educational costs and expenses; (c) abused or neglected children whose parent(s) or guardian(s) are addicted to and/or dependent on opioids, and/or who must be placed in foster care or adoptive guardians who take on the role of caretaker, including grandparents.

Motion [ECF No. 1363-1, at 25.

[3] *See, e.g., Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 498-502 (2d Cir. 2020) (describing medical monitoring as an element of damages for personal injuries under New York law); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1194 (9th Cir. 2001) (finding that medical monitoring claim was only an element of damages under California law); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (stating that a claim for medical surveillance "is simply a claim for future damages" under West Virginia law).

[4] The Hospitals defined the proposed class as:

> All acute care hospitals in the United States which treated, for opioid conditions, patients who have been prescribed prescription opioids. "Opioid conditions" are defined as opioid overdose; opioid addiction (including that of babies born opioid addicted); related mental health treatment programs; and any other opioid comorbidities noted in the patient's record. Excluded from the Class are any hospitals (1) that file their own claim, and/or (2) are directly or indirectly owned or operated by (a) Debtors or Debtors' affiliated entities, or (b) the federal government.

Motion [ECF No. 1330-1], at 23-24.

deductibles."), and (iv) the IPSDs seek to file a claim for the amounts necessary for "[f]unding special education and supplemental education services for children exposed to opioids." (*See* Motion [ECF No. 1211], at 13).

C. DISCUSSION

1. The Tribes lack standing to assert individual claims of other Native American tribes and individual claims of all Native Americans.

As an initial matter, this Court must determine whether the Tribes have standing. The Tribes assert that they are bringing this action in their *parens patriae* capacity. This argument lacks merit for two reasons.

First, the Tribes fail to cite any authority that would allow the approximately forty (40) Native American tribes that have joined their Motion, to claim sovereign authority over the remaining approximately five hundred and thirty (530) federally recognized Native American tribes that have not joined the Tribes' Motion. *See* Motion [ECF No. 1363] at 1, n.2. . For purposes of this Objection, Florida assumes *arguendo* that the Tribes have a sovereign or quasi-sovereign interest over their members, but the Tribes have no such interest as to the members of the remaining Native American tribes. Stated another way, the Tribes are suggesting the equivalent to the State of Florida filing a claim on behalf of the State of New York's citizens without the State of New York's consent and joinder. The doctrine of *parens patriae* is not expandable in such a manner.

Second, *parens patriae* actions are not class actions, and therefore, does not provide a basis for the Tribes' Motion. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212-13 (2d Cir. 2013) (concluding that a state's lawsuit against Purdue "is not a 'class action'"). Accordingly, this Court should deny the Tribes' Motion.

Despite the Tribes' confusion in the Motion relating to *parens patriae* authority, the Tribes cannot file the types of claims that they are seeking to file. With the proposed class claim, the Tribes are not seeking to recover for their sovereign or quasi-sovereign interests. Instead, the Tribes are seeking to recover private tribal members' damages. The federal courts which have recognized *parens patriae* authority of Native American tribes have limited that doctrine to those cases where a Native American tribe acts on behalf of **all** of its members and not individually harmed or injured members. *See Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Indep. School Dist.*, 817 F.Supp. 1319, 1327 (E.D. Tex. 1993); *The Kickapoo Tribe of Oklahoma v. Lujan*, 728 F.Supp. 791, 795 (D.D.C.1990); *Assiniboine & Sioux Tribes v. Montana*, 568 F.Supp. 269, 277 (D. Mont. 1983).[5] That is not the interest that the Tribes seek to redress in their Motion [ECF No. 1363].

Florida does not dispute that opioids have had a profound, negative effect on Native American tribes, just as they have had on the States. Florida is not challenging the Tribes' ability to file a claim advancing their sovereign and quasi-sovereign interests. However, the Tribes have no sovereign or quasi-interest over members of other Native American tribes and any individual damages claims are not within the Tribes' *parens patriae* standing. Accordingly, this Court should deny the Tribes' Motion [ECF No. 1363].

2. The Claims of the NAS Guardians and the Tribes do not meet Rule 7023's requirements.

The Tribes and NAS Guardian's Motions [ECF Nos. 1362 & 1363] should be denied because claims for personal injuries are rarely susceptible to class certification, especially on a

[5] Florida could only find one tort case dealing with these issues. *Alabama Coushatta Tribe of Texas v. Am. Tobacco Co.*, case no. 01-41198, 46 Fed. Appx. 225, 225 (5th Cir. July 2002). The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of a Native American tribe's claims against the tobacco companies. *Id.*

nationwide basis.[6] Not surprisingly, numerous courts have rejected prepetition class certification attempts against the Debtors for similar personal injury claims.[7] In each case, the courts concluded that claims within the putative classes depended on questions of fact and law peculiar to each individual and there was not sufficient commonality for a class to be certified. *E.g., Wethington*, 218 F.R.D. at 589. Nothing has changed from those decisions that justifies class treatment of the Tribes or the NAS Guardians.

With the exception of a RICO cause of action, different state laws will apply to each basis asserted by the Tribes and NAS Guardians (as well as the other movants), making adjudication in this case unmanageable.[8] For example, the law on medical monitoring is far from uniform.[9]

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[6] *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (stating "[w]e believe that the commonality barrier is higher in personal injury damages class actions…."); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089-90 (6th Cir. 1996) (denying class certification in single product pharmaceutical product liability personal-injury lawsuits); *In re Temple*, 851 F.2d 1269, 1273 n. 7 (11th Cir. 1988) (declining to hold that products liability or mass accident suits could never be the proper subject of a class action but recognizing "that the prerequisites of commonality and typicality will normally be hard to satisfy").

[7] *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577 (S.D. Ohio 2003); *Harris v. Purdue Pharma, L.P.*, 218 F.R.D. 590 (S.D. Ohio 2003); *Campbell v. Purdue Pharma, L.P.*, 2004 WL 5840206, at * (E.D. Mo. 2004); *Salisbury v. Purdue Pharma, L.P.*, 2003 WL 22005005 (E.D. Ky. 2003); *Gevedon v. Purdue Pharma*, 212 F.R.D. 333 (E.D. Ky. 2002); *Foister v. Purdue Pharma L.P.,* No. Civ.A. 01–268–DCR, 2002 WL 1008608 (E.D. Ky. Feb. 26, 2002); Howland *v. Purdue Pharm L.P.*, 821 N.E. 2d 141, 146-47 (Ohio 2004) (reversing class certification); *Hurtado v. Purdue Pharma Co.*, 800 N.Y.S.2d 347 (N.Y. Sup. Ct. 2005) (denying class certification); *see also United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 575 (W.D. Va. 2007) (discussing in the course of Purdue's criminal sentencing the difficulties of proving causation against Purdue by a personal injury plaintiff and the difficulties of certifying a class based on those same issues).

[8] *See, e.g., In re Bridgestone /Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (denying certification of a nationwide class); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, (5th Cir. 1996) (reversing class certification and stating "[p]rior to certification, the district court must determine whether variations in state law defeat predominance. While the task may not be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto*, renders class treatment not superior.") (emphasis in original).

[9] *See In re Prempro*, 230 F.R.D. 555, 569 (E.D. Ark. 2005) (refusing to certify a medical monitoring class because of the variation in state laws); *see, e.g., Houston County Health Care Auth. v. Williams*, 961 So.2d 795, 811 (Ala. 2007) (requiring a present manifestation of injury to receive medical monitoring); Bowerman *v. United Illuminating*, 1998 WL 910271, at *10 (Conn. Super. Dec. 15, 1998) (rejecting medical monitoring common law claim); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (refusing a medical monitoring claim); *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997) (rejecting a medical monitoring claim under the law of the District of Columbia); *Petito v. A.H. Robins Co.*, 750 So.2d 103, 106-07 (Fla. 3d DCA 1999) (allowing for medical monitoring in negligence cases despite physical injury); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995)

Similarly, public nuisance law is varied.[10] Indeed, under Florida and other state laws, a private right of action for public nuisance may not exist if the State or a municipality are already litigating such a claim.[11] Each state will have variation in the laws governing the whole range of issues necessary to be decided, including: viability of future claims; the amount and type of evidence necessary to prove causation; statutes of limitations; joint and several liability; and comparative and contributory negligence.

In addition to the differing laws, the personal injury claims advanced by both the NAS Guardians and the Tribes present disparate factual issues that exponentially compound the legal issues. Factual variations predominate amongst the class members, including: what opioid product was taken and for what condition (off label use); what dosage was taken and for how long; was a Purdue opioid product taken; did the claimant have OUD prior to taking the Purdue product; were the opioid products prescribed or illegally attained; what is the claimant's drug use and medical history; and what is the medical prognoses. In short, the number of uncommon issues becomes

(concluding that no separate action for medical monitoring existed, but if there was a physical injury medical monitoring could be recovered under Kansas law); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 694-704 (Mich. 2005) (rejecting a medical monitoring claim); La. Civ. Code Ann. art. 2315 (stating "[d]amages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease."); *also* Victor E. Schwartz, *et al.*, Medical Monitoring: Should Tort Law Say Yes?, 34 WFLR 1057 (1999) (collecting cases).

[10] *Compare City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (concluding that no claim for public nuisance existed under Illinois law); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421-22 (3d Cir. 2002) (holding same) *with City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002) (concluding under the same facts that a claim for public nuisance existed); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (holding same).

[11] *Brown v. Florida Chautauqua Ass'n,* 52 So. 802, 804 (Fla. 1910) ("[P]ublic wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain separate judicial proceedings to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong.") (emphasis added); *see also Castro v. Sun Bank of Bal Harbour, N.A.* 370 So. 2d 392, 393 (Fla. 3d DCA 1979) (stating that where State settled a public nuisance claim, private parties were bound even if they were not parties to the original action); *Young v. Miami Beach Imp. Co.*, 46 So. 2d 26, 30 (Fla. 1950) (stating private plaintiffs were bound by a nuisance settlement by a city over the same subject matter).

endless. The differences among the class members make a class action anything but the manageable, superior method for resolution that Rule 23 requires. Accordingly, this Court should deny the Tribes' and NAS Guardian's Motions [ECF Nos. 1362 & 1363].

3. The Claims of the Hospital Claimants, the Private Insurance Class Plaintiffs, and the Independent Public School Districts Are Derivative and Too Remote for Class Treatment.

The Hospital Claimants, the Private Insurance Class Plaintiffs, and the IPSDs have asserted claims that are derivative of others' claims and are therefore too remote to be presented to this Court as class claims. These claimants seek to recover expenses incurred in responding to torts suffered by their respective patients, insureds, and students. The claims of private, third-party payors – and the claims of school districts attempting to recover for students' injuries -- are not amenable to class-wide proof. *See UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121, 134 (2d Cir. 2010) (holding unions and insurers who acted as third-party payors could not demonstrate proximate cause by generalized proof in a RICO claim against a pharmaceutical manufacturer alleging false marketing of the drug Zyprexa). Nine United States Courts of Appeal, including the Second Circuit, have held that the claims like these are derivative, raising questions of proximate cause and standing.[12] Accordingly, the Hospital Claimants, Private Insurance Class Plaintiffs, and the IPSDs cannot use the class action device to prove proximate cause.

[12] *See, e.g.*, *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *see also Allegheny Gen. Hosp. v. Philip Morris*, 228 F.3d 429 (3d Cir. 2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F. 3d 912 (3d Cir. 2000); *Ass'n of Washington Pub. Hosp. Dists. v Phillip Morris*, 241 F.3d 696 (9th Cir 2001); *Lyons v. Philip Morris Inc.*, Case No. 99-2843, 2000 WL 1234272 (8th Cir. Sept. 1, 2000); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund*, Case No. 99-13476, 2000 WL 1190787 (11th Cir. Aug. 22, 2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999); *Perry v. Am. Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001). These causation questions are not susceptible to class-wide proof. *See UFCW Local 1776*, 620 F.3d at 134.

The Hospital Claimants' claims are largely derivative of their patients' own tort claims and therefore cannot be afforded class treatment. In analogous cases involving tobacco litigation, courts have held that hospitals, when seeking recovery for costs incurred in responding to smokers' injuries, lack standing to assert tort claims for the injuries that were derivative of their patients' injuries. *See, e.g., Allegheny Gen. Hosp.*, 228 F.3d at 436. In *Allegheny Gen. Hosp.*, the Third Circuit noted that hospitals do not possess *parens patriae* authority like that of state governments to sue on behalf of individuals. *Id.* at 437. As a result, the hospitals were required to prove the proximate cause of their injuries. The Court affirmed the dismissal of all claims asserted by the hospitals including those for RICO violations, negligence, fraud, unjust enrichment, and public nuisance, reasoning:

> Like the Court in *Steamfitters*, we find that the Hospitals' injuries are indirect. Neither the duty to provide medical care, nor the direct or free provision of medical care, affects this conclusion… "[T]he remoteness of the [Hospitals'] alleged RICO injuries from any wrongdoing on the part of the [T]obacco [C]ompanies' leads us to conclude that proximate cause is lacking."

Id. at 444 (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 933-4 (3d Cir. 1999)); *see also Ass'n of Washington Pub. Hosp. Dist.*, 241 F.3d at 704 (affirming dismissal of claims brought by public hospital districts claiming injuries from the tobacco companies' conduct).

Here, the Hospital Claimants cannot prove derivative claims based on expenses incurred from the injuries their patients may have suffered by using class-wide proof. *See UFCW Local 1776*, 620 F.3d at 134. Instead, after removal of these derivative claims, the Hospital Claimants are left with nothing more than claims for increased expenses to provide care to people suffering from OUD and increased costs of purchasing opioid products. These claims are also necessarily

individualistic and will vary from hospital to hospital. Such derivative claims are simply not the types of claims that are capable of class treatment, and the Court should reject the hospitals' attempt to shoehorn these types of claims as a class.

Likewise, the claims asserted by the Private Insurance Class Plaintiffs suffer from these same defects. The Private Insurance Class Plaintiffs seek to recover damages caused by other insureds' increased costs incurred as a result of taking Purdue's opioid products that were then passed on to them in the form of increased insurance premiums. Thus, the Private Insurance Class Plaintiffs' claims are derivative of other insureds' claims. These types of derivative claims by private insureds have routinely been rejected as too remote. *See, e.g.*, *Perry*, 324 F.3d at 849 (affirming dismissal of putative class action claims brought by insureds under a group health insurance plain claiming they paid increased premiums as a result of the tobacco companies' actions). Further, the Private Insurance Class Plaintiffs' claims for increased insurance premiums are even more remote than the claims asserted by insurance companies, unions, and welfare benefit funds, which courts have held cannot be brought as class actions. *See, e.g.*, *UFCW Local 1776*, 620 F.3d at 134 (third-party payors could not demonstrate proximate cause by generalized proof); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999) (holding "the economic injuries alleged" by the health and welfare benefit funds "are purely derivative of the physical injuries suffered by plan participants [from smoking] and therefore too remote as a matter of law for them to have standing to sue defendants");[13] *Sidney Hillman Health*

[13] The Second Circuit also considered the fact that the State of New York had already sued Philip Morris, creating the threat of a double recovery. *Laborers Local 17 Health and Benefit Fund,* 191 F.3d at 241 (citing *Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 269 (1992)). Notably, here, every state and several territories have asserted claims in this proceeding, and the claims by the Hospital Claimants, the Private Insurance Class Plaintiffs, and the IPSDs threaten a double recovery with those of the Public Claimants.

Ctr. v. Abbott Labs., 873 F.3d 574, 578 (7th Cir. 2017) (affirming dismissal of RICO lawsuit by two welfare benefit plans that paid for members' use of the drug Depakote after off-label marketing for lack of proximate cause).

It is noteworthy that the Second Circuit in *UFCW Local 1776* rejected class certification on the plaintiffs' theory that the defendant had misrepresented to doctors the risks and benefits of the drug taken by its insureds, a similar theory employed here by the Private Insurance Class Plaintiffs.[14] The Court held that issues of reliance are not capable of proof on a class-wide basis. 620 F.3d 121, 134-6 (reversing district court's class certification order). Accordingly, this Court should deny the class certification requested by the Private Insurance Class Plaintiffs.

Moreover, the claims asserted by the IPSDs suffer from the same defects as the claims asserted by the Hospital Claimants and the Private Insurance Class Plaintiffs. The IPSDs, a loosely defined group of public schools located in four states with vastly different inter- and intra-state funding structures, are seeking costs for special education of children who are born with neonatal abstinence syndrome after exposure to opioids in utero ("NAS Children"). The IPSDs lack standing to assert class action claims for the injuries suffered by the NAS Children, who are also

[14] It appears that the Private Insurance Class proponents' proposed class claim is based on guesswork instead of data despite this bankruptcy pending for 10 months. Remarkably, the Private Insurance Class concede that they do not currently know the additional costs that they are seeking with the class claim, stating:

> The precise costs imposed on the insurance ratepayer market are more nefarious because Purdue knows those costs are veiled by the inner workings of the insurance industry and rate-setting mechanisms that insurers keep shrouded in secrecy. Because health insurance carriers
> refuse to voluntarily produce this information and facilitate the claims process, the Private Insurance Plaintiffs are serving subpoenas under Bankruptcy Rules 9014 and 9016 in order to further substantiate their claims beyond the common sense reality that insureds pool the costs of medical treatment through insurance payments.

Motion [ECF No. 1334], at 10.

claimants in this matter.[15] As discussed *supra*, the IPSDs, like the Hospital Claimants and the Private Insurance Class Plaintiffs, cannot establish proximate cause by class-wide proof. *See supra*, pp. 11-16; *UFCW Local 1776*, 620 F.3d at 134-6.[16]

Further, the claims by the IPSDs threaten a double recovery by asserting overlapping claims with both the Public Claimants, which provide funding for the IPSDs, and the NAS Children. The Second Circuit has warned against the risks of recognizing indirect claims, such as those presented here. In a leading case, the court stated that "recognizing claims by the indirectly injured would require courts **to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries**." *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 237 (2d Cir. 1999) (citing *Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 269 (1992)) (emphasis added). Permitting the IPSDs, the Hospital Claimants, and the Private Insurance Class Plaintiffs to proceed with class action proofs of claim will put this Court in precisely the position the Second Circuit sought to prevent by requiring the apportionment of "damages among

[15] It is not clear how the IPSD class could be ascertained. The NAS Guardians represent that "the numbers [of NAS children] and what those numbers represent vary widely because there is no uniform standard for assessing and collecting data." Motion [ECF No. 1362-1], at 7-8. As relief, the NAS Guardians seek creation of a registry of NAS children. *Id.* at 2. Given the differing ways that States fund education, including public education, without having an ascertained class, such a class will be unmanageable. For example, Florida's funding calculations differ by county. *See, e.g.,* http://fldoe.org/core/fileparse.php/7507/urlt/Fefpdist.pdf, at 9-10, 17 (last visited July 13, 2020). The individual variables of what support a student needs, his or her age, geography, and county demographics cause variations in how much funding the school districts receive for a student.

[16] By contrast, individual states have both *parens patriae* and the statutory authority to bring claims on behalf of their citizens and are the proper parties to represent their constituents in this forum. *See Laborers Local 17 Health and Benefit Fund*, 191 F.3d at 243-44 (distinguishing cases brought by states and holding that, "in general, state cases are often distinguishable on the issue of proximate causation given the state's unique role relative to protection of its citizens . . . and certain state statutes that permit states to maintain actions on behalf of their citizenry "); *Southeast Fla. Laborers Dist. Health & Welfare Tr. Fund v. Philip Morris*, No. 97-8715-CIV-RYSKAMP, 1998 WL 186878, at *5 & n.5 (S.D. Fla. Apr. 13, 1998) (rejecting attempts by a private third-party payor – a union health care fund – to recover for injuries to health care recipients, expressly distinguishing the State's "tobacco settlement."). All of the states are present in this forum as part of the Public Claimants group.

plaintiffs removed at different levels of injury." *Id.* Accordingly, this Court should deny the Hospitals Claimants', Private Insurance Class's, and IPSD's Motions.

4. The Claims of the Hospital Claimants, the Private Insurance Class Plaintiffs, and the Independent Public School Districts Are Inappropriate for Class Treatment Because Individual Issues Are Predominant.

In addition to the fatal flaws concerning the derivative and remote nature of the claims asserted by the Hospital Claimants, the Private Insurance Class Plaintiffs, and the Independent Public School Districts, class treatment is categorically unavailable for these claims due to the need to prove causation as to each of the respective patients, insureds or students, an inquiry necessarily requiring individualized determinations. *See In re Motors Liquidation Co*., 447 B.R. 150, 158 (Bankr. S.D.N.Y. 2011) ("When resolution of class questions will still require case-by-case analysis of facts with respect to each member of the class, class certification may not be appropriate.").

Courts have routinely rejected similar claims for such causation and individualized proof problems. *See*, *e.g.*, *UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121, 134 (2d Cir. 2010) (holding third-party payors cannot demonstrate proximate cause by generalized proof in a RICO claim against a pharmaceutical manufacturer alleging false marketing of the drug Zyprexa*); see also United Food & Commercial Workers Cent. Pennsylvania & Reg'l Health & Welfare Fund v. Amgen, Inc.*, 2010 WL 4128490, at *1 (9th Cir. 2010) (affirming dismissal of third-party payors' RICO lawsuit against pharmaceutical manufacturer based on lack of proximate cause because "the complaint proffered an attenuated causal chain that involved at least four independent links"); *Southeast Laborers Health & Welfare Fund v. Bayer Corp.*, 2011 WL 5061645, at *9 (11th Cir. 2011) (affirming dismissal of third-party payor's RICO claim against pharmaceutical manufacturer because the plaintiff "failed to allege facts plausibly demonstrating that [it] would

have independently determined that Trasylol was not 'medically necessary' if Bayer had disclosed the allegedly suppressed material information").

In a similar case, residents of Southern Sudan filed a lawsuit against the government of Sudan and a Canadian energy company alleging that they were the victims of various violations of international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 226 F.R.D. 456, 457 (S.D.N.Y. 2005). The judge denied class certification because the plaintiffs would have to show with respect to each individual class member that the injuries for which they were claiming damages were actually caused by the alleged crimes against humanity. *Id.* at 482. To conduct such an inquiry, facts individual to each attack would have to be determined. *Id.* The Court further stated that given the need for evidence of causation, and the allegations involving hundreds of thousands of class members, hundreds of individual attacks, the massive geographic area involved, and the six-and-a-half year time period, "[t]he challenge of presenting that individualized proof on behalf of thousands of class members, even if it were logically feasible, will quickly dominate the proof regarding the common issues." *Id.* at 482-83.

Similarly, in the bankruptcy case of *In re Motors Liquidation*, 447 B.R. 150, the Court denied class certification because it found that the common issues presented in this case did not predominate over the individual issues. *Id.* at 159. Claimants had sought relief on behalf of thousands of South Africans who had allegedly suffered distinct injuries over multiple decades. *Id.* The court determined that it would be too difficult to establish causation and the requisite intent and that the simpler alternative would be to have individual claimants "tell" their story to the court. *Id.* at 163. The Court further stated that "to proceed on a class action basis, I'd have to choose between holding one or more trials of extraordinary complexity, on the one hand, or taking inappropriate shortcuts as to individual issues of wrongful conduct, causation and requisite purpose

and assistance, on the other … [and] any shortcuts that would have to be taken to make class action treatment superior as an administrative matter would have to come at the expense of due process concerns." *Id.* at 163.

Here, burdensome and time-consuming discovery and individual proof would be required for the patients, insureds, and students upon whose injuries the Hospital Claimants, the Private Insurance Class Plaintiffs, and the IPSDs must rely, demonstrating that the claims of each of these groups are completely inappropriate for class treatment.

Moreover, the extraordinary class action relief sought here only highlights the inappropriate nature of the request made by the Hospital Claimants, the Private Insurance Class Plaintiffs, and the IPSDs. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-4 (1997) (Requirement of predominance for certification of class action was not met because of individual issues surrounding asbestos exposure, with Court noting that "'[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma....'"); *see also Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002) (affirming district court's denial of motion for class certification where individual misrepresentations made in insureds' fraud action were not shown to be uniform to the putative class members); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (Common issues did not predominate in class action involving defective penile implants.).

WHEREFORE, Florida respectfully requests that this Court enter an order denying the Hospital Claimants, the Private Insurance Class Plaintiffs, the Independent Public School Districts,

the NAS Guardians, and the Cheyenne and Arapaho Tribes leave to file any motions for class relief.

Respectfully submitted, this 15th day of July 2020.

Dated: July 15, 2020

New York, New York

By: */s/ Christopher Spuches*

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February 12, 2025

The Honorable John Thune
Senate Majority Leader
United States Senate SD-511
Washington, DC 20510

The Honorable Chuck Schumer
Senate Democratic Leader
United States Senate
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Via Email and U.S. Mail

Re: Pass the HALT Fentanyl Act (H.R. 27/S.B. 331)

Dear Majority Leader Thune and Democratic Leader Schumer:

Despite the decades-long proliferation of fentanyl analogues and the obvious problems with the then-current mechanisms for prosecution of fentanyl-analogue traffickers, it was not until 2018 that the Drug Enforcement Administration (DEA) classified fentanyl analogues as Schedule I drugs, and only then on a temporary basis.[1] As that temporary scheduling came to an end, however, Congress failed to take the responsible course and schedule them permanently.[2] Instead, fentanyl analogues' status as Schedule I drugs has become a political plaything in Congress and

[1] Sarah N. Lynch, *U.S. lawmakers seek permanent ban on illicit types of fentanyl*, Reuters (Mar. 7, 2022), https://tinyurl.com/28wbzxx4.
[2] See, *e.g.*, National Association of Attorneys General, *Deadly Fentanyl Loophole Should be Closed by Passing Federal Legislation Endorsed by State and Territory Attorneys General* (Aug. 23, 2018), https://tinyurl.com/5bkx5nke (bipartisan group of 52 state and territory attorneys general urging Congress to permanently schedule fentanyl analogues).

remains at the mercy of repeated temporary extensions, the most recent of which will expire less than two months from now—on March 31, 2025.[3]

Placing fentanyl analogues on Schedule I is the correct move, but it must be done *permanently*. To ensure that law enforcement can continue to prosecute the sale and use of illicit fentanyl analogues, the undersigned Attorneys General of 25 States respectfully ask the Senate to permanently schedule all current and future fentanyl analogues as Schedule I drugs by passing the vital HALT Fentanyl Act (H.R. 27/S.B. 331) as soon as possible. The House of Representatives recently passed this bill with an overwhelming bipartisan majority. The Senate should do the same to the bipartisan bill co-sponsored by Senators Chuck Grassley, Bill Cassidy, and Martin Heinrich.

The United States is experiencing a cataclysmic surge of overdose deaths due to the lethal amounts of fentanyl and fentanyl-related substances that cross the southwestern land border unimpeded. Each year, fentanyl and fentanyl analogues kill Americans at a rate that rivals World War II or the Civil War. In 2023, drug overdoses killed more than 100,000 Americans, and synthetic opioids like fentanyl caused 69% of those overdose deaths.[4] The HALT Fentanyl Act will provide permanent tools to help staunch the damage caused by fentanyl analogues' incursion into the United States.

The cause of this fentanyl scourge is clear: Mexican drug cartels, including the Sinaloa Cartel and the Jalisco New Generation Cartel, import dangerous raw materials from China, use them to produce deadly synthetic opioids at low cost, and unlawfully transport those opioids across the U.S. border.[5] In FY2024, U.S. Customs and Border Protection seized 21,889 pounds of cartel-smuggled fentanyl crossing into the United States.[6] That is enough fentanyl to kill the entire population of the United States fourteen times over.[7]

The federal government's response to this existential threat under the Biden Administration was woefully deficient. As fentanyl poured over the United States-Mexico border, the Department of Homeland Security chose to eliminate[8] the very program designed to prevent transnational criminal organizations and gangs from exploiting migrants "to bring drugs, violence, and illicit goods into American communities."[9] Indeed, the Biden Administration's abject refusal to secure our border—one of the basic duties of any government—was a direct cause of this crisis.

Even more fundamentally, however, the federal government has not equipped law enforcement with the tools needed to prosecute the sale and use of illicit fentanyl analogues.

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[3] See American Relief Act, Pub. L. No. 118-158 (2024).
[4] Centers for Disease Control National Center for Health Statistics, *U.S. Overdose Deaths Decrease in 2023, First Time Since 2018* (May 15, 2024), https://tinyurl.com/3wn6k44y.
[5] U.S. Drug Enforcement Administration, *Fentanyl Deaths Climbing, DEA Washington Continues the Fight* (Feb. 16, 2022), https://tinyurl.com/356khj7f.
[6] U.S. Customs and Border Protection, *Drug Seizure Statistics* (Jan. 14, 2025), https://tinyurl.com/4vhmrkyn.
[7] U.S. Drug Enforcement Administration, *Facts about Fentanyl*, https://tinyurl.com/bdhypctr (noting that one kilogram of fentanyl is enough to kill 500,000 people).
[8] See U.S. Department of Homeland Security, *Termination of the Migrant Protection Protocols (MPP)* (Oct. 29, 2021), https://tinyurl.com/4uvc98ts.
[9] U.S. Department of Homeland Security, *Migrant Protection Protocols* (Jan. 24, 2019), https://tinyurl.com/5ywfmhhj.

Controlled substances are divided into five schedules under the Controlled Substances Act based on whether they have a currently accepted medical use in treatment in the United States, their relative abuse potential, and their likelihood of causing dependence when abused.[10] DEA has classified fentanyl itself as a Schedule II drug because of its high potential for abuse yet accepted medical use for the treatment of certain cancer patients.[11] But fentanyl is only part of the problem: the federal government has not similarly addressed illicit fentanyl analogues, even though these analogues have no medical use and are more lethal than fentanyl, as evidenced by the higher rate of death and serious bodily injury resulting caused by their use.[12]

Fentanyl was first synthesized in 1960 as a medicine for treating pain, and was approved by the U.S. Food and Drug Administration as an intravenous anesthetic in 1972.[13] Fentanyl analogues—drugs that are developed to imitate fentanyl, but are not chemically identical—soon appeared.[14] Fentanyl analogues "quickly bec[a]me just as deadly" as fentanyl itself: "by the mid to late 1980s, over ten analog[ue]s were identified on the black market and were reported to be responsible for overdoses related to laced heroin."[15]

Fentanyl analogues pose a unique enforcement problem: although fentanyl itself is a Schedule II drug, fentanyl analogues' "chemical make-up, once easily altered, is no longer banned by law."[16] This "begins a game of cat and mouse: federal agents race to identify and ban the analog[ue]s while chemists continue to make new ones."[17] These unique characteristics made analogue-by-analogue remediation efforts impossible. For instance, DEA exercised its temporary scheduling authority under 21 U.S.C. § 811(h) to place temporarily into Schedule I dozens of synthetic drugs, several of which are fentanyl analogues.[18] But, as Deputy Attorney General Rod J. Rosenstein explained, Chinese fentanyl distributors would "take advantage of the fact that the fentanyl molecule can be altered in numerous ways to create a fentanyl analogue that is not listed as illegal under U.S. [] law; when regulators are able to identify the new fentanyl and make it illegal, the distributors quickly switch to a new, unlisted fentanyl analogue."[19]

Prosecution under the Analogue Act, 21 U.S.C. § 813, fared no better. The Analogue Act ostensibly provides that a controlled substance analogue shall "to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule

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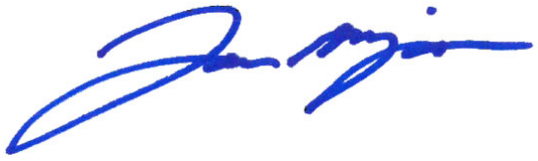
[10] U.S. Department of Justice Drug Enforcement Administration, *Drug Scheduling* (Jul. 10, 2018), https://tinyurl.com/3hp6xvbr.
[11] Chris Battiloro, *Fentanyl: How China's Pharmaceutical Loopholes are Fueling the United States' Opioid Crisis*, 46 Syracuse J. Int'l. L. & Com. 343, 370 (2019).
[12] United States Sentencing Commission, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* (Jan. 2021), at 5, https://tinyurl.com/yfh64us2.
[13] Agneta Hendershot, *Solving the Fentanyl Problem Beyond the Border: A Call for an International Solution*, 9 Penn St. J. L. & Int'l Aff. 216, 223–24 (2020).
[14] *Id.* at 224.
[15] *Ibid.* (quotation marks omitted).
[16] *Ibid.* (quotation marks omitted).
[17] *Ibid.* (quotation marks omitted).
[18] Rachel L. Rothberg & Kate Stith, *Fentanyl: A Whole New World?*, 46 J. L. Med. & Ethics 314, 319 (2018).
[19] U.S. Dep't of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks on Enforcement Actions to Stop Deadly Fentanyl and Other Opiate Substances from Entering the United States* (Oct. 17, 2017), https://tinyurl.com/3pfzr8tf.

I."[20] Although unlisted fentanyl analogues are arguably already banned under the Analogue Act, prosecution under that statute is difficult.[21] In order to convict fentanyl-analogue traffickers, prosecutors must prove that the new analogue is "intended for human consumption" and "substantially similar" to an already listed substance.[22] This often results in a legal dispute between conflicting scientific expert witnesses testifying to the chemical structure of the drugs in dispute.[23]

Placing fentanyl analogues on Schedule I must be done permanently. Permanent scheduling allows the criminal prosecution of anyone caught possessing, distributing, or manufacturing illicit variations of the drug—"a task previously burdensome for prosecutors"—without the uncertainty of whether the temporary authorization will expire during the prosecution.[24] Permanently changing the scheduling of fentanyl analogues "would eliminate lengthy litigation and permit prosecutors to quickly remove those involved in the illicit narcotic market from the streets."[25] Such legislative action "would allow authorities to keep pace with clandestine labs attempting to bypass regulations by altering the chemical structures of controlled substances."[26]

The fentanyl crisis has devastated many American communities, families, and lives, including those in our respective States. This national catastrophe requires a serious federal solution. Permanently scheduling fentanyl analogues as Schedule I drugs will allow the federal government to engage resources thus far underutilized in the fight against the fentanyl epidemic, putting drug cartels and traffickers on notice and saving American lives. We urge you to take up and pass the HALT Fentanyl Act as soon as possible.

Sincerely,



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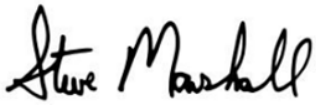
[20] 21 U.S.C. § 813.
[21] Rothberg & Stith, *A Whole New World*, *supra* n.18, at 319; see also *McFadden v. United States*, 576 U.S. 186, 191–95 (2015) (describing a multi-pronged, complicated *mens rea* requirements for conviction).
[22] 21 U.S.C. §§ 802(32), 813.
[23] Battiloro, *China's Pharmaceutical Loopholes*, *supra* n.11, at 370.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid.*



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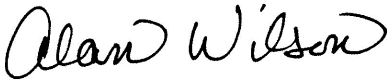

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Submitted electronically via Regulations.gov

Re: Comments of the States of Nebraska, Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming on the *Request for Public Comments on the Scientific Report of the 2025 Dietary Guidelines Advisory Committee* [HHS-OASH-2024-0017-0001], 89 Fed. Reg. 99883 (Dec. 11, 2024).

Dear Director Taylor and Acting Administrator Owens:

You recently issued a notice of opportunity for public comment on the *Scientific Report of the 2025 Dietary Guidelines Advisory Committee*. As you know, the Scientific Report forms the basis for the "Dietary Guidelines for Americans" that the Secretary of Health and Human Services and the Secretary of Agriculture publish jointly every five years. *See* 7 U.S.C. § 5341(a)(1); *id.* § 5302(9). The Advisory Committee that prepared the report was appointed by the Biden-Harris Administration. Their recommendations, particularly with respect to limiting beef consumption, are anti-scientific and potentially harmful. This Administration has the opportunity to correct the Advisory Committee's errors before the dietary guidelines become final. Nebraska and 22 other States write to provide our objections to the Scientific Report prepared by appointees of the Biden-Harris Administration.

To be clear at the outset: the Unites States' government's attempt to influence the food choices of Americans has been an abject failure. Since 1970s, the federal government has published the *Dietary Guidelines for Americans*, which serve as the "cornerstone of Federal food and nutrition guidance."[1] The dietary guidelines are the government's way of directly involving itself in how Americans fill our grocery carts and what is on the menu in our nation's school cafeterias.

Only a brief look at the history of the guidelines makes clear that they have given Americans poor guidance. For example, the dietary guidelines used to advise the public that "[c]arbohydrates are especially helpful in weight-reduction diets."[2] Indeed, the original food pyramid recommended that adults consume between 6 and 11 servings of bread, cereal, rice, and pasta *every single day*.[3] But research (and common sense) strongly suggest that a diet heavy in carbohydrates can lead to insulin resistance, a hallmark of type-2 diabetes. Doubling-down on this bad advice, the guidelines at one point stated "[d]iets high in sugars have not been shown to cause diabetes."[4] We now know that those statements and recommendations are not only anti-scientific but are actively harmful.[5]

Rather than help Americans lead healthier lives, the issuance of the guidelines has corresponded with a dramatic decline in the overall health of our nation's citizens. This is particularly seen in the alarming rise in obesity rates across the country. Just over a decade ago, not a single State had an adult obesity rate above 35 percent.[6] Today, 22 States bear that unhealthy distinction.[7] Nationally, nearly 42 percent of American adults and one in five American children are obese.[8] This dramatic rise in obesity rates has corresponded with a shocking rise in type-2 diabetes. In the past decade, type-2 diabetes in adults has increased by almost 20 percent.[9] The problem is even worse among children. Since the Covid-19 pandemic, type-2 diabetes rates among

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[1] *History of the Dietary Guidelines*, Dietary Guidelines for Americans, https://perma.cc/7ZL9-GHVX.
[2] U.S. Dep't of Health and Hum. Servs. & U.S. Dep't of Ag., *Dietary Guidelines for Americans, 1985*, at 17 (1985).
[3] *See* U.S. Dep't of Ag., *A Brief History of the USDA Food Guides* 2 (May 2024), https://perma.cc/2RS2-DKYE.
[4] U.S. Dep't of Health and Hum. Servs. & U.S. Dep't of Ag., *Dietary Guidelines for Americans, 1990*, at 22 (1990).
[5] *E.g.*, Mark t. Cucuzzella, *A Low-Carbohydrate Survey: Evidence for Sustainable Metabolic Syndrome Reversal*, 2 J. of Insulin Resistance 1 (2017); Samir Faruque, et al., *The Dose Makes the Poison: Sugar and Obesity in the United States – A Review*, 69 Polish J. of Food & Nutrition Sci. 219 (2019); Emily J. Endy, *Added Sugar Intake Is Associated with Weight Gain and Risk of Developing Obesity over 30 Years: The CARDIA Study*, 34 Nutrition, Metabolism & Cardiovascular Diseases 466 (2024); Yi Wan, et al., *Association Between Changes In Carbohydrate Intake And Long Term Weight Changes: Prospective Cohort Study*, BMJ 382:e073939, at 1 (Sept. 27, 2023).
[6] Molly Warren, et al., Trust for America's Health, *The State of Obesity 2023: Better Policies for a Healthier America* 6 (Sept. 2023).
[7] *Id.*
[8] *Id.* at 5.
[9] Leigh Hataway, *Type 2 Diabetes Increased by Almost 20% Over a Decade*, UGA Today (Aug. 20, 2024), https://perma.cc/V7B9-WRFD.

children have climbed a staggering 62 percent.[10] Obesity, often caused by bad dietary choices, is the number one risk factor for developing type-2 diabetes.[11]

The dietary recommendations in the Scientific Report prepared under the Biden-Harris Administration will age as poorly as—if not worse than—the recommendations in years past. While we take issue with the dietary guidelines as a whole, Nebraska and 22 other States object to two specific aspects of this year's Scientific Report: (1) its downplaying the importance of beef and other animal-based sources of protein, and (2) its "review of scientific evidence through a health equity lens." Part A, at 11.

The Advisory Committee's criticism of red meat as a primary source of protein ignores a vast scientific literature that touts the importance of beef and other animal-based sources of protein to healthy anatomical functioning, a recommendation that will serve only to exacerbate the very problems the previous guidelines have already created. And the Advisory Committee's express use of race and non-medical factors in reviewing the scientific literature conflicts with the factors Congress enumerated for consideration in preparing the dietary guidelines.

I. The Advisory Committee Overlooked the Benefits of Animal-Based Sources of Protein Like Beef in a Healthy Diet

The Advisory Committee's ill treatment of animal-based sources of protein are unwarranted by the evidence. The Scientific Report recommends that the Secretaries advise the public to "[l]imit consumption of red and processed meats." Part D, ch. 2, at 26. In a radical departure from previous dietary guidelines, the Advisory Committee further "proposes reorganizing the order of the Protein Foods Group to list Beans, Peas, and Lentils first, followed by Nuts, Seeds, and Soy products, then Seafood, and finally Meats, Poultry, and Eggs." *Id.* This is shortsighted.

First, animal sources of food—especially beef—are an incredibly important to a healthy diet, as they are the best sources of protein in existence. "Proteins are the building blocks of life."[12] Sufficient protein consumption is therefore a staple of a healthy diet. Protein helps our bodies build and retain muscle, support healthy bone mass, and suppress hunger.[13] Due to its high protein content, beef also plays a significant role in promoting satiety, which helps control hunger and manage weight.[14] On the other hand, a diet with deficient protein intake contributes to poor growth in childhood and adolescence, cardiovascular dysfunction, and an increased risk of infectious

[10] Mary Van Beusekom, *Type 2 Diabetes Rates in US Youth Rose 62% After COVID Pandemic Began, Study Suggests*, CIDRAP (Sept. 22, 2023), https://perma.cc/TD54-T4FX.
[11] *See Diabetes*, FamiliyDoctor.org (Nov. 2024), https://perma.cc/S2S7-L38Q.
[12] Stefania Manetti, *Protein in Diet*, MedlinePlus (updated Apr. 13, 2023), https://perma.cc/5WVG-XAU4.
[13] Alisa Bowman, *Can You Consume Enough Protein on a Plan-Based Diet?*, Mayo Clinic (Aug. 30, 2024), https://perma.cc/TV9H-2WZY.
[14] *See High-Satiety Meat, Poultry & Eggs: The Best Options*, Diet Doctor, https://perma.cc/2GTN-URTK.

disease.[15] Despite its well-known and widely accepted importance, a nutrition expert at the Mayo Clinic has identified protein as "probably the nutrient most people tend to undereat."[16]

The best source of protein comes from red meats like beef. A single three-ounce serving of beef contains approximately 22 grams of protein.[17] Given a daily dietary intake of 2000 calories, a single three-ounce serving of beef could provide almost half the protein a person needs in a day.[18] To consume the same amount of protein through a non-beef substitute, a person would need to consume, for example, three cups of quinoa, six and a half tablespoons of peanut butter, or nearly two cups of black beans.[19] Eating such large amounts of beef substitutes to reach the same protein intake as a single serving of beef would require consuming up to four times as many calories.[20] It also could include a higher number of carbohydrates.

The reason that "meats" like "beef, goat, lamb, pork, and game meat" and "eggs" appear at the top of the recommended protein foods in the 2020 dietary guidelines is that these animal-based foods are packed full of protein and limit unnecessary calories.[21] Researchers have cautioned about the inferiority of plant-based protein consumption as compared to diets where protein is consumed through animal sources.[22] In addition to beef, eggs are also a "nutrient-dense food[]." Part D, ch. 9, at 1. Indeed, the Advisory Committee itself notes that eggs help to ensure sufficient choline intake, an "essential nutrient for methyl metabolism, cholinergic neurotransmission (which is involved in memory and muscle control), cell membrane signaling, and lipid and cholesterol transport and metabolism," and that vegan diets make it "challenging to achieve" proper choline levels. Part D, ch. 1, at 47. The scientific report's downplaying of both meat and eggs makes it more difficult to achieve sufficient intake of macronutrients like protein and micronutrients like choline. As compared to lentils, beef and eggs are also a safer choice. Raw legumes are responsible for approximately 20 percent of all food poisoning cases worldwide, and the lectins in legumes can cause long-term digestive tract problems.[23]

The building blocks of protein, amino acids, are plentiful in animal-based sources of protein like beef. Amino acids like leucine, lysine, methionine, and tryptophan play important roles in different metabolic functions, including skeletal muscle development, insulin secretion, and

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[15] *See* Guoyao Wu, *Dietary Protein Intake and Human Health*, 7 Food & Function 1251, 1251, 1255 (2016).
[16] Bowman, *supra* note 13 (quoting Dr. Andrew R. Jagim, Ph.D.).
[17] *Nutrition Facts: Beef, Ground, 90% Lean Meat / 10% Fat, Patty, Cooked, Broiled, 1 Serving (3 oz)*, Univ. of Rochester Med. Ctr., https://perma.cc/5LCV-8NP2.
[18] *See* David M. Klurfeld, *What Is the Role of Meat in a Healthy Diet?*, Animal Frontiers, July 2018, at 5, 6.
[19] *The Power of Beef's Protein*, Beef Checkoff, https://www.beefitswhatsfordinner.com/nutrition/beef-protein (last visited Jan. 24. 2025).
[20] *Id.*
[21] U.S. Dep't of Health and Hum. Servs. & U.S. Dep't of Ag., *Dietary Guidelines for Americans, 2020–2025*, at 29 (Dec. 2020).
[22] *See* Steven R. Hertzler, *Plant Proteins: Assessing Their Nutritional Quality And Effects On Health And Physical Function*, 12 Nutrients 3704 (2020).
[23] Karthik Kumar, *Why Are Lentils Bad for You?*, MedicineNet (Apr. 14, 2021), https://perma.cc/8G2Q-G489.

maintaining proper levels of the neurotransmitter, serotonin.[24] Animal-based sources of protein contain all essential amino acids in sufficient amounts, while nearly all plant-based sources of protein do not.[25] The Scientific Report even seems to acknowledge that meat-based sources of protein are superior in many ways to plant-based protein. The Advisory Committee notes that "both plant-based and animal-based foods contribute to protein intake, but the nutrient profiles for each can differ substantially." Part D, ch. 2, at 1. Scientific studies bear this out. One study concluded that "[s]everal lines of evidence show that animal-source protein has a greater nutritional value than plant-source protein to sustain skeletal-muscle mass."[26] And another found that, as compared to soy-based patties, beef patties were much more effective at stimulating "muscle protein synthesis"—a process that "plays a crucial role in the metabolic health of skeletal muscle by renewing older, less functional muscle protein fibers with better-functioning fibers."[27]

In addition to its protein and satiety benefits, beef is an indispensable source of micronutrients like vitamins and minerals. Iron, zinc, potassium, selenium, vitamin B6, vitamin B12, thiamin, riboflavin, and niacin are all essential to a healthy diet, and all of those are found in beef, goat, lamb, and pork.[28] Iron, zinc, and B vitamins in particular are important to healthy cognitive development and maintenance in children and adults.[29] Given its high iron content, red meat consumption serves as a straightforward way to help the 1.2 million children in the United States who have anemia, and the teenage girls and pregnant women who are at a higher risk of anemia.[30] Micronutrients are also more bioavailable in meat than they are in non-meat sources; this means that the proportion of ingested nutrients utilized for metabolic functions is greater in meat than it is for plants.[31]

All these benefits of beef are especially pronounced for vulnerable populations. Studies show that babies who are six months to one year old benefit from the iron, zinc, and protein that

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[24] KatieRose McCullough, *A Guide to Meat Processing for the Nutrition Community* 8, https://perma.cc/RB8D-ATLV.
[25] *What Are Complete Proteins?*, Cleveland Clinic (Dec. 6, 2022), https://perma.cc/BR9C-DZZW.
[26] Wu, *supra* note 15, at 1258.
[27] David D. Church et al., *The Anabolic Response to a Ground Beef Patty and Soy-Based Meat Alternative: A Randomized Controlled Trial*, 120 Am. J. of Clinical Nutrition 1085, 1085 (2024).
[28] *See* Gita Sharma et al., *Contribution of Meat to Vitamin B(12), Iron and Zinc Intakes in Five Ethnic Groups in the USA: Implications for Developing Food-Based Dietary Guidelines*, 26 J. Hum. Nutrition Diet 156 (2013). *See generally* Institute of Medicine, National Academy of Sciences, *Dietary Reference Intakes for Vitamin A, Vitamin K, Arsenic, Boron, Chromium, Copper, Iodine, Iron, Manganese, Molybdenum, Nickel, Silicon, Vanadium, and Zinc.* (2001); Institute of Medicine, National Academy of Sciences*, Dietary Reference Intakes for Vitamin C, Vitamin E, Selenium, and Carotenoids* (2000); Institute of Medicine, National Academy of Sciences, *Dietary Reference Intakes for Thiamin, Riboflavin, Niacin, Vitamin B6, Folate, Vitamin B12, Pantothenic Acid, Biotin, and Choline* (2000).
[29] *Frequently asked questions about beef nutrition*, Beef Checkoff, https://www.beefitswhatsfordinner.com/nutrition/beef-faqs (last visited Jan. 24, 2025).
[30] *See* Cattlemen's Beef Bd. & Nat'l Cattlemen's Beef Ass'n, *Beef in the Early Years: A Research Brief Detailing Beef as a Complementary First Food* 5 (2021), https://perma.cc/NR4Y-FJ7E; *see also* Meghan F. Raleigh et al., *Anemia in Infancts and Children: Evaluation and Treatment*, 110 Am. Family Physician 612, 612 (2024).
[31] *See* Sylvia M. S. Chungchunlam & Paul J. Moughan, *Comparative Bioavailability of Vitamins in Human Foods Sourced from Animals and Plants*, 64 Food Science & Nutrition 11,590 (2024).

beef and other meat provide as first complements to breast milk or formula.[32] As mentioned, the micronutrients in beef and animal sources of food are also integral to healthy childhood development on a number of fronts, including physical growth and cognitive development.[33] The Scientific Report adds that, for children, "nutrients such as protein, phosphorus, and magnesium are critical for bone mineral development." Part D, ch. 10, at 10. The Advisory Committee also recognizes that "23 percent of females ages 14 through 18 years have intakes of protein below the [estimated average requirement]." Part D, ch. 1, at 55. Swapping lamb for lentils will do nothing to close that gap. For pregnant women, beef is a prime dietary choice to ensure that mothers are consuming enough protein and essential micronutrients.[34] And for seniors, protein consumption helps to prevent the loss of lean muscle mass that occurs with age.[35] Part D, ch. 1, at 52. Switching out pork for peas for these populations will make it harder for them to achieve the protein and micronutrient levels they need.

The Advisory Committee ignored these benefits of beef based on a solitary thread—a singular interest in reducing saturated fat. *See* Part D, ch. 4, at 2. In doing so, the Advisory Committee isolated a single nutrient in red meat and recommended that its consumption be limited based on its saturated fat content alone. The implication of the Advisory Committee's laser focus on saturated fat is that red meat leads to bad health care outcomes. That implication is not warranted. To start, the Advisory Committee's assumption that saturated fat and heart disease are inextricably linked may not be true.[36] A recent study concluded that "the conceptual model of dietary saturated fat clogging a pipe is just plain wrong" and that there is "no association between saturated fat consumption" and coronary heart disease and type-2 diabetes in healthy adults.[37] In addition, beef has independent and unique nutritional value that is unmatched by other foods at both the macro- and micronutrient levels. Chief among the many benefits of beef as compared to other foods is its extremely high protein content. Not only are animal-based sources of protein nutritious. Humans have been eating meat for millennia.[38] Eating beef has been, and should continue to be, a staple of a healthy human diet.

In sum, plant-based sources of protein cannot replace animal-based sources as the primary source of protein. At both the macro- and micronutrient levels, beef, goat, lamb, and pork have

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[32] *Supra* note 17, at 9.
[33] *See* Suzanne P. Murphy & Lindsay H. Allen, *Nutritional Importance of Animal Source Foods*, 133 J. Nutrition 3923 (2023).
[34] Sanjiv Agarwal & Victor L. Fulgoni III, *Contribution of Beef to Key Nutrient Intakes and Nutrient Adequacy in Pregnant and Lactating Women: NHANES 2011–2018 Analysis*, 16 Nutrients 981 (2024).
[35] *See* Jeanette M. Beasly, et al., *The Role of Dietary Protein Intake in the Prevention of Sarcopenia of Aging*, 28 Nutrition in Clinical Prac. 684 (2013); *see also* Sanjiv Agarwal & Victor L. Fulgoni III, *Beef Consumption Is Associated with Higher Intakes and Adequacy of Key Nutrients in Older Adults Age 60+ Years: National Health and Nutrition Examination Survey 2011–2018 Analysis*, 16 Nutrients 1779 (2024).
[36] *See, e.g.*, Gregory Ferenstein, *I Lost Weight by Eating Lots of Bacon and Cream. Here's a Scientific Explanation for Why*, Vox (Jan. 6, 2015), https://perma.cc/6UJU-KTCP.
[37] Aseem Malhotra, *Saturated Fat Does Not Clog the Arteries: Coronary Heart Disease Is a Chronic Inflammatory Condition, The Risk of Which Can Be Effectively Reduced from Healthy Lifestyle Interventions*, 51 British J. of Sports Med. 1111 (2017).
[38] Tess Joosse, *Meet the Scientist Studying How Humans Started Eating Meat*, Smithsonian Magazine (Dec. 9, 2021).

dietary benefits that plants simply do not. The Secretaries should reject the Advisory Committee's recommendation and retain meat as the first listed food in that group.

II. The Advisory Committee Wrongly Considered Non-Scientific, Non-Medical Factors

Beyond botching the benefits of beef, the Advisory Committee exceeded the bounds of its authority by considering factors that Congress did not intend it to. The Advisory Committee was chartered to help the Secretary of Health and Human Services and Secretary of Agriculture fulfill their statutory duty to publish the Dietary Guidelines for Americans. *See* 7 U.S.C. § 5341(a)(1); Charter, *2025 Dietary Guidelines Advisory Committee* (Dec. 9, 2022), https://perma.cc/3GN7-WNFT. Congress deemed that the "information and guidelines contained in" the dietary guidelines "shall be based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared." *Id.* § 5341(a)(2). Under the statute, the Secretaries—and, by extension, the Advisory Committee—can consider only current scientific and medical information in preparing the dietary guidelines.

Yet the Advisory Committee reached well beyond the current scientific and medical literature in the Scientific Report. The report unapologetically "considered factors such as race, ethnicity, socioeconomic position, and culture" and "examined relationships between diet and health across the lifespan through a health equity lens." Scientific Report at 1, 4. The report is also replete with "green callout boxes with the health equity icon" that "highlight examples of where health equity considerations strongly factored into the Committee's conclusions." Part B, ch. 2, at 1–2. Any data or study reviewed through a health equity "lens" is contrary to the plain text of section 5341(a)(2). The Advisory Committee's use of health equity is also arbitrary and capricious under the Administrative Procedure Act because the Advisory Committee "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). For these reasons, any analysis in the Scientific Report that is based on health equity framework should be ignored in the Dietary Guidelines for Americans, 2025–2030.

III. Conclusion

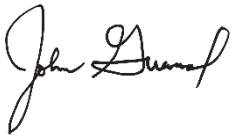
This Administration has the opportunity to correct the anti-scientific dietary recommendations of the Biden-Harris Administration. The Secretaries should reject the Advisory Committee's recommendation to limit the consumption of red meat and any analysis based on health equity considerations in publishing the Dietary Guidelines for Americans, 2025–2030.

Sincerely,

Mike Hilgers
Nebraska Attorney General

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General



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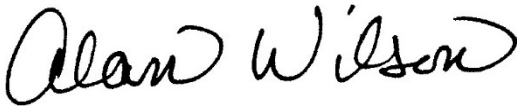

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February 5, 2025

To: Congressional Leadership

The Honorable Mike Johnson
Speaker of the House
United States House of Representatives
568 Cannon House Office Building
Washington, D.C. 20003

The Honorable John Thune
Majority Leader
United States Senate
511 Dirksen Senate Office Building
Washington, D.C. 20510

Re: An inquiry into the response to COVID-19

Dear Speaker Johnson and Majority Leader Thune:

We, the undersigned Attorneys General, write to commend your work to promote transparency and accountability in studying the response to the COVID-19 Pandemic. As part of your continued efforts in holding malign actors accountable for their actions arising out of the Pandemic, if you believe that further findings or direct evidence that suggests there may have been any violation of state laws, please include us in any actions taken so that we may evaluate state-level courses of action. Although former President Biden attempted to shield potential bad actors—like Dr. Anthony Fauci—from accountability via preemptive pardons, we are confident that state laws may provide a means to hold all actors accountable for their misconduct.

With respect to your work thus far, we read with great interest the findings of the House Select Subcommittee on the Coronavirus Pandemic.[1] We commend Chairman Brad Wenstrup and the subcommittee for their excellent work in exposing the fraud, waste, and abuse that plagued the pandemic response. Equally as important, we commend the subcommittee for its attempt to hold government actors accountable, highlighting misrepresentations, evasions, and potential deceitfulness by high-ranking government officials.

[1] *After Action Review of the COVID-19 Pandemic: The Lessons Learned and a Path Forward*, H. Select Sub Comm. On the Coronavirus Pandemic, H. Comm. On Oversight & Accountability, available at https://oversight.house.gov/wp-content/uploads/2024/12/12.04.2024-SSCP-FINAL-REPORT.pdf (Dec. 4, 2024).

As you are doubtlessly aware, the Subcommittee's report delineated several key areas where Dr. Fauci and others engaged in potential wrongdoing or misconduct:

(1) **COVID-19's Origins**: The report suggests high ranking medical officials may have misled the public about COVID-19's origins in at least two ways. *First*, the report indicates Dr. Fauci "prompted" a "Proximal Origin" theory of COVID-19's origins, which was meant to disprove a "lab leak" theory. As we all now know, and as the report found, the weight of the evidence increasingly supports a lab leak hypothesis, and Dr. Fauci's potential involvement in attempting to discredit that hypothesis is troubling. Any deliberate manipulation or suppression of alternative hypotheses could have delayed critical understanding of and responses to the Pandemic, with dire consequences for global health.

Second, the report indicates that Dr. Fauci may have misled Congress about the National Institutes of Health's funding of gain-of-function research at the Wuhan Institute of Virology. In responding to questioning from Senator Rand Paul before the U.S. Senate Committee on Health, Education, Labor, and Pensions, Dr. Fauci categorically denied that such funding was occurring three times. The Subcommittee confirmed that such research was indeed funded through the EcoHealth Alliance, directly contradicting Dr. Fauci's statements. This discrepancy not only raises questions about the integrity of his testimony but also about the broader implications for scientific integrity and public trust. The possibility of perjury or at least a significant lack of transparency demands attention.

(2) **NIH Oversight Failures**: The report notes a significant lapse in the oversight of NIH grants, particularly those awarded to EcoHealth Alliance. These grants facilitated gain-of-function research at the Wuhan Institute of Virology under conditions that were not adequately monitored, directly implicating Dr. Fauci's leadership in potential mismanagement or negligence. Indeed, the multitudes of findings from Congress show that American tax dollars went directly to this research without proper scrutiny from the NIH.

(3) **Public Health Policy Decisions**: The report emphasizes how these actions, among others, have contributed to a profound erosion of public trust in health institutions. The need for accountability is not just about correcting past oversights, but also about ensuring that future public health crises are met with policies that are transparent, evidence-based, and trustworthy. For example, Dr. Fauci led a deliberate campaign to stifle the voices of premier health scholars regarding the lack of adequate testing of vaccines. This subsequently siloed crucial information from the public that may have led to more public awareness concerning the risks of myocarditis and pericarditis among young adult males; the verified increased risk of blood clots in women; and the long-term effects vaccines had on fertility. The notion of "trusting the science" not only was grotesquely false, but was the very definition of propaganda that contributed to serious vaccine injuries—and in some cases, death.

Despite these serious findings, former President Biden issued a sweeping full and unconditional pardon for Dr. Fauci for "any offenses which he may have committed or taken part in during the period of time from January 1, 2014 through the date" of the pardon. The pardon purports to apply to any offenses arising from his service as Director of the National Institute of Allergy and Infectious Diseases, as a member of the White House Coronavirus Task Force or the White House COVID-19 Response Team, or as Chief Medical Advisor to the President.

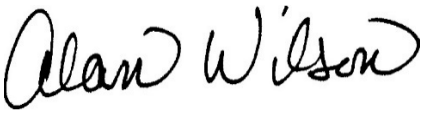
To say we are troubled by the scope and timing of the pardon—on the heels of the Subcommittee's Final Report—would be a gross understatement. To ensure that former President Biden's shameful pardon does not frustrate accountability, we urge Congress to consider using all available tools at its disposal.

Certainly, one potential tool at our disposal is the referral of any pertinent findings to state officials. As you are aware, a pardon by former President Biden does not extend to preclude state-level investigations or legal proceedings. As state Attorneys General, we possess the authority to address violations of state law or breaches of public trust. We are fully committed to investigating any malfeasance that may have occurred to the fullest extent of our authority and are prepared to collaborate with you in further efforts.

Our current capabilities may be somewhat limited, and thus, your cooperation would be invaluable. You are uniquely positioned to assist us by providing us with information that could outline potential courses of action under state law, should they exist. If possible, please furnish us with the necessary details so that we may make informed decisions aimed at holding malign actors accountable.

Thank you for your attention to this matter.

Sincerely,



Alan Wilson
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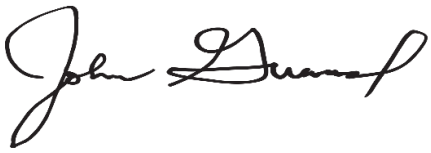

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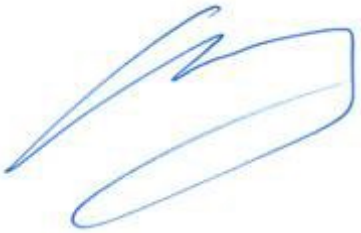

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Comments
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"IMPOTENT FIGUREHEADS" ? State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores [a1]

The Supreme Court has never clearly defined Congress's power, under the Enforcement Clauses of the Reconstruction Amendments, to burden neutral state laws that may have a discriminatory effect, but are themselves not constitutional violations. Section 2 of the Voting Rights Act represents one of the most burdensome and expansive regulations of a traditional state activity, redistricting, by a discriminatory effects standard. Section 2 imposes federalism costs on the states, as they maneuver between the floor of race consciousness mandated by section 2 and the prohibition on race consciousness contained in the Fourteenth Amendment. Section 2, therefore, presents the court with an opportunity to define better the boundaries between permissible and impermissible federal power.

State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores

*330 I. The Controversy

The Court's voting rights opinions and enforcement power opinions focus the underlying tension that exists between the Voting Rights Act (VRA) and the Fourteenth Amendment. [1] This tension is based on the unresolved question of whether Congress has the power under the Enforcement Clauses of the Reconstruction Amendments to burden neutral state laws that may have

a discriminatory effect, but are themselves not constitutional violations. In Lopez v. Monterey County [2] and City of Boerne v. Flores, [3] the Court dealt with this question and provided some insight regarding section 2 of the VRA, which prohibits states and political subdivisions from discriminating against racial minorities through vote dilution. This view is tempered by the somewhat incompatible analyses in these two cases [4] and by the academic dispute over the implications of Flores. [5]

***331** This tension is played out in the states during redistricting, when the states squeeze between the floor that has been erected by the VRA and the ceiling of allowable race consciousness under the Fourteenth Amendment. The federal intrusion that accompanies section 2 into a traditional state activity, redistricting, has led different Justices and the Court to try to ease this tension. [6]

Specifically with regard to section 2, Justice Kennedy, dissenting in Chisom v. Roemer [7] and later concurring in Johnson v. De Grandy, [8] noted that the Court had never determined the constitutionality of section 2 of the VRA in its precedents. [9] Justice O'Connor, after writing the plurality opinion in Bush v. Vera, filed a separate concurring opinion, stating that section 2 should be presumptively constitutional and that compliance was a compelling state interest. [10] O'Connor argued that it would be irresponsible for the states not to comply with section 2 because of the number of lower courts that had upheld its constitutionality. [11] Justice O'Connor continued that the Court should not require states to become “‘trapped between the ***332** competing hazards of liability.” ’ [12] The VRA's constitutionality was bolstered, according to O'Connor, by the respect for the power given to Congress under the Fourteenth and Fifteenth Amendments. [13] Justice O'Connor cited the legislative history of the 1982 amendments and Congress's belief that if the standard were otherwise, discrimination would not be prevented. [14] O'Connor concluded that Congress was ensuring the full realization of the guarantees of the Reconstruction Amendments, and as such, section 2 was constitutional. [15]

Part II of this Comment summarizes the current interpretation and history of section 2. Part III sets forth the constitutional basis for the districting power and the amendments that have affected this basis and reviews the Framers' intent applicable to districting. In addition, Part III examines the four historical cases, South Carolina v. Katzenbach, Katzenbach v. Morgan, Oregon v. Mitchell, and City of Rome v. United States, on which the Court has recently relied. Part IV discusses Flores and the academic discussion that has followed it as well as the Court's decision in Monterey County. Finally, Part V attempts to distill the applicable framework, apply it to section 2, and suggest a conclusion as to its constitutionality.

II. Section 2 and Vote Dilution

A. Section 2 Prior to the Amendments

The Court in City of Mobile v. Bolden in part dealt with whether a pre-1982 section 2 claim added anything to a Fifteenth Amendment claim of vote dilution. [16] The Court looked first at the statutory language of section 2 as it existed and compared it to the language of the Fifteenth Amendment and then looked into the legislative history ***333** of the section. [17] The Court specifically quoted the testimony of then Attorney General Katzenbach who agreed with a statement by Senator Dirksen that section 2 was “almost a rephrasing of the 15th [A]mendment.” [18] A section 2 claim after Bolden equaled a Fourteenth Amendment claim, and a section 2 plaintiff would bear the same burden--proving discriminatory intent-- as existed for proving constitutional violations under that decision. [19]

B. 1982 Amendments and Statutory Vote Dilution

Congress responded to the Court's decision in Bolden by amending section 2. [20] The amendment created a clear right of action against states distinct from the Reconstruction Amendments. [21] Section 2, after its amending, has come to be known as the “statutory bulwark” of voting rights expansion because it is not limited to changes in procedure and is not restricted to one area of the country. [22] After the amendment, section 2 reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

***334** (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. [23]

C. Judicial Interpretation of Section 2

The Court first interpreted the amendment in Thornburg v. Gingles. [24] Gingles involved North Carolina's use of multimember districts for state elections, which had the effect of diluting minority voting strength. [25] All nine justices in Gingles recognized that section 2 provided a cause of action for vote dilution. [26] The majority opinion by Justice Brennan examined the legislative history of section 2 and indicated that section 2 rejected Bolden's test and adopted instead the results test of White v. Regester and Zimmer v. McKeithen. [27] The results test, as termed by the Gingles Court, looks at the totality of the circumstances to see if the law has the effect of denying minorities an equal right to participate in the voting process. [28] The intent test that existed under Bolden was "repudiated" by Congress because it was "'unnecessarily divisive,' " placed an "'inordinately difficult' burden of ***335** proof on plaintiffs," and asked "'the wrong question.' " [29] The Court also noted that the Senate had found that "'discriminatory results perpetuate the effects of past purposeful discrimination,' " and that the VRA was originally enacted to both correct purposeful discrimination and to remove the past vestiges of discrimination. [30] The Court stated that Congress intended that the question of equal opportunity should depend on a "'functional' view of the political process." [31]

The Court created a three-part test to determine the presence of vote dilution. [32] First, the minority group has to be "sufficiently large and geographically compact to constitute a majority in a single-member district." [33] Second, the group has to prove that it is politically cohesive with substantially similar interests. [34] Third, the minority group must show that the majority votes in a bloc, allowing it to elect its own candidate at the expense of the minority. [35]

The Court next heard a vote dilution case in Chisom v. Roemer, which involved the use of multimember districts to elect supreme court justices in Louisiana. [36] The Court held that section 2 applied to judicial elections, rejecting what it termed an "anomalous view" of the extent of VRA coverage. [37] Justice Scalia dissented, arguing that "[s]ection 2 . . . [was] not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." [38] Justice Kennedy joined Justice Scalia, but additionally mentioned that the Court had not determined the section's constitutionality. [39]

***336** In the next term, the Court heard two more cases concerning section 2. [40] In Growe v. Emison, the Court faced the question of whether section 2 covered single-member districts. [41] The Court held that section 2 applied to such districts, but that the Gingles prerequisites still must be met. [42] In Voinovich v. Quilter, the Court dealt with an Ohio redistricting plan that had "packed" minority voters into districts, diluting their votes in other majority white districts. [43] The Court also discussed whether section 2 prohibited majority-minority districts and decided that it did only when they had "the effect of denying a protected class the equal opportunity to elect its candidate of choice." [44] The Court stated that federal courts, unlike the states, are limited in their creation of districts only to remedy violations of the VRA. [45]

The following Term, the Court again dealt with a section 2 claim in Johnson v. De Grandy. [46] DeGrandy involved competing claims from two minority groups over the effects of a state plan in Dade County, Florida. [47] The Court reasoned that even

though the Gingles prerequisites were met, the district court still needed to look at the totality of circumstances but failed to do so.[48] The Court held that there was no section 2 violation because the representation achieved was roughly proportional.[49] The Court, however, refused to make a "safe harbor" or an affirmative defense based on proportionality.[50] The Court made clear that the "[f]ailure to maximize" a minority ***337** group's political power was not the measure of section 2.[51] Kennedy, concurring, stated that while proportionality was relevant, an emphasis on proportionality could defeat the goals of the VRA and that too much emphasis by government or courts on proportionality raised "serious constitutional questions."[52]

On the same day as DeGrandy, the Court decided Holder v. Hall.[53] In Holder, African-American residents of Bleckley County, Georgia, challenged the single commissioner form of government as a form of dilution.[54] The Court held that a section 2 challenge could not be maintained based on the size of the governmental body.[55] The Court reasoned that no universal standard could be devised to adjudicate such a challenge.[56] As Justice O'Connor said in her concurring opinion, the spectrum of possible choices made any decision in such a case "inherently standardless."[57]

Justice Thomas also concurred, arguing that section 2 does not cover vote dilution at all.[58] He argued that the Court's past interpretation of section 2 had mired the federal courts in hopeless questions of political theory and encouraged the federal courts to racially segregate voters into districts based on the voting strength of groups.[59] Justice Thomas reasoned that by allowing claims for vote dilution, the Court had moved away from the original purposes of the VRA, which, in his opinion, was to remove the discriminatory obstacles to voting in the South.[60] Section 2 had become "a device for ***338** regulating, rationing, and apportioning political power among racial and ethnic groups."[61] This device was accomplished through the Gingles test, which created a rule of rough proportionality based on the number of seats controlled by a group and not access to the political system.[62] Justice Thomas looked to the text and legislative history of section 2 and found that Congress did not intend for proportional representation.[63] Indeed, Thomas explained, this concern of causing proportional representation had led the Court to abandon the White formula in Bolden because it would have produced an "inevitable drift" toward proportional representation.[64] He concluded that the "drive" under section 2 towards proportionality had created an "'inherent tension" ' and an "irreconcilable conflict," dragging the judiciary into this process of segregating voters by race.[65] This conflict could be remedied, in his opinion, only by limiting the VRA to practices and procedures that deny minorities access to the franchise.[66]

The Court's latest decision involving section 2 occurred in Reno v. Bossier Parish School Board.[67] Bossier Parish involved the interaction between section 5 and section 2 of the VRA.[68] The Department of Justice had promulgated a regulation that tied preclearance under section 5 to a lack of vote dilution under section 2.[69] The Court held that section 5 preclearance could not be denied ***339** based on a section 2 violation because "Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5."[70] The Court determined that holding otherwise would increase the "federalism costs" that section 5 already causes.[71] The Court did state, however, that discriminatory effects of dilution under section 2 were relevant to determining whether there was a discriminatory purpose under section 5.[72]

III. The Constitution, the Enforcement Power, and Federalism

In the 1990s, there have been several decisions concerning congressional and federal power,[73] which have led to a view that there is a revival of federalism with "phoenix-like" dimensions.[74] While such enthusiasm may be warranted, there is a question of whether section 5 of the Fourteenth Amendment shares a connection with these Article I cases. Most scholars have argued that the "commandeering" rationale of the Article I cases is inapplicable to the Fourteenth Amendment because by its nature the Amendment is a regulation of the states by the federal government.[75] If this argument is true, then ***340** the enforcement power that Congress has under the Reconstruction Amendments is now a more important source of legislative power. However, Flores and College Savings mark the second and third times that the Court has struck down a law as not being within this power.[76] To discern the framework of Congress's enforcement power, one must conduct an analysis of the text of the Constitution, the Framers' intent, and the historical and recent decisions of the Court.

A. The Constitution and the Enforcement Power

Traditionally, the powers to determine voting practices, procedures, and districting lay with the states, especially with state and local districting. [77] Under either the Fourteenth or Fifteenth Amendment, however, Congress was ceded the power to enforce the substantive sections of each Amendment, which could have included the power to regulate elections and districting. [78] Section 5 of the ***341** Fourteenth Amendment [79] and section 2 of the Fifteenth Amendment [80] provide the bases for this power. The Court has typically viewed the two Amendments similarly due to the similarities in their formation, history, and text. [81] The text of the Amendments and the Framers' intent underlying them do not help to clear up the ambiguous extent of power that was given. [82] Additionally, the Reconstruction Amend-ments are not the end of the power distribution in the voting rights context because several other Amendments have directly affected the balance between the states and the federal government. [83]

B. Historical Cases Considered

Since the text of the Constitution and the Framers' intent are ambiguous on the extent of Congress's enforcement power, a look to the past decisions of the Court is in order. The Court, in its two most recent congressional enforcement power decisions, relied primarily on four civil rights-era cases for a baseline of Congress's power. This subpart explores the Court's reasoning in those early opinions.

1. State Sovereignty's First Attack

The South Carolina v. Katzenbach [84] case was the south's initial response to the passage of the VRA. South Carolina sought declaratory relief, claiming that the VRA was unconstitutional because it violated the principles of federalism. [85] The Court detailed ***342** comprehensive congressional findings of discrimination and avoidance of other past remedial attempts by the South. [86] The Court looked at the VRA and stated that the act “reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting.” [87] The Court stated that Congress had enacted the law under section 2 of the Fifteenth Amendment, which granted Congress a reserved power, and any challenge to its constitutionality should be viewed like other cases involving reserved powers. [88] The test that the Court applied was the same that Chief Justice Marshall applied in McCulloch v. Maryland: the constitutionality of an act depends upon the exercise of power having a legitimate end and a means plainly adapted to that end. [89] The Court held that Congress, by enacting a prohibition on literacy tests and other such devices, was reacting to a persisting discriminatory practice that was inadequately resolved on a case-by-case basis. [90] In the Court's opinion, Congress was able “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.” [91] Second, Congress, in the Court's view, was limiting the remedy to the subdivisions “familiar to Congress by name.” [92]

The Court then applied the test more specifically to each provision. [93] The Court found that the coverage formula was a proper exercise of congressional power because Congress had found either substantial evidence of voting discrimination or “fragmentary ***343** evidence of recent voting discrimination” in the covered areas. [94] These covered subdivisions shared similar characteristics, as all had some sort of device or test for voter registration and a voting rate well below the national average. [95] This evidence, to the Court, was rationally related to disenfranchisement of voters and discrimination. [96] Sections 4(b) and 5 of the VRA, which implemented the process of review of state actions, were both subject to termination. [97] The Court conceded that it “may have been an uncommon exercise of congressional power, . . . but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.” [98] The Court also held that prohibition of devices such as literacy tests, which the Court had previously found constitutional, was within the power of Congress because such devices had a history of discriminatory application. [99] The Court stressed that the prohibition had a termination provision and “was a legitimate response to the problem, for which there [was] ample precedent.” [100]

2. State Sovereignty Routed in Morgan?

The Court has also recently relied on Katzenbach v. Morgan, which concerned the constitutionality of section 4(e) of the VRA. [101] Morgan involved New York's use of literacy tests to exclude native Puerto Ricans from voting because they could not read or write English even though they had been educated in American-flag schools. [102] The Court held that section 4(e) was a valid use of Congress's enforcement power under section 5 of the Fourteenth Amendment. [103] The Court reasoned that Congress's powers had been enlarged by the Amendment, and Congress was authorized to enforce the prohibitions of the Amendment with appropriate measures. [104] The Court treated the power under section 5 of the Fourteenth Amendment similarly to the Court's treatment of the Fifteenth Amendment in South ***344** Carolina v. Katzenbach. [105] Congress, in the Court's view, had the power “to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” [106]

Justice Brennan, writing for the Court, stated that by obtaining the franchise, the Puerto Rican community would gain more favorable nondiscriminatory treatment in receiving governmental services. [107] Second, section 4(e), in the Court's opinion, “was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications.” [108] In either case, the Court found a sufficient basis in evidence for Congress to make a legislative determination. [109]

3. State Sovereignty's Revival in Mitchell?

The third historic decision on which the Court has recently relied is Oregon v. Mitchell. [110] Mitchell involved a challenge to three provisions of the 1970 amendments to the VRA. [111] Black, who announced the judgment of the Court, relied primarily on Article I, Section 4 of the United States Constitution for the proposition that Congress had the power to regulate qualifications such as age in federal elections. [112] Justice Black, however, recognized that this ***345** congressional power was limited or nonexistent when it came to state elections because the principles of federalism blocked the intrusion. [113] Black continued that the Fourteenth Amendment and the subsequent amendments were not meant to “blot out all state power” and render states nothing more than “**impotent figureheads**.” [114]

Justice Black recognized three limitations on Congress's power under the Reconstruction Amendments. [115] The first limitation he recognized was that Congress cannot repeal a constitutional amendment. [116] The second was that Congress cannot strip all power from the states and create an “unrestrained” central government. [117] The third was that Congress's power under the amendments was limited to the ability to enforce. [118] Justice Black further discussed that there were “no legislative findings” that states were using the age requirements to discriminate based on race and concluded that Congress had exceeded its power in regulating state elections. [119]

All nine justices upheld the prohibition of literacy tests for five years nationwide in Mitchell. [120] Their opinions highlight the legislative findings by Congress of discriminatory use, past discrimination in education, and the recognition of discrimination as a national problem. [121] The Justices noted that the provision had a limited duration and that the Court had decided two previous cases involving such devices. [122] The Court held that Congress's decision ***346** was a reasonable means to remedy and enforce the Fifteenth Amendment. [123]

4. Another Defeat for State Sovereignty in Rome

In its recent decisions, the Court also has relied on City of Rome v. United States. [124] The Rome Court was again faced with a challenge to the preclearance requirements of reenacted section 5 because Rome, Georgia, had not sought preclearance for changes to its municipal government structure during an eleven-year period. [125] The city fell under section 5 because it was a subdivision of the State of Georgia, a covered jurisdiction pursuant to section 4(b). [126] First, the Court held that the “bailout” provision of section 4(a) was available only to the State as a whole, which then led the city to challenge section 5's constitutionality. [127]

The Court stated that "the prior decisions of this Court foreclose[d] any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect." [128] The Court viewed the city's request as asking it to overrule South Carolina v. Katzenbach. [129] The majority concluded that the "ban on electoral changes that are discriminatory in effect [was] an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it [were] assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." [130] The Court held that the ban was rationally related to a long history of discrimination, and the majority was unwilling to overturn Congress's determination. [131]

Justice Powell, in dissent, argued that Congress's power under section 2 extended only "to remedy violations of voting rights." [132] ***347** Powell stated that since the district court found that the city had never violated the voting rights of African-Americans, there was no authority for the VRA. [133] Justice Powell was troubled "because [the encroachment of the federal government] destroys local control of the means of self-government, one of the central values of our polity." [134] The Court had enhanced this problem, according to Powell, because it had denied the city of the use of the bailout provision, which was one of the key reasons that the section had been upheld in South Carolina v. Katzenbach. [135] Justice Powell concluded that the decision would hurt, rather than help, voting rights in the covered jurisdictions because the Court had removed the incentive, i.e., the ability to bail out, for those jurisdictions to comply and end discriminatory behavior. [136]

Justice Rehnquist also dissented, stating that the Court's decision was nothing less than "total abdication of [the Court's] authority" and not just "deference due to a coordinate branch." [137] Rehnquist began with the district court's findings of no discrimination. [138] Justice Rehnquist then propounded three theories of potential enforcement power that could be the source of the congressional power at issue. [139] The first was that the conduct regulated was unconstitutional. [140] The second was that the exercise was a remedial use of power to enforce a judicially defined right. [141] The final theory was that Congress, by ordinary legislation, "could effectively amend the Constitution." [142]

***348** Justice Rehnquist gave detailed consideration to the second theory and his position that the Court's interpretation was not remedial. [143] Rehnquist first mentioned that the Court had never decided whether nonracially motivated changes to the voting structure that have the effect of decreasing the ability of African-Americans to elect African-American candidates was within the remedial power of Congress. [144] Justice Rehnquist stated that the Court's earlier precedents could be "distilled" to allow Congress, in some limited circumstances, to regulate as remedial legislation discriminatory effects alone. [145] These circumstances are limited to when it "is necessary to remedy prior constitutional violations" or "to effectively prevent purposeful discrimination." [146]

There must be a wrong to have a remedy, and the wrong identified by the Court, according to Rehnquist, was the purposeful discrimination by localities. [147] Justice Rehnquist responded to the Court's holding, stating that "[n]either reason nor precedent supports the conclusion that here it is 'appropriate' for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is not purposeful discrimination." [148] Justice Rehnquist conceded that Congress could place the burden of proving that legislation was not purposeful on the political subdivision. [149] The Court's earlier precedents, according to Rehnquist, did not support section 5 as a preventive remedy because the devices at issue in those cases were different from the devices in Rome. [150] Rehnquist argued that there was historical evidence supporting "[t]he presumption that the literacy tests were either being used to purposefully discriminate, or that the disparate effects of those tests were attributable to discrimination." [151] Additionally, Rehnquist stated that private discrimination in the form of "bloc voting," as opposed to state action, is the root of vote dilution. [152] The administrative advantages of a nationwide ban, which had been implicated with the ban on literacy ***349** tests, were not implicated in this case, and any purposeful dilution could be dealt with on a case-by-case basis. [153]

IV. Change or Status Quo?

A. City of Boerne v. Flores

After Rome, the law remained relatively unchanged until City of Boerne v. Flores, which involved the Religious Freedom Restoration Act of 1993 (RFRA). [154] The RFRA was an attempt by Congress to legislatively overrule an earlier Free Exercise Clause decision. [155] Flores involved a suit instituted by a church, pursuant to the RFRA, after a city denied a building permit for enlarging the church because the church was a historic landmark. [156] The litigation mainly concerned the constitutionality of the RFRA, which the District Court for the Western District of Texas had ruled unconstitutional [157] and the United States Court of Appeals for the Fifth Circuit had ruled constitutional. [158]

In the majority opinion, written by Justice Kennedy, the Court began its analysis by invoking McCulloch v. Maryland, Marbury v. Madison, and The Federalist No. 45 to indicate decisively that Congress's powers are limited to those enumerated in the Constitution. [159] Kennedy then stated that "all must acknowledge" the positive power granted by section 5. [160] The majority cited Morgan and ***350** Ex parte Virginia to illustrate Congress's power. [161] The opinion stated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power" even when it impedes upon power that was previously thought to lie with the states. [162]

The Court examined the power granted to Congress in South Carolina v. Katzenbach, Morgan, Mitchell, and Rome and cited Black's opinion in Mitchell for the proposition that "[this] power [was] not unlimited." [163] The majority opinion suggested that the power was limited to the enforcement of the provisions of the Fourteenth Amendment. [164] The power to enforce as developed in South Carolina v. Katzenbach was limited to "remedial" measures. [165] The Court stated that Congress does not have the power to alter the substance of the Fourteenth Amendment. [166] According to the majority, the line between laws that alter substance and those that remedy or prevent was difficult to find. [167] The Court defined a test to determine where this line was located, stating that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," and the "appropriateness of . . . measures must be considered in light of the evil presented." [168]

The Court analyzed the legislative history of the Fourteenth Amendment to confirm that the Fourteenth Amendment was remedial. [169] The Court also looked to the debate on the Ku Klux Klan ***351** Act, occurring three years after the Amendment's passage, and to the interpretation by various scholars and found support for the remedy reading of the Amendment. [170] The Court cited precedents that reinforced section 5's preventive but not definitive power. [171] The majority cited South Carolina v. Katzenbach to show that the Court had recently interpreted the provision as remedial. [172] The Court stressed the findings of pervasive discrimination in that case and how prior laws with less dramatic measures were completely ineffective at ending the discriminatory conduct. [173] The Court rebuffed the notion that Morgan allowed Congress to have a substantive power. [174] The majority concluded that if Congress had such power to define and alter the Fourteenth Amendment, then the Constitution, as the Marbury opinion stated, would not be the "'superior paramount law, unchangeable by ordinary means." ' [175] This reading, the Court concluded, conflicted with the amending procedure in Article V of the Constitution. [176]

The Court looked to the legislative history of the RFRA and found that there were no modern instances of laws passed because of religious persecution or prejudice. [177] Congress, according to the Court, was actually concerned with "incidental burdens" on religion. [178] The Court stated that the lack of a suitable legislative history itself was not fatal. [179] The majority considered whether the means employed ***352** were proportional to the unconstitutional behavior that the Act was trying to prevent. [180] The Court agreed that preventive laws may be appropriate when there is a likelihood that many of the laws that will be affected will be unconstitutional. [181] The majority found, however, that the RFRA was not confined just to potentially unconstitutional laws, but also intruded onto "every level of government," displacing a variety of laws without any regard to substance. [182] Additionally, the Court mentioned that the RFRA lacked a termination date or mechanism. [183]

The Court compared the RFRA to the different sections of the VRA, whose constitutionality had been dealt with by precedent. [184] The majority noted that the law considered in South Carolina v. Katzenbach had a termination provision and was confined in its extent to the South, which had a long history of discriminatory conduct. [185] The law considered in Rome also had a termination date and was confined to jurisdictions with a long history of discrimination. [186] The Court turned to the laws

considered in the Morgan and Mitchell cases and noted that both attacked a particular voting practice that had a long history of discriminatory use. [187] The Court recognized that termination dates, long histories of discrimination, or geographic restrictions were not necessary in section 5 legislation. [188] The Court stated that this class of congressional action would not "pervasively prohibit[] constitutional state action." [189] The majority held that the strict scrutiny test applied under the Act was burdensome and showed "a lack of proportionality or congruence" to the end the Act was trying to achieve. [190] The Court reasoned that the RFRA intruded too far into the traditional police powers of the states. [191] The majority continued that the litigation cost imposed by the Act placed burdens on the states, and these burdens exceeded the conduct at which the RFRA was aimed. [192] The Court also found that the substantial burden test in the ***353** RFRA imposed a higher standard than a discriminatory effects test. [193] The RFRA's test would be applied to neutral regulatory laws that burden large groups of individuals in addition to religious groups. [194]

The Court then considered whether Congress had the power to override a prior decision of the Court. [195] The majority pointed to a statement by Madison to the effect that Congress has the duty to consider the constitutionality of its acts. [196] The Court agreed and stated that if that were not true, then Congress's actions would not be entitled to deference. [197] The Court, however, pointed to its role "to say what the law is." [198] The majority stated that when the legislative branch works against an earlier judicial decision and passes a law that tries to control its decision, the Court will accord its precedent with the proper respect, and when the action is beyond Congress's power, precedent will control. [199]

B. The Response

Flores immediately received a great deal of academic criticism and review. [200] Some scholars challenged the view that there were only two categories, remedial and substantive, and instead proposed a third category with slightly different dimensions. [201] Most of these scholars share the same basic criticisms of the Flores decision. They first ***354** criticize the desirability and meaningfulness of determining what is substantive and what is remedial. [202] Second, they challenge the notion that the Court is the only interpreter of the Constitution and argue that there should be a dialogue between the branches. [203] Third, they criticize the Court's use, or selective use and reinterpretation, of Framers' intent and prior precedent. [204] All propose, with some varying details, that Congress can create rights, but not dilute them, as long as it does not contravene a prohibition. [205] The common thread is that a more deferential standard is needed to support a valid congressional determination. [206] Additionally, scholars have discussed the implications of Flores in an attempt either to question the decision, [207] explain it, [208] or defend something that might now be questionable. [209]

C.Lopez v. Monterey County

In the wake of this scholarly debate, the Court in Lopez v. Monterey County heard a challenge by Hispanic voters in Monterey County to the lack of preclearance for county ordinances, some of which were mandated by state laws, that consolidated judicial districts. [210] Monterey County had been designated under section 4(b) of the VRA to receive preclearance under section 5. [211] According to the statute, section 5 applied to any administration of a change in any "'voting qualification or prerequisite to voting, or standard, practice, or ***355** procedure with respect to voting different from that in . . . 1968." ' [212] The district court dismissed the complaint, finding that section 5 applied and created an obligation only on covered jurisdictions and not on those put in force by a higher noncovered jurisdiction. [213]

The Supreme Court reversed this determination, construing the words "seek to administer" to include such laws and showing that other noncovered jurisdictions complied with the preclearance obligation. [214] The State argued that this reading required an invasion of state power that could not hold up to scrutiny because the State was not a wrongdoer. [215] The Supreme Court held that Congress has constitutional authority to take such action, pursuant to its enforcement power of the Fifteenth Amendment. [216] The Court cited Flores, noting the remedial boundary of Congress's enforcement power. [217] Then the Court analyzed two previous Fifteenth Amendment voting rights cases, South Carolina v. Katzenbach and Rome, both of which involved the

constitutionality of section 5.[218] The majority mentioned that in both cases the Court held that Congress had the power to act against discriminatory animus and effect, and in Rome, against discriminatory effect alone.[219] The Court looked to another voting rights decision, Gaston County v. United States, which upheld a ban on literacy tests even when the laws were enacted by noncovered jurisdictions.[220] The majority did not find the State's argument about its inability to end or bail out of section 5 to be persuasive, concluding that "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our ***356** holding today adds nothing of constitutional moment to the burdens that the Act imposes."[221]

Justice Thomas dissented, arguing against the majority's construction of the statute.[222] He also questioned the majority's constitutional analysis, arguing that section 5 is "unique" in its imposition of burdens on states and that the Court had recognized this in the past.[223] Thomas argued that the Court had twice upheld section 5, but each time the Court carefully termed the power, stressing that it was remedial.[224] The dissent noted that the enforcement provisions of the Reconstruction Amendments were similar and that in Flores the same carefulness was required for the Fourteenth Amendment by the Court.[225] Thomas pointed to South Carolina v. Katzenbach and Rome, relied on by the majority, and stated that in both cases the Court required Congress to have "some evidence" of intentional discrimination and wrongdoing by the relevant state prior to allowing a remedy.[226] Second, in both cases, the Court thought that the presence of a termination provision was critical to the holdings.[227] Third, Thomas cited Flores for the proposition that the "appropriateness" of an act must be viewed with the "evil" at issue.[228] Thomas found no intentional discrimination on the part of California.[229] Therefore, there ***357** was no likelihood that its laws affecting these districts would be unconstitutional.[230] He contended that the new reading expanded federalism costs.[231] The dissent concluded by distinguishing the ban on literacy tests considered in Mitchell from preclearance.[232] The former, the dissent suggested, was "a focused remedy directed at one particular" discriminatory device, while the latter required federal involvement in all changes.[233]

V. The Resolution

A. Federalism Framework After Monterey County

Monterey County, as the dissent suggests, does not thoroughly discuss the framework that exists after Flores.[234] However, Monterey County is a very different case than Flores. First, there was no challenge to a previous interpretation by the Court. At stake was section 5 of the VRA, twice successful at defeating federalism challenges.[235] Stare decisis was weighing in its favor. Second, the Court had already decided Gaston County, which upheld a provision that burdened a covered county in a noncovered state.[236] Third, the Court, while not conducting a Flores analysis, did analogize the cases that are at the foundation of Flores.[237] Fourth, there is no indication that Flores has been limited because the Monterey County majority cites it and stresses the remedial nature of the enforcement power.[238] Fifth, the Court has recently heard another federalism challenge in College Savings and relied heavily on Flores.[239]

***358** The majority did minimize the burden that the new reading of section 5 had caused. First, the Court pointed out that other noncovered states were currently complying with the preclearance obligations without problem and apparently without being overburdened.[240] Second, the bailout provision was available and applicable to either the State or the county, and one of the two could try to use it.[241] The Court was implying that because there was no increase in the burden, there was no need to analyze the burden of the new reading. There was no reason to apply Flores because the decision was already made under the precedents cited that were the basis of the Flores analysis.

Thomas, on the other hand, saw increased costs and burdens by the new reading and argued that a Flores analysis was necessary.[242] Congruence was a problem because there had been no finding of discrimination on the part of California, and this led him to find the new burdens, the additional costs of compliance, to be nonproportional.[243] His reading of the Flores remedial power seems to be much stricter than the reading in Flores itself because it appears that preventive measures are not within the remedial power of Congress.[244] This reading would in effect not give any deference to congressional enforcement decisions and require not just proportionality, but a tight fit between the ends and means.

The unclear implications of Monterey County raise several questions. First, will the Court routinely adhere to the Flores analysis and comparatively determine that a provision is remedial? [245] Second, does Monterey County signal that Flores has been weakened or demoted for those cases that the Court wants to strike down? Regardless, Flores still seems to be the test that will be applied, especially after College Savings, at least in cases that are close to the line between substantive and remedial or that challenge the Court's interpretation of the Constitution.

***359 B. Section 2 Considered**

Section 2 is probably the best opportunity for the Court to explore and define Flores. Any determination of section 2's constitutionality will probably hinge on Justice O'Connor's vote. Comparing the majority opinion in Monterey County written by O'Connor to her earlier concurring opinion in Bush v. Vera and her subsequent dissent in Flores raises some question on how she and the Court might now view a challenge. [246] O'Connor's concurrence in Bush was an example of a deferential review of a congressional enforcement decision, [247] but it was prior to Flores and Monterey County. In Flores, O'Connor agreed with the Court's section 5 analysis, but did not join the majority because she disagreed with the underlying decision. [248] Her opinion for the Monterey County majority supports a belief in the distinction between remedial and substantive measures, but fails to conduct the Flores analysis. [249]

There is a difference between the RFRA and section 2 that might lead to an avoidance of the Flores test. First, the heavy burden for proving unconstitutional vote dilution approved in Bolden has been lessened by the Court in Rogers v. Lodge, which allows an inference from impact and effects. [250] This eases the conflict that exists between the Court and Congress in interpreting vote dilution. A heightened tension between Congress and the Court was the driving force in Flores. Second, section 2 regulates the effects of discrimination, and there is a question whether the Flores formula reaches discriminatory effects measures. In dictum, Justice Kennedy's majority opinion for the Flores Court stated that the RFRA test was more than a discriminatory impact or effects test. [251] The Flores majority also cited with approval Fitzpatrick v. Bitzer, which upheld a discriminatory ***360** impact test applied to neutral employment laws. [252] This, combined with the decision in Monterey County, involving a discriminatory effects standard where the Court does not conduct a Flores analysis, [253] suggests that section 2 might not need to receive the Flores analysis. This view is highlighted by the Court's later use of Flores in College Savings. [254] Third, section 2 has not engendered the same kind of outrage from the legal community that the RFRA did. Unlike the criticism of RFRA, no scholars have argued that section 2 is unconstitutional. [255] The only scholarly writing prior to Flores that discussed the constitutionality of section 2 was Professor Hartman's discussion in 1982. [256] Hartman was not as concerned that federalism would make section 2 unconstitutional as she was with how the separation of powers question would play out. [257] Those that have recently raised the constitutionality of section 2 have done so not to argue that it should be declared unconstitutional, but to criticize Flores and show that it was wrongly decided. [258]

Section 2, however, could be viewed as similar to the RFRA and receive the Flores analysis. First, section 2 overruled a Supreme Court interpretation similar to the RFRA. Second, both standards weakened the burden of proof required to prove a violation and returned the standard to the previous constitutional standard. Third, Congress justified a return in both cases because of the difficulty of proof for injured plaintiffs. [259] Fourth, section 2 lacks a durational limit, making it similar to both Flores and College Savings. [260]

If the Court applies the Flores proportionality and congruence test, it will need to determine the reach of section 2. Section 2 is a nationwide remedy, which is not limited to any particular voting device or concept. [261] It covers multimember districting, [262] single- ***361** member districting, [263] and all levels of elections, including judicial. [264] Local and state governments may possibly avoid the risk of a section 2 challenge by instituting cumulative voting [265] or instituting a single-member commissioner system of local government. [266]

Section 2 as it exists is no longer concerned with intentional state discrimination and other traditional constitutional prohibitions. The concepts that underlie the Gingles test are not constitutionally based and do not resemble the traditional tiers of scrutiny. [267]

As Justice Thomas argued in Holder, and as many other scholars have noted, section 2 now is not concerned with denial of the right to vote or with racial discrimination in the constitutional sense.[268] The concept that has been legislated is the right to an "effective vote" and effective representation. Effective representation does not find clear support in the intent of either the Fourteenth or Fifteenth Amendment. The idea of effective representation has at times been repugnant as a race-conscious remedy as it allows courts to make assumptions based on race. The potential overbreadth of the section is evidenced by the number of times that judges have tried to achieve maximization or proportionality with section 2,[269] and the Justice Department's use or misuse of the section at issue in Bossier Parish.[270] The section, while not as broad as the RFRA in its scope,[271] reaches most aspects of traditional state and local voting.[272] Section 2 additionally contains no durational limit, unlike the rest of the VRA.

Supporters of section 2 note that, in its application, section 2 is self-limiting and therefore not overbroad.[273] First, they argue that the racially polarized voting requirement will fade over time and make the action unsustainable.[274] Second, they argue that there are only so many concentrated and compact minority groups, and when there are ***362** no more compact groups there is no more remedy.[275] Third, when Congress amended section 2, it had comprehensive findings of past and current discrimination, which differentiates section 2 from the RFRA. The Bolden case is just one example of the evidence that Congress had of entrenched purposeful discrimination.[276] The question is whether section 2 is an appropriate means that is congruent and proportional to ending the "evil" of the intentional discrimination.

The best methodology to determine whether section 2 is proportional and congruent is to compare section 2 to previous voting rights cases. Section 2 can be distinguished from South Carolina v. Katzenbach because Congress, for the provisions at issue in that case, had evidence of discrimination in all of the areas that were covered, and the provision had a termination provision.[277] Morgan, as re-interpreted, and its analysis of 4(e) do not provide a better result because 4(e) in actuality only applied to three areas so that a geographical limit was present.[278] Section 4(e) also applied only to a particular device, and not all voting practices and procedures like section 2.[279] Mitchell does not provide a good analogy, as the provisions in that case again feature durational limits, and while there is a nationwide ban, it is again on a particular device.[280] Rome is closer because the provision also had a discriminatory effects component, but it still does not provide a good analogy as it applied only to a limited area, and the Court had evidence of discrimination in all covered areas.[281] Monterey County is the closest analogy, as the provision in that case applied to more states than Rome, some of which had no history of discrimination, imposed a discriminatory effects test, and had an uncertain termination provision.[282] Although Monterey County is the closest analogy to section 2, it can be differentiated. Section 5's coverage scheme is based on actual evidence of discrimination somewhere in the uncovered jurisdiction. Yet section 2 applies even if there are no governmental entities with histories of discriminatory conduct.

A comparison of the cases is not sufficient, as the Court has indicated that a lack of "termination dates, geographic restrictions, or egregious predicates" does not set the limit to section 5 of the ***363** Fourteenth Amendment.[283] The Flores Court, however, stated that when the act "pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5."[284] Section 2, similar to the RFRA, imposes a heavy litigation burden and curtails one of the paramount state activities, control of districting. These burdens substantially outweigh any constitutional misconduct that exists or existed. The lack of any limitations together with a broad remedy, broader than any previously upheld remedy, not based on preventing or remedying widespread national unconstitutional conduct leads to only one conclusion: If the Court applies the Flores analysis, amended section 2 could be unconstitutional because it could be considered substantive.

VI. Conclusion

As Justice Black stated in Mitchell, the federal government's enforcement power can not render states "**impotent** **figureheads**," and the Constitution assures states that if a power is not within the enumerated powers of Congress, then it is reserved to them.[285] The question of section 2's constitutionality depends upon how the Court characterizes that section. If section 2 is found to be a discriminatory effects or results type measure, then a Monterey County analysis will follow and the section will be held constitutional. If section 2 receives the Flores test because the Court perceives it as pervasively intruding into a traditional state area further than a discriminatory effects test, then it could be unconstitutional. Section 2 could be unconstitutional because the unconstitutional conduct that it is trying to remedy or prevent is not proportional or congruent to the burden that it places on the states.

Footnotes

a1 Oregon v. Mitchell, 400 U.S. 112, 126 (1970). Justice Black, announcing the judgment of the Court, used this phrase while discussing the propriety of applying the Fourteenth Amendment to lower the voting age to 18 in state and local elections. See id. He thought that such an invasion of state sovereignty would render the states nothing more than "**impotent figureheads**." See id.

d1 J.D. candidate 2000, Tulane University School of Law; B.A. 1997, Florida State University. The author wishes to express special thanks to Professor Stephen M. Griffin for his guidance and comments and to friends and colleagues of the Tulane Law Review for their hard work.

1 See City of Boerne v. Flores, 521 U.S. 507, 516-20, 524-29 (1997); Bush v. Vera, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring); id. at 1037-38 (Stevens, J., dissenting); id. at 1045-46 (Souter, J., dissenting); see also Holder v. Hall, 512 U.S. 874, 892-93, 903-08, 912-13 (1994) (Thomas, J., concurring) (arguing for a new definition of section 2 to bring it in line with the Constitution); Johnson v. De Grandy, 512 U.S. 997, 1028-31 (1994) (Kennedy, J., concurring) (noting that the allowance of racial classifications is a "dangerous course").

2 119 S. Ct. 693 (1999).

3 521 U.S. 507 (1997).

4 See Monterey County, 119 S. Ct. at 706-10 (Thomas, J., dissenting).

5 Compare Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores, 39 Wm. & Mary L. Rev. 725, 733 (1998) (arguing that under Flores, the 1982 amendments to the VRA would be upheld), with David Cole, The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights, 1997 Sup. Ct. Rev. 31, 33, 35, 48-49 (arguing that the Flores Court "failed to consider the institutional implications of the Fourteenth Amendment's grant of concurrent enforcement power" and failed to give due deference to Congress's view of the amount of protection for religious freedom required by the Free Exercise Clause), and Douglas Laycock, Conceptual Gulfs in City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 749-52 (1998) (arguing that section 2 of the VRA is similar to the Religious Freedom Restoration Act and that the Court could strike it down under the Flores framework).

6 See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477, 483-85 (1997) (invalidating 28 C.F.R. §51.55(b)(2) because section 5 compliance is not hinged on section 2 compliance); Miller v. Johnson, 515 U.S. 900, 920-27 (1995) (stating that the Justice Department's interpretation of section 5 as requiring maximization of majority-minority districts is incorrect); Holder, 512 U.S. at 903-08, 912-13 (Thomas, J., concurring) (arguing for a construction of section 2 to ease the tension with the Constitution); De Grandy, 512 U.S. at 1016 (stating that the dangers accompanying maximization "are not to be courted").

7 501 U.S. 380, 418 (1990) (Kennedy, J., dissenting).

8 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring).

9 The Court in Shaw v. Reno, 509 U.S. 630, 656-58 (1993) [[[[hereinafter Shaw I], expressly avoided considering the constitutionality of section 2 and instead remanded the case for a determination of that issue. In its subsequent racial gerrymandering cases, the Court has made no reference to the section's constitutionality, sidestepping the issue by

assuming that compliance with the VRA would be a compelling interest. See Abrams v. Johnson, 521 U.S. 74, 91 (1997); Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion); Shaw v. Hunt, 517 U.S. 899, 916-17 (1996) [[[[hereinafter Shaw II]; see also Miller, 515 U.S. at 921 (stating that "[w] hether or not in some cases compliance with [section 5 of] the Act, standing alone, can provide a compelling interest ..., it cannot do so here").

10 517 U.S. at 990-91 (O'Connor, J., concurring).

11 See id. at 991 (O'Connor, J., concurring) (citing United States v. Marengo County Comm'n, 731 F.2d 1546, 1556-63 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 372-75 (5th Cir. 1984); Shaw v. Hunt, 861 F. Supp. 408, 438 (E.D.N.C. 1994), aff'd, 517 U.S. 899 (1996); Prosser v. Elections Bd., 793 F. Supp. 859, 869 (W.D. Wis. 1992); Wesley v. Collins, 605 F. Supp. 802, 808 (M.D. Tenn. 1985), aff'd, 791 F.2d 1255 (6th Cir. 1986); Jordan v. Winter, 604 F. Supp. 807, 811 (N.D. Miss.), aff'd sub nom. Allain v. Brooks, 469 U.S. 1002 (1984); Sierra v. El Paso Indep. Sch. Dist., 591 F. Supp. 802, 806-08 (W.D. Tex. 1984); Major v. Treen, 574 F. Supp. 325, 342-49 (E.D. La. 1983)). Justice O'Connor also cited Joan F. Hartman, Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and Legislative "Results" Standards, 50 Geo. Wash. L. Rev. 689, 739-52 (1982).

12 Bush, 517 U.S. at 992 (O'Connor, J., concurring) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring)).

13 See id. (O'Connor, J., concurring) (citing City of Rome v. United States, 446 U.S. 156, 179 (1980)).

14 See id. (O'Connor, J., concurring).

15 See id. at 992-93 (O'Connor, J., concurring). Justice Stevens, in dissent, stated that compliance with section 2 was an obvious compelling interest. See id. at 1033 (Stevens, J., dissenting). Justice Souter, also in dissent, argued that the plurality's assumption at least demonstrated that "the Court [did] not intend to bring the Shaw cause of action to ... the cruelly ironic point of finding in the Voting Rights Act ... a violation of the Fourteenth Amendment[]." Id. at 1065 (Souter, J., dissenting). Recognizing compliance with section 2 as a compelling interest implies that section 2 is constitutional. Thus, the four Justices in dissent and O'Connor's concurrence indicate that a majority of the current Court believes section 2 is constitutional.

16 446 U.S. 55, 60-61 (1980) (plurality opinion). In actuality, the Court only dealt with the Fourteenth Amendment claim. See id. at 66 (plurality opinion).

17 See id. at 60-61 (plurality opinion). Section 2 of the VRA at that time read, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Id. (plurality opinion) (internal quotations omitted) (quoting 42 U.S.C. §1973 (1976)).

18 Id. at 61 (plurality opinion); see also Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong. 204 (1965) (statement of Attorney General Katzenbach).

19 See id. at 61-74 (plurality opinion). The plurality relied heavily on Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977), and Washington v. Davis, 426 U.S. 229, 240 (1976), for support of this standard. See Bolden, 446 U.S. at 61-75 (plurality opinion). The end result was that expert historians conducted an in-depth study and linked the multimember districting to purposeful discrimination in Mobile. See Bolden v. City of Mobile, 542 F. Supp. 1050, 1053-68, 1074-78 (S.D. Ala. 1982). The Justice Department paid $120,000 in fees to the experts. See Hartman, supra note 11, at 713 n.156.

20 See Voting Rights Act of 1965, sec. 2, Pub. L. No. 89-110, 79 Stat. 437 (1965), amended by Voting Rights Act Amendments of 1982, sec. 3, Pub. L. No. 97-205, 96 Stat. 134 (1982) (codified as amended at 42 U.S.C. §1973 (1994)).

21 See Keith J. Bybee, Mistaken Identity: The Supreme Court and the Politics of Minority Representation 23-27 (1998).

22 See id. at 26.

23 42 U.S.C. §1973.

24 478 U.S. 30, 42-80 (1986). For a historical perspective of section 2, see generally M. David Gelfand, Constitutional Litigation Under Section 1983 §1-4(A) to (B)(1), at 38-53 (2d ed. 1996).

25 See Gingles, 478 U.S. at 34-35.

26 See id. at 42-46; id. at 82-83 (White, J., concurring); id. at 83-84 (O'Connor, J., concurring); see also Holder v. Hall, 512 U.S. 874, 920, 920 n.20 (1994) (Thomas, J., concurring) (noting that a plurality of the Court had previously held that the "Fifteenth Amendment did not address concerns of dilution at all"); Voinovich v. Quilter, 507 U.S. 146, 159 (1993) (pointing out that the Court had never decided whether the Fifteenth Amendment protected minorities from vote dilution).

27 See Gingles, 478 U.S. at 35-36; see also White v. Regester, 412 U.S. 755, 765-70 (1973) (employing the results test); Zimmer v. McKeithen, 485 F.2d 129, 130-08 (5th Cir. 1973) (holding that a court may adopt a multimember election plan if such a plan would increase minority political participation and that an at-large voting scheme may dilute black voting strength in districts with a majority black population), aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

28 See Gingles, 478 U.S. at 36-38.

29 Id. at 44 (quoting S. Rep. No. 97-417, at 36 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 214; see also S. Rep. No. 97-417, at 39-43, reprinted in 1982 U.S.C.C.A.N. at 217-21 (terming section 2 as remedial and not definitional).

30 Gingles, 478 U.S. at 44 n.9 (quoting S. Rep. No. 97-417, at 40, reprinted in 1982 U.S.C.C.A.N. at 218).

31 Id. at 45 (quoting S. Rep. No. 97-417, at 30, reprinted in 1982 U.S.C.C.A.N. at 208).

32 See id. at 50-51.

33 Id. at 50.

34 See id. at 51.

35 See id.

36 501 U.S. 380, 384-85 (1991).

37 See id. at 404 (Scalia, J., dissenting).

38 Id. (Scalia, J., dissenting). Scalia's argument was premised on the fact that judicial elections were covered under the pre-Bolden section 2, which was concurrent with the Fifteenth Amendment. See id. at 405 (Scalia, J., dissenting). Congress's decision to reduce the burden in enacting the 1982 amendments did not mean that they extended the standard to a group not specifically mentioned in the amendment or the legislative history. See id. at 407 (Scalia, J., dissenting).

39 See id. at 418 (Kennedy, J., dissenting).

40 See Voinovich v. Quilter, 507 U.S. 146 (1993); Growe v. Emison, 507 U.S. 25 (1993).

41 507 U.S. at 40-42.

42 See id. at 40-41 (dealing with a fragmentation claim).

43 507 U.S. at 149-50. There are two different types of single member dilution claims. See id. at 153-54. “Packing” involves minorities being placed into districts in super-majorities, marginalizing their overall strength with majority-minority districts. See id. “Fragmentation” occurs when minorities are placed in districts so that white majority bloc voting can effectively always defeat them. See id.

44 Id. at 155.

45 See id. at 156. The Court found that the Gingles test was not met. See id. at 157-58.

46 512 U.S. 997 (1994).

47 See id. at 1000-02.

48 See id. at 1010-12. The Court was mainly concerned that the district court had not considered the opportunities that minority groups had in politics in Dade County. See id. at 1011-12.

49 See id. at 1014-15.

50 See id. at 1015-22. The Court concentrated on the State's scheme of equality of opportunity for Hispanics as working against the “historical tendency to exclude.” See id. at 1014.

51 See id. at 1017; see also Miller v. Johnson, 515 U.S. 900, 920-27 (reinforcing the statement that maximization is not the goal of section 2).

52 See id. at 1028-30 (Kennedy, J., concurring). Kennedy again noted that section 2's constitutionality had not been determined. See id. at 1028-29 (Kennedy, J., concurring). His main objection was to the race consciousness of section 2. See id. at 1029-31 (Kennedy, J., concurring).

53 512 U.S. 874 (1994).

54 See id. at 876-77.

55 See id. at 885.

56 See id.

57 See id. at 889 (O'Connor, J., concurring).

58 See id. at 891-93 (Thomas, J., concurring).

59 See id. at 892 (Thomas, J., concurring).

60 See id. at 893, 920 (Thomas, J., concurring). Justice Thomas looked at sections 4 and 5 and how they were at least initially concerned solely with devices such as literacy tests. See id. at 894 (Thomas, J., concurring); see also Bybee, supra note 21, at 30 (describing section 2 as differing from the original purpose by bringing political presence and not access to the forefront); Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 49 (1994) (describing the VRA of 1965 as representing Congress's response to the total denial and exclusion of African-Americans from the election process); Abigail M. Thernstrom, Whose Votes Count?: Affirmative Action and Minority Voting Rights 17-27 (1987) (perceiving the VRA of 1965 as aiming at the removal of devices inhibiting black involvement in the political process in the South); Lani Guinier, The Representation of Minority Interests: The Question of Single-Member Districts, 14 Cardozo L. Rev. 1135, 1151 (1993) (referring to the initial VRA claims as seeking access to the ballot); Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833, 1838-53 (1992) (discussing the evolution of the voting rights cases).

61 Holder, 512 U.S. at 893 (Thomas, J., concurring). Thomas noted that one district court had decided to ease the problems associated with districting and racially polarized voting by enacting cumulative voting in local elections. See id. at 912 (Thomas, J., concurring).

62 See id. at 924-28, 940 (Thomas, J., concurring).

63 See id. at 926-28, 934-35 (Thomas, J., concurring). He based his argument largely on Senator Robert Dole's comments, as Dole led the compromise effort that achieved passage. See id. (Thomas, J., concurring).

64 See id. at 940-41 (Thomas, J., concurring).

65 Id. at 927, 944 (Thomas, J., concurring) (quoting Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring) (recognizing a cause of action, but observing the tension between the language disclaiming proportional representation and a dilution claim)).

66 See id. at 945 (Thomas, J., concurring).

67 520 U.S. 471 (1997). Bossier Parish School Board is the Court's latest section 2 decision, excluding the racial gerrymandering cases cited supra note 9. Justice Thomas filed a concurring opinion, stating that it was his belief that this decision would cause the Court to face the “inconsistency that lies at the heart of our vote dilution jurisprudence.” Id. at 492 (Thomas, J., concurring).

68 See id. at 474.

69 See id. at 476; see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.55 (1999) (containing the Justice Department's new interpretation and revision in light of the Bossier Parish School Board decision.

70 Bossier Parish Sch. Bd., 520 U.S. at 483.

71 See id. at 479-80.

72 See id. at 483-90.

73 See Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (holding that states retain sovereign immunity from federal suits in state courts); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2210-11 (1999) (finding inadequate evidence to support section 5 of the Fourteenth Amendment as the basis for a prohibition on state sovereign immunity); Printz v. United States, 521 U.S. 898, 934-35 (1997) (striking down the federally imposed obligation on state and local law enforcement officers to conduct background checks on gun purchasers); Seminole Tribe v. Florida, 517 U.S. 44, 58-59 (1996) (holding that section 5 of the Fourteenth Amendment could abrogate sovereign immunity); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down a criminal law prohibiting guns in school zones on grounds that the statute exceeded Congress's commerce power); New York v. United States, 505 U.S. 144, 187-88 (1992) (invalidating a take-title provision of a waste disposal measure).

74 See Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 Harv. L. Rev. 2180, 2181 (1998); see also Julian Epstein, Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases, 34 Harv. J. on Legis. 525, 546-49 (1997) (detailing the implications of cases like Lopez in other areas); Philip P. Frickey, The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez, 46 Case W. Res. L. Rev. 695, 728-30 (1996) (discussing that judicial review of findings of fact could act as curb in all areas of congressional action).

75 See Evan H. Caminker, State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1006 (1995); Jackson, supra note 74, at 2208-11; Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1577 (1994); see also Seminole Tribe, 517 U.S. at 59, 63-66 (recognizing that section 5 contains an explicit limitation on the states' power); Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976) (holding similarly).

76 See College Sav., 119 S. Ct. at 2210-11; City of Boerne v. Flores, 521 U.S. 507, 511 (1997). This, of course, comes from the distinction between the federal enumerated powers and state reserved powers. States have plenary power--a broad police power--while the federal government has limited, enumerated powers. The first time the Court declared a congressional enforcement action unconstitutional was in Oregon v. Mitchell, 400 U.S. 112 (1970), discussed infra Part III.B.3.

77 See U.S. Const. art. I, §2, cl. 1 (making the qualifications for the electors for the House of Representatives equal to those for the electors for the largest elected legislative body in each state); id. §4, cl. 1 (allowing the states to decide the “[t]imes, [p]laces, and [m]anner of holding [[[[e]lections” for Congress, but containing a limit by providing Congress a power to make or alter those regulations); id. art. II, §1, cls. 2-4 (allowing states to prescribe rules for the appointment of electors and voting, but allowing Congress to regulate the date); see also The Federalist No. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that states have power over the federal government under the above sections of the Constitution). But see Mitchell, 400 U.S. at 119-24 (asserting that Congress has the power to regulate federal elections and citing Madison's words in the Virginia ratifying convention).

78 See U.S. Const. amend. XIV, §§1-2; id. amend. XV, §1. There are conflicting views as to the extent to which the Framers intended Section 1 of the Fourteenth Amendment to reach voting. See Earl M. Maltz, Civil Rights, The Constitution, and Congress, 1863-1869, at 93-120 (1990); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 40-90 (1988). Several Supreme Court Justices have offered differing opinions as to the Framers' intended use of the Fourteenth Amendment. See Mitchell, 400 U.S. at 118, 124-31; id. at 135-44 (Douglas, J., concurring in part and dissenting in part); id. at 154-213 (Harlan, J., concurring in part and dissenting in part); id. at 239-81 (Brennan, J., concurring in part and dissenting in part). The intent of the Framers of the Fifteenth Amendment is equally unhelpful, as the conference committee substantively changed the Amendment after it had passed both houses of Congress as the session was coming to a close; thus, the radicals were forced to either accept the Amendment in that form or not pass one. See Maltz, supra, at 142-50; see also Emma Coleman Jordan, Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment, 64 Neb. L. Rev. 389, 393-406 (1985) (discussing early judicial efforts to enforce voting rights); D. Grier Stephenson, Jr., The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years, 57 U. Mo.-Kan. City L. Rev. 47, 52-65 (1988) (same).

79 .U.S. Const. amend. XIV, §5 reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

80 .U.S. Const. amend. XV, §2 reads, "The Congress shall have power to enforce this article by appropriate legislation."

81 See Lopez v. Monterey County, 119 S. Ct. 693, 703 (1999); Flores, 521 U.S. at 518; City of Mobile v. Bolden, 446 U.S. 55, 60-74 (1980) (plurality opinion); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966); James v. Bowman, 190 U.S. 127, 136-42 (1903); see also Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (applying both a Fourteenth and Fifteenth Amendment rationale to a redistricting discrimination claim).

82 See Gregory Bassham, Original Intent and the Constitution: A Philosophical Study 56-62, 91-107 (1992); Erwin Chemerinsky, Interpreting the Constitution 57-80 (1987); see also Stephen M. Griffin, American Constitutionalism: From Theory to Politics 169-88 (1996) (noting that the text of the Fourteenth Amendment is ambiguous and discussing constitutional theories of interpretation, including originalism).

83 See U.S. Const. amend. XVII (requiring the direct election of senators and requiring that electors for Senate elections have the same qualifications as electors for the "most numerous branch of the State legislatures"); id. amend. XIX (granting the right to vote to women); id. amend. XXIV (disallowing states' use of poll taxes); id. amend. XXVI (allowing eighteen-year-olds the right to vote).

84 383 U.S. 301, 307-08 (1966).

85 See id. Other states were invited to join by the Court. See id.

86 See id. at 310-14. The Court noted that literacy tests, grandfather clauses, and other devices were used to systematically exclude African-Americans. See id. When the devices were struck down, the states just used other devices. See id. at 313-14.

87 Id. at 315.

88 See id. at 324-26. The Court reviewed only the constitutionality of certain provisions of the VRA. See id. at 316-17 (examining sections 4(a)-(d), 5, 6(b), 7, 9, and 13(a) of the VRA). Section 4 contained a series of provisions that suspended literacy tests and prevented changes to voting procedures without approval of either the Attorney General or the D.C. district court under section 5. See id. at 317-20. These provisions had a jurisdictional effect limited to certain subdivisions under section 4(b). See id. at 319-20. Section 6(b) concerned the appointment of voting examiners in certain

jurisdictions; the decision determining if they were necessary was not reviewable under the VRA. See id. at 320-21. Sections 7(a)-(b), (d), and 9(a) concerned the examiners' power to qualify voters and the power of states to challenge their placement under the list. See id. at 321-22. Section 13(a) contained a termination provision for the use of the federal examiners and examination procedure. See id. at 322. The other sections were not challenged or were ruled as premature for litigation. See id. at 317.

89 See id. at 326-27; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 352-62, 421 (1819) (involving the constitutionality of the act that created the First Bank of the United States).

90 See South Carolina v. Katzenbach, 383 U.S. at 327-28.

91 Id. at 328.

92 See id.

93 See id. at 329-35.

94 Id. at 329-30.

95 See id. at 330.

96 See id.

97 See id. at 331-32, 334-35.

98 Id. at 334.

99 See id. at 333-34; see also Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-54 (1959) (finding literacy tests by themselves not to be facially unconstitutional).

100 South Carolina v. Katzenbach, 383 U.S. at 334.

101 384 U.S. 641, 643 (1966).

102 See id. at 643-45.

103 See id. at 652. At the time the case was decided, section 4(e) applied only in three areas of the country in which there were significant Puerto Rican populations.

104 See id. at 648, 650-53.

105 See id. at 648-51. Interestingly, Justice Brennan pointed to an earlier draft of the Amendment, which contained necessary and proper language that was not included in the final version of the Amendment, for support of his proposition of congressional power. Compare id. at 650 & n.9 (stating that the earlier draft suggests that the Framers intended to confer

to Congress “the same broad powers expressed in the Necessary and Proper Clause”), with City of Boerne v. Flores, 521 U.S. 507, 520-24 (1997) (positing that the failure to include such language has the opposite implication).

106 Morgan, 384 U.S. at 651.

107 See id. at 652-53. This enhancement of rights has been termed the “one way ratchet” and has been viewed as suggesting that Congress has a substantive power. See Laurence H. Tribe, American Constitutional Law §5-14, at 334-50 (2d ed. 1988); Stephen L. Carter, The Morgan “Power” and the Forced Reconsideration of Constitutional Decisions, 53 U. Chi. L. Rev. 819, 826-30 (1986); William Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603, 606-09 (1975); Archibald Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199, 226-39 (1971).

108 Morgan, 384 U.S. at 653-54.

109 See id. at 652-54.

110 400 U.S. 112 (1970).

111 .See id. at 117-19; see also Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (lowering the voting age in state and federal elections to eighteen, prohibiting the use of literacy tests for five years, and forbidding the use of residency requirements).

112 See Mitchell, 400 U.S. at 119-24. There was deep division on the Court over the extent of control that Congress could exercise over elections. See id. Justice Black's position was the compromise position. See id. Justices Harlan and Stewart read Article I, Section 4 differently from Black and found that Congress's power could not even reach decisions on federal districting. See id. at 152-53 (Harlan, J., concurring in part and dissenting in part); id. at 281-82 (Stewart, J., concurring in part and dissenting in part). Justices Douglas and Brennan opined that the Fourteenth Amendment allowed congressional intrusion into state and local elections. See id. at 136-44 (Douglas, J., concurring in part and dissenting in part); id. at 239-78 (Brennan, J., concurring in part and dissenting in part).

113 See id. at 124-31.

114 Id. at 126-29.

115 See id. at 128.

116 See id.

117 See id.

118 See id.

119 See id. at 130.

120 See id. at 131-34; id. at 144-47 (Douglas, J., concurring in part and dissenting in part); id. at 216-17 (Harlan, J., concurring in part and dissenting in part); id. at 232-36 (Brennan, J., dissenting in part and concurring in part); id. at 282-85 (Stewart, J., concurring in part and dissenting in part).

121 See id. at 131-34; id. at 144-47 (Douglas, J., concurring in part and dissenting in part); id. at 216-17 (Harlan, J., concurring in part and dissenting in part); id. at 232-36 (Brennan, J., concurring in part and dissenting in part); id. at 282-85 (Stewart, J., concurring in part and dissenting in part).

122 See id. at 131-34; id. at 144-47 (Douglas, J., concurring in part and dissenting in part); id. at 216-17 (Harlan, J., concurring in part and dissenting in part); id. at 232-36 (Brennan, J., concurring in part and dissenting in part); id. at 282-85 (Stewart, J., concurring in part and dissenting in part).

123 See id. at 131-34; id. at 144-47 (Douglas, J., concurring in part and dissenting in part); id. at 216-17 (Harlan, J., concurring in part and dissenting in part); id. at 232-36 (Brennan, J., concurring in part and dissenting in part); id. at 282-85 (Stewart, J., concurring in part and dissenting in part).

124 446 U.S. 156 (1980). Interestingly, City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion), discussed supra Part II.A, was decided on the same day.

125 See Rome, 446 U.S. at 159-61.

126 See id. at 161, 166.

127 See id. at 167-73.

128 Id. at 173.

129 See id. at 174.

130 Id. at 177.

131 See id. at 177-78. The Court affirmed the specific findings of discriminatory effect. See id. at 183-87.

132 Id. at 200 (Powell, J., dissenting). Powell continued later in his opinion to reemphasize that a “remedial device[] can be imposed only in response to some harm.” Id. at 202 (Powell, J., dissenting).

133 See id. at 200-01 (Powell, J., dissenting). Justice Stevens filed a concurring opinion rebuffing this argument. See id. at 193 (Stevens, J., concurring). Stevens' argument was based on the fact that the State of Georgia had been found to violate the voting rights of African-Americans. See id. (Stevens, J., concurring). Stevens equated the remedial power to the power in antitrust cases and school desegregation cases where system-wide remedies were applied for individual entity wrongdoing. See id. at 193 n.5 (Stevens, J., concurring).

134 Id. at 201 (Powell, J., dissenting).

135 See id. at 203-04 (Powell, J., dissenting).

136 See id. at 206 (Powell, J., dissenting).

137 Id. at 206 (Rehnquist, J., dissenting).

138 See id. at 208-09 (Rehnquist, J., dissenting). Justice Rehnquist pointed to testimony and findings that demonstrated that city officials had to be responsive because African-Americans were seen as controlling the “balance” in city elections. See id. at 208 (Rehnquist, J., dissenting). Additionally, an African-American had been appointed to and served in a vacated seat. See id. (Rehnquist, J., dissenting).

139 See id. at 209-10 (Rehnquist, J., dissenting); see also Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (advocating a somewhat similar set of limitations on congressional power).

140 See id. at 210 (Rehnquist, J., dissenting). Justice Rehnquist quickly disposed of this by citing Bolden and stating that the Fifteenth Amendment covered only intentional discrimination. See id. (Rehnquist, J., dissenting).

141 See id. at 210 (Rehnquist, J., dissenting).

142 Id. at 210 (Rehnquist, J., dissenting). Rehnquist disposed of this theory by citing the Civil Rights Cases, 109 U.S. 3 (1883), and various other opinions since then, which suggested that Congress has only remedial power by virtue of the Civil War Amendments. See Rome, 446 U.S. at 219-21 (Rehnquist, J., dissenting). Because Rehnquist did not find this exercise within the remedial power, he found that the court's decision violated these precedents. See id. (Rehnquist, J., dissenting).

143 See id. at 211-15 (Rehnquist, J., dissenting).

144 See id. at 211 (Rehnquist, J., dissenting).

145 See id. at 212-13 (Rehnquist, J., dissenting).

146 Id. at 213 (Rehnquist, J., dissenting).

147 See id. (Rehnquist, J., dissenting).

148 Id. at 214 (Rehnquist, J., dissenting).

149 See id. (Rehnquist, J., dissenting).

150 See id. at 215 (Rehnquist, J., dissenting).

151 Id. at 215-16 (Rehnquist, J., dissenting).

152 See id. at 216-17 (Rehnquist, J., dissenting).

153 See id. at 217-18 (Rehnquist, J., dissenting). The advantages cited by Rehnquist include the lack of administrative expenses and the fact that the burden was on the political subdivision to prove no discriminatory purpose. See id. (Rehnquist, J., dissenting).

154 521 U.S. 507, 511 (1997); see also Religious Freedom Restoration Act of 1993, 42 U.S.C. §§2000bb to 2000bb-4 (1994) (providing that section 5 of the Fourteenth Amendment is the basis upon which Congress enacted the RFRA).

155 See Flores, 521 U.S. at 512-13. The decision to which Congress objected was Employment Division v. Smith, 494 U.S. 872 (1990). Smith involved Native Americans who were denied unemployment benefits because they used peyote, which was illegal, as part of a sacramental ritual. See id. at 874. The Court stated that it would be an "anomaly" to allow the plaintiffs to have a constitutional right to ignore a neutral law. See id. at 886.

156 See Flores, 521 U.S. at 511-12.

157 See id.; see also Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding that the RFRA was unconstitutional), rev'd, 73 F.3d 1352 (5th Cir. 1996), rev'd, 521 U.S. 507 (1997).

158 See Flores, 521 U.S. at 511-12; see also Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), rev'g 877 F. Supp. 355 (W.D. Tex. 1995), rev'd, 521 U.S. 507 (1997).

159 See Flores, 521 U.S. at 516-20. Justice Kennedy's majority opinion is the only opinion that reaches the Fourteenth Amendment enforcement question, as both the concurring and dissenting opinions debate the case that was legislatively overruled by RFRA. See id. at 537-44 (Scalia, J., concurring); id. at 544-65 (O'Connor, J., dissenting); id. at 565-66 (Souter, J., dissenting). O'Connor explicitly agreed with the Court's enforcement analysis but dissented because of the Court's adherence to the Smith standard. See id. at 544-45 (O'Connor, J., dissenting).

160 See id. at 517.

161 See id.; see also Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (discussing Congress's section 5 power); Ex parte Virginia, 100 U.S. 339, 345-46 (1879) (same).

162 Flores, 521 U.S. at 518; see also Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (upholding Title VII as a valid exercise of section 5 of the Fourteenth Amendment, even though it applied to neutral laws with a discriminatory impact).

163 Flores, 521 U.S. at 518-19 (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)). The Court termed the powers under the two sections to be "parallel." See id. at 518.

164 See id. at 519. The Free Exercise Clause falls under the Fourteenth Amendment through the Due Process Clause. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

165 See Flores, 521 U.S. at 519 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

166 See id.

167 See id. at 519-20.

168 Id. at 520, 530.

169 See id. at 520-24. The Court pointed to the failed first draft of the Amendment sponsored by Representative John Bingham. See id. The proposal gave Congress the power to make all laws necessary and proper to ensure the privileges, immunities, and equal protection in life, liberty, and property. See id. Both conservatives and radicals resisted the proposal. See id. The conservatives, according to the Court, argued that the proposal destroyed the Constitution by allowing Congress to intrude on state rights freely. See id. The radicals objected because they thought it would place unlimited power in the changing factions in Congress. See id. The Court noted that the Amendment was tabled, and the Amendment as ratified did not contain the language and was passed without objection. See id. The Court also pointed to statements at the time that support a remedial or corrective view. See id.

170 See id. at 523. Kennedy's majority opinion cited Horace Edgar Flack, The Adoption of the Fourteenth Amendment 64 (1908), and Alexander M. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 96. See Flores, 521 U.S. at 523.

171 See id. at 524-27. In support of this proposition, the Court cited United States v. Guest, 383 U.S. 745 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); James v. Bowman, 190 U.S. 127, 139 (1903); United States v. Harris, 106 U.S. 629, 639 (1883); Civil Rights Cases, 109 U.S. 3, 13-15 (1883); and United States v. Reese, 92 U.S. 214, 218 (1875). See Flores, 521 U.S. at 524-25.

172 See id. at 525-26.

173 See id.

174 See id. at 527-28. The Court interpreted the decision as not allowing Congress to enhance the power of the Puerto Rican community, but instead as preventing discrimination in voter qualifications and government services. The Court reasoned that in Morgan there was a strong evidentiary basis of past discrimination, and section 4(e) was a reasonable attempt to combat this discrimination. See id. But see Tribe, supra note 107, §5-14, at 334-50; Carter, supra note 107, at 824-30; Cohen, supra note 107, at 604-06, 610-13; Cox, supra note 107, at 226-39.

175 Flores, 521 U.S. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

176 See id.

177 See id. at 530-32.

178 See id. at 530.

179 See id. at 531-32.

180 See id. at 532-33.

181 See id.

182 See id.

183 See id.

184 See id.

185 See id.

186 See id. Additionally, the law considered by the Rome Court did not require compliance in some circumstances. See id.

187 See id.

188 See id.

189 Id. at 533.

190 Id.

191 See id. at 534.

192 See id. at 534-35.

193 See id. at 535. This, of course, distinguishes the RFRA from section 2 of the VRA, as examined infra Part V.B.

194 See id.

195 See id. at 535-36.

196 See id.

197 See id.

198 Id. at 536 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

199 See id.

200 See Erwin Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, 39 Wm. & Mary L. Rev. 601 (1998); Cole, supra note 5; Stephen Gardbaum, The Federalism Implications of Flores, 39 Wm. & Mary L. Rev. 665 (1998); Marci A. Hamilton, City of Boerne v. Flores: A Landmark for Structural Analysis, 39 Wm. & Mary L. Rev. 699 (1998); Karlan, supra note 5; Laycock, supra note 5; Ira C. Lupu, Why the Congress Was Wrong and the Court Was Right--Reflections on City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 793 (1998); Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153 (1997); Katherine A. Murphy, Note, City of Boerne v. Flores: Another Boost for Federalism, 76 N.C. L. Rev. 1424 (1998); Note, Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores, 111 Harv. L. Rev. 1542 (1998).

201 See Chemerinsky, supra note 200; Cole, supra note 5; McConnell, supra note 200. Cole and McConnell argue for a congressional power that is somewhat substantive, in McConnell's words interpretive, but subject to either a reasonableness review, see Cole, supra note 5, at 69-70, or a good faith requirement, see McConnell, supra note 200, at 170-73. Chemerinsky, on the other hand, argues for substantive power for Congress based on the Ninth Amendment and the lack of a justifiable policy for having a limit on congressional power. See Chemerinsky, supra note 200, at 604-06, 622-29.

202 See Chemerinsky, supra note 200, at 606-08, 616; Cole, supra note 5, at 46-59; McConnell, supra note 200, at 170-71.

203 See Chemerinsky, supra note 200, at 619-22; Cole, supra note 5, at 59-71; McConnell, supra note 200, at 156-57, 192-94.

204 See Chemerinsky, supra note 200, at 610-14; Cole, supra note 5, at 44-46; McConnell, supra note 200, at 174-88.

205 See Chemerinsky, supra note 200, at 603; Cole, supra note 5, at 69-70; McConnell, supra note 200, at 169-74.

206 See Chemerinsky, supra note 200, at 618; Cole, supra note 5, at 33, 37, 77.

207 See Laycock, supra note 5, at 749-52 (discussing the implications on laws such as section 2 of the VRA); Cole, supra note 5, at 48-49 (discussing similar implications).

208 See Gardbaum, supra note 200, at 665-88; Hamilton, supra note 200, at 699-723; Lupu, supra note 200, at 793-817.

209 See Karlan, supra note 5, 725-41 (defending section 2 of the VRA and arguing that it meets the Flores test).

210 119 S. Ct. 693, 696-99 (1999). The county was unable to prove that the ordinances that it adopted did not negatively effect Latino voting strength. See id. at 699.

211 See id. at 697; see also Determination of Director Regarding Voting Rights, 36 Fed. Reg. 5809 (1971) (determining political subdivisions in which less than 50% of the eligible electorate voted in the 1968 elections); Determination Regarding Literacy Tests, 35 Fed. Reg. 12,354 (1970) (listing states and counties not covered under the VRA of 1965 that maintained literacy tests).

212 Monterey County, 119 S. Ct. at 697 (quoting 42 U.S.C. § 1973(c) (1994)).

213 See id. at 700. The case had already been up to the Supreme Court once in Lopez v. Monterey County, 519 U.S. 9 (1996). In that case, the Court determined that the court of appeals erred in allowing an election in the districts in question without preclearance. See id. at 25. The Court passed on the question presented in the later case. See id. On remand, the district court dismissed the complaint in an unreported decision, stating that section 5 does not apply to noncovered entities. See Monterey County, 119 S. Ct. at 700.

214 See Monterey County, 119 S. Ct. at 701-03.

215 See id. at 703.

216 See id. at 703-04.

217 See id. at 703. Both Reconstruction Amendments were passed at similar times and contemplate intrusion into state sovereignty. See id. The opinion, written by Justice O'Connor, quoted Flores, which had quoted the opinion in Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). Fitzpatrick, which applied a discriminatory impact test in upholding a neutral state law, indicates that the Court would consider this section to be similarly constitutional. See Fitzpatrick, 427 U.S. at 455.

218 See Monterey County, 119 S. Ct. at 703.

219 See id.

220 See id. at 703-04; see also Gaston County v. United States, 395 U.S. 285, 287 (1969) (upholding a five-year literacy test ban).

221 Monterey County, 119 S. Ct. at 704. The Court suggested that the state or the county was actually able to bail out. See id.

222 See id. at 706-08 (Thomas, J., dissenting). Justice Kennedy, writing for himself and Chief Justice Rehnquist, concurred but analyzed the statute differently and placed the burden on the discretionary decisions by the county after the state had passed the law. See id. at 705-06 (Kennedy, J., concurring). Under his reasoning, the constitutional question was avoided because the state would not have had to seek preclearance. See id. (Kennedy, J., concurring).

223 See id. at 708 (Thomas, J., dissenting). Justice Thomas cited Reno v. Bossier Parish School Board, 520 U.S. 471, 480 (1997); Miller v. Johnson, 515 U.S. 900, 926 (1995); City of Rome v. United States, 446 U.S. 156, 200 (1980) (Powell, J., dissenting); United States v. Sheffield Board of Commissioners, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting); and South Carolina v. Katzenbach, 383 U.S. 301, 358-60 (1966) (Black, J., concurring and dissenting).

224 See Monterey County, 119 S. Ct. at 708 (Thomas, J., dissenting).

225 See id. at 709 n.6. In addition to City of Boerne v. Flores, Justice Thomas cited James v. Bowman, 190 U.S. 127, 127-28 (1903).

226 See Monterey County, 119 S. Ct. at 709 (Thomas, J., dissenting). This seems to contradict Rehnquist's assertion that preventive measures could be taken in Rome. See Rome, 446 U.S. at 214 (Rehnquist, J., dissenting).

227 See Monterey County, 119 S. Ct. at 709 (Thomas, J., dissenting).

228 See id. (Thomas, J., dissenting) (quoting Flores, 521 U.S. at 530). Thomas's position in this regard is supported by the Court's more recent decision in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999). The College Savings Court conducted a Flores analysis and determined that the prohibition of state sovereign immunity in patent infringement suits was not an “appropriate” exercise of section 5 power. See id. at 2205-11.

229 See Monterey County, 119 S. Ct. at 709 (Thomas, J., dissenting).

230 See id. (Thomas, J., dissenting).

231 See id. (Thomas, J., dissenting).

232 See id. at 710 (Thomas, J., dissenting).

233 Id. (Thomas, J., dissenting).

234 Compare Monterey County, 119 S. Ct. at 693 (citing only the remedial-substantive distinction made by the Flores Court), with Flores v. City of Boerne, 521 U.S. 507 (1997) (applying a test of proportionality and congruence to determine whether a law is remedial or substantive), and Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (same). The Monterey County majority cites Flores only once and does not analyze whether the statute is remedial or substantive. See Monterey County, 119 S. Ct. at 708-10 (Thomas, J., dissenting).

235 See City of Rome v. United States, 446 U.S. 156, 176-77 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966).

236 395 U.S. 285, 287 (1969).

237 See Monterey County, 119 S. Ct. at 703-04.

238 See id. at 703.

239 See College Sav., 119 S. Ct. at 2205-11. College Savings does not add much to Flores because it would be an easy case under Flores. College Savings involved little or no findings by Congress of abuse of sovereign immunity by the states in patent infringement cases. In addition, there was a lack of a durational limit in the Patent Infringement Act. See id. at 2223-30.

240 See Monterey County, 119 S. Ct. at 701-02.

241 See id. at 703-04.

242 See id. at 708-09 (Thomas, J., dissenting).

243 See id. at 709-10 (Thomas, J., dissenting). The same lack of abuse, similar to a lack of discrimination, lies at the heart of the more recent College Savings case. See College Sav., 119 S. Ct. at 2205-11.

244 See Monterey County, 119 S. Ct. at 708-10 (Thomas, J., dissenting). But see City of Rome v. United States, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting) (arguing that preventive measures are within Congress's power).

245 The Court did not clarify this issue when it decided College Savings, as it relied heavily on Flores. See College Sav., 119 S. Ct. at 2206-11.

246 Compare Bush v. Vera, 517 U.S. 952, 991-92 (1996) (O'Connor, J., concurring) (stressing the deference entitled to a congressional determination), and Monterey County, 119 S. Ct. at 703-04 (same), with City of Boerne v. Flores, 521 U.S. 507, 544-65 (1997) (O'Connor, J.) (agreeing with the proportionality and congruence test as applied), and College Savings, 119 S. Ct. at 2205-11 (joining Chief Justice Rehnquist's majority opinion that paid lip service to deference, but conducted a thorough review of the proportionality and congruence of the Patent Infringement Act). In College Savings, O'Connor voted and sided with Rehnquist in striking down the Patent Infringement Act using a Flores analysis. See College Sav., 119 S. Ct. at 2202.

247 See Bush, 517 U.S. at 991-92 (O'Connor, J., concurring).

248 See Flores, 521 U.S. at 544-48 (O'Connor, J., dissenting).

249 See Monterey County, 119 S. Ct. at 703-04.

250 Compare City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality) (requiring a plaintiff to prove that a challenged districting plan was conceived to further discrimination without an inference from effects or impact), with Rogers v. Lodge, 458 U.S. 613, 616-28 (1982) (lowering the burden to prove intent).

251 See Flores, 521 U.S. at 533-36.

252 See id. at 518 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976)).

253 See Monterey County, 119 S. Ct. at 703-04.

254 See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2219, 2224 (1999).

255 For criticisms of the RFRA, see Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 Cardozo L. Rev. 357, 370-86 (1994), and William W. Van Alstyne, The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment, 46 Duke L.J. 291, 300-06 (1996).

256 See Hartman, supra note 11, at 739-52.

257 See id.

258 See Laycock, supra note 5, at 747-58; Cole, supra note 5, at 46-59.

259 See Bybee, supra note 21, at 22-29.

260 See Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2210 (1999); City of Boerne v. Flores, 521 U.S. 507, 582 (1997).

261 See Thornburg v. Gingles, 478 U.S. 30, 35-43 (1986).

262 See Chisom v. Roemer, 501 U.S. 380, 384-85 (1991); Gingles, 478 U.S. at 35.

263 See Voinovich v. Quilter, 507 U.S. 146, 153 (1993); Growe v. Emison, 507 U.S. 25, 40 (1993).

264 See Chisom, 501 U.S. at 384-85.

265 See Holder v. Hall, 512 U.S. 874, 912 (1994) (Thomas, J., concurring); Cane v. Worcester County, 847 F. Supp. 369, 373 (D. Md. 1994), aff'd in part and rev'd in part, 35 F.3d 921 (4th Cir. 1994).

266 See Holder, 512 U.S. at 881 (holding that section 2 does not permit a challenge based on the size of a governing body).

267 See Gingles, 478 U.S. at 35-38. Justice Brennan's “functional” view is responsible for this difference. See id. at 45.

268 See Holder, 512 U.S. at 944-45 (Thomas, J., concurring).

269 See id. at 905-12 (Thomas, J., concurring).

270 See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 476-86 (1997).

271 See City of Boerne v. Flores, 520 U.S. 507, 532-36 (1997).

272 See Bybee, supra note 21, at 23-24.

273 See, e.g., Karlan, supra note 5, at 741.

274 See, e.g., id.

275 See, e.g., Bybee, supra note 21, at 59.

276 See id.

277 See South Carolina v. Katzenbach, 383 U.S. 301, 310-14 (1966).

278 See Katzenbach v. Morgan, 384 U.S. 641, 648-52 (1966).

279 See id.

280 See Oregon v. Mitchell, 400 U.S. 112, 124-31 (1970).

281 See City of Rome v. United States, 446 U.S. 156, 159-63 (1980).

282 See Lopez v. Monterey County, 119 S. Ct. 693, 696-99 (1999).

283 City of Boerne v. Flores, 521 U.S. 507, 533 (1997).

284 Id.

285 See Mitchell, 400 U.S. at 126.

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Recent Developments
John M. Guard

HAL ANTILLEN N.V. V. MOUNT YMITOS MS: STRANGERS IN THE NIGHT, THE STARBOARD-TO-STARBOARD PASSING CUSTOM IN THE SOUTHWEST PASS

The M/V NOORDAM (NOORDAM), a passenger liner, and the M/S MOUNT YMITOS (MOUNT YMITOS), a cargo ship, collided on November 6, 1993, in the Southwest **Pass** just south of the mouth of the Mississippi River. [1] The NOORDAM was returning to New Orleans, and to her east, off her **starboard** side, [2] lay the MOUNT YMITOS having just departed from New Orleans. [3] Prior to the collision, the MOUNT YMITOS was showing the NOORDAM her green lights, thereby indicating that the vessels should **pass starboard**-to-**starboard** with no risk of collision. [4] When the MOUNT YMITOS, however, made a sudden and unexpected turn to **starboard**, the NOORDAM could then only see her red lights, indicating an imminent collision. [5] The NOORDAM turned hard to port [6] in a vain attempt to evade the MOUNT YMITOS, but the vessels collided 90-120 seconds later. [7]

In the subsequent suit between the vessels, the United States District Court for the Eastern District of Louisiana rejected the MOUNT YMITOS's version of events because the logbook from the ***2144** ship had been altered. [8] The district court found that a **custom** existed in the Southwest **Pass** requiring vessels to **pass starboard**-to-**starboard**, and held the MOUNT YMITOS liable for the collision because it did not follow this **custom**. [9] The district court determined further that the MOUNT YMITOS had violated numerous provisions of the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS). [10] The court also explicitly rejected MOUNT YMITOS's argument that it was a privileged vessel in a crossing situation under COLREGS Rule 15. [11] The court also found that the NOORDAM had violated Rule 5 (failure to keep a proper lookout) and Rule 7(b) (failure to use radar properly), [12] but ruled that the NOORDAM'S violation of Rule 5 was not a proximate cause of the collision. [13] The court then apportioned liability, finding the MOUNT YMITOS ninety percent at fault and the NOORDAM ten percent at fault. [14] On appeal, MOUNT YMITOS challenged the finding of the **starboard**-to-**starboard passing custom** in the Southwest **Pass**, the proximate cause determination as to NOORDAM's Rule 5 violation, and the apportionment of damages by the trial court. [15] The United States Court of Appeals for the Fifth Circuit held that there is not a **custom** of **starboard**-to-**starboard passing** in the Southwest **Pass**. Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 451, 1999 AMC 76, 79 (5th Cir. 1998).

***2145** In the case of a collision at sea there are multiple sources of potential liability. Liability may arise from a violation of a statute, negligence of a party, or a **custom** or usage regarding a vessel's particular conduct. [16] In particular, a **custom** determines liability for a collision only when the **custom** in question does not violate a statute. [17] This rule regarding **custom** is well established and has been called a matter of "hornbook law." [18] One of the earliest applications occurred in The "City of Washington," where the Supreme Court clearly enunciated this no-conflict principle. [19] In The "City of Washington," a collision occurred when a vessel did not obey a **custom** allowing the pilot boat to cross its bow after the pilot boat had discharged a pilot to that vessel. [20] The Court imposed liability on the vessel based on this **custom**, because Congress had not indicated otherwise

by enacting a statute.[21] Similarly, the Eastern District of Louisiana has ruled that no **custom** exists for **starboard**-to-**starboard passing** in the Southwest **Pass**, because a statute did exist that governed the conduct that was subject to the **custom**.[22]

There are exceptions to the no-conflict rule, but they will occur only when the **custom** is firmly established and well understood, and when based on an appropriate nautical reason.[23] An example of an ***2146** exception to the rule that has been given the effect and force of law is the point-bend **custom** on the lower Mississippi.[24] Other **customs** are limited in their applicability and are increasingly factually dependent because the dangerous nautical condition, the reason for the **custom**, may not always exist.[25] Most courts, however, have made exceptions rarely and even begrudgingly; there are more examples of courts disallowing **customs** than there are of courts upholding **customs** when they violate a law.[26]

A statutory violation is the most common basis for imposing liability when vessels collide.[27] The COLREGS are an international statutory scheme providing a comprehensive and uniform set of rules regarding the travel of vessels on the high seas.[28] They have been referred to as "The Rules of the Road,"[29] and enjoy acceptance by most maritime nations.[30] In the United States, the COLREGS have been codified, and are closely mirrored by the Uniform Inland Navigational Rules.[31] Violation of any of the COLREGS or any other statutory provision creates a rebuttable presumption against the violating party that can only be overcome by showing that the ***2147** violation could not have been a cause of the collision.[32] This presumption is known as the Pennsylvania Rule.[33] The United States Supreme Court, in United States v. Reliable Transfer Co., ultimately adopted the comparative fault doctrine in collision cases apportioning damages with regard to the percentage of fault belonging to each vessel and thus ended the divided damage rule that had existed under the Pennsylvania Rule.[34] The Pennsylvania Rule, however, "still floats" after Reliable Transfer, as far as causation of the collision is concerned.[35] The continued use and existence of the Pennsylvania Rule has been criticized because of perceived misuse by judges to achieve results that could be correctly reached by using other means.[36]

Three rules from COLREGS need to be given further introduction and explanation. These include Rule 5, which requires a proper lookout;[37] Rule 14, which governs head-on situations;[38] and ***2148** Rule 15, which governs crossing situations.[39] The requirement of having a proper lookout at all times, found in Rule 5, existed even prior to the establishment of the COLREGS or its statutory predecessors.[40] In Chamberlain v. Ward, the Supreme Court held that the lookout must be competent and have suitable experience.[41] The Court has also held that the person serving as a lookout cannot simultaneously serve in any other capacity[42] and that the lookout rule is such a necessity to navigation that any doubt of noncompliance should be resolved against the vessel.[43] Modern courts have consistently adopted and taken this view.[44]

While Rule 5 does not govern the actual navigation of the vessel, Rule 14 does. Rule 14 applies whenever two power-driven vessels approach on near reciprocal courses that involve the risk of collision.[45] The courts have applied Rule 14 literally and consistently.[46] For example, the United States Court of Appeals for the Fifth Circuit has held that a head-on situation did not exist in circumstances factually similar to the noted case because the sidelights of the vessel were not both in line.[47]

***2149** Rule 15, which governs crossing situations, is similar to Rule 14 in its applicability.[48] The vessel that lies to the port of the other must keep out of the way and must avoid crossing in front of the other vessel.[49] Rule 15 is applied in conjunction with Rule 17, which requires the privileged vessel, specifically the vessel not to **starboard**, to maintain course and speed.[50] The failure of the privileged vessel to maintain both course and speed has led to rulings that there was no Rule 15 violation.[51]

The effect of presenting altered logbooks in a collision case also deserves some attention. The courts are very clear that such a practice brings not only the logbooks under suspicion, but also the ship's conduct and any contentions made by her or her crew.[52] Some courts have gone so far as to indicate that alterations almost create a presumption that the ship with the altered logs was at fault.[53] In Archer Daniels Midland Co. v. M/V Freeport, the United States ***2150** District Court for the Eastern District of Louisiana similarly held that such practices are an admission that those on the vessel knew of significant navigational errors.[54]

In the noted case, the United States Court of Appeals for the Fifth Circuit followed the general rule that a **custom** will not be found to exist when it is contrary to a rule of navigation, except when the **custom** is well known and understood. [55] The court also held that the district court's determinations as to the COLREGS violations of both parties were not clearly erroneous as to either vessel's conduct. [56] The court explicitly made this finding as to the NOORDAM's violation for lacking a proper lookout. [57] The court also agreed with the decision of the district court to give little or no weight to the story of the MOUNT YMITOS because of its altered logbooks. [58]

On determining whether a **custom** existed, the court first cited The Giove for the principle that courts do not generally give effect to **custom** over law, unless that **custom** is well established and seafarers understand the **custom**. [59] In addition, the court noted that **custom** cannot violate the rules of navigation. [60] The Hal Antillen court concluded that, because Rule 14 normally requires vessels to **pass** port-to-port, this Southwest **Pass starboard passing custom** would create confusion among vessels as to the proper way to **pass**. [61] The court also expressed doubt that such a **starboard passing custom** even existed, given the conflicting testimony presented at trial. [62]

After reaching its conclusion on **custom**, the Fifth Circuit examined the applicability of the COLREGS and the district court's determination that the MOUNT YMITOS had violated several of them. [63] The court compared the violations in the noted case to an earlier Fifth Circuit case, Acacia Vera Navigation Co. v. Kezia, Ltd. [64] The Fifth Circuit agreed with the district court's determinations of ***2151** fault for the MOUNT YMITOS, implicitly noting the similarities between the two cases. [65]

The court next concentrated on the NOORDAM's conduct. [66] With respect to the Rule 5 violation for failing to have a proper lookout, the court stated that while the finding of no proximate causation seemed odd, the record supported it. [67] The Fifth Circuit cited Burma Navigation Corp. v. Reliance Seahorse MV for the proposition that when sufficient evidence exists to support a factual finding of the district court, that finding is not clearly erroneous. [68] The court then stated that this proposition was equally applicable to the district court's implicit finding that there was no Rule 14 head-on situation. [69]

The Fifth Circuit stated that the district court's decision was based on heavily disputed facts and that it was proper to discount or completely discredit its version of the story, given the alterations to MOUNT YMITOS's logs. [70] The court then cited The Silver Palm and quoted Andros Shipping Co. v. Panama Canal Co. for the proposition that the alteration of log books not only discredits testimony, but causes a presumption adverse to that party's contentions. [71] Nonetheless, in light of the court's reversal of the finding of a **custom**, the court vacated the apportionment of damages and remanded for a new determination by the trial court. [72]

The dissenting opinion by Judge Smith concentrated not on whether there was a **custom**, but on whether the majority should have, after overturning the finding of a **custom**, determined if there was a Rule 14 or 15 violation. [73] Judge Smith pointed to the fact that there are three proximity situations that the COLREGS govern: overtaking ***2152** (Rule 13), head-on (Rule 14), and crossing (Rules 15-17). [74] Judge Smith first noted that there had been no suggestion of an overtaking situation. [75] The crossing situation (Rule 15) was equally inapplicable because the district court ruled correctly that the MOUNT YMITOS altered speed and course prior to the collision. [76] The dissent pointed out that the court was then left with a choice between a Rule 14 violation or no proximity violation. [77] Judge Smith observed that the court chose the no-violation option and viewed the vessels' travel as a "**passing**" situation, which is not governed under the COLREGS. [78]

The dissent proceeded to examine whether Rule 14 was applicable. [79] Judge Smith concluded that Rule 14 applied, because a proximity situation existed that was nearly reciprocal. [80] Judge Smith would have imposed liability on the NOORDAM for turning to port, instead of **starboard** as mandated by Rule 14. [81] In a footnote, Judge Smith stated that the course could also be interpreted as a crossing situation with the same end result. [82] Judge Smith then criticized both parties, stating that it is immaterial whether the vessels were unaware of each other's presence because courts have required vessels to know the position of the other in such situations. [83] The dissent concluded that both vessels violated this duty and should have been held responsible accordingly. [84]

The decision reached by the Fifth Circuit as to the finding that no **custom** existed in the Southwest **Pass** was to be expected for several reasons. First, the law clearly opposed the finding of a **custom**. There was no dangerous tide, rocky shores, nor strong currents to create a peculiar navigational situation that would justify the imposition of **custom** over law. Second, the court was influenced by the amicus curiae brief filed on behalf of the local pilots' association. [85] The court stated that the association sided with the appellants, MOUNT YMITOS, and was arguing against the existence of the **custom**. [86] The association's participation may have been critical, given the fact that ***2153** the district court had completely discredited similar arguments by MOUNT YMITOS because of the altered logbooks. Third, the court noted that the confusion that such a **starboard passing custom** would create weighs against recognizing it. [87] Fourth, the fact that expert mariners could not agree about the **custom** at trial indicates that any **custom** was not well understood, and thus failed to meet the requirements required for recognition. [88] This explanation is supported by the fact that in an earlier case decided in the same district as the noted case, a different judge heard similar testimony and arguments and concluded that there was no **starboard passing custom** in the Southwest **Pass**. [89] This conflict as to the existence of the **custom** suggests that the court reached the proper conclusion.

The Fifth Circuit's affirmation of the district court's determination that the violation of Rule 5 was not a proximate cause of the collision, however, is problematic. In order to reach this determination, both the Fifth Circuit and the district court would have to find that the NOORDAM rebutted the presumption under the Pennsylvania Rule. The NOORDAM could have only done this by showing that the lack of a lookout could not have caused the accident. Neither court cited the Pennsylvania Rule nor applied the operative test. In addition, neither court mentioned the importance of the lookout, or how, traditionally, courts have punished ships for lacking a proper lookout. [90]

The district court's motivation for an incomplete analysis may have been that finding the NOORDAM in violation of Rule 5 would lead to a reversal of its apportionment of liability. The district court judge in effect reduced the comparative fault of the NOORDAM by improperly using the Pennsylvania Rule to get rid of the Rule 5 violation. Academics have criticized similar conduct by lower court judges, arguing that the number of violations should not drive courts to misuse the Pennsylvania Rule. [91] The district judge, given the misconduct of the MOUNT YMITOS, could have structured his decision in other ways to achieve a similar result without misusing the Pennsylvania Rule. The Fifth Circuit noted that this result was ***2154** peculiar, but was compelled to accept it because it was not clearly erroneous. [92] The failure of both courts to apply the Pennsylvania Rule properly leads to an unnecessary return to the manipulations of the pre-Reliable Transfer era.

The majority opinion and the dissent express differing views on the applicability of COLREGS Rule 14. This disagreement is unnecessary because the lower court found that a crossing situation existed and imposed liability on the MOUNT YMITOS for violating Rule 17. [93] This finding would on its face exclude the applicability of Rule 14. The dissent specifically mentioned the finding of a Rule 17 violation and stated that it was correct. [94] The dissent then inconsistently suggested that the NOORDAM should be held liable under Rule 15. [95] This result would be completely erroneous under past case law. [96] The dissent's discussion, which allowed for either or both a Rule 14 or 15 violation, is additionally inconsistent with the statutory framework set up in the dissent's opinion, as Judge Smith initially suggested that there were three mutually exclusive categories. [97]

The majority could have possibly eased the dissent's concern by restating explicitly what the district court had already found and the effect of that determination. Although the situation involved a crossing situation, Rule 15 did not apply because of the course and speed change by the MOUNT YMITOS. There would have then been no reason on the majority's part to discuss the implicit findings of the district court or for the dissent to disagree. This change would have made more sense and made the opinion more consistent with applications of Rule 14 and 15 in this and other jurisdictions.

Footnotes

1 See Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 450, 1999 AMC 76, 77 (5th Cir. 1998). The vessels collided at approximately 8:40 p.m. See id.

2 **Starboard** means the right side of a ship.

3 See id. The Southwest **Pass** is a 1.4 to 2.0 miles-wide safety fairway that ships can use to safely navigate through the oil rigs along the Louisiana coast. It extends for over six miles. Its use is voluntary, and is not part of any designated traffic scheme. Therefore, there are no specialized rules governing the area. See Hal Antillen N.V. v. M/V Mount Ymitos, No. 93-3714, 1996 WL 547426, at *1, 1996 AMC 2913, 2914-15 (E.D. La. Sept. 24, 1996), vacated and remanded, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998). The district court found that the MOUNT YMITOS was traveling at a course of 170 degrees and the NOORDAM at a course of 325 degrees prior to the collision. See id. at *4, *6, 1996 AMC at 2919, 2921-22. These headings allowed the court to determine the exact navigational situation that existed, and what rule or rules applied. See id.

4 See Hal Antillen N.V., 147 F.3d at 450 & n.1, 1999 AMC at 77 & n.1.

5 See id. at 450, 1999 AMC at 77.

6 Port is the left side of a ship, and a turn to port is a turn to the left.

7 See id., 1999 AMC at 77-78. The district court concluded that the Mount Ymitos altered its course from 170 degrees to 190 degrees. See Hal Antillen N.V., 1996 WL 547426, at *4, 1996 AMC at 2919. This finding meant that the MOUNT YMITOS was not on a steady course just prior to the collision and causes the application of some of the navigation rules. See id.

8 See id. at *2-*3, *5, 1996 AMC at 2915-17, 2920. The NOORDAM had an automated system that recorded the ship's position. See id. at *5, 1996 AMC at 2919-20. The MOUNT YMITOS had no such system, but contested the position and navigation of its vessel and the NOORDAM prior to the collision. See id. at *3 n.4, 1996 AMC at 2919 n.4.

9 See id. at *3-*4, 1996 AMC at 2918.

10 See id. at *1, *4-*7, 1996 AMC at 2914, 2919-21. The court determined that the collision occurred in international waters. See id. at *1, 1996 AMC at 2914. Therefore, the Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 (codified at 33 U.S.C. § 1602 app. (1997)) [[[hereinafter COLREGS] was the statutory scheme applied. See Hal Antillen N.V., 1996 WL 547426, at *4, 1996 AMC at 2919. The court found specifically that the MOUNT YMITOS had violated Rule 2 (responsibility and good seamanship), Rule 7(b) (failure to use radar properly), Rule 8 (failure to take action to avoid collision), and Rule 17 (failure to maintain course and speed and to make **passing** arrangements with the NOORDAM). See id. at *6, 1996 AMC at 2921.

11 See id. at *5-*6, 1996 AMC at 2920-21. Rule 15 of the COLREGS determines whether a vessel is a burdened or privileged vessel in a crossing situation. See COLREGS, supra note 10, Rule 15. The effect of finding MOUNT YMITOS to be a privileged vessel would have significantly reduced its liability.

12 See Hal Antillen N.V., 1996 WL 547426, at *6-*7, 1996 AMC at 2923.

13 See id. at *7, 1996 AMC at 2923.

14 See id.

15 See Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 451-52, 1999 AMC 76, 78-81 (5th Cir. 1998). The Associated Pilots Association filed an amicus curiae brief arguing that no **custom** existed in the Southwest **Pass**. See id. at 450.

16 See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 14-2, at 255, 260 (2d ed. 1994).

17 See id. § 14-2, at 260-61; Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 7-13 (2d ed. 1975); John Wheeler Griffen, The American Law of Collision § 253, at 572 (1949).

18 See Pennsylvania R.R. Co. v. S.S. Marie Leonhardt, 202 F. Supp. 368, 375 n.56, 1962 AMC 370, 386 n.56 (E.D. Pa. 1962), aff'd, 320 F.2d 262, 1964 AMC 1507 (3d Cir. 1963).

19 92 U.S. (2 Otto) 31, 38-39 (1875). There are some earlier cases involving "usages," most significantly Cushing (The Brig James Gray) v. Owners of The Ship John Fraser, 62 U.S. (21 How.) 184, 187-88 (1858) (involving an ordinance in Charleston harbor), and Williamson v. Barrett, 54 U.S. (13 How.) 101, 109-10 (1851) (involving a usage applicable in crossing situations). Both of these earlier cases indirectly point to the no-conflict rule, but The "City of Washington" more clearly and concisely states this principle.

20 92 U.S. (2 Otto) at 38-39.

21 See id. at 39-40.

22 See Zim Israel Navigation Co. v. Special Carriers, Inc., 611 F. Supp. 581, 587, 1986 AMC 2016, 2022-23 (E.D. La. 1985). Compare Hal Antillen N.V. v. M/V Mount Ymitos, No. 93-3714, 1996 WL 547426, at *3-*4, 1996 AMC 2913, 2918 (E.D. La. Sept. 24, 1996), vacated and remanded, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998), with Zim Israel Navigation (ruling exactly opposite on the applicability of the **custom** with a similar accident to the noted case; both accidents occurred in the Southwest **Pass**).

23 See The Giove, 27 F.2d 331, 332, 1928 AMC 1438, 1439 (5th Cir. 1928) (citing The Albert Dumois, 177 U.S. 240, 249-50 (1900) (imposing liability on a vessel even though it was in compliance with a **custom**); The Mary Shaw, 6 F. 918, 922 (D. Md. 1881) (allowing a local **custom** in the face of law only when a permanent local peculiarity necessitates a departure).

24 The point-bend **custom** replaces the Inland Rules from south of New Orleans to the mouth of the Mississippi because the way the river flows makes following the Inland Rules dangerous. See Canal Barge Co. v. China Ocean Shipping Co., 770 F.2d 1357, 1361, 1986 AMC 2042, 2047-48 (5th Cir. 1985); Valley Towing Serv., Inc. v. S/S American Wheat, 618 F.2d 341, 342 n.1, 1981 AMC 436, 447 n.1 (5th Cir. 1980); The Norne, 59 F.2d 145, 147, 1932 AMC 1598, 1599 (5th Cir. 1932).

25 See The Transfer No. 21, 248 F. 459, 461 (2d Cir. 1917) (allowing for **starboard**-to-**starboard** **passing** in the Hell's Kitchen area of the East River in New York when there is a flood tide). But cf. The Nassau (The Terje), 35 F.2d 709, 710-11, 1929 AMC 1758, 1760-61 (2d Cir. 1929) (leaving undecided whether the **custom** still exists when the tide is insufficient to alter navigation); The Governor Warfield, 39 F.2d 926, 929, 1930 AMC 448, 453-54 (E.D.N.Y. 1930) (holding that regular navigation rules apply on the ebb tide), aff'd sub nom. Arundel Corp. v. M/V Socony No. 5, 48 F.2d 1069 (2d Cir. 1931).

26 See Stevens v. F/V Bonnie Doon, 655 F.2d 206, 208, 1982 AMC 294, 295-96 (9th Cir. 1981) (stating that a **custom** of not having lookouts during fishing circles did not relieve liability); In re H. & H. Wheel Serv., Inc., 219 F.2d 904, 913-15, 1955 AMC 1017, 1029-32 (6th Cir. 1955) (holding that a **custom** of not having a lookout was immaterial as contrary to law and good seamanship); A.H. Bull S.S. Co. v. Chesapeake S.S. Co., 101 F.2d 599, 601, 1939 AMC 132,

135 (4th Cir. 1939) (stating that a "[**c]ustom**, no matter how long persisted in, cannot make [a] dangerous procedure safe"); The Priscilla, 55 F.2d 32, 36, 1932 AMC 334, 335 (1st Cir. 1932) (holding that violating a statute will not be excused by **custom**).

27 See 2 Schoenbaum, supra note 16, § 14-2, at 255.

28 See COLREGS, supra note 10, Rule 1.

29 See, e.g., Hal Antillen N.V. v. M/V Mount Ymitos, No. 93-3714, 1996 WL 547426, at *1 n.1, 1996 AMC 2913, 2914 n.1 (E.D. La. Sept. 24, 1996), vacated and remanded, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998).

30 See 2 Schoenbaum, supra note 16, § 14-2, at 256.

31 Compare 33 U.S.C. §§ 1601-1608 (1997), with 33 U.S.C. §§ 2001-2073 (1997). The Inland Rules govern internal waters. See § 2001(a).

32 See The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873).

33 The Pennsylvania Rule was originally quite harsh in its application, because any statutory violation would lead to divided damages. See id. at 138. In actuality, the harshness of the rule can be linked back to the divided damages rule established in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170, 177-78 (1854).

34 421 U.S. 397, 411, 1975 AMC 541, 552 (1975). The Supreme Court took this action in part to end the various means that lower courts were using to subvert and circumvent the Pennsylvania Rule. See George Rutherglen, Not With a Bang But a Whimper: Collisions, Comparative Fault, and the Rule of The Pennsylvania, 67 Tul. L. Rev. 733, 739 (1993).

35 See Allied Chem. Corp. v. Hess Tankship Co., 661 F.2d 1044, 1052, 1982 AMC 1271, 1281 (5th Cir. Unit A. Nov. 1981); see also Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1471-72, 1994 AMC 1034, 1042-44 (5th Cir. 1991) (recognizing the overruling of the damages portion of the rule); Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 436, 1993 AMC 1578, 1592-93 (1st Cir. 1992) (noting that the Pennsylvania Rule is merely a burden-shifting device on the issue of causation, not a rule that establishes fault); Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T Rich Duke, 947 F.2d 83, 86, 1992 AMC 1, 6 (3d Cir. 1991) (interpreting the Pennsylvania Rule as one pertaining to proximate causation of a collision); Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 824-27, 1989 AMC 627, 634-41 (9th Cir. 1988) (applying the Pennsylvania burden of proof on causation); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1555, 1988 AMC 2278, 2302 (11th Cir. 1987) (noting that the portion of the Pennsylvania Rule on presumptions and burdens is "still viable"); Alter Barge Line, Inc. v. TPC Transp. Co., 801 F.2d 1026, 1028, 1987 AMC 1788, 1791 (8th Cir. 1986) (discussing the application of the Pennsylvania Rule).

36 See Rutherglen, supra note 34, at 739-40; see also Nicholas J. Healy & Joseph C. Sweeney, Establishing Fault in Collision Cases, 23 J. Mar. L. & Com. 337, 348 (1992) (criticizing the use of the Pennsylvania Rule); David R. Owen, The Origins and Development of Maritime Collision Law, 51 Tul. L. Rev. 759, 803 (1977) (advocating abolition of the Pennsylvania Rule because it hinders uniformity in the law); William Tetley, The Pennsylvania Rule-An Anachronism? The Pennsylvania Judgment--An Error?, 13 J. Mar. L. & Com. 127, 139-44 (1982) (questioning the necessity of the continued use of the Pennsylvania Rule).

37 See COLREGS, supra note 10, Rule 5.

38 See id. Rule 14.

39 See id. Rule 15.

40 See Chamberlain v. Ward, 62 U.S. (21 How.) 548, 570 (1858); see also The Ottawa, 70 U.S. (3 Wall.) 268, 272-73 (1865) (holding similarly).

41 62 U.S. (21 How.) at 570-71.

42 See id.; The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 462-63 (1851).

43 See The Ariadne, 80 U.S. (13 Wall.) 475, 478-79 (1871).

44 See In re Complaint of Pac. Bulk Carriers, Inc., 639 F.2d 72, 74-75, 1980 AMC 2530, 2532-35 (2d Cir. 1980) (holding a vessel without a lookout 100% at fault); Seacarriers Maritime Co. v. M/T Stolt Jade, 823 F. Supp. 1311, 1320, 1994 AMC 191, 204-05 (E.D. La. 1993) (assigning liability to a vessel in the Southwest **Pass**, where the vessel had not posted a proper lookout), aff'd, 36 F.3d 90 (5th Cir. 1994); Dahlia Maritime Co. v. MS Nordic Challenger, Civ. No. 90-2398, 1993 WL 268413, at *3, 1994 AMC 2208, 2214-15 (E.D. La. July 9, 1993) (discussing the vessel's failure to maintain a lookout prior to a collision in the Southwest **Pass**).

45 See COLREGS, supra note 10, Rule 14(a). The rule gives further specificity as to when this situation exists. See id. Rule 14(b) (governing only when the masthead of sidelights are in line). It indicates that when a vessel is in doubt as to whether a head-on situation exists, then it "shall" assume that it does. See id. Rule 14(c). The rule prescribes that a ship in such a situation must turn to **starboard** and effectuate port-to-port **passing**. See id. Rule 14(a).

46 See Ching Sheng Fishery Co. v. United States, 124 F.3d 152, 161, 1998 AMC 370, 384 (2d Cir. 1997) (finding Rule 14 applicable); see also Oliver J. Olson & Co. v. Luckenbach S.S. Co., 279 F.2d 662, 671, 1960 AMC 1230, 1242-43 (9th Cir. 1960) (applying the identical precursor to Rule 14).

47 Compare Acacia Vera Navigation Co. v. Kezia, Ltd., 78 F.3d 211, 1996 AMC 2592 (5th Cir. 1996) (involving a collision in a safety fairway at night where one vessel made a sudden **starboard** turn striking the other), with Hal Antillen N.V. v. Mount Ymitos M/S, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998). The court, in Acacia Vera Navigation, also did not find a crossing situation to exist, and therefore no violations of Rule 15, Rule 16, or Rule 17. See Acacia Vera Navigation, 78 F.3d at 213-19, 1996 AMC at 2593-2603. Nor did the court find violations of Rule 2, Rule 6, or Rule 8. See id. at 216, 1996 AMC at 2598. The court concluded that the turning party was responsible and apportioned damages accordingly. See id. at 214-15, 1996 AMC at 2595-97.

48 Compare COLREGS, supra note 10, Rule 15, with COLREGS, supra, Rule 14(a). Rule 15 similarly applies to two power-driven boats when there is risk of a collision.

49 See id. Rule 15.

50 See id. Rule 17. The vessel to the **starboard** is known as the burdened or give-way vessel. The duties of the give-way vessel are dictated by Rule 16, which is also applied in conjunction with Rule 15. See id. Rule 16.

51 See Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 823, 1989 AMC 627, 633-34 (9th Cir. 1988); cf. In re Complaint of Seiriki Kisen Kaisha, 629 F. Supp. 1374, 1380-81, 1986 AMC 913, 919-21 (S.D.N.Y. 1986) (finding no Rule 15

liability where the privileged vessel maintained its course and speed); Zim Israel Navigation Co. v. Special Carriers, Inc., 611 F. Supp. 581, 587-88, 1986 AMC 2016, 2023-24 (E.D. La. 1985) (same); In re Shaun Fisheries, Inc., No. 82-529, 1983 WL 699, at *4-*5, 1984 AMC 2650, 2655 (D. Or. Sept. 21, 1983) (same); cf. also United States v. S.S. Soya Atlantic, 330 F.2d 732, 737, 1964 AMC 898, 906 (4th Cir. 1964) (resulting in a similar outcome under a predecessor to the COLREGS); Commonwealth & Dominion Line, Ltd. v. United States, 20 F.2d 729, 731, 1927 AMC 1690, 1692-93 (2d Cir. 1927) (giving a similar result under a predecessor to the COLREGS), rev'd, 278 U.S. 427, 1929 AMC 238 (1929).

52 See Gratsos v. S.S. Mosie Bay, 287 F.2d 706, 708, 1961 AMC 653, 654-56 (4th Cir. 1961); Lykes Bros. S.S. Co. v. Union Carbide & Carbon Corp., 253 F.2d 444, 448, 1958 AMC 722, 727-28 (5th Cir. 1958); Freedman & Slater, Inc. v. M.V. Tofevo, 222 F. Supp. 964, 969, 1963 AMC 1525, 1531-32 (S.D.N.Y. 1963); Capehorn S.S. Corp. v. Texas Co., 152 F. Supp. 33, 36, 1957 AMC 1335, 1339 (E.D. La. 1957); The Tillie, 23 F. Cas. 1266, 1267 (E.D.N.Y. 1874) (No. 14,048), aff'd, 23 F. Cas. 1267 (E.D.N.Y. 1876) (No. 14,049).

53 See Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453, 1939 AMC 281, 286, modified on reh'g, 103 F.2d 430, 1939 AMC 795 (2d Cir. 1939); The Silver Palm (The Chicago), 94 F.2d 754, 762, 1937 AMC 1427, 1441-42 (9th Cir. 1937); The Etruria, 147 F. 216, 217 (2d Cir. 1906); Villaneuva Compania Naviera, S.A. v. S.S. Matilde Corrado, 211 F. Supp. 930, 934 (E.D. Va. 1962); Andros Shipping Co. v. Panama Canal Co., 184 F. Supp. 246, 259, 1960 AMC 2348, 2366-67 (D.C.Z. 1960), aff'd, 298 F.2d 720, 1962 AMC 870 (5th Cir. 1962).

54 705 F. Supp. 1197, 1205 (E.D. La. 1989), aff'd, 909 F.2d 809 (5th Cir. 1990).

55 See Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 451, 1999 AMC 76, 79 (5th Cir. 1998).

56 See id. at 451-52, 1999 AMC at 79-80.

57 See id., 1999 AMC at 80.

58 See id. at 452, 1999 AMC at 81.

59 See id. at 451, 1999 AMC at 79; see also The Giove, 27 F.2d 331, 332, 1928 AMC 1438, 1439 (5th Cir. 1928) (stating that courts may make an exception and apply a **custom** contrary to law where the **custom** is "firmly established and well understood").

60 See Hal Antillen N.V., 147 F.3d at 451, 1999 AMC at 79.

61 See id.

62 See id.

63 See id.

64 See id., 1999 AMC at 79-80; see also Acacia Vera Navigation Co. v. Kezia, Ltd., 78 F.3d 211, 216, 1996 AMC 2592, 2598 (5th Cir. 1996) (affirming the district court's determination that Rule 2, Rule 6, and Rule 8 had not been violated).

65 Compare Hal Antillen N.V., 147 F.3d at 451-51, 1999 AMC at 79-80, with Acacia Vera Navigation, 78 F.3d at 216, 1996 AMC at 2598.

66 See Hal Antillen N.V., 147 F.3d at 451-52, 1999 AMC at 80.

67 See id.

68 See id. at 452, 1999 AMC at 80; see also Burma Navigation Corp. v. Reliant Seahorse MV, 99 F.3d 652, 657, 1997 AMC 2184, 2189-90 (5th Cir. 1996) (discussing the applicable standard of review).

69 See Hal Antillen N.V., 147 F.3d at 452, 1999 AMC at 80.

70 See id., 1999 AMC at 81.

71 See id.; see also The Silver Palm, 94 F.2d 754, 762, 1937 AMC 1427, 1441-42 (9th Cir. 1937) (discussing the presumption that attaches when a vessel logbook has been altered); Andros Shipping Co. v. Panama Canal Co., 184 F. Supp. 246, 259, 1960 AMC 2348, 2366-67 (D.C.Z. 1960) (reiterating the adverse presumption that operates as a result of unexplained alterations of a ship's records), aff'd, 298 F.2d 720, 1962 AMC 870 (5th Cir. 1962).

72 See Hal Antillen N.V., 147 F.3d at 452, 1999 AMC at 81.

73 See id. at 452-53, 1999 AMC at 81-83 (Smith, J., dissenting).

74 See id. at 452, 1999 AMC at 81 (Smith, J., dissenting).

75 See id. (Smith, J., dissenting).

76 See id. at 452-53, 1999 AMC at 81-82 (Smith, J., dissenting).

77 See id. at 453, 1999 AMC at 82 (Smith, J., dissenting).

78 See id. (Smith, J., dissenting).

79 See id. (Smith, J., dissenting).

80 See id. (Smith, J., dissenting).

81 See id. (Smith, J., dissenting).

82 See id. at 453 n.1, 1999 AMC at 82 n.1 (Smith, J., dissenting).

83 See id. at 453, 1999 AMC at 82 (Smith, J., dissenting).

84 See id. (Smith, J., dissenting).

85 See id. at 451, 1999 AMC at 78-79 (Smith, J., dissenting).

86 See id.

87 As a ship enters the fairway, it would have to change from the COLREGS regime in their **passing** to the **starboard**-to-**starboard** **custom** and then change again when entering the Mississippi River to the point-bend **custom**. These changes are counterintuitive and counterproductive to the very reasons that such laws and regulations were enacted.

88 See supra notes 23-26 and accompanying text.

89 See Zim Israel Navigation Co. v. Special Carriers, Inc., 611 F. Supp. 581, 587, 1986 AMC 2016, 2022-23 (E.D. La. 1985).

90 See supra notes 40-44 and accompanying text.

91 See supra note 36.

92 See Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 451-52, 1999 AMC 76, 80 (5th Cir. 1998).

93 See Hal Antillen N.V. v. M/V Mount Ymitos, No. 93-3714, 1996 WL 547426, at *5-*6, 1996 AMC 2913, 2920-21 (E.D. La. Sept. 24, 1996), vacated and remanded, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998).

94 See Hal Antillen N.V., 147 F.3d at 452-53, 1999 AMC at 81-82 (Smith, J. dissenting).

95 See id. at 453 n.1, 1999 AMC at 82 n.1 (Smith, J., dissenting).

96 See supra notes 48-51 and accompanying text.

97 See Hal Antillen N.V., 147 F.3d at 452-53, 1999 AMC at 81-82 (Smith, J., dissenting).

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