No. 19-3827

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: NATIONAL PRESCRIPTION OPIATE LITIGATION
STATE OF OHIO,

Petitioner.

Appeal from the United States District Court
Northern District of Ohio at Cleveland
Honorable Dan Aaron Polster

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ALASKA, ARIZONA, CONNECTICUT, HAWAII, INDIANA, KANSAS, MONTANA, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND DISTRICT OF COLUMBIA IN SUPPORT OF THE STATE OF OHIO'S PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF INTEREST OF AMICUS CURIAE STATES

The mandamus action filed by the State of Ohio implicates two critical, interrelated matters that deeply affect the authority and interests of many States, including the Amici States (Michigan, Alaska, Arizona, Connecticut, Hawaii, Indiana, Kansas, Montana, Nebraska, North Dakota, South Dakota, Tennessee, Texas) and District of Columbia. The first relates to the authority of the States to manage litigation that will affect the entire State, and to enter into binding agreements that will make all of its residents whole. The second relates to the opioid crisis that has had devastating effects for the citizens of the States. It has been one of the leading causes of death, often exceeding those who die by car accidents or murder. The States are the chief guardians of the health and safety of their citizens, and they seek to ensure that their efforts are not impeded.

For this reason, the States write here in support of Ohio's exercise of its sovereign authority to bring an action on behalf of all of its citizens to address the opioid crisis. The States also join Ohio in asserting that the right is a state right, not available to its municipalities, and that only States may exercise it. This amicus curiae

brief is being filed pursuant to Federal Rule of Appellate Procedure 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

The significance of the opioid crisis to the States is hard to overestimate. It has devastated the communities in Ohio and in the Amicus States, leaving a trail of death and economic woe in its wake. The human toll has been incalculable. In economic terms, the two local governments here are seeking $8 billion, fast on the heels of a judgment from the State of Oklahoma for more than $500 million. The economic stakes are profound and uniquely relate to the parens patriae, statutory, and common-law authority of the Attorney General to govern the litigation. Cases like this one and those related come only once in a generation. The only analogy is the tobacco settlement.

The Amici States raise two points here.

First, this Court issues the extraordinary writ of mandamus only in extreme and unusual cases. This is such a case. The State of Ohio is not a party to the two cases that have been scheduled for trial. In each, a local government seeks relief from the same parties subject to suit by Ohio in state court. Ohio has no other recourse here, and it is no

answer to suggest that Ohio may intervene in federal court, where Ohio has already chosen to pursue its claims in state court.

Second, the district court has erred in a critical way by allowing the local governments' suits to move forward in the absence of a state legislative grant of authority to pursue these claims. Such an action undermines the exclusive authority invested in the State as sovereign to protect the interests of all communities within the State. The local governments do not—and cannot by their nature—serve in this role. This role cannot be alienated, cannot be derogated, and should not be defeated by procedural maneuvering.[1] Related to this point, any principle that allows the locals to take the lead and draw from an admittedly finite pool of resources from the defendants comes at the expense of the central role that the State must play in ensuring a fair distribution of relief. The first-in rule cannot govern here, where it may leave uncompensated those residents and communities who have suffered most deeply, as measured by lives lost and economic ruin. The

[1] Each state legislature has the authority to grant standing to its municipalities to bring actions to address harm to its citizens of the nature at issue here. The court, however, does not have the power to bestow parens patriae authority on municipal subdivisions in the absence of a state legislative grant of authority.

protection of these residents is the function of state, not local, government.

The constitutional order depends on the States playing this role, and the Attorney General is the counsel for the States. These are not just traditional roles, but necessary ones. They ensure that the deep wrongs of private actors may be rectified and that all the State's citizens may be made whole. This is the extraordinary case.

ARGUMENT

I. A writ of mandamus is an appropriate vehicle.

The State of Ohio, a nonparty in the district court litigation, has chosen to file a writ of mandamus to this Court, seeking to stop or delay the consolidated bellwether trial involving two Ohio subdivisions that have sued manufacturers, distributors, and others responsible for the nation's opioid epidemic. This extraordinary writ is an appropriate vehicle because this Court will eventually have jurisdiction over the issues involved in the underlying litigation, and a writ is the only adequate avenue for Ohio to obtain relief, since the consolidated trial will include claims that only a State Attorney General has standing to prosecute—claims that vindicate generalized harm to the entire State.

A. This Court will eventually have jurisdiction over this case.

This Court's jurisdiction stems from the All Writs Act, 28 U.S.C. § 1651(a). The Act empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). "The exercise of this power 'is in the nature of appellate jurisdiction' where directed to an inferior court." *Id.* (quoting *Ex parte Crane*, 5 Pet. 190, 193, 8 L. Ed. 92 (1832) (Marshall, C.J.)). It extends to the potential jurisdiction of the appellate court "where an appeal is not then pending but may be later perfected." *Id.*

Here, this Court would eventually have jurisdiction because any appeals related to the bellwether trials would be filed in this Court.

B. This extraordinary writ is the only way to achieve the necessary interlocutory review.

This Court issues the extraordinary writ of mandamus only in "extreme and unusual cases." *United States v. Battisti*, 486 F.2d 961, 964 (6th Cir. 1973) (citation omitted). This Court has explained what is required for a petitioner to seek a writ of mandamus: the petitioner must "show a clear and indisputable right to the relief sought." *In re*

Parker, 49 F.3d 204, 206 (6th Cir. 1995). This Court has further explained that, for the writ to issue, "[t]here must be a demonstrable abuse of discretion or conduct amounting to usurpation of judicial power." *Id.* at 206–07 (citing *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989); *In re NLO, Inc.*, 5 F.3d 154, 156 (6th Cir. 1993); *United States v. Ford (In Re Ford)*, 987 F.2d 334, 341 (6th Cir.), *cert. denied*, 506 U.S. 862 (1992)). "The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, may not be done with it. It lies only where there is practically no other remedy." *In re Parker*, 49 F.3d at 206 (cleaned up).

This Court has adopted a five-step process for examining whether there are extraordinary circumstances warranting mandamus relief:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief needed;
>
> (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;
>
> (4) whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; [and]

> (5) whether the district court's order raises new and important problems, or issues of law of first impression.

In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 303–04 (6th Cir. 1984). These factors are cumulative and should be balanced, and they need not "all point to the same conclusion." *Id.* (citation omitted). Not every factor need be met, and in fact, "[r]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005). This Court has cautioned that it is "in favor of a 'flexible' rather than a 'rigid' approach" to the factors because the writ of mandamus "cannot be wholly reduced to formula." *In re Perrigo Co*, 128 F.3d 430, 435 (6th Cir. 1997) (citations omitted).

Here, these factors weigh in favor of mandamus. This is an exceptional case that may fundamentally affect Ohio's ability to make its residents whole in its own action seeking redress for the harm caused by the opioid crisis.

As to factor one, Ohio cannot obtain the requested stay in any other manner. It is not a party to any of the federal cases below. (Indeed, Ohio has indicated that it does not want to be a party.) (6th

Cir. docket No. 1, Petition at 11.) So it cannot file a dispositive motion below.

Nor can Ohio file a direct appeal, so factor two weighs in Ohio's favor. Any involvement Ohio might have at the appeal level would be too little, too late, and hardly an "adequate" means to secure the relief it seeks—control over the opioid litigation. *Compare In re Parker*, 49 F.3d at 207 (in issuing mandamus, noting that Kentucky had *some* other possible means of gaining some relief because "the state could directly appeal the stay.")

With respect to factor three, the district court's refusal to stay or delay the bellwether trials was contrary to law. A district court has considerable discretion in determining whether to issue a stay, and that power " 'is incidental to the power inherent in every court to control the disposition of the cases in its docket with economy and time and effort for itself, for counsel and for litigants.' " *Ohio Env'tl Council v. U.S. Dist. Court, Southern Dist. of Ohio, Eastern Div.*, 565 F.2d 393, 396 (6th Cir. 1977) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936)). But there is a pressing need for a stay or delay here. Notably, the claims at issue below essentially assert parens patriae claims, and

only the State, as parens patriae, has standing to assert those claims. And it has long been established that the State has a sovereign right to seek relief from interference by its political subdivisions. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[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."). The claims alleged in the opioid litigation below are statewide harms—and, for the reasons set forth more fully in Argument II, it must be the State that litigates them to fruition. The scheduled bellwether trials, which have statewide impact (6th Cir. Dkt. No. 1, Pet. at 9), frustrate that sovereign interest.

Local governments are "subordinate governmental instrumentalities created by the State to assist in the carrying out of a state governmental function." *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105, 107–08 (1967). These governmental units "are 'created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the *absolute discretion of the state*." *Id.* (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178

(1907) (emphasis added)). In numerous contexts, this Court has recognized the authority of States over their local governments. *See e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 715 (6th Cir. 2016) (citing *Sailors* and upholding Michigan's emergency manger law, explaining that there is no fundamental right to have local officers exercising governmental functions selected by popular vote). Although municipalities "have 'great[ ] latitude to conduct their business,' " *Guertin v. State*, 912 F.3d 907, 938 (6th Cir. 2019) (quoting *Assoc. Builders & Contractors v. City of Lansing*, 499 Mich 177 (2016)), this Court nevertheless has recognized the role of the State in serving the State as a whole, in contrast to a municipality, which serves "only a limited number of people within its boundaries," *Guertin*, 912 F.3d at 936, 938 (rejecting an argument that the City of Flint was an "arm of the state."). There are issues—like the opioid crisis at issue here—that affect the entire State. In regard to those issues, the State must be able to step in and act in its own interests.

Factor four and five are sometimes in tension, but not here. Courts sometimes look at the broader context, not just a particular judge's own rulings. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1089 (6th

Cir. 1996). When the broader context is considered here, the recurring problem is elevating settlement of all municipalities in the multi-district litigation (MDL), through the bellwether trials, to the detriment of the State. *See generally Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (warning that a desire to settle large civil actions cannot override restraints on federal-court authority); *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) (same).

Finally, factor five weighs in favor of mandamus, since this situation raises an important and somewhat novel problem for which the federal rules do not account—a stay or delay of local litigation in order to ensure adequate State resolution of a statewide problem. That is the best strategy for States attempting to protect *all* their local communities that are impacted by that problem. It is the State, not its instrumentalities, that should direct opioid monies where they are most needed. In contrast, if the bellwether trials take place, they essentially allow the State's political subdivisions to usurp the State's sovereign role. And they jeopardize Ohio's ability to settle its own state-court actions.

Mandamus is an appropriate vehicle here. If the bellwether trials proceed, Ohio will be damaged in a way that cannot be corrected later through the course of an ordinary appeal. *See Bendectin*, 749 F.2d at 304. The Court should issue the extraordinary writ.

II. States must control major litigation affecting the entire State, including the opioid litigation at issue here.

A. States are in a position to enter into global settlements, which are jeopardized by local, piecemeal litigation.

The district court judge managing this MDL previously recognized that "it has no jurisdiction over (i) the AGs or their representatives, (ii) the State cases they have filed, or (iii) any civil investigations they may be conducting." (Doc # 146, Case 1:17-md-02804-DAP, Feb. 27, 2018 Dist. Ct. Order Regarding State Court Coordination, PageID #806.) The judge also admonished that "nobody should construe the AGs' participation in MDL settlement discussions as a limitation on litigation in the sovereign States." (*Id.*; *see also* Doc # 94, Jan. 24, 2018 Dist. Ct. Order clarifying State Attorneys General appearance at 1/30/18 conference, PageID #523.)

In bringing their actions, Attorneys General have exercised their unique roles as the top law enforcement officers of their respective States, with broad statutory, constitutional, and common-law powers to obtain meaningful relief on behalf of *all* their citizens. Maintaining the prominent role of the Attorneys General acting on behalf of the State as a whole through its parens patriae authority and specific statutory empowerment, is crucial to resolving the claims of the people of the State on a fair and equitable basis. Quite simply, in the absence of a state legislative grant of authority, smaller political subdivisions lack the broad powers and duties that are necessary to effectively protect the States' citizenry as a whole. *See Hunter*, 207 U.S. at 178 (explaining that "[m]unicipal corporations are political subdivision of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."); see also *Nash Cty Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 496 (4th Cir. 1981) (holding that the North Carolina Attorney General had the authority to litigate on behalf of localities without their consent, and explaining that "[i]t 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.") Moreover, an ineffective piecemeal approach is the only result when various inferior instrumentalities of the State pursue conflicting or overlapping claims. Those localities' efforts hinder, rather than help, global, statewide resolution.

An example of this piecemeal approach is the district court judge's consideration of a novel class certification scheme premised on the multitude of claims brought by counties and local municipalities. This proposed arrangement would work to undermine the settlement process by creating an unworkable number of claims and claimants and seeking to include within its jurisdiction those state instrumentalities that have not sought to seek relief separate from that being sought by the States. The opioid crisis is a matter of statewide impact that requires a statewide response. The States should not be hindered by various claims brought by separate instrumentalities making separate arguments from separate attorneys.

As has been pointed out by various Attorneys General, "Doling out small buckets of funds without regard to how the funds should be spent

is the opposite of a 'coordinated' response, which would balance statewide efforts—such as public education campaigns, with local efforts. It also purports to override State decision-making about how best to apply resources to the epidemic and may well interfere with existing State programs and priorities." (R. 1726, June 24, 2019 Letter to Judge Polster, Case 1:17-md-02804-DAP Doc #1726 Filed: 06/24/19, PageID #51637.)

As this Court is aware, the State Attorneys General have been and remain intimately involved in ongoing efforts to address the opioid crisis through a wide variety of means, including litigation, investigations, and negotiations regarding potential resolution with many of the parties. The opioid epidemic remains a national crisis that plagues countless individuals and the States in their role as States. Allowing bellwether trials for an individual county or municipality undermines the ability of the States to secure an ultimate resolution, whether through litigation or settlement, either of which considers the State's local instrumentalities. At its core, the current path impedes the ability of the State of Ohio to seek resolution for all its people.

B. States protect all communities through statewide implementation of policy, ensuring equitable distribution of available funds.

As noted by the National Conference of State Legislatures, the States have through various measures worked to identify statewide responses to the opioid epidemic. "State lawmakers are crafting innovative policies—engaging health, criminal justice, human services and other sectors—to address this public health crisis while also ensuring appropriate access to pain management." *Prescribing Policies: States Confront Opioid Overdose Epidemic*, National Conference of State Legislatures, 6/30/2019.[2]

Part of the effort to address the opioid epidemic from a statewide perspective includes enacting laws that affect prescribing rules limiting access to opioids. For example, Michigan has amended its Public Health Code to address this problem. See 2017 Mich. Pub. Act 246 (requiring a prescriber to discuss certain issues and obtain signed parental consent prior to issuing the first prescription to a minor under certain circumstances); 2017 Mich. Pub. Act 247 (requiring prescriber of

[2] Available at http://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx.

a controlled substance to be in a bona fide prescriber-patient relationship with patient being prescribed the controlled substance); 2017 Mich. Pub. Act 248 (requiring a licensed prescriber to obtain and review a patient's Michigan Automated Prescription System report before prescribing certain controlled substances to the patient, and outlining disciplinary action for violations); 2017 Mich. Pub. Act 249 (similar to PA 248).

This state-level policy and implementation are also key in other facets of the response to the crisis. Prescription drug monitoring programs are one of the strategies with significant evidence backing their effectiveness to improve opioid prescribing and protect patients. Distribution of and access to Naloxone, a medication that can reverse an opioid overdose, is also a key component of statewide response to the ongoing crisis. States have also created requirements for and implemented training and education of health care providers and other relevant entities regarding best practices and remediation concerning opioids, including training in prescribing controlled substances, pain management and identifying substance use disorders.

Coordinated management of data is a further example. The Healthcare Information and Management Systems Society has encouraged States to integrate prescription drug monitoring program data into electronic health records. And statewide provision of services, sometimes via novel modalities, can ensure statewide access to treatment. As an illustration, the Centers for Medicare & Medicaid Services (CMS) have noted that States can deliver services through telehealth modalities that may be more effective in various areas.

In Michigan, Governor Gretchen Whitmer recently issued Executive Order 2019-18, creating the Michigan Opioids Task Force. The Task Force brings together key leaders from across state government—including the State's Chief Medical Executive, the Attorney General, and the Chief Justice of the Michigan Supreme Court, as well as directors from various state departments—to implement a statewide response to the opioid epidemic. As noted in the Executive Order,

> Combating an epidemic of this size and impact requires a coordinated and comprehensive approach: one that identifies and confronts the full scope of the epidemic's root causes and contributing factors in Michigan; that pools, optimizes, and augments the efforts and resources on all levels—public and private; local, state, and federal—that are

> available to address the epidemic; and that raises public awareness of the epidemic, its causes and effects, the resources available to those afflicted by it, and the actions that can be taken to combat it.

The implementation of statewide responses and remedial efforts is hindered when individual communities dilute the coordinated approach of statewide efforts that can maximize outcomes on a statewide basis. And in this regard, States as States are in the best position to both bring the claims and settle with responsible parties, ensuring an appropriate implementation of State policy through coordinated use of State resources to address this crisis of statewide concern. Such implementation is undercut where various local-level claims are tried, risking both inconsistent results and inequitable distribution of resources.

CONCLUSION AND RELIEF REQUESTED

This is an extreme and unusual case where the Writ of Mandamus is needed to stay or delay scheduled bellwether trials below. States must be able to control litigation that affects the State as a whole. They are in the best position to enter into global settlements and to protect all communities through statewide implementation of policy and ensuring equitable distribution of available funds.

WHEREFORE, Amici States respectfully request that this Court grant Ohio's petition for a Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on September 6, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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