

***PARENS PATRIAE* AND STATE ATTORNEYS GENERAL: A SOLUTION TO OUR NATION'S OPIOID LITIGATION?**

State attorneys general have tried to take the lead in responding to the national opioid crisis by suing pharmaceutical companies and distributors on behalf of their states' citizens.¹ An attorney general's standing to bring these suits relies on the common law doctrine of *parens patriae*, which allows a state to assert "quasi-sovereign interest[s]" in a judicial forum, including "the health and well-being—both physical and economic—of its residents."² Several state and federal laws codify this concept in particular areas of the law, such as antitrust, by explicitly providing for *parens patriae* actions.³ But on the whole, the doctrine's precise boundaries remain ill-defined.⁴

Recently, however, two state attorneys general invoked *parens patriae* in petitions seeking to halt opioid lawsuits brought by local governments. Their petitions argued that local government lawsuits illegally impaired each state's ability to protect its citizens

1. See, e.g., Berkeley Lovelace Jr., *Nearly every US state is now suing OxyContin maker Purdue Pharma*, CNBC (June 6, 2019, 1:47 PM), <https://www.cnbc.com/2019/06/04/nearly-every-us-state-is-now-suing-oxycontin-maker-purdue-pharma.html> [https://perma.cc/2G34-TX4N]; Sara Randazzo, *In the Opioid Litigation, It's Now States v. Cities*, WALL ST. J. (Aug. 6, 2019, 5:27 PM), <https://www.wsj.com/articles/in-the-opioid-litigation-its-now-states-v-cities-11565123075> [https://perma.cc/4FN6-KNSQ].

2. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

3. See, e.g., 15 U.S.C. § 15c (2018); COLO. REV. STAT. § 6-4-111 (2018); OHIO REV. CODE ANN. § 109.81 (2017).

4. Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 S.M.U. L. Rev. 759, 764 (2016).

through state-controlled suits.⁵ Both petitions failed, but no court has squarely addressed the possibility that *parens patriae* standing may prevent local governments from bringing claims for harms to their residents. The remainder of this paper refers to this concept as “*parens patriae* preclusion.” I intend this term to cover several distinct ideas, each of which might bar local government suits on the basis of a state’s unique *parens patriae* role.

The first possibility is that local governments simply lack standing (at least in federal courts) to sue based on harms to their residents, because municipal governments lack the sovereign capacity necessary to bring claims on their residents’ behalf as *parens patriae*. This concept would not involve “preclusion” in the *res judicata* sense, but nonetheless merits discussion because the attorneys general packaged it within their broader preclusion arguments. Another possibility is that state-level settlements of *parens patriae* cases preclude local governments from litigating broad-based public (and possibly also private) claims by *res judicata*. Finally, local governments might be barred from litigating these claims even if no settlement has been reached at the state level. This bar might be inherent in the sovereignty that states have and local governments lack or might only arise when states initiate litigation. This note will attempt to delineate clearly between these ideas, although it is not always possible to isolate which of these ideas a party intended to advance. Elaborating on this set of ideas (which, again, this note refers to collectively as “*parens patriae* preclusion”) is worthwhile because they could profoundly influence opioid litigation should they gain judicial acceptance. This note will ask (and take a position on) whether this *parens patriae* preclusion concept has any legal merit, how it would likely affect pending opioid litigation, and whether these effects would be normatively positive.

5. See *infra* notes 8, 13, 15.

First, this note will introduce the two instances where state attorneys general have made explicit *parens patriae* preclusion arguments. Part I will then examine the sparse legal materials on the scope and effect of *parens patriae* standing, and argue that they lend enough support to certain aspects of the arguments made by the attorneys general to make these arguments plausible as a matter of legal theory. Part II will explore how active assertions of *parens patriae* preclusion might operate on pending opioid litigation. Part III will discuss innovative proposals to address perceived problems with the current path of opioid litigation, their likelihood of success, and how *parens patriae* preclusion might interact with them. The note concludes by arguing that, under any foreseeable set of circumstances, continued development and court acceptance of a *parens patriae* preclusion doctrine is normatively desirable because it would promote the goals of facilitating nationwide settlement agreements and proper allocation of settlement funds.

INTRODUCTION

On August 30, 2019, Ohio Attorney General Dave Yost filed a petition for a writ of mandamus asking the Sixth Circuit to enjoin the U.S. District Court for the Northern District of Ohio from holding a bellwether trial of suits that two Ohio counties, Cuyahoga and Summit, brought against several opioid manufacturers and distributors.⁶ In this petition, Yost argued, “[t]he counties advance claims that belong to the State,”⁷ that, if allowed to proceed, “will cripple

6. Alison Frankel, *As Ohio AG tries to shut down opioid bellwether trial, MDL leaders say he’s ‘outlier,’* REUTERS (Sept. 3, 2019, 5:30 PM), <https://www.reuters.com/article/us-otc-opioids/as-ohio-ag-tries-to-shut-down-opioid-bellwether-trial-mdl-leaders-say-hes-outlier-idUSKCN1VO2OE> [<https://perma.cc/Q866-KNZ9>].

7. Petition for Writ of Mandamus at 3, *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827), <https://static.reuters.com/resources/media/editorial/20190903/opioidsMDL--ohioAGmandamus.pdf> [<https://perma.cc/M6Z7-FUDJ>].

the federal dual-sovereign structure of these United States.”⁸ Hyperbole aside, the petition offers an argument with intuitive appeal: states, not their political subdivisions, have standing as *parens patriae* to “recover money for harms to the general health, safety, and physical and economic wellbeing of Ohioans.”⁹ The counties’ claims, based on harms to their residents and requesting relief similar to that which Ohio requests, interfere with this power by making it more difficult for the Attorney General to negotiate a settlement with the defendants.¹⁰ The defendants, knowing that the counties’ suit would survive a settlement with the state and would continue to threaten liability for the same harms a settlement with the Attorney General would address, would be disincentivized to negotiate. On October 10, 2019, a three-judge panel disregarded this argument in its denial of Ohio’s petition.¹¹ The opinion rejected the petition as untimely without addressing the question of whether Ohio’s *parens patriae* claims precluded the counties’ similar claims.¹²

Arkansas Attorney General Leslie Rutledge advanced a closely analogous argument when she petitioned the Arkansas Supreme Court for a writ of mandamus to halt an opioid lawsuit brought by seventy-five counties, fifteen cities, and a district attorney.¹³ Rutledge argued that the suit would usurp her sole authority to

8. *Id.* at 2.

9. *Id.* at 20.

10. *See id.* at 8–9.

11. *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827) (order denying writ of mandamus), 1–3, <https://images.law.com/contrib/content/uploads/documents/292/54976/Opioid-6th-Cir-Ohio-ruling.pdf> [<https://perma.cc/6AVS-SXLA>].

12. *Id.*

13. David Ramsey, *Attorney General Leslie Rutledge in spat with cities and counties over opioid lawsuits*, ARK TIMES: ARK BLOG (Apr. 5, 2018, 6:44 AM), <https://arktimes.com/arkansas-blog/2018/04/05/attorney-general-leslie-rutledge-in-spat-with-cities-and-counties-over-opioid-lawsuits> [<https://perma.cc/KWV5-WXZG>].

bring lawsuits on behalf of the state as *parens patriae*.¹⁴ The Arkansas Supreme Court responded with a one-sentence opinion that reads: “Petitioner’s emergency petition for writ of mandamus is denied.”¹⁵ Because both the Sixth Circuit and Arkansas Supreme Court declined to analyze thoroughly the argument that *parens patriae* standing prevents local governments from bringing lawsuits parallel to a state attorney general, it remains an open question whether this argument is well-founded.

I. IS THERE A LEGAL BASIS FOR *PARENS PATRIAE* PRECLUSION?

Now that two state attorneys general have argued that states’ *parens patriae* standing is exclusive and therefore bars local governments from bringing suits based on injuries to their residents, an attempt to determine whether a legal basis exists to support this claim is in order. Supreme Court precedent and the origins and history of *parens patriae* standing suggest that local governments lack standing (at least in federal courts) to bring lawsuits on behalf of their citizens. This concept does not turn on whether a state has already asserted *parens patriae* standing, but focuses instead on local governments’ incapacity to do so. It therefore does not involve *res judicata*. This note nonetheless includes this concept under the umbrella term *parens patriae* preclusion because both attorneys general bundled it with arguments that truly implicate *res judicata*.

14. *Id.* Rutledge took particular issue with the participation of an executive branch official in this lawsuit. *Id.*

15. Wesley Brown, *AG Rutledge loses ‘writ of mandamus’ request, second opioid lawsuit may proceed with ‘state actor,’* TALK BUS. & POL. (April 6, 2018, 4:29 PM), <https://talkbusiness.net/2018/04/ag-rutledge-loses-writ-of-mandamus-request-second-opioid-lawsuit-may-proceed-with-state-actor> [<https://perma.cc/6WYG-9YG2>].

A. *Parens Patriae History, Theory, and Case Law*

Beginning in the thirteenth century, as a prerogative of the English Crown to initiate legal action as guardian of the mentally infirm,¹⁶ the *parens patriae* concept expanded dramatically in the United States throughout the nineteenth century as states asserted standing to vindicate other “quasi-sovereign interests,” including the abatement of public nuisances.¹⁷ This rapid common law development left the boundaries of *parens patriae* standing anything but clearly defined. The Supreme Court has never ventured “an exhaustive formal definition nor a definitive list of” what constitutes a “quasi-sovereign interest,”¹⁸ and justices have offered divergent views as to whether a state’s assertion of *parens patriae* standing heightens or relaxes courts’ standing analysis.¹⁹ Still, tracing the Court’s treatment of the concept provides some insight into the potential extent of its reach.

The Supreme Court has justified the expansion of *parens patriae* standing by reasoning from two theories: “universal sovereignty theory,” which posits that *parens patriae* standing is a privilege that inherently belongs to all sovereign governments; and “sovereignty transference theory,” which posits that *parens patriae* authority transferred from the British Crown to the states when they achieved independence.²⁰ The Court has not cleanly differentiated between

16. See generally Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

17. See Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1866–71 (2000).

18. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

19. Compare Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (stating that Massachusetts, as *parens patriae*, “is entitled to special solicitude in our standing analysis”) with *id.* at 538 (“[P]arens patriae actions raise an additional hurdle for a state litigant.”) (Roberts, C.J., dissenting).

20. Gabrielle J. Hanna, *The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1969–72 (2017).

these two related theories,²¹ but both, whether applied separately or in combination, make plausible the argument that states' *parens patriae* authority precludes local government lawsuits for harms to their residents.

The Supreme Court first endorsed “universal sovereignty theory” in 1890 when it proclaimed, in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,²² that “[t]his prerogative of *parens patriae* is inherent in the supreme power of every State” and is “often necessary to be exercised in the interests of humanity.”²³ The Court has never repudiated this rationale.²⁴ When combined with the Court’s labelling of lawsuits that protect the public welfare as exercises of *parens patriae*,²⁵ this theory would arguably preclude local governments from pursuing lawsuits to address harms to their residents. The argument would go that local governments’ interest in protecting their residents is a public welfare concern—a quasi-sovereign interest that only a quasi-sovereign actor can assert. Because the Supreme Court has repeatedly held that local governments lack any measure of sovereignty,²⁶ any suit by a local government for injuries to its residents would be an impermissible exercise of *parens patriae* standing by a non-sovereign entity. Put differently, all of the power to use litigation to protect the public welfare rests with sovereign government entities with none left over for local governments. In our federal system, only the national and state governments (but not localities) share sovereignty and, by extension, *parens patriae* authority.

21. See generally *Alfred L. Snapp*, 458 U.S. at 592.

22. 136 U.S. 1 (1890).

23. *Id.* at 57.

24. See *Hanna*, *supra* note 20, at 1971–72.

25. *Alfred L. Snapp*, 458 U.S. at 607.

26. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 437 (2002); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53–54 (1982).

“Sovereignty transference theory” supports a similar conclusion. The Supreme Court explicitly invoked this theory in 1972, proclaiming in *Hawaii v. Standard Oil Co. of California*²⁷ that, “[i]n the United States, the ‘royal prerogative’ and the ‘parens patriae’ function of the King passed to the States.”²⁸ The people of the states presumably surrendered some of their sovereignty (and with it some of the *parens patriae* function) to the national government by ratifying the Constitution. As with “universal sovereignty theory,” this leaves local governments with no measure of sovereignty. Therefore, they may not bring lawsuits protecting the public welfare because this requires *parens patriae* standing, which belongs only to “quasi-sovereign” actors.

Both the “universal sovereignty” and “sovereignty transference” theories bar local governments from suing in federal courts on behalf of their residents, regardless of whether a state has affirmatively acted as *parens patriae* by filing its own lawsuit. The disability stems not from a prior action of the state, but from the localities’ immutable status as non-sovereigns. As a matter of legal theory, then, the portions of Arkansas and Ohio’s mandamus petitions in which the states argued that local government suits conflicted with suits that they were actually pursuing may have been unnecessary.²⁹

Ohio sought to prevent claims from proceeding in federal court. Thus, if the state had successfully demonstrated that the local governments were surreptitiously trying to invoke *parens patriae*, and not some alternative theory of standing that would be permissible,

27. 405 U.S. 251 (1972).

28. *Id.* at 257.

29. See Ramsey, *supra* note 13 (“[District Attorney] Ellington’s action, she said, jeopardizes the state’s ability to pursue its own case against opioid manufacturers.”); Petition for Writ of Mandamus, *supra* note 7, at 5 (“The complaints, from States and localities alike, all tell a similar story, and all assert nearly identical claims.”).

the Supreme Court's precedents would seem to determine the result in Ohio's favor. However, Arkansas faced an extra wrinkle. It sought to bar local government claims brought before a state court, which need not adhere to the Supreme Court's formulation of the *parens patriae* function.

It seems likely that a state court would follow the Supreme Court and the common law here, but states have not universally or unquestioningly, adopted the common law of *parens patriae*. Indeed, some states have legislatively modified the common law concept of *parens patriae* standing. Take, for example, the provision of Colorado's antitrust statute that directly authorizes *parens patriae* actions. Under the statute, the attorney general may sue on behalf of Colorado residents at his discretion,³⁰ but may sue "on behalf of any governmental or public entity, [only] *with the written consent of such entity*, injured, either directly or *indirectly*."³¹ In other words, to the extent that this statute prevents the attorney general from pursuing a local government's antitrust claim without its written consent, Colorado has modified its common law right to act as *parens patriae*. This language allows a Colorado local government to argue plausibly that it has the capacity to pursue an antitrust claim for an "indirect injury" that closely resembles a *parens patriae* claim, despite its lack of sovereign authority to officially act as *parens patriae*. State courts might easily expand this reasoning to allow local governments to bring lawsuits on behalf of their residents.

B. *Scope of Res Judicata Under Parens Patriae Preclusion*

Part I's analysis of *parens patriae*'s theoretical underpinnings and treatment speaks only to the argument that local governments lack

30. COLO. REV. STAT. § 6-4-111(3a) (2018).

31. *Id.* § 6-4-111(2) (2018) (emphasis added).

the capacity to bring suits resembling *parens patriae* actions. This Part will focus instead on the potential *res judicata* effects of a state's actual assertion of *parens patriae* standing on parallel local government suits. *Res judicata* and *parens patriae* standing are common law doctrines whose application varies widely across courts and according to state law.³² This lack of uniformity, combined with the absence of guiding statutory language, makes it difficult to draw broad conclusions about the proper scope of *parens patriae* preclusion. Nevertheless, a pair of Ninth Circuit cases and federal and state statutes codifying *parens patriae* actions offer some insight into how courts might apply *parens patriae* preclusion. These sources can be distilled to suggest three versions of *res judicata* through *parens patriae* preclusion: narrow, broad, and broadest.

1. Narrow *Res Judicata* Through *Parens Patriae* Preclusion

In 2003, in *City of Martinez v. Texaco Trading & Transportation, Inc.*,³³ a panel of the Ninth Circuit considered whether a settlement between Texaco and the California Department of Fish and Game precluded the city's subsequent lawsuit asserting multiple causes of action related to the same oil spill that the settlement addressed.³⁴ Texaco characterized the city's suit as an impermissible attempt to enforce "public rights."³⁵ The Ninth Circuit drew a distinction among the causes of action, precluding the city's "public claims," but allowing a claim arising from the spill's interference with a "private easement" that the city held in an affected marsh.³⁶ Thus the prior state-level settlement of a *parens patriae* case barred the city

32. See generally Hanna, *supra* note 20, at 1956–57.

33. 353 F.3d 758 (9th Cir. 2003).

34. *Id.* at 760–62.

35. Brief for Appellee at 24, *City of Martinez*, 353 F.3d 758 (No. 02-16436).

36. *City of Martinez*, 353 F.3d at 763.

from bringing “public claims” that cast the city in a *parens patriae*-like role, but did not affect its property claims.

Extrapolating this logic onto potential *parens patriae* preclusion in opioid litigation would bar local government suits based on harms to their residents (i.e. “public claims”) where the state had settled a public welfare suit,³⁷ while leaving local governments free to recover their direct costs from the opioid epidemic (such as increased first responder and law enforcement expenses).³⁸ Ohio Attorney General Yost contemplated an expansion of this “narrow” version of *parens patriae* preclusion via an unintroduced piece of legislation his office helped draft. The bill would give the state exclusive control over only claims affecting citizens in at least five Ohio counties, thus allowing local governments to pursue private claims to recover their direct crisis-related costs.³⁹ It goes further than the City of Martinez holding because it would bar municipal governments from pursuing “public claims” even if the state has not reached a settlement in, or even initiated, a parallel *parens patriae* action. The statute would give the state the exclusive right to decide whether, when, and in what forum to pursue these claims.

Assuming that the draft bill is consistent with Yost’s view of *parens patriae* preclusion, its five-county trigger for suits involving harms to residents illustrates an ambiguity in the *parens patriae* preclusion theory: are local governments’ lawsuits on behalf of their own residents impermissible only when their residents’ injuries are

37. *Supra* Part I.A.

38. See Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1063 (2019) (identifying discrete costs of the opioid crisis to local governments).

39. Jeremy Pelzer, *Bill seeks to give AG Dave Yost control over local opioid lawsuits*, CLEVELAND.COM (updated Aug. 28, 2019), <https://www.cleveland.com/open/2019/08/bill-seeks-to-give-ohio-ag-dave-yost-control-over-local-opioid-lawsuits.html> [<https://perma.cc/UEH6-T48N>]; see also *infra* Part II.B.

indistinguishable from those of state residents at large (as demonstrated by similar injuries among citizens in five counties), or categorically because suing on behalf of one's residents is inherently a "public welfare" action belonging solely to the state? If the first is true, the state's role as *parens patriae* would not bar a local government suit for harms to its residents if no one outside of that local government's jurisdiction suffered the same or similar harm. According to the second position, the state's *parens patriae* status continuously radiates independent force barring local governments from bringing lawsuits that implicate quasi-sovereign interests.

Ohio's unsuccessful mandamus petition argued at times from both positions. The petition first identifies the problem as being that "[t]hese are widespread, statewide harms, not local harms The bellwether trial therefore will not focus on the particular Ohio county plaintiffs."⁴⁰ This is an argument from the first position. By implication, no problem would exist if the trial were to focus on the counties suing, instead of on the state as a whole, even though the counties are seeking damages for harms to their residents.⁴¹ Just three pages later, the petition jumps to position two, asserting that "a political subdivision may not sue to enforce its residents' rights,"⁴² apparently regardless of whether these rights are shared with residents of the state outside the municipality. In an amicus brief supporting the petition, the attorneys general of thirteen states and the District of Columbia took the second position, arguing that local governments may not sue to redress harms to their residents "in the absence of a state legislative grant of authority to pursue

40. Petition for Writ of Mandamus, *supra* note 7, at 7.

41. *See id.*

42. *Id.* at 10 (quoting Jackson v. Cleveland Clinic Found., No. 1:11 CV 1334, 2011 U.S. Dist. LEXIS 101768, at *17–18 (N.D. Ohio Sept. 9, 2011)).

these claims.”⁴³ This is so regardless of how widespread or localized the harm.⁴⁴

This second position is similar to the theories of *parens patriae* standing that the Supreme Court has articulated in that it would prevent local governments from suing on behalf of their residents in all instances, regardless of whether the state has acted.⁴⁵ It is distinct, however, because it reasons from states’ sovereign status, rather than localities’ lack of sovereignty. The first position—that the state’s authority to act as *parens patriae* bars local government suits to redress harm to their residents only when the harm is too widely shared with other residents of the state outside the locality—has more pragmatic appeal because it would allow localities to sue immediately to redress localized harms whereas the second position risks leaving localized harms unaddressed if the state delays or fails to give specific authorization for suits by local governments.

Also, practical reasons not to allow local government suits, namely the risks of impeding state-level lawsuits for similar claims and appropriating value from residents of other areas of the state, do not arise when public harms are sufficiently local. For these reasons, courts would likely be less willing to accept the second position as compared to the narrower first position, especially in the context of current opioid litigation where accepting the second position would require dismissal of local government suits that are already far along. This note does not insist that “narrow” *parens patriae* preclusion—prohibiting local government suits on behalf of their residents (in at least some instances) while leaving them free to recover direct costs—must rest on one of these bases to the ex-

43. Brief of Amici Curiae at *3, *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827), 2019 WL 4390968.

44. *Id.*

45. See *supra* Part I.A.

clusion of the other. Because the opioid crisis' harms are widespread, state attorneys general can continue making arguments from both positions without committing to either of them.

2. Broad *Res Judicata* Through *Parens Patriae* Preclusion

Another Ninth Circuit case could be understood to take *parens patriae* preclusion one step further. *Alaska Sport Fishing Ass'n v. Exxon Corp.*⁴⁶ decided how a settlement between Exxon and Alaska affected a private fishing organization's lost recreational use claims.⁴⁷ The settlement disposed of a suit that Alaska brought as *parens patriae* under provisions of the Clean Water Act and CERCLA that specifically provided for *parens patriae* actions.⁴⁸ The court held that the organization's claims were not "private," and were therefore barred because the settlement discharged all "public" claims.⁴⁹ Although the decision was technically one of statutory interpretation and extended only to "private" claims, it can be read to support the remarkable proposition that *parens patriae* actions preclude even private parties from bringing "public" claims that arise from the same incident as the *parens patriae* action.

From a policy perspective, the Ninth Circuit's decision that a *parens patriae* suit precludes all subsequent "public" claims was probably an attempt to ensure Exxon's survival by placing finite limits on its liability. Courts hearing lawsuits against pharmaceutical companies that are expected to liquidate would lack this incentive to apply *parens patriae* preclusion to private parties.

46. 34 F.3d 769 (9th Cir. 1994).

47. *Id.* at 770.

48. *Id.* at 771.

49. *Id.* at 770.

3. Broadest *Res Judicata* Through *Parens Patriae* Preclusion

Translating *Alaska Sport Fishing* to the opioid litigation context would preclude individuals' narrower personal injury claims only if one reasons that personal injury claims are "public" because the injuries—addiction and the costs thereof—are no different than those of thousands of other state citizens, and are therefore properly pursued only by the states or an individual suffering a special injury. On this reading, *Alaska Sport Fishing's* extension of *parens patriae* preclusion to private parties serves as a logical stepping-stone to extend the concept to reach "private" claims. This broadest version of common law *parens patriae* preclusion would allow state attorneys general to seek money damages for individuals' direct injuries, thus precluding individuals from pursuing their own claims.

Though it might take a strained reading of existing common law doctrine to arrive at "broadest" *parens patriae* preclusion, this formulation has statutory parallels in federal and state antitrust law.⁵⁰ But these laws barring private claims also recognize a limit that the attorneys general did not concede in their formulation of a "narrow" *parens patriae* preclusion applying only to "public" claims:⁵¹ the statutes necessarily require that the state actually bring a lawsuit before claims-holders' suits are precluded.⁵² If it were otherwise, no non-sovereign party could initiate any civil action in response to a widespread harm without permission from the state attorney general or legislature.

50. *Supra* note 3.

51. *See supra* Part I.B.ii.

52. *See, e.g.*, 15 U.S.C. § 15c (1980); COLO. REV. STAT. § 6-4-111 (2018); *supra* Part I.A.

A look at the *parens patriae* provision of the federal antitrust statute helps give shape to this “broadest” version of *parens patriae* preclusion. 15 U.S.C. § 15c provides that, “[a]ny attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons . . . to secure monetary relief,”⁵³ and that the “final judgment in [any such action] shall be *res judicata* as to . . . [all antitrust claims] by any person on behalf of whom such action was brought.”⁵⁴ This statute authorizes state attorneys general to litigate individuals’ antitrust claims for direct injuries with preclusive effect, but, to insulate the actions from due process challenges, the statute also requires notice to affected individuals⁵⁵ and an opportunity to opt-out.⁵⁶ A common law *parens patriae* preclusion doctrine that applies to parties’ direct injuries would almost certainly also require notice and an opportunity to opt-out to conform to constitutional due process guarantees.⁵⁷

Although all three versions have plausible legal support and any may yet be invoked in opioid litigation, the remainder of this paper uses the term *parens patriae* preclusion to signify the “narrow” version described above because both real-world assertions of *parens patriae* preclusion thus far have been articulations of this version. This fact could be interpreted as evidence that the “narrow” version is least politically objectionable and therefore also the version most likely to be asserted in future opioid litigation.

53. 15 U.S.C. § 15c(a)(1) (2018).

54. *Id.* § 15c(b)(3).

55. *Id.* § 15c(b)(1).

56. *Id.* § 15c(b)(2).

57. See Hanna, *supra* note 20, at 1955.

II. PARENS PATRIAE PRECLUSION APPLIED TO OPIOID LITIGATION

Part I explained how state attorneys general can make a plausible legal argument that states' status as guardian of their citizens precludes local governments from asserting claims based on harm to their residents (as opposed to direct harms to the local governments themselves). Local government lawsuits might be precluded (1) because local governments lack the capacity to assert such claims, (2) because a state has already brought sufficiently similar claims as *parens patriae*, or (3) out of some power emanating from states' sovereign status.

Part II will examine how an operationalized *parens patriae* preclusion doctrine might affect opioid litigation. Because preclusion arguments and their potential effects must be understood in light of state and local government actors' fears and incentives, this Part opens with a discussion of some of these concerns and motives.

A. Underlying Concerns

Arkansas and Ohio proffered *parens patriae* preclusion arguments as an attempt to gain the upper hand in the struggle between state and local governments for influence in litigation against the opioid industry. Both levels of government want to control spending of settlement money. Cities and counties fear a repeat of the 1998 "Master Settlement Agreement" ("MSA"), which forty-six state attorneys general negotiated to end nationwide tobacco litigation without local government input.⁵⁸ The Agreement released participating tobacco companies from all liability to government entities in exchange for ongoing payments, but less than one percent of

58. *Master Settlement Agreement*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement> [<https://perma.cc/7NEZ-9TW8>].

MSA funds were earmarked for tobacco prevention programs.⁵⁹ The vast majority of settlement money went instead to state treasuries' general funds, and then on to pay for state highway projects and to cover other state budgetary shortfalls.⁶⁰ This outcome angered local governments, which received little or no compensation for the harms that tobacco addiction inflicted on their residents—and on their budgets.⁶¹ Taking the lesson of the past to be that local governments lose when they leave mass tort litigation to the states, county and city governments fear that *parens patriae* preclusion of their lawsuits would also mean preclusion from settlement funds.

Meanwhile, the outcome of Oklahoma's lawsuits against industry giants Purdue Pharma and Teva Pharmaceuticals seemingly confirmed these fears. First, in March 2019, Purdue agreed to a \$270 million settlement, of which only \$12.5 million went to local governments.⁶² Incensed that it received no money from the Purdue deal, the Oklahoma legislature, two days before Teva settled with the state, enacted a law requiring that all future settlement money enter the state treasury.⁶³ To local governments' horror, the law leaves the state in control of the \$465 million verdict entered against Johnson & Johnson in November 2019.⁶⁴ Local governments may

59. PUB. HEALTH L. CTR., *THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW* 8 (Jan. 2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf>.

60. Ashley Fuoco Antonelli, *Overwhelmed by all the multi-million dollar opioid settlements? Here's everything you need to know.*, ADVISORY BD. (Oct. 30, 2019), <https://www.advisory.com/daily-briefing/2019/10/30/opioid-settlements> [<https://perma.cc/H9TL-R922>].

61. *Id.*

62. Lenny Bernstein, *In Oklahoma, opioid case windfall starts winners squabbling*, WASH. POST (June 20, 2019, 12:44 PM), https://www.washingtonpost.com/health/in-oklahoma-opioid-case-windfall-starts-winners-squabbling/2019/06/20/92ce0f60-92bb-11e9-b570-6416efdc0803_story.html [<https://perma.cc/68MS-94G9>].

63. *Id.*

64. Colin Dwyer, *Oklahoma Judge Shaves \$107 Million Off Opioid Decision Against Johnson & Johnson*, NPR (Nov. 15, 2019 3:31 PM), <https://www.npr.org/2019/11/15/>

once again receive little of that money despite having absorbed many of the opioid epidemic's costs.⁶⁵

Nor are state legislatures the only competitors for settlement funds with whom local governments must contend. In states that grant their attorney general discretion to decide how to spend damages awards, these officials have sometimes misallocated settlement funds to projects intended to boost their chances of reelection or election to higher office.⁶⁶ Former West Virginia Attorney General Darrell McGraw, for example, used funds from settlements with pharmaceutical companies to create a nursing program at the University of Charleston headed by the State Senate President's wife and to construct an enormous fitness center at a state police academy facility.⁶⁷

Unsurprisingly, state attorneys general have voiced their own concerns. Foremost among these is that local government lawsuits create uncertainty for the defendant companies making it more difficult for states to settle their own lawsuits with them.⁶⁸ The resulting confusion and threat of continued liability, states contend, only delay the process of obtaining a recovery for victims, victims' families, and taxpayers.⁶⁹

779439374/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson [https://perma.cc/7VWS-4ZR7].

65. See Weeks & Sanford, *supra* note 38, at 1063.

66. Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209, 251–55 (2016).

67. *Id.* at 254–55.

68. Letter from 27 Attorneys General to Judge Dan Polster, N.D. of Ohio (June 24, 2019), [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Negotiation%20Class%20Letter%20TX-CA%20Final%20\(002\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Negotiation%20Class%20Letter%20TX-CA%20Final%20(002).pdf) [https://perma.cc/CML3-CB8E].

69. *Id.*

Another concern is that local government lawsuits tend to rely heavily on private attorneys charging contingency fees.⁷⁰ As a result, huge portions of settlement funds end up in plaintiffs' attorneys' pockets instead of restoring the public welfare. The Arkansas local government suit that Attorney General Rutledge unsuccessfully opposed bore out this concern. There, the private attorneys whom the Arkansas counties and cities hired were to receive twenty-one percent of any future settlement.⁷¹ Although some state attorneys general have also heavily relied on private attorneys, particularly in consumer protection cases,⁷² they may be less likely to do so in opioid cases where the alternative of teaming up with other states' attorney general's offices to pool resources will be available.

B. *Parens Patriae Preclusion's Potential Effects on Opioid Litigation*

By far the most important question surrounding *parens patriae* preclusion arguments is how they might change the ultimate fate of settlement funds. Intuition suggests that states would use a *parens patriae* preclusion doctrine to keep all settlement funds for their treasuries, but actual events tell a more nuanced story. First, although the Oklahoma settlements suggest that states will eagerly grasp at any opportunity to keep control over funds in the statehouse and away from local governments,⁷³ the Oklahoma legislature has yet to decide how to distribute the funds it seized control over, and may allocate significant sums to local governments.⁷⁴

70. See Andrew Joseph, *A veteran New York litigator is taking on opioid makers. They have a history*, STAT NEWS (Oct. 10, 2017), <https://www.statnews.com/2017/10/10/opioid-law-suits-paul-hanly/> [<https://perma.cc/QN5T-NR93>].

71. Brown, *supra* note 15.

72. Silverman & Wilson, *supra* note 66, at 217.

73. *Supra* Part II.A.

74. See Bernstein, *supra* note 68.

Moreover, the position that Ohio Attorney General Yost actually took when elaborating on his preclusion argument belies the state-as-settlement-hog stereotype. Indeed, events in Ohio demonstrate that political accountability may in fact steer settlement funds toward local governments by restraining state government actors' freedom to spend them on unrelated projects as they did following the tobacco settlement. First, Attorney General Yost has been careful to stipulate that he wants local governments to receive a substantial portion of any settlement he negotiates for the state.⁷⁵ Yost released a statement claiming that his push for the state to have exclusive control over litigation, far from a power grab, is actually a response to "[c]ities and counties that individually race to the courthouse, hoping for the luck of the draw and attempting to get any money that they can."⁷⁶ State control will put an end to this wasteful racing and ensure that "[the state] can fairly deliver equitable relief to communities based on impact," rather than letting most or all settlement money go to those cities and counties first off the starting-line.⁷⁷ The Ohio Attorney General's office followed up by working with state legislators to draft an un-introduced bill that precludes local government lawsuits competing with state efforts, but guarantees that at least 20 percent of any resulting settlement goes to affected local governments.⁷⁸

Ohio Governor Mike DeWine's public disagreement with Yost's decision to file the failed mandamus petition asserting *parens patriae* preclusion in the first place,⁷⁹ is another piece of evidence that local governments' loudly expressed concerns constrain states' ability to

75. Pelzer, *supra* note 44.

76. *Id.*

77. *Id.*

78. *Id.*

79. Frankel, *supra* note 8.

spend settlement funds self-interestedly. Local governments' ability to curry public sympathy by warning of a repeat of states' unsavory behavior following the 1998 tobacco settlement has forced Ohio's elected governor and attorney general to make concessions to local governments. All parties understand that a repeat of the 1998 Master Settlement Agreement is politically impossible. The Ohio situation indicates that, even if courts were to accept state attorneys general's arguments that states' role as *parens patriae* precludes local government suits, public opinion would still ensure that local governments receive considerably more funds from opioid settlements than they received from the tobacco MSA.

The tobacco settlement's lessons may significantly alter another likely effect of *parens patriae* preclusion should courts begin to accept the concept. If these arguments begin to succeed, state attorneys general, notorious for their political ambitions as "Aspiring Governors,"⁸⁰ might assert *parens patriae* preclusion to halt local government lawsuits for the sole purpose of later, during a campaign for higher office, claiming all of the credit for having negotiated a settlement. In a pre-tobacco litigation world, such an unsubtle move might have evaded public detection with the result being all settlement funds finding their way into the state treasury and political benefit to the attorney general. But today the media, with its attention focused on opioids⁸¹ and eager to draw parallels to the

80. Larry J. Sabato, *The AG: Attorney General as Aspiring Governor*, RASMUSSEN REPORTS (April 23, 2010), https://www.rasmussenreports.com/public_content/political_commentary/commentary_by_larry_j_sabato/the_ag_attorney_general_as_aspiring_governor [https://perma.cc/872G-SXL5].

81. See generally Fiona Webster, Kathleen Rice, & Abhimanyu Sud, *A critical content analysis of media reporting on opioids: The social construction of an epidemic*, 244 SOC. SCI. & MED. 112642 (Jan. 2020).

still-controversial tobacco litigation,⁸² is far more likely to detect and report on such posturing.

Consequently, any attorney general hoping to reap political benefit by claiming to have single-handedly fought pharmaceutical companies and won would need to credibly make the additional claim that his seizure of control produced a fairer allocation of settlement funds than piecemeal local government litigation would have. Ambitious attorneys general would thus have an incentive to negotiate settlements that specifically earmark a large percentage of funds for local governments or require public disclosure of how funds are spent.⁸³ By building in these safeguards, state attorneys general would position themselves to claim credit later for having protected localities from the depredations of both the state legislature and other localities racing to the courthouse for a disproportionate recovery. Therefore, even if judicial acceptance of *parens patriae* preclusion resulted in all or nearly all states petitioning for dismissal of local lawsuits, state attorneys general's political ambitions, combined with heightened media scrutiny, might counterintuitively bring benefits to local governments.

There is also reason to believe that, in many cases, *parens patriae* preclusion would facilitate faster and larger settlements uncomplicated by piecemeal local government litigation, just as state attorneys general have argued.⁸⁴ Scholars have recognized that *parens patriae* actions, even without precluding parallel local government

82. See, e.g., Jan Hoffman, *States Clash With Cities Over Potential Opioids Settlement Payouts*, N. Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/health/opioids-litigation-settlement.html> [<https://perma.cc/B4GG-L7BT>]; Randazzo, *supra* note 1.

83. Arizona and Arkansas have passed statutes requiring their attorneys general to report on how settlement funds are actually spent. Silverman & Wilson, *supra* note 66, at 267.

84. See *supra* text accompanying notes 6–15.

suits, increase the odds of settlement.⁸⁵ Defendants sued by individuals or local governments face less potential liability if they go to trial and lose, and therefore face less pressure to settle.⁸⁶ Defendants in these cases are more likely to risk trial in hopes of establishing a pattern of no liability that would discourage potential future claimants.⁸⁷ States, on the other hand, can bring much larger damages claims than most county or city governments by suing on behalf of all of their citizens as *parens patriae*. This makes defendants more likely to settle rather than risk liability for the claims of an entire state's population.⁸⁸ *Parens patriae* preclusion would likely amplify this effect by preventing comparatively low-stakes local government suits from establishing patterns of no-liability.

On the whole, if courts were to embrace *parens patriae* preclusion arguments similar to those that Arkansas and Ohio advanced, the primary effect would likely be to give states, as opposed to local governments, increased control over funds recovered in opioid settlements. Despite their loss of control, local governments might nonetheless fare well in the allocation of these funds because statewide lawsuits would extract larger settlements, and the media scrutiny that would inevitably surround attorneys general's assertions of *parens patriae* preclusion would force them to consider local governments' interests when negotiating settlements and making distribution decisions.

85. See generally Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 915–16 (2008).

86. *Id.*

87. *Id.*

88. *Id.*

III. PARENS PATRIAE AND OTHER INNOVATIONS IN OPIOID LITIGATION

Whatever effects a *parens patriae* preclusion doctrine might have on opioid litigation in a static environment, the concept does not operate in a vacuum. Understanding the implications of *parens patriae* preclusion therefore requires consideration of how the concept would interact with the moves that state attorneys general and other institutional actors are making in response to the opioid crisis. This Part will address three of those moves: proposed congressional legislation directing states' use of settlement funds, the certification of a "Negotiation Class" comprising nearly every local government in the United States, and a state-led \$48 billion global settlement framework that would extinguish all state and local government claims against five defendants.

A. Congressional Response: The Opioid Settlement Accountability Act

Proposed Congressional legislation might offer local governments additional protection in the event that *parens patriae* preclusion arguments gain traction in the courts. On November 21, 2019, Representatives Marcy Kaptur (D-OH) and David B. McKinley (R-WV) introduced a bill entitled the "Opioid Settlement Accountability Act" ("OSAA"), designed to prevent states from misallocating settlement funds as they did following the 1998 tobacco settlement.⁸⁹ As matters stand, the OSAA is expected to die in the House Energy and Commerce Committee,⁹⁰ but if courts began holding that states' *parens patriae* actions preclude local governments' parallel lawsuits, a wave of public concern about the fate of settlement

89. Opioid Settlement Accountability Act, H.R. 5242, 116th Cong. (2019).

90. H.R. 5242: Opioid Settlement Accountability Act, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr5242> [<https://perma.cc/P4SM-BV3G>].

funds could push the bill to enactment. The bill, an amendment to title XIX of the Social Security Act, which creates Medicaid, directs that all Medicaid-related funds that states recover from the pharmaceutical industry be spent toward opioid abuse prevention and treatment programs, supporting first responders, or other “public health-related activities.”⁹¹ If the bill became law, local governments would indirectly benefit from this state spending, and the bill’s limitations on how else states may spend settlement funds would incentivize states to allocate more to local governments.

Yet the OSAA, if enacted, would be vulnerable to states’ constitutional challenges as violating federalism principles contained in the Tenth Amendment. First, the bill might impermissibly commandeer the machinery of state legislatures by issuing them a direct command, which encroaches on the states’ sphere of autonomous action and thus upsets the constitutionally mandated balance between state and national governments. In *Murphy v. National Collegiate Athletic Ass’n*,⁹² the Supreme Court’s most recent anti-commandeering case, the Court held that Congress may not issue direct orders to state governments.⁹³ Section 2 of the proposed OSAA contains an imperative that does just that: “A State shall use amounts recovered . . . as part of comprehensive or individual settlement, or a judgment for [approved purposes only].”⁹⁴ Just as Justice Alito wrote of the PASPA provision at issue in *Murphy*, “[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”⁹⁵ An attentive Congress could obviate this objection by rewording the bill to achieve its purpose without using

91. H.R. 5242 § 2(a).

92. 138 S. Ct. 1461 (2018).

93. *Id.* at 1476.

94. H.R. 5242 § 2(a).

95. *Murphy*, 138 S. Ct. at 1478.

commandeering language, as Justice Ginsburg's *Murphy* dissent noted.⁹⁶

Even if anti-commandeering concerns serve only as a drafting guide, OSAA may be infirm as an unconstitutional condition exceeding Congress' power under the Spending Clause.⁹⁷ States objecting to OSAA would argue that it is a condition placed on states' receipt of Medicaid funds that attached only after the funds had already left the Treasury. This appears to violate *South Dakota v. Dole*'s⁹⁸ requirement that conditions on states' receipt of federal funds be unambiguous.⁹⁹ However, in *National Federation of Independent Business v. Sebelius*,¹⁰⁰ Justices Ginsburg, Sotomayor, Breyer, and Kagan read *Dole* in a way that would seemingly make OSAA consistent with *Dole*'s requirement that conditions be unambiguous. Those four justices took the position that conditions must be unambiguous at the time states receive and use federal money, not when the money is initially allocated.¹⁰¹

But the analogy to *Dole* and *NFIB* is imperfect. OSAA conditions states' use of Medicaid-related funding not received directly from Congress, but rather obtained through judgments against pharmaceutical companies. This difference strengthens the logic of the argument against OSAA because a major concern underlying the Supreme Court's Spending Clause decisions—that state governments cannot serve a meaningful role unless there are limits to Congress's power to spend for the general welfare—is still more acute when Congress places a second round of conditions on funds it has already allocated. Allowing Congress to add this tool to its Spending

96. *Id.* at 1490 (Ginsburg, J., dissenting).

97. U.S. CONST. art. I, § 8, cl. 1.

98. 483 U.S. 207 (1987).

99. *Id.* at 207.

100. 567 U.S. 519 (2012).

101. *Id.* at 639 (Ginsburg, J., concurring in part and dissenting in part).

Clause toolbox would allow it to exert still greater control over state governments, and leave the states with still less room to exercise their traditional “police powers” free from Congressional influence.

Despite the unlikelihood that OSAA will actually become law, the very threat of congressional legislation may incentivize state attorneys general to incorporate provisions specifically earmarking funds or imposing reporting requirements into the settlements they negotiate. Doing so would serve states’ interests by soothing the concerns that might rally political will to pass OSAA, and thus avert the risk of new federally-imposed limits on their decision-making autonomy. For state attorneys general, this self-restraint is more attractive than risking OSAA’s passage because it would be costly, both economically and politically, for them to challenge an enacted OSAA in federal court. even if the challenge is ultimately successful.

B. *Local Governments’ Response: The Proposed “Negotiation Class”*

The analysis has thus far assumed that the alternative to state control of opioid litigation through *parens patriae* preclusion of local government lawsuits would be piecemeal litigation. However, local governments and their private attorneys, driven by a desire to avoid a repeat of the tobacco MSA, proposed an innovative class-action vehicle called a “Negotiation Class” that would allow local governments to negotiate a single nationwide settlement with the pharmaceutical industry.¹⁰² Unlike a settlement class action, the Ne-

102. Hoffman, *supra* note 82.

negotiation Class contemplates the opt-out process and class certification occurring before a settlement is reached.¹⁰³ If viable, this Negotiation Class would render inapplicable the piecemeal litigation-premised policy arguments that attorneys general have cited as reasons to dismiss local government suits.

The Negotiation Class would comprise nearly every local government in the country, some 34,000 entities.¹⁰⁴ This block would attempt to negotiate a universal settlement that would preclude all future local government lawsuits and result in the dismissal of the more than 2,600 individual county and municipal suits that have been consolidated before Judge Polster in the Northern District of Ohio as Multi-District Litigation Case 2804, “*In re: National Prescription Opiate Litigation*.”¹⁰⁵ A settlement would need to be accepted by 75 percent of class members, and would be allocated based on a county-level formula.¹⁰⁶ Judge Polster certified this novel class proposal on September 11, 2019.¹⁰⁷ Even though any Negotiation Class settlement would not bind states, leaving state attorneys general free to continue their pending state court lawsuits,¹⁰⁸ thirty-seven state attorneys general sent Judge Polster a joint letter opposing the class as inconsistent with Federal Rule of Civil Procedure 23, which governs class actions, and failing to provide prospective class members with due process.¹⁰⁹ This letter does not contain the phrase “*parens patriae*,” but it does claim that attorneys general have

103. See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

104. Hoffman, *supra* note 82.

105. Antonelli, *supra* note 60.

106. *Nat'l Prescription Opiate Litig.*, 976 F.3d at 668.

107. Alison Frankel, *Opioid MDL judges [sic] Oks novel negotiating class as 'likely to promote global settlement,'* REUTERS (Sept. 12, 2019, 5:20 PM), <https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE> [<https://perma.cc/Q7QD-LY93>].

108. See Letter from 27 Attorneys General, *supra* note 68.

109. Frankel, *supra* note 107.

the right to “speak[] on behalf of . . . governmental entities from their own states.”¹¹⁰ This is a clear indication that the attorneys general understand themselves to have exclusive discretion over opioid litigation involving political subdivisions of their states.

In a September 24, 2020 decision on interlocutory appeal, the Sixth Circuit reversed Judge Polster’s decision to certify the Negotiation Class as an abuse of discretion.¹¹¹ Judge Clay’s opinion criticized the proposed class as “wholly untethered from Rule 23,” which does not authorize a Negotiation Class as a separate category of certification distinct from a settlement or litigation class.¹¹² The court’s reasoned that the class as-proposed would qualify as neither a litigation nor settlement class, and that even if Rule 23 did authorize certification of a Negotiation Class as a separate category, the district court failed to conduct a full Rule 23(b)(3) analysis because it considered only federal (not parallel state-law) claims when determining that common questions predominate.¹¹³ Despite rejecting the Negotiation Class proposal, the court suggested that Rule 23 might yet facilitate a settlement, noting “[t]here is no apparent reason why some of the procedural elements of the negotiation class, such as the supermajority voting scheme and county-level allocation formula, could not be used to facilitate the participation of more Plaintiffs in a lawful settlement class.”¹¹⁴ Moreover, that Judge Moore wrote a forty-one page dissent arguing that certifying the Negotiation Class is consistent with Rule 23 suggests that another circuit might permit such a class in future mass tort litigation.¹¹⁵ This possibility of future negotiation classes makes it

110. Letter from 27 Attorneys General, *supra* note 68.

111. *Nat’l Prescription Opiate Litig.*, 976 F.3d at 677.

112. *Id.* at 672.

113. *Id.* at 672–76.

114. *Id.* at 676.

115. *Id.* at 677–708.

worthwhile to consider how this vehicle could have affected the current MDL litigation had it been allowed to proceed.

Had the Sixth Circuit allowed nearly all of the country's local governments to negotiate as a single block, it could have largely abated the concern of local governments "racing" one another to reach individual settlements before defendants run out of money. But the Negotiation Class would have done nothing to end the race between state and local governments because the latter would lack power to bind the former. As the state attorneys general reminded Judge Polster in their letter opposing certification, only a settlement reached by the states can release defendants from liability to both state and local governments.¹¹⁶ Moreover, the Negotiation Class did not offer to extinguish liability to all local governments in one fell swoop as its proponents hoped. Instead, 541 local governments, many of them in West Virginia and other areas of the country most heavily affected by the opioid crisis, opted out of the Negotiation Class in favor of pursuing individual litigation.¹¹⁷ This would make opioid manufacturers and distributors less willing to settle with the Negotiation Class because they would know that the settlement would not release these localities' relatively large claims. State-led negotiations would therefore still be more likely to result in quick, favorable settlements, and are accordingly more normatively desirable than even the proposed unified Negotiation Class of local governments.

As a matter of pure theory, *parens patriae* preclusion applies with full force to the Negotiation Class because the class consists entirely of non-sovereign entities asserting a "quasi-sovereign interest" in

116. See Letter from 27 Attorneys General, *supra* note 68.

117. Tom Hals, *U.S. regions hard hit by opioids to ditch class action, pursue own lawsuits*, REUTERS (Dec. 3, 2019, 1:34 PM), <https://www.reuters.com/article/us-usa-opioids-litigation/u-s-regions-hard-hit-by-opioids-to-ditch-class-action-pursue-own-lawsuits-idUSKBN1Y72C6> [<https://perma.cc/W9U8-4KX4>].

residents' general welfare.¹¹⁸ The Negotiation Class could have been expected to argue that its claims (two under RICO, and one under the Controlled Substances Act)¹¹⁹ do not assert a quasi-sovereign general welfare interest, but rest instead on injuries to the governmental units themselves. This would place the Negotiation Class claims squarely within the body of caselaw that holds that governmental units have standing to bring RICO claims for injuries to the governmental units themselves.¹²⁰ However, an equally well-developed body of law holds that RICO does not provide a cause of action for governmental units to bring claims on behalf of their citizens.¹²¹ The basis for the Negotiation Class's RICO claims—that defendants misled the public and failed to monitor and prevent suspicious opioid sales¹²²—relies heavily on these actions' effect on the general public. These claims therefore appear to be impermissible assertions of *parens patriae* jurisdiction. In practice, even if the Negotiation Class was consistent with Rule 23, it would be normatively desirable for state attorneys general to offer, and the Sixth Circuit to accept, an argument that states' *parens patriae* suits preclude the Negotiation Class's MDL lawsuit. Dismissal of this suit would allow defendants to focus on negotiating with states settlements that could actually release the defendants from all liability to municipal governments.

118. See *supra* Part I.A.

119. *Frequently Asked Questions*, IN RE: NATIONAL PRESCRIPTION OPIATES LITIGATION, <https://www.opioidsnegotiationclass.info/Home/FAQ> [<https://perma.cc/T4TN-R4X5>].

120. See JOHN J. HAMILL ET AL., A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURTS 73 n.15 (2014), <https://jenner.com/system/assets/assets/9961/original/Civil%20RICO%202014.pdf> [<https://perma.cc/R3M6-86GZ>].

121. *Id.* at 73 n.16.

122. See *Frequently Asked Questions*, *supra* note 119.

C. *The States' Response: The Global Settlement Framework*

The policy benefit of *parens patriae* preclusion—facilitating quick settlement of all state and local government claims in a single negotiation—is potentially greater when states negotiate settlements in groups rather than individually because defendants face correspondingly fewer negotiations with individual states, and therefore less uncertainty. Four state attorneys general understood this when they proposed a global settlement framework that, if all states were to join, would settle all state and local government claims against opioid distributors Cardinal Health, McKesson, and Amerisource-Bergen and manufacturers Teva and Johnson & Johnson in return for installments of payments, products, and services worth \$48 billion made over the course of eighteen years.¹²³ State and local governments would each receive 15 percent of the money, with the remaining 70 percent going to fund efforts to combat the crisis.¹²⁴ Although some state attorneys general, including West Virginia's Patrick Morrisey, have expressed unwillingness to participate if the settlement distributes money based on state population instead of need,¹²⁵ the framework offers a promising starting point for a truly nationwide settlement.

State assertions of *parens patriae* preclusion, if successful in persuading courts to dismiss local government suits against defendants participating in the global settlement framework, would increase the likelihood of a nationwide settlement by allowing all parties to focus their attention and resources on this single set of

123. *Opioid Framework Factsheet*, N.C. DEP'T JUST., <https://ncdoj.gov/wp-content/uploads/2019/10/OpioidFrameworkFactSheetv3.pdf> [<https://perma.cc/JMQ8-RQBT>].

124. Tom Hals & Nate Raymond, *Several states wary of \$48 billion opioid settlement proposal*, REUTERS (Oct. 24, 2019, 6:11 AM), <https://www.reuters.com/article/us-usa-opioid-lawsuits/several-states-wary-of-48-billion-opioid-settlement-proposal-idUSKBN1X315P> [<https://perma.cc/W4ET-T9WK>].

125. *Id.*

negotiations. States would also likely receive better terms because there would be no pending local government lawsuits to cause trepidation among, or draw value out of, defendants. Because *parens patriae* preclusion of local government lawsuits would, in these ways, help produce a global settlement of all opioid crisis-related state and local government lawsuits, it would be normatively desirable for courts to accept and apply a *parens patriae* preclusion doctrine to opioid litigation. The doctrine would positively interact with state attorneys general's efforts to work together to achieve nationwide settlements that draw on the lessons of the 1998 tobacco settlement to simultaneously ensure that defendants obtain release from all liability to government entities and that funds are properly allocated to relevant programs and local governments.

CONCLUSION

State attorneys general have twice argued in mandamus petitions that states' unique capacity to represent their residents as *parens patriae* bars local governments from bringing substantially similar lawsuits. The courts in both instances rejected the petitions without discussing this argument. State attorneys general should nonetheless continue making *parens patriae* preclusion arguments, and courts should give them more serious consideration. A doctrine preventing local governments from bringing lawsuits based on harms to their residents not only finds plausible support in the sparse legal materials delimiting *parens patriae* standing, but would also encourage state attorneys general and pharmaceutical industry defendants to agree to nationwide or statewide settlements that avoid the 1998 tobacco Master Settlement Agreement's principal flaws.

Arkansas and Ohio's formulations of *parens patriae* preclusion were highly ambiguous, and neither made much effort to identify

a theoretical basis for the concept or define its limits. These shortcomings are no doubt the result of the time constraints each state faced when writing its emergency mandamus petition. If state attorneys general more precisely formulate these arguments, root them in a coherent theory of *parens patriae* standing that draws on Supreme Court precedent and the common law, and highlight the concept's potential to encourage relatively quick nationwide settlements with mass tort defendants, courts might begin to take the arguments seriously. The resulting dialogue between state attorneys general and courts would help resolve the ambiguities apparent in this note's discussion of the multiple possible forms of a *parens patriae* preclusion doctrine by settling on a definite rationale with defined limits. The end result would be more clarity in the law and a doctrinal vehicle for more efficiently and equitably resolving mass tort suits involving wide swaths of the nation's population and an entire industry.

Nick Cordova