Critical Legal Issues:
Working Paper Series

Public Health and *Parens Patriae:*

How Attorneys General Can Preserve States' Exclusive Litigation Authority

By Doug Peterson

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Attorney General,
State of Nebraska, 2015-2023

Foreword By

The Honorable Alan Wilson

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FOREWORD

By
The Honorable Alan Wilson
Attorney General of South Carolina

In this thoughtful *WLF Working Paper*, former Nebraska Attorney General Doug Peterson considers what it means for a State to invoke its *parens patriae* authority to protect the health and well-being of its citizens. In this foreword, I aim to highlight the significance of General Peterson's work by drawing from my firsthand experience as South Carolina's Attorney General.

To briefly summarize, General Peterson's paper meticulously details the importance of the *parens patriae* doctrine and chronicles its development over time. As General Peterson notes, it is well established that States, through their Attorneys General, often use this quasi-sovereign authority to protect the health, safety, and welfare of their citizens and to vindicate their rights in matters pertaining to public health. He provides a robust discussion of various examples of when this has happened—ranging from the nationwide claims involving Big Tobacco in the 1990s, to claims against a modern vaping company, and even claims pertaining to social media companies and harms to children.

General Peterson's paper also explores the limits of the doctrine, arguing that it may generally not be invoked by political subdivisions. According to General Peterson's analysis, political subdivisions, like cities and counties, lack the inherent sovereignty to bring these types of claims. General Peterson explains that the *parens patriae* claims often brought from States are actually brought on behalf of *all* state citizens. This cannot be utilized by cities or counties unless such power is expressly granted to the subdivision by the State itself. As a result, Attorneys General must dutifully protect this

quasi-sovereign authority from usurpation by political subdivisions whenever the health, safety, and welfare of their constituents is being harmed.

To address this type of issue, General Peterson proposes a proactive strategy for Attorneys General to monitor public health risks, engage with political subdivisions, and intervene to preempt unauthorized local claims, ensuring unified state leadership in future public health crises. His paper is both a scholarly exposition and a practical guide for States using the doctrine of *parens patriae*. His work reaffirms the crucial role of Attorneys General in protecting public welfare and it offers a principled framework to safeguard state sovereignty while respecting the horizontal separation of powers among the States.

In recent years, my office has encountered the difficulties associated with rogue lawsuits brought by political subdivisions. For example, in the case *City of Charleston v. Brabham Oil Inc., et al.,* the City of Charleston sued over twenty of the largest oil and gas companies in the United States. *See* Compl., *City of Charleston v. Brabham Oil Co.*, No. 2020CP1003975 (S.C. Ct. Com. Sept. 9, 2020), https://tinyurl.com/b3sxpnht. They claimed, *inter alia*, that these oil companies collectively conspired and used deceptive marketing strategies to promote the sale of petroleum products. In doing so, they asserted several state law claims, including claims for public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, trespass, and the South Carolina Unfair Trade Practices Act.

The City continues to advance these arguments despite my Office's long-held position that such claims should not be brought under state law. *See* Amicus Brief of the Attorney General, *City of Charleston v. Brabham Oil Co.*, No. 2020CP1003975 (S.C. Ct. Com. Sept. 4, 2024). And although the City's lawsuit did not present a conflict over *parens patriae* authority specifically, it provides a useful illustration of a scenario in which the legal positions of a State Attorney General and a political subdivision may conflict.

As we continue to combat evolving public health, environmental, and other challenges, General Peterson's work serves as an important reminder for Attorneys General to carefully consider their own role in protecting the health, safety, and welfare of their citizens.

As General Peterson's conclusion notes, all State Attorneys General should use "sound legal judgment" to determine the appropriate use of *parens patriae* in a particular circumstance. As a disclaimer, I should note that by authoring this foreword I do not purport to officially endorse all of General Peterson's conclusions about the applicability or scope of *parens patriae* authority. Despite this disclaimer, I am confident that his thoughtful analysis will shape my legal judgment on this issue moving forward.

PUBLIC HEALTH AND *PARENS PATRIAE*: HOW ATTORNEYS GENERAL CAN PRESERVE STATES' EXCLUSIVE LITIGATION AUTHORITY

I. OVERVIEW OF ATTORNEYS' GENERAL RESPONSE TO THE OPIOID CRISIS

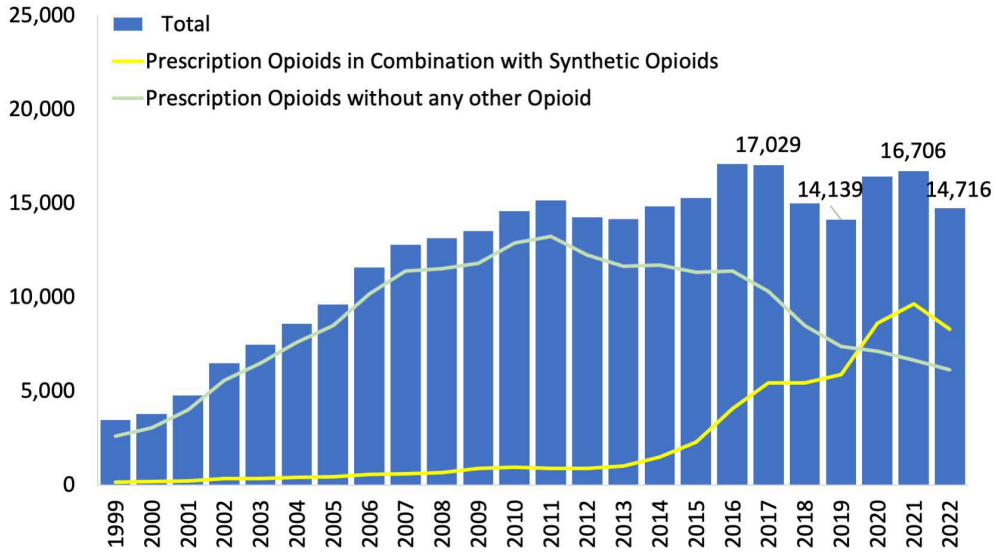
The United States' opioid crisis knows no bounds. It has hurt rich and poor, young and old, professionals and the uneducated, people in small towns and big cities. It has hurt people of all races and all political parties. In response to this crisis, numerous State Attorneys General initiated investigations—and subsequently, litigation—on a bipartisan basis against corporations involved with the manufacturing and distribution of opioid-based prescription drugs. Attorneys General have a long history of investigating and litigating public health matters, using both their quasi-sovereign *parens patriae* authority and their state consumer protection laws, both of which they used to pursue opioid litigation.

Political subdivisions do not share this same history of pursuing claims using *parens patriae* authority. This *Working Paper* explores the limitations of political subdivisions' *parens patriae* authority. As discussed below, political subdivisions do not inherently possess the *parens patriae* powers available to States in the federal system, and therefore, their participation in Multidistrict Litigation ("MDL") for *parens patriae* consumer protection claims is unwarranted. State Attorneys General should therefore move to intervene in any such legal action and assert their offices' sovereign authority to exclusively invoke *parens patriae.*

A. Overview of Opioid Crisis

America's opioid crisis began in 1996.[1] At that time, federal authorities and pain management specialists instructed the medical profession to do more to recognize and address the treatment of pain.[2] In response, Purdue Pharma L.P. ("Purdue") began a strategy to aggressively market OxyContin as the

Figure 4. U.S. Overdose Deaths Involving Prescription Opioids*, 1999-2022



*Among deaths with drug overdose as the underlying cause, the prescription opioid subcategory was determined by the following ICD-10 multiple cause-of-death codes: natural and semi-synthetic opioids (T40.2) or methadone (T40.3). Source: Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2022 on CDC WONDER Online Database, released 4/2024.

wonder drug to address patients' pain needs with the use of its opioid based timed-released feature.[3] Purdue represented that OxyContin would have a very low chance of creating addiction because of its patented time-released design.[4]

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[1] BARRY MEIER, PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA'S OPIOID EPIDEMIC 41 (2d Ed. 2018).

[2] Michelle L. Richards, *Pills, Public Nuisance, and* Parens Patriae*: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 434, 435 (2020).

[3] Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 307-309 (2021).

[4] *Id.*

Between 1996 and 2000, OxyContin sales ballooned from $48 million to over $1.1 billion,[5] and from 1997 to 2002, prescriptions skyrocketed from 670,000 to 6.2 million.[6] During that time, additional companies began manufacturing similar types of opioid-based drugs. For every opioid-related death that occurs, there are 10 admissions to a drug abuse treatment center, and 32 admissions to emergency rooms for overdose treatment.[7]

B. Opioid Lawsuits

In 2007, the federal government brought criminal charges against Purdue executives for misleading and defrauding doctors and consumers by advertising OxyContin as a safer and less addictive use of opioids. The parties entered a plea agreement to settle these charges.[8] Numerous private individuals pursued individual lawsuits against Purdue Pharma. However, virtually all those claims were dismissed or dropped due to difficulty in establishing either duty or causation.[9] Purdue was very successful in arguing that individual plaintiffs chose to abuse the drug. The plaintiffs' bar also had difficulty pursuing class action lawsuits for opioid abuse due to challenges meeting the commonality requirements under Rule 23 of the Federal Rules of Civil Procedure.[10]

The first legal action taken by an Attorney General against Purdue was in 2001 when the West Virginia Attorney General filed suit against Purdue, alleging Purdue (1) maintained a public nuisance, (2) violated West Virginia's

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[5] Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223 (2009).

[6] Richards, *supra* note 2, at 436.

[7] *Drug Overdose Deaths: Facts and Figures,* NAT'L INST. OF DRUG ABUSE, https://perma.cc/A4NG-52EA.

[8] *Purdue Settles OxyContin Charge for $600M*, CNN MONEY (May 10, 2007, 1:48PM EDT), https://money.cnn.com/2007/05/10/news/companies/oxycontin/index.htm.

[9] Richards, *supra* note 2, at 438, 439.

[10] *Id.* at 439.

Consumer Protection Act, (3) was negligent in its safety representations, and (4) committed antitrust violations. The parties settled that case in 2004 for $10 million.[11] Following the West Virginia settlement, 26 other States filed similar claims that were together settled for almost $20 million following the plea agreement in the federal criminal prosecution.[12] The State of Kentucky refused to accept its settlement allocation of $500,000 and it separately filed a lawsuit against both Purdue and Abbott. After years of rulings and appeals, Kentucky settled with Purdue in 2015 for $24 million.[13]

In 2014, a collection of States began sending subpoenas to Purdue. In February 2016, State Attorneys General formed an opioid working group, which formally initiated a multi-state investigation into Purdue in December 2016.

Unlike prior national public health crises addressed by State Attorneys General, the opioid crisis involved a unique situation where over 2,700 political subdivisions engaged national law firms to file lawsuits against the opioid manufactures, distributors, and pharmacies.[14] These firms collectively filed thousands of separate lawsuits, pursuing public nuisance, RICO, negligence, fraud, and other claims throughout the country. Most of these suits were consolidated into a complex MDL matter in an Ohio federal district court.[15] Most troubling was that the political subdivisions did not limit their legal claims to actual damages. Instead, they implied they had sovereign authority to pursue *parens patriae* claims to protect the health, safety, and welfare of the citizens in their respective political subdivisions.[16] A handful of

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[11] *Id.* at 440.

[12] *Id.* at 441.

[13] *Id.* at 442, 443.

[14] Engstrom & Rabin, *supra* note 3, at 319.

[15] *See In re National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio 2018), https://perma.cc/ZM9L-JWQY.

[16] *See id.* at Doc. #1029, https://perma.cc/6VEB-9J4V.

the municipality and state cases were litigated in courts throughout the country with mixed results—ranging from the dismissal of the public nuisance claims to significant jury trial verdicts.[17]

C. Attorneys General Leadership Team, Multidistrict Litigation, and Settlement

Beginning in the summer of 2017, as part of a 36-state investigation, an Attorneys General leadership team began settlement discussions with Purdue. By October of that year, the States began meeting with the three major distributors: AmerisourceBergen, Cardinal Health, and McKesson. Throughout 2017, the leadership team met regularly with legal counsel for both manufacturers and these distributors to discuss possible settlement terms. By the end of 2017, nearly every State was a part of the multi-state investigation. By December 2017, the leadership team, with counsel for the distributors and manufacturers, began hammering out a term sheet, including injunctive relief, an independent monitoring party, and terms for a national remediation fund.

Also in December 2017, the Judicial Panel on Multidistrict Litigation consolidated 64 opioid lawsuits and designated Judge Dan Polster of the Northern District of Ohio to oversee the multidistrict litigation of lawsuits primarily filed by political subdivisions in numerous federal courts.[18] Ultimately, over 2,700 political subdivisions, tribes, and other government entities (but not States) had their lawsuits consolidated into the MDL.[19] In January 2018, Judge Polster contacted Attorneys General and encouraged them to participate in anticipated MDL settlement discussions in order to reach a global settlement. The Attorneys General agreed to participate in these

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[17] Richard C. Ausness, *Opioid Lawsuits: Is There Any End in Sight?*, 33 HEALTH MATRIX: J.L.-MED. 192, 209-230 (2023).

[18] *In re National Prescription Opiate Litigation*, No. 1:17-MD-2804, at Doc. #1, https://perma.cc/8VZU-8GPR.

[19] Ausness, *supra* note 17, at 232.

discussions but advised the court that the States would not be parties or otherwise consent to the authority or jurisdiction of the MDL.[20] Beginning in March 2019, the Attorneys General leadership team met approximately once per month with counsel for the manufacturers and the three distributors. Certain plaintiffs' lawyers, designated by the MDL as the Plaintiffs' Executive Committee (PEC), occasionally attended these monthly settlement discussions led by the States.

In June 2019, the PEC filed a motion to certify a "negotiation class" for the subdivisions, to which the States objected. Although Judge Polster granted the motion to certify the class,[21] the Sixth Circuit overruled the certification.[22]

In October 2019, several important events advanced the settlement process. On the eve of trial, AmerisourceBergen, Cardinal Health, and McKesson announced they had agreed to a $215 million settlement with two Ohio counties, Cuyahoga and Summit, in the first track of multidistrict opioid litigation. Shortly before that settlement was announced, the Attorneys General negotiation team reached an agreement with the distributors and Johnson & Johnson on a framework for a global resolution, which was initially circulated to the States. Those proposed terms included $18 billion from the three distributors over 18 years, the full amount being contingent on the degree of participation by the numerous plaintiffs. Johnson & Johnson agreed to pay $4 billion over a nine-year period. It was also agreed that an additional $1.7 billion (up to $1.2 billion from distributors and $500 million from Johnson & Johnson) would be set aside for costs and attorneys' fees. The proposal also included a general framework for injunctive relief, including the creation of a monitoring system for suspicious orders, a prescription data

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[20] *In re National Prescription Opiate Litigation*, No. 1:17-MD-2804, at Doc. #111, https://perma.cc/6JJK-7DWF.

[21] *Id.* at Doc. #2591, https://perma.cc/96SK-U68R.

[22] *See In re National Prescription Opiate Litigation*, 976 F. 3d 664 (6th Cir. 2020).

clearinghouse, a list of approved abatement uses for the funds, terms for an independent monitor, and levels of required participation by the States and political subdivisions in order to receive the full amount of the settlement proceeds.

In circulating these proposed settlement terms, the Attorneys General negotiation team conveyed to both the States and political subdivisions that possible room for limited improvement in the settlement proposal existed, if parties wanted to settle the case. What followed was approximately two years of negotiations focused primarily on increasing private counsels' fees and cost payments. Much of that period focused on resolving conflicting positions among plaintiffs' counsel as to how their fee payments and costs would be determined. The result of the further negotiations was increased fees and costs paid by the three distributors to private counsel, increasing from $1.7 billion to at least an estimated $2.4 billion. Abatement fund payments also increased from $22 billion to approximately $23.6 billion.

On July 21, 2021, a bipartisan coalition of Attorneys General announced that it reached a $26 billion national opioid settlement, including injunctive terms with the three distributors and Johnson & Johnson. States had 30 days to sign on, and political subdivisions had 150 days.

On February 25, 2022, the distributors announced there was sufficient participation by the States and political subdivisions to finalize the settlement agreement.[23] Forty-six of the 49 eligible States agreed to the terms, and over 90% of the litigating political subdivisions agreed to participate. AmerisourceBergen agreed to pay approximately $6.1 billion; Cardinal Health agreed to pay $6 billion; and McKesson agreed to pay $7.4 billion, each over a period of 18 years.

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[23] *Distributors Approve Opioid Settlement Agreement,* MCKESSON (Feb. 25, 2022), https://perma.cc/QR4L-BLMA.

Then in late 2022, the three large pharmacy chains—CVS, Walgreens, and Walmart—confirmed they had reached a national settlement with a significant portion of the States and political subdivisions. CVS agreed to pay $4.9 billion over 10 years, Walgreens agreed to pay $5.52 billion over 15 years, and Walmart agreed to pay $2.74 billion within six years.[24]

There were several other lawsuits, appeals, and settlements with smaller manufacturers, distributors, and a consulting firm, McKinsey and Associates. In total, the national opioid settlements came to approximately $55.2 billion.[25] The basic terms of the multi-state settlement agreements required that 85% of the funds the participating States and political subdivisions received must be used for the abatement of the opioid epidemic, with the funds being restricted to future abatement efforts by state and local governments.[26] The settling defendants agreed to numerous injunctive terms that the Attorneys General negotiations team initially set out in the settlement framework in October 2019.[27]

Political subdivisions filing separate public health claims based on *parens patriae* authority through national law firms raises serious concerns. The legal authority for those claims is spurious at best. Moreover, the economic and prudential value of the political subdivisions' involvement appears to be negligible for protecting public health and welfare. The following sections of this *Working Paper* analyze whether political subdivisions have inherent *parens patriae* authority for public health issues and how Attorneys General should protect their quasi-sovereign authority over these matters.

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[24] *Executive Summary of National Opioid Settlements*, NATIONAL OPIOIDS SETTLEMENT (May 6, 2024), https://perma.cc/Z4ED-BBVW.

[25] *The Official Opioid Settlement Tracker Tally,* OPIOID SETTLEMENT TRACKER (Last visited Nov. 30, 2024), https://perma.cc/B2X3-EA3J.

[26] Jan Hoffman, *Companies Finalize $26 Billion Deal with States and Cities to end Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2022), https://tinyurl.com/3rhfzd7a.

[27] *Executive Summary of National Opioid Settlements*, *supra* note 24.

II. THE HISTORY AND AUTHORITY OF STATE ATTORNEYS GENERAL LITIGATING ON BEHALF OF THEIR CITIZENS' PUBLIC INTEREST

A. *Parens Patriae* Background

American jurisprudence adopted the common law *parens patriae* doctrine (Latin for "parent of the country") from its historical usage in England. Under the doctrine, the Crown used its "royal prerogative" as "parent of the country" to take legal action on behalf of its subjects who were unable to legally act for themselves.[28]

In adopting the *parens patriae* doctrine from England's common law, Justice Joseph Bradley of the United States Supreme Court described the States' sovereign power as follows:

> This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person, or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people, and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.[29]

The *parens patriae* doctrine allows the States to establish Article III standing to sue on behalf of their citizens for violations of the States' sovereign and quasi-sovereign interests. The sovereign interest of a State includes enforcement of criminal, civil, and other regulatory provisions. States' quasi-sovereign interest, first recognized by the Supreme Court in 1900 in *Louisiana v. Texas*, gives standing to the States to pursue litigation in matters involving the promotion and protection of the health, safety, and welfare of their

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[28] *See Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

[29] *Late Corp. of the Church of Jesus Christ of Latter-Day Saints, et al. v. United States*, 136 U.S. 1, 57 (1890).

citizens.[30] Importantly, political subdivisions are not themselves sovereign and only have such sovereign powers when specifically granted to them by their state legislatures.[31] This principle, known as the "Dillon Rule" (after Iowa Supreme Court Justice John F. Dillon),[32] is fundamental to the relationship between political subdivisions and sovereign States in American jurisprudence.[33] As a result of the U.S. Supreme Court acknowledging the State's quasi-sovereign authority in *Louisiana v. Texas*, several other States successfully pursued *parens patriae* claims enjoining public nuisances by neighboring States or companies.[34]

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[30] *See Louisiana v. Texas,* 176 U.S. 1 (1900).

[31] *See City of Lafayette v. Louisianna Power & Light Co.*, 435 U.S. 389, 412 (1978); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.").

[32] *City of Clinton v. Cedar Rapids & M.M.R. Co.*, 24 Iowa 455 (1868) (displaying how Justin Dillion clearly espoused this rule).

[33] Although the Dillion Rule provides the default relationship between political subdivisions and the sovereign States that created them, most States allow for some level of autonomy for political subdivisions, usually based on size. This autonomy, known colloquially as "Home Rule," allows a city a sphere of authority without state interference. *See* Travis Moore, *Dillion Rule and Home Rule: Principles of Local Government*, LRO SNAPSHOT (Feb. 2020), https://perma.cc/KDP8-8H5C. For example, in the State of Nebraska, cities with a population of more than 5,000 people may form a government, and that local government may create a home rule charter, so long as it is "consistent with and is subject to the constitution and laws of [Nebraska]." NEB. CONST. art. XI, § 2. Similarly in Nebraska, the Legislature is prohibited from "[i]ncorporating Cities, Towns, and Villages, or changing or amending the charter of any Town, City, or Village." NEB. CONST. art. III, § 18. In States permitting political subdivisions to exercise home rule, the extent to which a political subdivision can pursue consumer protection actions or other *parens patriae* will be dictated by the state's constitution and the political subdivision's charter. State Attorneys General should be aware of whether broad or restrictive Home Rule authority exists in their States and to what extent that authority could enable cities and other political subdivisions to assert *parens patriae* standing, and for what types of claims.

[34] *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas v. Colorado*, 206 U.S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin diversion of water from an interstate stream); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (holding that Georgia was entitled to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *New York v. New Jersey*, 256 U.S. 296

In *Georgia v. Pennsylvania R.R. Co.*, for example, the U.S. Supreme Court concluded that Georgia had standing under its *parens patriae* quasi-sovereign authority to pursue an antitrust action against several railroad companies that the State alleged had conspired to fix rates that discriminated against Georgia shippers.[35] In finding that Georgia had standing to pursue its quasi-sovereign authority as *parens patriae,* the Court stated:

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. . . . [Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. . . . Georgia *as a representative of the public* is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.[36]

B. The Seminal *Snapp* Case

American courts recognize that *parens patriae* is "inherent in the supreme power of every state."[37] *Snapp* is the preeminent U.S. Supreme Court case explaining the States' sovereign authority to utilize their "inherent power" under the doctrine of *parens patriae*. In *Snapp*, the Commonwealth of Puerto Rico filed a claim for declaratory relief alleging violations of federal labor laws

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1921) (holding New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (holding Pennsylvania can sue to enjoin changes in drainage which increases the flow of water in an interstate stream); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding Minnesota can sue to enjoin changes in drainage which increases the flow of water in an interstate stream).

[35] *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

[36] *Id.* at 450–51 (emphasis added).

[37] *See Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

by individuals and companies in the Virginia apple industry. The basis of the allegation was that private apple harvesting companies in Virginia failed to provide employment for qualified Puerto Rican migrant farm workers. The Commonwealth of Puerto Rico alleged that, as a commonwealth, it had *parens patriae* authority to protect its citizens' right to effectively participate in the benefits, provided under the federal law, to engage in employment for private contractors. The contractors' failure to comply with the federal employment laws caused injury to Puerto Rico in its efforts to reduce its unemployment and promote opportunities for profitable employment to its citizens.

Notably, the defendants in *Snapp* argued that only 787 individuals—out of a Commonwealth population of three million—would actually be affected, so therefore, there was not a sufficient basis to claim *parens patriae* standing. The U.S. Supreme Court disagreed and held that the Commonwealth of Puerto Rico did have Article III standing to assert quasi-sovereign authority under *parens patriae*. The Court stated:

> In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, *a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general*. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[38]

The *Snapp* Court found that requirements for standing in *parens patriae* existed based on violation of the State's quasi-sovereign interest. First, the State articulated a "quasi-sovereign" interest in its citizen's health and

[38] *Id.* at 607 (emphasis added).

well-being based on economic harm. Second, the State asserted a quasi-sovereign interest of its citizens not being discriminated against by denying its rightful status within the federal system. As to the State's interest in protecting and vindicating the health, safety, and welfare of its people, the Court also considered whether the injury is one that the State would likely attempt to address to its sovereign lawmaking powers. The *Snapp* Court recognized that the actual number of people affected was only a small portion of the Commonwealth, but concluded that it sufficiently asserted harm to health, safety, and welfare to warrant Article III standing for a *parens patriae* claim.

C. Other *Parens Patriae* Actions

While there may be a common misconception surrounding States' use of *parens patriae* claims—that they revolve exclusively around a public nuisance theory—"*parens patriae* interests extend well beyond the prevention of such traditional public nuisances."[39] *Parens patriae* state claims have succeeded on various other legal grounds. For example, the Nevada Attorney General successfully maintained a *parens patriae* suit under consumer protection laws.[40] New York's Attorney General used *parens patriae* to bring a claim under the Americans with Disabilities Act for unlawful discrimination.[41] Also, Pennsylvania's interest in the well-being of the public by creating a charity was a clear quasi-sovereign interest necessary for *parens patriae*.[42]

D. Tobacco Litigation and Settlements

The most well-known Attorneys General invocation of *parens patriae* in a major public health matter was the tobacco settlements in the 1990s. Litigation against the tobacco industry, commonly referred to as "Big

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[39] *Id.* at 605.

[40] *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. 2012).

[41] *People by Vacco v. Mid-Hudson Med. Group*, 877 F. Supp. 143 (S.D.N.Y. 1995).

[42] *Commonwealth by Corbett v. Citizens All. for Better Neighborhoods, Inc.*, 983 A.2d 1274 (Pa. Comm. Ct. 2009).

Tobacco," started in 1954, when a factory worker named Ira Charles Lowe, suffering from lung cancer, filed a personal injury lawsuit against R.J. Reynolds Tobacco Company.[43] Numerous personal injury lawsuits followed against the tobacco companies claiming personal injury and wrongful death caused by the addictive and cancer-causing effects of cigarettes. It is estimated that from the mid-1950s to the early-1990s, approximately 300 such claims were filed, and not one plaintiff prevailed.[44] By the mid-1950s, more than 25,000 Americans were dying annually from lung cancer.[45]

Because of the extreme cost involved in proving such a case, lawyers started pursuing their clients' claims under a class action process in order to spread out the tremendous cost necessary to pursue such litigation. However, those class actions also had limited results.[46] The most significant class action was *Castano v. American Tobacco,* filed in March 1994, in which 60 plaintiffs' lawyers claimed to represent 90 million claimants.[47] Although the Federal District Court in Louisiana initially approved the class action—making it the largest class action ever certified—the U.S. Court of Appeals for the Fifth Circuit decertified the class for lack of commonality.

Marking a seminal moment in the tobacco litigation, in May 1993, Mike Moore, Attorney General for the State of Mississippi, filed a *parens patriae* action in state court against major cigarette manufacturers alleging that the State was entitled to healthcare reimbursement claims for its citizens suffering from lung cancer, and sought to recoup the millions of dollars the State had spent treating sick smokers.[48] Such a theory against Big Tobacco was unique in

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[43] Engstrom & Rabin, *supra* note 3, at 295.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 298, 299.

[47] *Id.* (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)).

[48] *Id.* at 303–05.

the fact that it did not have to address the challenges faced by prior plaintiffs as to the plaintiffs' choice to continue to smoke. Instead, it simply rested on the claim that the State was entitled to recover the expenses associated with those subsequent health care costs to Mississippi. The State alleged that the tobacco companies used deceptive and misleading marketing practices that caused harm to the public, warranting a claim under the State's *parens patriae* authority.[49]

In the years that followed, all 50 States pursued similar claims using their *parens patriae* authority to allege public nuisance, deceptive marketing, state consumer protection violations, conspiracy, fraud, and wrong against the public.[50] By 1997, four major tobacco companies settled with the States of Mississippi, Florida, Texas, and Minnesota for $40 billion.[51] In November 1998, the tobacco companies settled with the 46 remaining States, negotiating a $206 billion Master Settlement Agreement ("MSA"), which is still in effect today.[52]

This state-led litigation was by far the largest unified *parens patriae*-based litigation effort ever made by the States, and it has significantly shaped how State Attorneys General can utilize their collective inherent power to pursue significant public health crises facing the nation under their quasi-sovereign authority to sue as *parens patriae*.

E. Other *Parens Patriae*-Related Litigation and Settlement

More recently, the States of North Carolina and Minnesota brought successful *parens patriae* claims against Juul Labs, Inc. ("Juul") for deceptively marketing e-cigarettes. North Carolina settled with Juul for $40

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 305.

[52] *Id.* at 305.

million with the proceeds to be paid to the State, along with numerous business practice commitments.[53]

In Minnesota's case, the Minnesota Attorney General's original complaint alleged that the State as *parens patriae*, as well as a payor of government health care programs, had an important and unique interest in protecting the health and safety of its citizens.[54] This lawsuit also resulted in settlement, with the company paying $60.5 million and making public disclosures of its internal documents. Juul also paid Minnesota's legal costs, including costs of litigation and attorneys' fees. The settlement further requires Juul to follow other conduct restrictions, like a prohibition against marketing and selling to children, a restriction on Juul's ability to sponsor events, and a requirement that Juul accurately disclose the nicotine content of its products.[55] Ultimately, 45 States pursued investigations or lawsuits against Juul resulting in more than $1 billion in settlements.[56]

State Attorneys General have also invoked their *parens patriae* powers to intervene in private litigation where the States have an interest as *parens patriae* in the subject matter of the litigation. In 1996, for instance, the Sierra Club filed an action under the Endangered Species Act against the City of San Antonio.[57] The group alleged that entities withdrawing water from a local aquifer were causing harm and threatened endangered species living in a

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[53] *Attorney General Stein Reaches Agreement with Juul for $40 Million and Drastic Business Changes*, N.C. DEP'T OF JUST. (June 28, 2021), https://perma.cc/725N-SH36.

[54] Complaint, *Minnesota v. Juul Labs, Inc.*, 2019 WL 6532989 (Minn. Dist. Ct. 2019) (No. 27-CV-19-19888).

[55] *Minnesota Settles Lawsuit Against Juul and Altria for $60.5 Million*, MINN. ATT'Y GEN. (May 17, 2023), https://perma.cc/5BWR-SCLB.

[56] *Juul to Pay $462 Million to Six US States, D.C. Over Youth Addiction Claims,* Reuters (Apr. 12, 2023, 5:26PM CDT), www.reuters.com/world/us/juul-pay-462-million-six-states-over-youth-addiction-claims-2023-04-12/.

[57] *See Sierra Club v. City of San Antonio*, 115 F.3d 311, 313 (5th Cir. 1997), *reh'g denied*, *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997), *petition for cert. denied*, Sierra Club v. City of San Antonio, 522 U.S. 1089 (1998).

nearby canal.[58] It further alleged that the annual recharge of the aquifer trailed its discharge, causing the water level of the aquifer to fall and reduce waterflow.[59] The Texas Attorney General sought to intervene in multiple capacities, including *parens patriae*, on behalf of its citizens. On appeal, the Fifth Circuit reversed the district court's partial denial of the State's motion to intervene, ruling that Texas and its Attorney General, "as *parens patriae*, ha[d] an interest in the physical and economic health and well-being of the citizens directly affected by changes in the water level drawdowns at the aquifer."[60]

Most recently, Attorneys General have used the doctrine of *parens patriae* to take on harms allegedly caused by social media companies. Forty-one States and the District of Colombia are presently suing technology company Meta, claiming that the company has built addictive features into Instagram and Facebook, consequently harming children's mental health. The complaint alleges that the company knowingly schemed to "exploit young users for profit," by misleading them about safety features and harvesting data.[61]

Overall, the unique authority granted to Attorneys General to invoke and pursue *parens patriae* claims on behalf of their citizens is a privileged status, not to be utilized lightly. As Justice William Brennan stated in his concurring opinion in *Snapp*:

> More significantly, a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which

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[58] *Id.*

[59] *Id.*

[60] *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) ("Although we do not dispute the Sierra Club's contention that this case is about the alleged excess water pumping of the various 'customers' of the aquifer only, we are at a loss to understand its insistence that these above-named constituencies do not have a direct, cognizable legal interest in the subject matter of the litigation.").

[61] Cristiano Lima-Strong & Naomi Nix, *41 States Sue Meta, Claiming Instagram, Facebook are Addictive, Harm Kids*, WASH. POST (Oct. 24, 2023), https://perma.cc/GJ4C-24PF.

> concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.[62]

With this understanding of the historical beginnings of *parens patriae* authority and its application in major litigation and settlement matters, the remainder of this *Working Paper* discusses why only the States hold inherent power to assert *parens patriae* on behalf of their citizens, the importance of States protecting this inherent authority, and how States can proactively do so.

III. POLITICAL SUBDIVISIONS LACK AUTHORITY TO REMEDIATE SIGNIFICANT PUBLIC HEALTH CRISES THROUGH *PARENS PATRIAE* CLAIMS

It is well-established that States, under their quasi-sovereign authority, can bring suit as *parens patriae*, to protect the public health, safety, and welfare of their citizens. Courts have repeatedly affirmed this quasi-sovereign authority as a State's duty.[63] However, as noted earlier, such sovereign power does not inherently belong to political subdivisions under common law.[64] Political subdivisions do not inherently possess the sovereign power of the States; any such power must be specifically granted, such as by a State itself granting a political subdivision this authority by statute.[65]

The U.S. Supreme Court has left no room for doubt that political subdivisions are not sovereign and that their powers are derived from the States:

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[62] *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring).

[63] James G. Hodge, Jr., *National Legal Paradigms for Public Health Emergency Responses*, 71 AM. U. L. REV. 65, 74 (2021).

[64] *City of Lafayette v. Louisianna Power & Light Co.*, 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.").

[65] *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

> Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in [*Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)], 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.' The relationship of the States to the Federal Government could hardly be less analogous.[66]

Thus, because political subdivisions are not sovereign entities, federal courts have recognized they do not possess Article III standing to pursue *parens patriae* claims for the health, safety, and welfare of the citizens in their separate subdivisions, unless specifically granted to them by the State. Article III standing in federal court requires a party to satisfy a three-part test: (1) the plaintiff must have suffered an "injury in fact," (2) there must be a "causal connection" between the injury and the conduct before the court, and (3) it must be "likely" that a favorable decision by the court will redress the injury.[67]

In the *parens patriae* context, political subdivisions are unable to establish the first prong because they do not possess the sovereign authority to claim that they are the proper plaintiff to pursue a claim for an "injury in fact" to the health, safety, and welfare of *all* the citizens of their respective States. For example, in *New Jersey v. New York*, the U.S. Supreme Court explained the standing limitation of the City of Philadelphia, which intervened in the case claiming *parens patriae*.[68] The Court explained:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware

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[66] *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (cleaned up).

[67] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[68] *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

> River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.[69]

The Court, in its reasoning, recognized that if local bodies were allowed to bring *parens patriae* claims, States and the federal government would lose some dignity regarding their sovereignty. The Court would then be forced to determine matters between all the separate interests within a State when they could be resolved more efficiently if brought by the State alone. The primary exception to this denial of power to political subdivisions is that a limited number of States have enacted legislation allowing political subdivisions to enforce State consumer protection laws in their respective jurisdictions. The Court in *New Jersey v. New York* ultimately concluded that:

> The 'parens patriae' doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.' The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.[70]

The derivative nature of power exclusively granted by the States to political subdivisions makes any *parens patriae* claim by a subdivision fatal in federal courts as to establishing Article III standing. "The federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not sovereign. Thus, cities bringing claims as quasi-sovereigns in federal court or whose claims as quasi-sovereigns

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[69] *Id.* at 373.

[70] *Id.* at 372–73.

are removed to federal court are certain to face dismissal."[71]

The Ninth Circuit has also addressed this question in a multidistrict litigation alleging that automobile manufacturers conspired to eliminate competition.[72] The court rejected the cities' attempts to sue as *parens patriae* because that authority was originally retained in "the English Sovereign;" thus, formal sovereignty was a prerequisite. It logically follows that political subdivisions that lack inherent or delegated sovereignty also lack Article III standing to sue as *parens patriae* for injury to quasi-sovereign interests.[73]

The Fifth Circuit has reached the same conclusion as the Ninth Circuit, stating it is apparent that "public entities which are political subdivisions of States do not possess constitutional rights…," and that "[s]uch entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state."[74] Because they are not sovereigns, political subdivisions do not have the Article III standing required to sue as *parens patriae* in federal court.[75]

In another case, the Fifth Circuit held that El Paso County in Texas, as a political subdivision, "may not assert the economic injuries of its citizens on their behalf as *parens patriae*."[76] The Ninth Circuit expanded on this point, explaining that cities are not able to sue as *parens patriae* because their power

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[71] Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 366, 367 (2006).

[72] *In re Multidistrict Vehicle Air Pollution M.D.L.*, No. 31, 481 F.2d 122 (9th Cir. 1973).

[73] *See generally* U.S. CONST. art. III, § 2, cl. 1.6.6.3 (addressing States and *parens patriae*).

[74] *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976).

[75] *See, Cmty Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 54 (1982) ("'We are a nation not of "city states" but of States'") (citation omitted); *id.* at 53–54; *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985).

[76] *El Paso Cnty., Texas v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020).

is derivative and not sovereign.[77] The Ninth Circuit pointed out that as municipalities, cities can sue only to protect their own proprietary interests, which precludes *parens patriae* standing.[78]

What has been established in federal court has been mimicked in numerous state courts. To be clear, state courts are not bound by Article III of the federal Constitution's "case or controversy" requirement and often have more lenient standards for standing. However, some state courts have applied or adopted the federal *parens patriae* standards.[79] They cite federal precedent and describe that subdivisions lack the sovereignty necessary to maintain a *parens patriae* suit in state courts.[80] Absent a clear state constitutional or statutory provision, political subdivisions fail to acquire sovereign status to pursue a *parens patriae* claim.

The Supreme Court of Colorado discussed this legal principle in a case where three counties sued a board of commissioners to supply water to all citizens of the counties.[81] The counties claimed they had *parens patriae* authority to do so. The Court stated that "[t]he basis of the *parens patriae* doctrine is the combination of sovereign capacity of the state and incompetence of citizens to act for themselves in the matter."[82] The Court reasoned that because States have sovereign capacity, they may maintain *parens patriae* suits, but counties, unlike States, are not "independent governmental entities existing by reason of any inherent sovereign authority of their residents;" rather, they are "political subdivisions of the state with only

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[77] *Sausalito*, 386 F.3d 1186, 1197.

[78] *Id.*

[79] Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L., REFORM 581 (2019).

[80] *Id.* at 605.

[81] *Board of Cnty. Comm'rs of Arapahoe Cnty. v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986).

[82] *Id.* at 241.

such powers as the state delegates to them."[83] This same general principle—that political subdivisions may not maintain *parens patriae* suits because they lack inherent sovereignty—has also been applied in South Carolina, Michigan, and Texas.[84]

While the U.S. Supreme Court has not addressed the broad question of whether local governments or other political subdivisions can ever permissibly invoke *parens patriae*, much of the Court's general treatment of subdivisions implies that they do not enjoy many of the privileges that States do. "State action" exemptions from antitrust laws do not apply to municipalities, counties, or other similar units because they do not possess the characteristic of sovereignty that a State does; nor do cities and counties have protections under the Eleventh Amendment because they are not sovereign.[85] Ultimately, the lack of sovereignty precludes these entities from exercising numerous powers, including *parens patriae*.

IV. FURTHER REASONS FOR EXCLUSIVE STATE AUTHORITY

A. Political Subdivisions Lack the Large Scope of Equitable Remedies Available to the States

When political subdivisions lack standing to pursue *parens patriae* claims to protect their citizens from public health, safety, and welfare

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[83] *Id.*

[84] *See Capital View Fire Dist. v. County of Richland*, 377 S.E.2d 122, 123 (S.C. Ct. App. 1989) (a fire district seeking to invalidate an agreement between the city and county is a political subdivision lacking the prerequisite of sovereignty); *Coldsprings Township v. Kalkaska Cnty. Zoning Bd. of Appeals*, 755 N.W.2d 553, 555 (Mich. Ct. App. 2008) (a township seeking judicial review of a county zoning board decision may not sue *parens patriae*); *Cnty. of Lexington v. City of Columbia*, 400 S.E.2d 146, 147 (S.C. 1991) (a county seeking a declaratory judgment against a city's annexation of property does not have *parens patriae* standing); *Tuma v. Kerr Cnty.*, 336 S.W.3d 277, 282 (Tex. App. 2010) (a county's power to sue animal owners for violations of the Dangerous Wild Animals Act is derivative, not sovereign; therefore, the county may not sue as *parens patriae*).

[85] *See, e.g.*, Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 763 (2007).

concerns, the legal authority of those subdivisions in such matters is limited to their actual damages, or specific injunctive relief appropriate for their jurisdiction.[86] In comparison, Attorneys General have broad authority granted to them through each State's constitution, state statutes (such as consumer protection laws), and common law to bring claims on behalf of all their respective States' citizens. Attorneys General have significant civil and criminal investigation authority, the ability to pursue litigation under numerous legal theories, and the ability to represent their States in appellate courts. This legal authority allows Attorneys General to both protect their citizens and seek remediation for harm to citizens.

History has shown that States' sovereign authority is particularly strong when States collectively pursue multi-state investigations or litigation under *parens patriae*.[87] To allow, by acquiescence, political subdivisions to assert such authority without express authorization to do so would amount to a usurpation of the States' sovereignty and their ability to pursue unified results under state authority. It also results in a legal quagmire of multiple political subdivision lawsuits with an assortment of different judicial rulings, as history has shown.

B. States Bring Resources and Time Efficiency

Political subdivision suits on behalf of the public are simply not practical, either. States have the authority and resources to act as plaintiffs, while localities are more limited in what they can do and afford. This has especially been the case in opioid litigation.

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[86] To be clear, this *Working Paper* is not suggesting that political subdivisions may not bring their own proprietary claims for direct injuries to the political subdivisions themselves. The focus is instead on the inability of local units of government to bring certain claims on behalf of citizens as *parens patriae* absent express authority from the State.

[87] Richards, *supra* note 2, at 407.

Resources play a large role in mass litigation, and resources to support this kind of litigation will almost always be greater at the state level, especially under a multi-state action.[88] Subdivisions simply may not be able to bear the burden of substantial document marshaling and database production that accompanies being a plaintiff. Additionally, most contingency-fee law firms that subdivisions hire will specify in their retainer agreements that electronic document handling and storage is an additional expense not covered by the firm. These costs are then deducted from the subdivisions' recovery.[89] Political subdivisions' costs and legal fees are not inconsequential. They were a significant factor in delaying the eventual settlements in the opioid cases.[90]

Both lack of authority and resources on the political subdivisions' behalf tend to suggest that public health litigation initiated and pursued by State Attorneys General is more likely to succeed, and in a timelier fashion. As examples, two of the most successful public health mass-tort lawsuits brought by governments—tobacco and asbestos—were primarily led by state governments, while efforts initiated by local governments—against gun and lead paint manufacturers—were much less successful.[91] For instance, after seeking damages for medical expenses due to smoking-induced illnesses, plaintiff States were able to provide billions of dollars to their citizens while also imposing restrictions on the tobacco market.[92] In both the gun and lead paint class actions brought by cities, however, the vast majority of claims were dismissed on procedural issues or terminated by legislation written by

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[88] Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. U. L. REV. 297, 310 (2021).

[89] Elise Eiselt, *Too Much of a Bad Thing: Municipalities and the Opioid Curse*, 59 J. LOC. GOV'T L. 2, 14 (2018).

[90] *Id.*

[91] Gable, *supra* note 88, at 310.

[92] *Id.*

Congress.[93]

As noted by law professor Donald G. Gifford,[94] *parens patriae* actions simply increase the odds of settlement. One reason is that defendants sued by individuals or local governments have less pressure to settle, as they face less liability if they go to trial.[95] Defendants sued by States are more at risk; States bring larger damages claims than political subdivisions since they may sue on behalf of all their citizens. Defendants are more likely to settle than they are to risk liability for the claims of an entire State or multiple States. Settlements with the States are also more likely to proceed more expeditiously and produce bigger results since they are not complicated by piecemeal local government litigation.[96]

V. PRECLUSION: ANOTHER LEGAL THEORY PREVENTING LOCAL GOVERNMENT INVOCATION OF *PARENS PATRIAE*

As discussed above, States are the proper party to act on behalf of their citizens and invoke *parens patriae* to carry out certain litigation to protect those citizens' health, welfare, and wellbeing.[97] But even when litigation or settlement discussions are ongoing and, additionally, after States have reached

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[93] Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1235 (2018).

[94] Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 915, 916 (2008).

[95] Nick Cordova, Parens Patriae *and State Attorneys General: A Solution to our Nation's Opioid Litigation?*, 44 HARV. J.L. & PUB. POL'Y 339, 361 (2021).

[96] *Id.*

[97] While some legal scholars have favored the private sector getting involved in local government litigation for public health-related matters, the detriments of this arrangement cannot be ignored. Not only has it been evident that settlement resolution is greatly delayed when numerous contingency fee arrangements need to be worked out, but the arrangement has the potential to lead to substantially less funds being designated to remediate the issues central to the litigation and settlement discussions, as is evident from the opioid settlement discussions. *See* Gable, *supra* note 88, at 325 (recognizing that state Attorneys General "note that 'it is also a reality that Defendants will likely provide a finite amount of money to resolve all the cases, and any grant of excess compensation to Plaintiffs' counsel would unnecessarily lessen the funds available to abate the crisis'").

a settlement agreement or obtained a consent order, States must actively seek to protect this quasi-sovereign authority. Multidistrict litigation for consumer protection and other *parens patriae*-related claims under 28 U.S.C. § 1407 has historically been more successful than class action litigation, which must meet the stringent commonality requirements of Fed. R. Civ. P. 23. As a result, private law firms may encourage political subdivisions to pursue *parens patriae*-related claims even when the parent State has already pursued a similar claim.

States can protect their quasi-sovereign authority in different ways, particularly through what legal scholars have referred to as *parens patriae* "preclusion" or "preemption." The ways in which States can protect their quasi-sovereign authority are discussed further below.[98] It is worth noting that legislative litigation preemption is another form of the States' authority to preempt local government lawsuits. And while this *Working Paper* focuses on litigated preemption rather than legislative preemption, Attorneys General should be well-versed in their respective States' statutes preempting local governments from initiating litigation in certain contexts.[99]

First, the terms of settlement agreements can expressly preclude subsequent litigation that interferes with the States' quasi-sovereign authority and violates the terms of the settlement agreement. The tobacco litigation MSA is an example.[100] In the MSA, the terms bound not just the States but also their political subdivisions, including without limitation "municipalities, counties,

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[98] *See* Savit, *supra* note 79, at 591.

[99] *See, e.g.*, *id.* at 589–91 (explaining "[a] state's authority to preempt city-initiated lawsuits is well-established" and "[s]tates that disagree with city-initiated litigation, then, can and do take legislative steps to stop it entirely"). *See also* Gable, *supra* note 88, at 326–29 ("States, however, can legislatively preempt local laws in most cases, even in home rule jurisdictions."). In addition, "some state legislatures—including those in Arkansas and Tennessee—have separately passed legislation to limit when private attorneys are allowed to bring claims on behalf of public sector entities, imposed approval requirements to limit the discretion of government officials, or capped fees for outside representation." *Id.* at 324.

[100] *See* Swan, *supra* note 93, at 1275 n.325.

parishes, villages, [and] unincorporated districts."[101] Settlement terms must clearly guard States' quasi-sovereign authority to be solely responsible for litigating cases that claim statewide harm.[102] In other words, settlement agreements should include terms that clearly provide that States are the proper party for *parens patriae*-related suits and expressly preempt municipal lawsuits. Further, State Attorneys General must be proactive in monitoring future lawsuits that may be in violation of settlement terms or a consent order, such as those in the MSA discussed above.[103]

Second, States can assert the preemptive effect of their litigation when the States' and local governments' lawsuits are pending simultaneously. *State v. City of Dover* provides one example of how this can practically play out.[104] In *City of Dover,* the New Hampshire Supreme Court ruled that two New Hampshire cities' lawsuits against manufacturers, suppliers, and distributors of a gasoline additive must "yield to suits filed by the State of New Hampshire" against the same entities and be dismissed.[105] Regarding the posture of the case, New Hampshire filed suit in superior court and sought a declaratory ruling that the cities' lawsuits "must be dismissed because New Hampshire law requires that they yield to the State's [] suit."[106] Most notably, the State in its suit invoked its *parens patriae* authority to act on behalf of its "populace."[107]

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[101] *See* Savit, *supra* note 79, at 592 n.59 (citing Master Settlement Agreement § II (pp) (1998), https://perma.cc/G68Y-8WPN.

[102] *Id.* at 593.

[103] To be sure, the fact that States raise preemption in this context does not necessarily depend on whether States agree or disagree with the position local governments may take in the same type of litigation; it is simply that the States' quasi-sovereign authority generally rests with the states, and states are therefore the proper party to pursue the types of claims discussed herein. *See, e.g., id.* at 591.

[104] *State v. City of Dover*, 891 A.2d 524 (N.H. 2006).

[105] *Id.* at 527, 528.

[106] *Id.* at 527–28.

[107] *Id.*

The cities disagreed and took the position that "they may concurrently maintain their suits."[108]

The Court first recognized that the elements of the *Snapp* standing analysis for the States were met,[109] and held that it was presumed the State represented the cities' as well as the residents' interests.[110] It recognized that

> [o]ver time, the meaning of the doctrine has evolved, and *parens patriae* has become a different and far broader sovereign power. Today, it is a concept of standing utilized to allow the state to protect 'quasi-sovereign' interests such as the health, comfort and welfare of its citizens, interstate water rights, and the general economy of the state.[111]

The New Hampshire Supreme Court further agreed with the trial court that "'the fact that the Cities and the State have chosen to proceed on different theories and have thus opened themselves up to different defenses does not mean that the State is unable to properly obtain judgment on behalf of the Cities and other affected municipalities.'"[112] Because the Court agreed there was "no reason to conclude . . . that the State will not seek to obtain full compensation for all communities," the Court held the cities' suits must yield to the State's and the lawsuits were dismissed.[113] The New Hampshire case is an example of how Attorneys General should proactively protect their respective States' quasi-sovereign authority through declaratory relief when parallel lawsuits are pending.

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[108] *Id.* at 528.

[109] *Id.* at 529 (quoting Shirley v. Commission, 124 A.2d 189 (N.H. 1956)).

[110] *Id.* at 528.

[111] *Id.* (quoting *Bull HN Information Systems*, 16 F. Supp. 2d at 96 (citations omitted)).

[112] *Id.* at 528–31. *See also id.* at 531 ("While the cities may have a direct economic interest in recovering for contamination to their water supplies, this economic interest is represented by the State's suit.").

[113] *Id.* at 531, 534.

In addition, at least two States attempted to preempt local government litigation during the opioid suits. In Tennessee, for example, the Attorney General sought to intervene in state court lawsuits filed by 47 counties against opioid manufacturers that included a public nuisance theory.[114] The Tennessee Attorney General, in a letter to the district attorneys general, stated that their lawsuits interfered with the State's "ability to prosecute all of the opioid litigation implicating the State's interests" and that

> the Office of the Attorney General is in the best position both to represent the interests of the State and to obtain the best possible monetary recovery for key governmental stakeholders. The Office has broad and exclusive authority to bring a statewide civil enforcement action pursuant to the Tennessee Consumer Protection Act, under which the State is in a strong position to establish liability for deceptive or unfair acts.[115]

Notably, following the State's intervention, the local district attorneys dismissed their public nuisance claims.[116]

More recently, Kansas Attorney General Kris Kobach has intervened in two separate cases where a local government, Ford County, filed class action lawsuits to represent a nationwide class of consumers, states, and local governments.[117]

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[114] *Effler v. Purdue Pharma L.P.*, No. E2018-01994-COA-R3-CV, 2019 WL 4303050, at *1 (Tenn. Ct. App. Sept. 11, 2019), *aff'd in part, rev'd in part*, 614 S.W.3d 681 (Tenn. 2020).

[115] *See* letter from Herbert Slatery III, Attorney Gen. of Tenn., to Tenn. Dist. Attorneys Gen. (Mar. 15, 2018), https://perma.cc/W6C7-JYQ2.

[116] *See Effler*, 2019 WL 4303050, at *1. The Arkansas Attorney General has also attempted to halt local governments' opioid manufacturer lawsuits on grounds that they "impaired the State's sovereignty and threaten[ed] to hamstring our statewide, constitutional officers' ability to carry out the will of the people." *See* Emergency Petition for Writ of Mandamus at 3, 6, *Arkansas v. Ellington*, No. CV-18-296 (Ark. Apr. 2, 2018). The Arkansas Supreme Court ultimately allowed the lawsuit to continue and denied the request for mandamus. *See* Gable, *supra* note 88, at 330–31.

[117] S*ee Rodriguez, et al. v. Exxon Mobil, et al*, Case No. 4:24-cv-00803-SRB (W.D. MO); *In re: Shale Oil Antitrust Litigation*, Case No. 1:24-md-03119-MLF-LF (D.N.M).

In his brief seeking dismissal of Ford County's complaint against Exxon Mobil, Attorney General Kobach argued the County's "class action allegations fail because it cannot assert *parens patriae* standing for 'a national, 50-state solution' 'to hold these plastics producers and manufacturers accountable[.]" Additionally, the Attorney General argued that "Ford County lacks the inherent *parens patriae* authority of sovereign States to asserts claims based on the public health, welfare, and safety of all citizens in general."[118] Attorney General Kobach further argued that the court "lacks federal subject-matter jurisdiction over Ford County's class allegations, under Federal Civil Rule 12(b)(1), because Ford County lacks the legal authority and standing to assert claims on behalf of "all persons" and "all government activities."

Similarly, in *In re: Shale Oil Antitrust Litigation*, Attorney General Kobach filed a motion to dismiss Ford County's complaint because, the "Political Subdivisions improperly seek to exercise *parens patriae* authority over every sovereign State and their political subdivisions and citizens." The Attorney General's brief argued that allowing the local governments to "proceed with this litigation means each State's 'sovereign dignity will 'be judicially impeached on matters of policy by [Kansas's, Maryland's, and California's] subjects."[119]

As evidenced in each of these cases, involvement in the earliest stages of local government-instituted litigation is essential. Attorneys General should be diligent in monitoring these concurrent and future lawsuits and taking overt action where local governments attempt to invoke *parens patriae* authority reserved only for the States.

Finally, *res judicata* may be a separate but related consideration when a future private action or one by a local government may be barred in certain

[118] *Supra* fn. 28.

[119] Citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

circumstances. If a future action is initiated where the State has previously invoked its *parens patriae* authority, and where the plaintiff in that future action is seeking the same type of recovery for the same group of affected individuals as the State previously obtained via the prior suit, there may be grounds to assert the future action is barred under the doctrine of *res judicata*.[120]

For example, in *Alaska Sport Fishing Association v. Exxon Corporation*, the Ninth Circuit affirmed a lower court's dismissal of a class action brought by four Alaskan sports fishermen against Exxon seeking damages after the 1989 Exxon Valdez oil spill.[121] Prior to the fishermen's lawsuit and two years after the spill, the United States and State of Alaska sued Exxon. Alaska invoked its *parens patriae* powers on behalf of its citizens, seeking damages for restoration of the environment and for loss of use of natural resources. Alaska and the United States eventually entered a consent decree with Exxon, which included a $900 million damages payout, as well as a release "with respect to *any and all civil claims*," including all natural resource damage claims.[122]

Exxon argued that the state settlement and consent decree precluded any additional natural resource damages or other relief regarding lost public uses of natural resources. The Ninth Circuit affirmed the lower court's class action dismissal, concluding the plaintiff–fishermen were in privity with the government plaintiffs in the prior suit under the doctrine of *parens patriae* for *res judicata* purposes.[123] Specifically, the Ninth Circuit stated:

> The district court concluded that the plaintiffs were privies of the governments under the *parens patriae* doctrine. This ruling was not in error. State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit

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[120] *See, e.g.*, L. Settlement of Private § 17200 Cases, Bus. & Prof. C. 17200 Ch. 7-L, 7:245-7:247.

[121] 34 F.3d 769, 773 (9th Cir. 1994).

[122] *Id.* at 771.

[123] *Id.* at 774.

> to recover damages for injury to a sovereign interest. A state has a sovereign interest in natural resources within its boundaries. Under the *parens patriae* doctrine, 'a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.' There is a presumption that the state will adequately represent the position of its citizens.[124]

While *Alaska Sport Fishing Association v. Exxon Corporation* involved private plaintiffs, the rationale could reasonably be extended to future suits involving local governments seeking the same recovery (*e.g.*, monetary damages) brought by a State under the *parens patriae* doctrine in a prior action. The Alaska case provides another example of the importance of States protecting their quasi-sovereign authority by negotiating proper settlement and release terms and actively ensuring those terms are properly carried out and abided by.

In sum, whether local governments have impermissibly invoked *parens patriae* either expressly or implicitly in pending litigation, state-level settlements have already occurred, a consent order has been entered, or litigation has yet to be filed by local governments, States must be proactive in protecting their quasi-sovereign authority for the benefit of their citizens where political subdivisions' claims are preempted by prior or concurrent state-led litigation.

VI. PROPOSED ATTORNEYS' GENERAL RESPONSE TO MAINTAIN SOVEREIGN AUTHORITY FOR THE PUBLIC GOOD

One of the valid criticisms of the Big Tobacco settlement was the failure to specify in the terms of the MSA that a significant portion of the settlement proceeds must be strictly dedicated to abatement efforts or other public health matters. As a result, several States allowed settlement funds to be utilized for

[124] *Id.* at 773 (internal citations omitted).

things other than public health or tobacco use remediation. In contrast, the terms of the opioid settlement agreement made it very clear that 85% of the settlement proceeds must be dedicated to opioid addiction-related abatement efforts. It is important that State Attorneys General maintain the integrity of these settlements by assuring that the terms directing proceeds toward abatement are closely followed with their States.

Having developed a settlement model dedicated to remediation of the public health issue, the question becomes how State Attorneys General move forward to address the next public health crisis. This *Working Paper* proposes a three-part process.

A. Monitoring National Public Health Risks

First, it is incumbent upon Attorneys General Offices to be diligent in monitoring national public health risks even before mass litigation ensues. Typically, this monitoring is addressed through the Offices' consumer protection divisions. However, potential public health concerns can also arise in the criminal divisions, Medicaid fraud unit, environmental division, and State public health departments. Once an Office is aware of a potentially broad public health concern, it can do further discovery to determine if legal action needs to be taken and discuss among other States whether a multi-state investigation is appropriate.

B. Engaging Political Subdivisions

Second, political subdivisions are likely to experience the same public health impact being felt, and addressed by, the States as a whole. Therefore, there is great value in utilizing the Attorneys General Offices to communicate with those political subdivisions or their statewide associations to better understand the impact the health crisis is having on their respective communities. Gathering that important information allows the Offices to be much better informed on the scope of the health issue, as well as the

remediation necessary. It also shows the appropriate respect to the valid concerns of the political subdivisions. If political subdivisions are engaged at the outset, it allows for better trust going forward if a State initiates any legal action using its *parens patriae* authority to remediate the public health issue on behalf of citizens within that State. This process can be further enhanced by developing regular communication between the National Association of Attorneys General, the National Association of Counties, and the National League of Cities.

C. Intervention and Preemption

Finally, if a political subdivision does attempt to pursue litigation claiming *parens patriae* authority to remediate a public health crisis without express authority from the State to do so, it is imperative that Attorneys General move to intervene in such legal action and assert the States' sovereign authority to exclusively invoke *parens patriae*. Failure to legally challenge the misuse of *parens patriae* by political subdivisions will greatly undermine the long-standing sovereignty granted to the State Attorneys General Offices to protect their citizens.

CONCLUSION

The quasi-sovereign authority given to Attorneys General to utilize *parens patriae* to protect the health, safety, and welfare of their citizens is a unique and powerful legal instrument possessed by the States. This authority demands that Attorneys General utilize sound legal judgment as to its appropriate use. This includes evaluating important factors such as the overall harm to citizens, what limitations private citizens may have to rectify that harm themselves, analysis of the appropriate legal basis to establish liability, whether sufficient remedies are available to the States to remediate the harm to the public, and whether filing a *parens patriae* claim can deter others from creating similar harm in the future. The legal authorities cited in this *Working Paper* are helpful in establishing that the use of the quasi-sovereign authority

inherent to the States to bring *parens patriae* claims on behalf of all state citizens cannot be utilized by political subdivisions, unless such power and authority is expressly granted to them by the State, through statute or otherwise. Attorneys General must dutifully protect this quasi-sovereign authority from usurpation by political subdivisions and their private counsel whenever the health, safety, and welfare of their States' citizens are being harmed.

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