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A Surging Drug Epidemic: Time for Congress to Enact a Mandate on Insurance Companies and Rehabilitation Facilities for Opioid and Opiate Addiction

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**A SURGING DRUG EPIDEMIC: TIME FOR
CONGRESS TO ENACT A MANDATE ON
INSURANCE COMPANIES AND REHABILITATION
FACILITIES FOR OPIOID AND OPIATE
ADDICTION**

BY: ALANNA GUY

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INTRODUCTION

We have an epidemic in the United States. This epidemic is not one that medical researchers can find a drug to cure or a vaccine to prevent. This epidemic spans across all communities and now terrorizes high school and even middle school students. This epidemic is opiate and opioid addiction. With addiction rates already terrifyingly high, in the single year between 2013 to 2014, Ohio experienced a 18.3% increase.¹ Furthermore, sixty-two percent of all drug-related deaths in the United States are now caused by heroin and other opioids.² Recently, the demographic affected by this problem has shifted; the addiction is crashing into unsuspecting families and stealing the lives of some of the most promising youth in America. Heroin is no longer the drug we think of for “junkies” or the drug that is crippling our nation’s poorest individuals. The epidemic has spread far and wide throughout the country, and there is no community or city immune to the devastating effects. It is, however, a drug that is not easy to discuss. There needs to be a change in order to save peoples’ lives from this horrifying disease.

Twenty-nine-year-old David, a young man from Maine, who by society’s standards, “had it made,” lost a long, hard-fought battle to heroin.³ David’s family thought he was on the road to recovery, finally in a better place and shedding himself of the demon that had been inside of him for so long.⁴ This was until David’s father found him lying unconscious on the floor, needle on the bed, spoon on the nightstand, with the remnants of a crystalline substance glistening on it.⁵

David grew up in a small, affluent town in Maine with plenty of money and enough youthful independence to find himself wrapped up in something his parents never dreamed would eventually steal the life of their son.⁶ Despite his parents’ efforts to acclimate him to Broadway shows and help him develop an affinity for reading, more than anything, David wanted to be “cool” and accepted by his peers.⁷

David and his friends considered themselves the “black sheep” of their families and started smoking marijuana in middle school.⁸ During high school, David’s brother Kevin underwent surgery and the doctor prescribed him pain medication, OxyContin, which David and his friends would frequently use to get high and feed

¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Morbidity and Mortality Weekly Report: Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014* (January 1, 2016), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm>.

² *Id.*

³ Marc Fisher, *Cheap Fix: Heroin’s Resurgence, ‘And Then He Decided Not to Be,’* THE WASH. POST (July 25, 2015), <http://www.washingtonpost.com/sf/national/2015/07/25/and-then-he-decided-not-to-be/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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their growing addictions.⁹ David's brother had an at-will prescription, meaning he could have it refilled whenever he wanted.¹⁰ It was not long before David found himself buying more OxyContin in parking lots.¹¹ David and his friends felt invincible and never believed they would get addicted to the drugs because they were not poor, they were not from the inner-city, and for those reasons, they naively thought that the drugs would not affect them in that way.¹²

David and his friends made the jump from OxyContin to heroin when their regular supplier of painkillers ran out of the prescription medication, and they justified the switch because they "knew it was clinically basically the same drug."¹³ Furthermore, an OxyContin pill was almost fifty dollars, whereas a packet of heroin was approximately ten dollars.¹⁴ The boys snorted the heroin a few times a week because shooting up was something they only knew from movies; however, they started stealing money from their parents once they developed a higher tolerance and needed to get high in order to even feel "normal" or go about their days.¹⁵

It took several years for David to start shooting up because he had an aversion to needles, but he watched his friends do it and eventually needed the stronger high so badly that he succumbed and began injecting the drug.¹⁶ Ultimately, the heroin that took David's life was cut with fentanyl, an even stronger and more dangerous pain killer that heroin suppliers are selling to unwitting addicts because it is even cheaper than heroin.¹⁷

The heroin epidemic is ripping families like David's apart, thrusting them into a state of devastation. Kids who have been afforded every opportunity to succeed are getting hooked on this drug and their lives are ending before they have really begun. Each year, the staggering statistics reach shocking new heights. As such, state and federal governments are frantically trying to pass legislation to combat the opiate crisis in the United States.¹⁸ In 2015, Ohio Governor John Kasich signed House Bill 4 into law which allows civilians to purchase naloxone, a drug that, if administered

⁹ Marc Fisher, *Cheap Fix: Heroin's Resurgence, 'And Then He Decided Not to Be,'* THE WASH. POST (July 25, 2015), <http://www.washingtonpost.com/sf/national/2015/07/25/and-then-he-decided-not-to-be/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Marc Fisher, *Cheap Fix: Heroin's Resurgence, 'And Then He Decided Not to Be,'* THE WASH. POST (July 25, 2015), <http://www.washingtonpost.com/sf/national/2015/07/25/and-then-he-decided-not-to-be/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Jennifer Steinhauer, *Senate Passes Broad Bill to Combat Drug Abuse*, N.Y. TIMES (March 10, 2016), https://www.nytimes.com/2016/03/11/us/politics/senate-drug-abuse-bill.html?_r=0. "The epidemic 'is probably one of the most pressing public health issues facing American families across the country,' said Senator Lisa Murkowski, Republican of Alaska." *Id.*

in time, is able to reverse the effects of an opiate overdose without a prescription.¹⁹ With readily available naloxone, commonly known under its brand name Narcan, officials hoped that the overdose rates would decline.²⁰ However, allowing civilians to purchase the overdose-reversal drug without a prescription is not causing fewer people to overdose.²¹ Instead, the introduction of Narcan has led opiate addicts to push their tolerance to the edge, as they now possess a ‘saving grace’ that will allow them to cheat death if they find themselves on the verge of an opiate overdose.²² Narcan has led addicts to frequently overdose, and for some people this means overdosing several times in a row because they have the confidence that they will not actually lose their lives to the drug.²³

Ohio has gone through a transformation in its prescription drug laws. Most heroin addicts do not simply pick up a needle one day and inject themselves with a drug they know will kill them. Instead, many are already addicted to prescription opioids prior to their first heroin use and only change to heroin because it is cheaper than prescription pills, easier to find than painkillers, and provides a more intense high.²⁴ This precursor to heroin is extremely addictive, and by amending its prescription drug laws, Ohio may have found the solution to stop people from picking up the heroin needle. However, while making changes in prescription drug laws is one obvious solution, making these laws stricter will likely only help those not already addicted. For those who are already addicted, an increase in law enforcement will likely only result in negative consequences. One such consequence of amending prescription drug laws is that it may become more difficult for those addicted to obtain the substances, ultimately resulting in a turn to heroin use to obtain a similar high.

While many opioid addicts do ultimately turn to heroin, stricter laws surrounding prescription drugs could be an additional push that causes this change to happen more quickly. Thus, the only real solution to the problem is comprehensive

¹⁹ H.B. 4, 131st Gen. Assemb., Reg. Sess. (Oh. 2015); *See also* OHIO REV. CODE ANN. § 4729.44 (West. 2015).

²⁰ Tim Warsinsky, *CVS to Sell Heroin Antidote Naloxone Without Prescription in Ohio Stores*, THE PLAIN DEALER (Feb. 3, 2016, 4:43 p.m.), http://www.cleveland.com/metro/index.ssf/2016/02/cvs_to_sell_heroin_antidone_naloxone.html; (*quoting* William Denihan, “The overdoses continue to increase, and this coming into the community is really timely,” BOARD OF CUYAHOGA COUNTY ALCOHOL, DRUG ADDICTION & MENTAL HEALTH SERVICES, CEO).

²¹ Steph Solis, *10 Hours, 15 Overdoses in Akron, Ohio*, USA TODAY (July 6, 2016, 8:05 p.m.), <http://www.usatoday.com/story/news/nation/2016/07/06/akron-ohio-suspected-heroin-overdoses/86739796/> (stating that between 1:00 p.m. and 10:30 p.m. there were at least 15 reported heroin overdoses).

²² Katharine Q. Seelye, *Naloxone Saves Lives, but is No Cure in Heroin Epidemic*, N.Y. TIMES (July 27, 2016), http://www.nytimes.com/2016/07/28/us/naloxone-eases-pain-of-heroin-epidemic-but-not-without-consequences.html?_r=0.

²³ *Id.* Forty-four-year-old Melissa Tucci has been revived with naloxone seven times and hates the withdrawal symptoms the antidote sends her into.

²⁴ *5 Reasons Prescription Addiction Turns to Heroin*, NARCONON INTERNATIONAL (2016), <http://www.narconon.org/blog/heroin-addiction/5-reasons-prescription-addiction-turns-to-heroin/>.

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legislative action. Congress must mandate that, under the Affordable Care Act, insurance companies pay for opiate and opioid addicts' rehabilitation and that rehabilitation facilities accept the insurance coverage. Currently there is a wide gap between what insurance companies will cover and what coverage the rehabilitation facilities are willing to accept. This could be a good first step in preventing people from turning to heroin in order to satisfy their addiction that began from prescription drugs. This legislative action must be federal because simply entrusting individual states to enact their own policies lacks the consistency necessary to cure this epidemic. Instead, Congress must be the entity to take action.

Since 2015, Ohio has required that doctors maintain a database in order to track the history of their patient's prescription drug use.²⁵ This database was created to help cut down on the number of opioids prescribed, and in turn decrease the number of overdoses that occur. However, 2.6 million people or approximately twenty-three percent of Ohio's population, were prescribed prescription opioids in 2015, three years after the advent of the medical database.²⁶ These more restrictive regulations have obviously not been as successful as legislators had hoped. Furthermore, although Ohio claims victory and progress against the opioid crisis through legislation such as House Bill 4 as well as a decrease in the overdose rate of the prescription pills, Ohio has still seen a recent surge in heroin overdoses.²⁷

This Note begins with a discussion of both the national opioid problem as well as the specific epidemic in Ohio, as an example of how it has grown within all of the states. Part II of this Note discusses the differences between prescription opioids and opiates, how they can be obtained, what effects they have on the human body, and why the government has an interest in this growing problem. Next, this Note explains how and why there was an increase in access and addiction to prescription opioid pain medication. Following this explanation, the steps the government has taken to try to rectify the issue are explained. Part II then explores more details about the problem of heroin use—explaining what the drug is, what an overdose looks like, and how fentanyl-laced heroin is contributing to the problem. Similar to the pain medication description, there is a discussion on steps the government has taken thus far to combat the opiate issue. Finally, Part II introduces a United States Supreme Court case, *National Federation of Independent Business v. Sebelius*.

In Part III, there is an in-depth analysis of why the state government solutions for dealing with the opioid epidemic have not worked thus far. This Note argues that, because the strides that states like Ohio have not solved the problem, Congress should mandate that all rehabilitation facilities accept health insurance and that all health insurance companies cover the cost of rehabilitation for opiate and opioid

²⁵ *Mandatory OARRS Registration and Requests*, STATE OF OHIO BOARD OF PHARMACY (2015), <http://www.pharmacy.ohio.gov/Documents/Pubs/Special/OARRS/H.B.%20341%20-%20Mandatory%20OARRS%20Registration%20and%20Requests.pdf>.

²⁶ Casey Ross, *Prescriptions for Opioids Fall in Ohio, but Addiction Continues to Kill at Alarming Rates*, THE PLAIN DEALER (June 8, 2016, 7:00 a.m.), http://www.cleveland.com/healthfit/index.ssf/2016/06/prescriptions_for_opioids_fall_in_ohio_but_addiction_continues_to_kill_at_alarming_rates_photos_video.html; citing OHIO AUTOMATED RX REPORTING SYSTEM, <https://www.ohiopmp.gov/Portal/Default.aspx>.

²⁷ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Prescribing Data* (May 2, 2016), <http://www.cdc.gov/drugoverdose/data/statedeaths.html>.

addiction. Analysis of the Commerce Clause, the Necessary and Proper Clause, and the Taxing Clause show that Congress has the authority to make such demands.

BACKGROUND

Each year in America, more people now die from accidental drug overdoses than from car accidents or gun-related deaths.²⁸ The alarming rates at which people are overdosing on heroin and other opioids have caused public health officials to refer to it as an “epidemic” that is surging across the United States.²⁹ This section discusses the difference between opioids and opiates, why the government has an interest in these substances, how opioids became so prevalent in America, and what the government has done to combat the problem. This Note also examines the more specific problem of heroin, and again, considers governmental action thus far.

A. *The drugs that have caused the epidemic.*

1. The difference between opioids and opiates.

Opioids and opiates are similar substances that many easily confuse. Derived from the opium poppy, opiates are natural substances.³⁰ These substances are often used as very strong pain-relieving medications and examples include morphine, codeine, heroin, and opium.³¹ Opioids on the other hand, are synthetic drugs manufactured to mimic opiates’ pain-relieving characteristics.³² Common opioids include Methadone, Percocet, Oxycodone, and Vicodin.³³ Opioids are drugs that are typically used to treat acute pain, chronic pain, and pain caused by terminal illness.³⁴ Both opioids and opiates affect the way an individual perceives pain without actually healing the injury that caused that pain.³⁵ Upon ingestion of one of these drugs, the brain produces a large amount of dopamine, causing the individual to experience a state of euphoria.³⁶ Dopamine is the same chemical released when people exercise or

²⁸ Michael B. Sauter, *10 States with the Most Drug Overdoses*, WALL ST. J. (June 24, 2016), <http://247wallst.com/special-report/2016/06/24/10-states-with-the-most-drug-overdoses/>.

²⁹ *Id.* (In 2014, 47,055 people died from a drug overdose in the United States, with 28,647 of them being specifically from opioids, making it the highest rate ever recorded. “Nationally, there were 14.7 deaths per 100,000 people in 2014, according to data from the Substance Abuse and Mental Health Services Administration.”); *see also Prescribing Data*, *supra* note 27.

³⁰ JUST BELIEVE RECOVERY CENTER, LLC, *Difference Between Opiates and Opioids* (2015), <https://www.justbelieverecover.com/whats-difference-between-opiates-opioids/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Amy O’Grady, *Fighting Ohio’s Heroin Epidemic*, OHIO STATE BAR ASSOCIATION, <https://www.ohiobar.org/NewsAndPublications/OhioLawyer/Pages/Fighting-Ohios-heroin-epidemic.aspx>.

³⁵ JUST BELIEVE RECOVERY CENTER, LLC, *supra* note 30.

³⁶ Brain Palmer, *Brain Changes in an Addict Make it Hard to Resist Heroin and Similar Drugs*, WASH. POST (Feb. 17, 2014), <https://www.washingtonpost.com/national/health->

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indulge in their favorite food, which upon release arouses a sense of euphoria in the actor.³⁷ Additionally, both substances cause the individual to slip into a deep state of relaxation.³⁸

2. Why the government has an interest in this particular issue.

As problems with addiction continue to surge, an increasing amount of people are affected by the negative consequences.³⁹ American citizens are relying on the government to pass legislation and regulations to help combat the epidemic.⁴⁰ The government has an interest in taking action because citizens in all jurisdictions, no matter what type of community or where they live in the country, are negatively affected by addiction.⁴¹ Furthermore, the government has a vested interest in the problem of opioid and opiate addiction because these addictions have profound effects on the economy, partially due to their negative impact on work productivity.⁴² In the state of Ohio alone, unintentional fatal drug overdoses cost two billion dollars in 2012, and non-fatal overdoses cost the State an additional \$39.1 million dollars.⁴³

Moreover, “employers are grappling with the effects on the labor force, from lower productivity to higher turnover.”⁴⁴ It is a threat to local economic growth when

science/brain-changes-in-an-addict-make-it-hard-to-resist-heroin-and-similar-drugs/2014/02/14/dcc91c5e-9366-11e3-84e1-27626c5ef5fb_story.html; *see also* O’Grady, *supra* note 34.

³⁷ JUST BELIEVE RECOVERY CENTER, LLC, *supra* note 30.

³⁸ *Id.*

³⁹ Jen Christensen, Sergio Hernandez, *This is America on Drugs: A Visual Guide*, CNN (Oct. 14, 2016) <http://www.cnn.com/2016/09/23/health/heroin-opioid-drug-overdose-deaths-visual-guide/>. “Drugs are the leading cause of accidental death in this country.” *Id.*

⁴⁰ Steinhauer, *supra* note 18.

⁴¹ Christensen & Hernandez, *supra* note 39. Drug-related deaths are increasing in all fifty states. *Id.*; *see also* O’Grady, *supra* note 34, “No community is immune from the horrors of heroin.”

⁴² *Trends & Statistics*, NATIONAL INSTITUTE ON DRUG ABUSE: ADVANCING ADDICTION SCIENCE, (Aug. 2015), <https://www.drugabuse.gov/related-topics/trends-statistics>. Tobacco, alcohol, and illicit drug use combine to cost the United States over \$700 billion annually in costs related to crime, lost work productivity, and health care. *Id.* Illicit drug use alone costs our nation \$193 billion a year. *Id.*

⁴³ OHIO DEPARTMENT OF HEALTH, *Drug Overdose in Ohio*, <http://www.healthy.ohio.gov/vipp/drug/dpoison.aspx>. (last update Aug. 20, 2017).

⁴⁴ Arian Campo-Flores, *Drug Use at Work Roils Firms*, WALL ST. J. (Oct. 12, 2014), <http://www.wsj.com/articles/use-of-heroin-and-other-opioid-drugs-at-work-roils-firms-1413158177>. Illegal drug abuse also results in more workers’ compensation claims. *Effects of Substance Abuse in the Workplace*, TOMO DRUG TESTING (June 27, 2016), <https://www.yourdrugtesting.com/effects-of-substance-abuse-in-the-workplace/> (“Employees who abuse drugs or alcohol are three to five times more likely to file workers’ compensation claims.”). The reason this type of drug abuse decreases productivity is because the abuse of drugs negatively affects the user’s ability to concentrate, focus, act carefully, and make good-judgment decisions. *Id.* Furthermore, places of employment with many heroin addicts typically have very high turnover rates due to employees missing work and unable to keep their jobs. *Id.* Experts recommend that employers incorporate some sort of drug policy with

employers cannot fill positions because it is hard to find potential employees who are able to pass drug tests.⁴⁵ Jed Metzger, the president of the Lima/Allen County Chamber of Commerce said that in Allen County, Ohio, some employers have experienced 70% of applicants failing drug tests.⁴⁶ Across states including Kentucky, Ohio, and Indiana, there has been an increase in the amount of incidents and accidents occurring on job sites, and when the involved individuals are tested, they often test positive for opioids.⁴⁷ As a result, employers are experiencing higher rates of theft and absenteeism, which negatively impacts productivity.⁴⁸

The problem is not only that addicts' productivity has decreased, but also that family members of addicts are showing up to work distraught over their loved ones battling addiction, which in turn affects their own work performance.⁴⁹ A study conducted at the University of Cincinnati showed that twenty percent of Ohio residents know someone struggling with heroin.⁵⁰ As these drugs continue to negatively affect every aspect of addicts' lives, as well as their family members' lives, the government has an increasing interest in the collateral problems that the drug use is causing.

B. The rise of painkiller use and abuse in the United States.

Between 1999 and 2013 the number of opioids prescribed by doctors quadrupled; however, there has been no increase in the amount of pain being reported by Americans.⁵¹ It is now estimated that about twenty-five percent of patients without

regular drug testing. *Id.* These policies could include drug tests throughout the year as well as substance abuse education courses and training. *Id.*

⁴⁵ Flores, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Bill Whitaker, *Heroin Epidemic Kills at Least 23 Ohioans Each Week: Should heroin be treated as a medical or a legal problem*, CBS NEWS (April 24, 2016), <http://www.cbsnews.com/news/60-minutes-heroin-epidemic-ohio-bill-whitaker/>.

⁵¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 27; CTRS. FOR DISEASE CONTROL AND PREVENTION, *Morbidity and mortality Weekly Report*, *supra* note 1. There are several causes for creating a broad environmental availability, leading to the rise in prescription drug use, including an increase in the number of prescriptions written, an increased social acceptance for taking the pain killers, and "aggressive marketing by pharmaceutical companies." Nora D. Volkow, M.D., *America's Addiction to Opioids: Heroin and Prescription Drug Abuse*, NATIONAL INSTITUTE ON DRUG ABUSE: ADVANCING ADDICTION SCIENCE (May 14, 2014), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2016/americas-addiction-to-opioids-heroin-prescription-drug-abuse>. Opioids and opiates affect the brain in the same way, which is part of the reason these prescription drugs are highly addictive. *Id.* As people become more addicted, they seek other ways to increase that high, such as crushing and snorting or injecting the powder. *Id.* This only further increases the aggressiveness of the addiction. *Id.* Another cause of the increased supply of opioids was because pill mills started opening all over the country. Felix Gillette, *American Pain: The Largest U.S. Pill Mill's Rise and Fall*, BLOOMBERG (June 6, 2012), <https://www.bloomberg.com/news/articles/2012-06-06/american-pain-the-largest-u-dot-s-dot->

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cancer are being prescribed opioid painkillers to manage their pain.⁵² Interestingly, about half of all of the painkillers being prescribed are prescribed by primary care physicians, not by pain management specialists.⁵³ Children as young as eight-years-old are prescribed opioids for pain relating to surgery and broken bones.⁵⁴

In Ohio, a state amongst the highest for dispensing pain medication, there are between ninety-six and 143 prescriptions for painkillers per one hundred people.⁵⁵ Prescription pain medications are one of the biggest factors in the increase in opiate use throughout the nation.⁵⁶ Having an addiction to opioid painkillers makes a person forty times more likely to become addicted to heroin, thus proving that many people turn to heroin to satisfy an addiction that originated from an opioid prescription.⁵⁷

1. States like Ohio have taken action.

In 2011, Ohio Governor John Kasich established the Governor's Cabinet Opiate Action Team.⁵⁸ The creation of this organization was an effort to combat drug use and develop guidelines for prescribing opioid pain medication.⁵⁹ A few ideas that this group considered were cutting the pill supply, preventing drug abuse before it starts, providing treatment and recovery to those who need it, and making naloxone,

pill-mills-rise-and-fall. At these pill mills, one or two doctors would service large amounts of patients per day, where patients would not need an appointment, and they would leave every single visit, no matter what their condition, with a month supply of oxycodone. *Id.* People going through a divorce were given the same prescription as those going through chemotherapy for cancer treatment. *Id.* As it was so easy for people to obtain these painkillers, people quickly became addicted, and returned over and over to various pill mills around the country to satisfy their addictions. *Id.*

⁵² CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 27. *See also* Volkow, *supra* note 51, "opioids account for the greatest proportion of the prescription drug abuse problem."

⁵³ *Id.*

⁵⁴ Ross, *supra* note 26.

⁵⁵ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 27.

⁵⁶ Donna Leinwand Leger, *OxyCotin a Gateway to Heroin for Upper-Income Addicts*, USA TODAY (June 28, 2013, 11:52 AM) <http://www.usatoday.com/story/news/nation/2013/04/15/heroin-crackdown-oxycodone-hydrocodone/1963123/>, The painkillers are "feeding the frenzy" of drug addiction in the suburbs. "As addicts move from legitimate prescriptions to the black market of pure, precisely measured narcotic pain pills to the dirty world of dealers, needles, and kitchen table chemists, health officials and police are noting sharp increases in overdoses, crime and other public health problems."

⁵⁷ *Combating Opioid Addiction*, ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS (2016), <http://astho.org/2016-Advocacy-Materials/Opioid-Abuse-and-Overdose/>.

⁵⁸ *Expanding Ohio's Opioid Prescribing Guidelines*, GOVERNOR'S CABINET OPIATE ACTION TEAM, <http://mha.ohio.gov/Portals/0/Acute%20Prescriber%20Guidelines%20FINAL%20PRINT.pdf>. It should be noted that many other states have also enacted legislation to combat their own opioid and opiate problems. However, for purposes of this Note, only actions taken by Ohio, on a state level, will be discussed.

⁵⁹ *Id.*

the opioid overdose antidote, more available.⁶⁰ Efforts to decrease the pill supply have been successful as there was a national decrease of about forty-two million opioid doses that were dispensed between 2012 and 2014.⁶¹ Furthermore, because of research evidence showing that children who are taught about the dangers of drug abuse by adults were fifty percent less likely to use drugs, a newly implemented program, *Start Talking!*, provides parents, teachers, and community leaders with tips and tools to address the dangers of drugs with children of Ohio.⁶²

In sum, the new prescribing guidelines in Ohio are aimed at:

Preventing “doctor shopping” for prescription pain medication, by urging prescribers and patients to consider non-opioid therapies that reduce the potential for addiction and abuse, by reducing overprescribing that leads to leftover pain medication, and by encouraging prescribers to find out what other controlled medications a patient might already be taking.⁶³

A “doctor shopper” is defined as an individual who receives prescription pain medication from “five or more prescribers in one calendar month.”⁶⁴ In 2015, 2.6 million people in Ohio, or twenty-three percent of Ohio residents, still received prescription opioids to treat some sort of medical condition; however, this number was down from the 3.1 million people who received prescription opioids in 2012.⁶⁵ Furthermore, in 2014, House Bill 341 made it a requirement for physicians to review patient information on the Ohio Automated Prescription Reporting System (OARRS) prior to prescribing an opioid for pain management.⁶⁶

Less specific to the opioid problem, and related to drug use generally, Casey’s Law became effective in 2012.⁶⁷ Casey’s Law was an effort to give family and friends the opportunity to petition the court to order involuntary rehabilitation

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² GOVERNOR’S CABINET OPIATE ACTION TEAM, *supra* note 58. The purpose of the Start Talking! Program is to give parents and guardians the tools they need to begin conversations with children about drug abuse. *Start Talking! Drug Prevention Program*, Ohio Department of Education (Aug. 30, 2016), <http://education.ohio.gov/Topics/Other-Resources/Start-Talking>. The program is aimed at building a culture where children will resist trying drugs. *Id.* It also pairs student athletes with law enforcement mentors to build a bridge of resiliency. *Id.*

⁶³ *Id.*; see also OHIO DEPARTMENT OF HEALTH, *2015 Ohio Drug Overdose Data: General Findings*, <http://www.healthy.ohio.gov/-/media/HealthyOhio/ASSETS/Files/injury-prevention/2015-Overdose-Data/2015-Ohio-Drug-Overdose-Data-Report-FINAL.pdf?la=en>.

⁶⁴ OHIO DEPARTMENT OF HEALTH, *supra* note 63, In 2011, there were 2,205 doctor shoppers in the state of Ohio. This number fell to 720 doctor shoppers by 2015; see also STATE OF OHIO BOARD OF PHARMACY, *supra* note 24. The obvious signs of a doctor shopper are needle tracks and slurred speech. *Watch for Doctor-Shopper Red Flags, Group Warns*, MEDSCAPE (March. 18, 2015), <http://www.medscape.com/viewarticle/841727>. Less obvious warning signs are people using street names, asking for a refill early, and declining a physical examination. *Id.*

⁶⁵ Ross, *supra* note 26.

⁶⁶ O’Grady, *supra* note 34.

⁶⁷ *Id.*

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treatment for those suffering with drug or alcohol abuse.⁶⁸ Although courts may require an addict to begin some sort of rehabilitation program, ranging from detoxification to intensive treatment, the individual receiving treatment is responsible for all costs incurred by treatment.⁶⁹ Casey's Law is a thoughtful step in combatting the criminalization of drugs and the problems addicts face because of their negative encounters with the legal system. However, this law excludes a large population of addicts who cannot afford treatment.

C. Heroin is an epidemic throughout the nation that needs to be fixed.

1. What is heroin?

Heroin is a poisonous, illegal substance made from morphine, which has no legal medicinal use.⁷⁰ It is typically a powdery substance that can vary from white to dark brown in color.⁷¹ Heroin may be snorted or smoked, but is most commonly used by mixing it with water and injecting it into the body.⁷² Heroin is a very powerful drug that often causes people to overdose. When an overdose occurs, the individual gets very sleepy or becomes unconscious and eventually stops breathing.⁷³ Other visible symptoms of an overdose include dry mouth, extremely small pupils, discoloration of the tongue, bluish coloring in the nails and lips, and uncontrollable muscle movements.⁷⁴

Heroin does not discriminate in the lives it affects. Abuse of prescription painkillers is believed to be one of the major causes of the heroin epidemic.⁷⁵ The epidemic is affecting wealthy, educated communities as much as it is affecting poorer, less educated communities, and therefore, the problem cannot be said to be closely related to specific socioeconomic conditions.⁷⁶ A study conducted in 2014 by

⁶⁸ *Id.*

⁶⁹ Casey's Law, http://caseyslaw.org/Law_OH.htm; Ohio S.B. 117 (March 22, 2012). Casey's Law was developed after a family went through the impossibly difficult time of knowing their son struggled with a drug problem, but only he had the power to choose whether or not he needed treatment. *Id.* Casey ultimately died from a drug overdose, devastating his family who only wanted him to seek treatment and find recovery. *Id.*

⁷⁰ *Heroin Overdose*, MEDLINE PLUS, Oct. 5, 2016, <https://medlineplus.gov/ency/article/002861.htm>.

⁷¹ *Signs and Symptoms of Heroin Use*, NARCONON INTERNATIONAL (2016), <http://www.narconon.org/drug-abuse/signs-symptoms-heroin-use.html>.

⁷² Dennis Hopson, *Heroin Addiction Treatment: Heroin Addiction Treatment Success Rates, Types of Treatment, and Statistics*, GUIDEDOC, <http://guidedoc.com/heroin-addiction-treatment-success-rates-statistics>

⁷³ MEDLINE PLUS, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ Sara Bellum, *Prescription Opioid Abuse Can Lead to Heroin Abuse*, NATIONAL INSTITUTE ON DRUG ABUSE FOR TEENS (May 3, 2012), <https://teens.drugabuse.gov/blog/post/prescription-opioid-abuse-can-lead-heroin-abuse>.

⁷⁶ Sauter, *supra* note 28; *see also* Whitaker, *supra* note 50, The people becoming addicted to the substance are students, teachers, CEO's, and government employees.

the Journal of the American Medical Association (JAMA) deemed a twenty-three-year-old female from the suburbs as the “typical heroin user.”⁷⁷

One factor contributing to the increase in deaths is the increased purity of the heroin. Traditionally, heroin was between five and ten percent pure.⁷⁸ Now, however, the purity level of heroin is ranging between forty and sixty-five percent pure, making it more potent, resulting in a greater likelihood of overdose and increasing the number of deaths.⁷⁹

The euphoric nature of a heroin high affects the user within seconds of injection.⁸⁰ The drug is converted into morphine once it reaches the brain and then quickly goes away once the drug wears off, leaving the user longing to enter into that euphoric state once again.⁸¹ Because heroin causes dopamine to be released in an unnatural way, parts within the brain die and make a user unable to experience pleasure, or have dopamine released naturally in their brain, without using heroin to experience that pleasure.⁸² The substance is highly addictive because the user experiences feelings of comfort, “happiness and well-being.”⁸³ The user longs for the euphoric state and will experience withdrawal symptoms, for about a week, until and unless the body is injected with heroin again.⁸⁴

As the increased potency of heroin has resulted in a greater number of addicts, the problem is exacerbated by the fact that addicts often refuse to seek recovery out of fear for the highly uncomfortable symptoms that accompany withdrawal: pain and

⁷⁷ Theodore J. Cicero, PhD., Matthew S. Ellis, MPE, Hillary L. Surratt, PhD, et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, JAMA PSYCHIATRY (July, 2014), <http://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874575>; see also O’Grady, *supra* note 34.

⁷⁸ Jeff Goldberg, *Hooked on Heroin: Why it’s Deadlier Than Ever in the D.C. Suburbs*, WJMA (Nov. 13, 2014), <http://wjla.com/news/crime/hooked-on-heroin-why-it-s-deadlier-than-ever-in-the-d-c-suburbs-108987>.

⁷⁹ *Id.*

⁸⁰ NARCONON INTERNATIONAL, *supra* note 71.

⁸¹ Hopson, *supra* note 72.

⁸² O’Grady, *supra* note 34.

⁸³ Hopson, *supra* note 72; Goldberg, *supra* note 78.

⁸⁴ Hopson, *supra* note 72; *Heroin Withdrawal Timeline, Symptoms and Treatment*, AMERICAN ADDICTION CENTERS, <http://americanaddictioncenters.org/withdrawal-timelines-treatments/heroin/>. Although heroin withdrawal typically only lasts about a week, the symptoms are extremely severe. *Id.* However, each person’s withdrawal is different and dependent on certain factors: the length of time the individual has been using and how much of the drug was used each time, ultimately effecting how dependent the brain and body are to heroin. *Id.* Often times, when people choose to stop using heroin, methadone is used in a medical detox is used to soothe the symptoms and increase the chances the the individual will safely and successfully go through the severe withdrawal symptoms. *Id.* Medical detox is most successful when it begins before heroin completely leaves the individual’s system. *Id.* For someone who is addicted to heroin, medical detox will typically last five to seven days, however, for someone who is very heavily dependent on the drug, the detox will last up to ten days. *Id.*

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sickness.⁸⁵ When going through withdrawal, a heroin addict will experience bone and muscular pain, restlessness, cold flashes, vomiting, and diarrhea until these symptoms are relieved by getting high again.⁸⁶ Because some people are scared of rehabilitation because of the inevitable withdrawal, and others do not have access to it, the problem only continues to worsen.

2. Negative heroin statistics are rising at frightening rates throughout the country.

As a country, we experienced an increase of 137 percent in fatal heroin overdoses between 2000 and 2014.⁸⁷ Heroin is becoming increasingly addictive, and more people who experiment with the drug are becoming addicted than in the past.⁸⁸ Currently, it is estimated by the National Institutes of Health (NIH) that about 4.2 million people have experimented at one point or another with heroin.⁸⁹ Although the increase has been more dramatic in some states than others, there is not a state that has not experienced this increase in experimentation.⁹⁰

Between 2013 and 2014, heroin-related deaths increased twenty-six percent, and fentanyl-related deaths increased by eighty percent.⁹¹ As previously discussed, one of the highest risk factors for initiating heroin use is the misuse and dependence on opioid pain relievers.⁹² Beyond that original initiation with heroin, there are three main reasons that are related to the increased use of heroin: (i) heroin's availability has drastically increased; (ii) heroin is relatively inexpensive, especially compared to opioids; and (iii) heroin's high purity produces stronger and more intense highs for

⁸⁵ NARCONON INTERNATIONAL, *supra* note 71.

⁸⁶ Hopson, *supra* note 72.

⁸⁷ *Id.*

⁸⁸ Hopson, *supra* note 72 (*stating* about twenty-five percent of people who experiment with the drug develop a "crippling" addiction to it); *see also* ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS, *supra* note 57; Hopson, *supra* note 72 (*stating* that in the United States, we have about 900,000 chronic heroin users who are at least twelve years old).

⁸⁹ ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS, *supra* note 57; Hopson, *supra* note 72 (*stating* that in the United States, we have about 900,000 chronic heroin users). Part of the problem with an increase in the number of people experimenting with heroin is that it has a high potential for being addicting to those individuals, even if they only use the drug infrequently. *When Does Heroin Experimentation Become Addiction?*, HEROIN DETOX REHAB, <http://www.heroindetoxrehab.com/heroin-experimentation-become-addiction/>. Experimentation can occur simply to experience the intense euphoric state that is known to accompany the high caused by heroin, or it can be an attempt to relieve pain because it is an opiate. *Id.*

⁹⁰ Sauter, *supra* note 28 (*stating* that over the past decade, West Virginia experienced a 473% increase and New Hampshire a 670% increase).

⁹¹ *Id.*

⁹² CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 1.

people who are already addicted to opioids.⁹³ More specifically, in 2014, 2,482 people died of drug-related deaths in Ohio, with 1,177 of those deaths involving heroin.⁹⁴ This number continued to increase through 2015, claiming the lives of 3,050 people.⁹⁵ Now, it is reported that about twenty-three people in Ohio lose the battle to heroin each week.⁹⁶

One of the main reasons overdoses and resulting deaths are increasing at such alarming rates is because addicts do not know what is actually in the substances that they are buying.⁹⁷ Fentanyl is contributing to many of the deaths because Narcan, which countless people have grown to rely on, is intended for heroin and is sometimes ineffective when the overdose involves fentanyl.⁹⁸ Fentanyl-related overdoses have been surging and in 2014, there were 503 deaths.⁹⁹ Fentanyl, which is thirty to fifty times stronger than heroin, is being mixed in with heroin.¹⁰⁰ Most users purchase the drug expecting it to be purely heroin, but in reality, they are injecting fentanyl in addition to heroin that is increasing in purity.¹⁰¹ Dealers are lacing the heroin with fentanyl to make their supply go further, provide stronger highs, and ultimately to be more addictive to its users so that the users will continue to purchase their supply and spread the word that the particular dealer has a good product.¹⁰² Users overdose on the drug either not knowing that it was cut with

⁹³ *Id.*; O'Grady, *supra* note 34, Heroin can be found in nearly any community for about ten dollars for a dose; *see also* Leger, *supra* 56 (stating "An 80 mg OxyContin can cost \$60 to \$100 a pill. In contrast, heroin costs about \$45 to \$60 for a multiple dose supply.").

⁹⁴ Jeremy Pelzer, *Ohio's Heroin Epidemic gets National Exposure in New '60 Minutes' Segment*, CLEVELAND.COM (Oct. 30, 2015, 3:59 PM), http://www.cleveland.com/open/index.ssf/2015/10/ohios_heroin_epidemic_gets_nat.html.

⁹⁵ OHIO DEPARTMENT OF HEALTH, *supra* note 63. Stating that heroin was the "leading cause of injury-related death in Ohio in 2015."; *see also* OHIO DEPARTMENT OF HEALTH, *supra* note 63 at Figure 5 (As of 2015, 46.7% of drug-related deaths in Ohio were attributed to heroin, and 37.9% were related to fentanyl).

⁹⁶ Whitaker, *supra* note 50.

⁹⁷ Leger, *supra* note 56. Once people who are addicted to painkillers make the jump to heroin, it is impossible to know what is in each patch. Making the jump to heroin is just that, it is a *jump*. It is a big change from the regulated painkillers they were taking before that were prescribed by their doctors.

⁹⁸ Jack Healy, *Drug Linked to Ohio Overdoses Can Kill in Doses Smaller than a Snowflake*, THE NEW YORK TIMES, (Sept. 5, 2016), http://www.nytimes.com/2016/09/06/us/ohio-cincinnati-overdoses-carfentanil-heroin.html?_r=0.

⁹⁹ OHIO DEPARTMENT OF HEALTH, *supra* note 63 (This number more than doubled in 2015 when 1,155 Ohio residents died from a fentanyl overdose).

¹⁰⁰ OHIO DEPARTMENT OF HEALTH, *supra* note 63.

¹⁰¹ OHIO DEPARTMENT OF HEALTH, *supra* note 63; *see also* Ross, *supra* note 26; *see also* Evan MacDonald, *Fentanyl Pushes Ohio Drug Overdose Deaths to Record Levels in 2015*, CLEVELAND.COM (Aug. 26, 2016, 2:43 PM), http://www.cleveland.com/metro/index.ssf/2016/08/fentanyl_pushes_ohio_overdose.html (fentanyl has been labeled a public health crisis by officials in Cuyahoga County).

¹⁰² Katie Mettler, *This is unprecedented: 174 heroin overdoses in 6 days in Cincinnati*, THE MORNING MIX, THE WASHINGTON POST (Aug. 29, 2016)

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fentanyl, or because they sought out the mixed batch, after hearing that the particular dealer had a good supply, chasing a more intense high.¹⁰³ According to the Ohio Department of Rehabilitation and Correction's 2013 data reports, about ninety-two percent of inmates in Ohio prisons have a history of drug abuse.¹⁰⁴ For those addicted to heroin, jail or prison is typically the end-point for those who do not die of an overdose.¹⁰⁵

3. Naloxone: The "miracle" antidote for heroin overdoses.

The Food and Drug Administration (FDA) approved naloxone in 2014, a medication that has no potential for addiction and reverses the effects of heroin overdose by blocking the effects of opioids on the brain.¹⁰⁶ The drug can be administered by injection or through a nasal spray.¹⁰⁷ Naloxone reverses the effects

<https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/this-is-unprecedented-174-heroin-overdoses-in-6-days-in-cincinnati/>.

¹⁰³ Deborah Brauser, *Fentanyl-Laced Heroin Deaths on the Rise Once Again*, MEDSCAPE MEDICAL NEWS (Dec. 31, 2014), <http://www.medscape.com/viewarticle/837417> (when addicts hear that someone overdosed on a supply of heroin, they will sometimes seek it out because then they know that the product they are buying is really good and will give them a more intense high).

¹⁰⁴ *2013 Data Report*, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION (2013), <http://www.drc.ohio.gov/>.

¹⁰⁵ O'Grady, *supra* note 34. An interesting topic to add onto this Note at a later time, or even for a separate Note, is the criminalization of drugs in the United States. Some people are of the opinion that decriminalizing drug use would solve some of the severe problems with abuse and addiction that we have in our country. One country that has taken the route of rejecting the "war on drugs" and decriminalized both drug possession and use is Portugal. Artur Domoslawski, *Drug Policy in Portugal: The Benefits of Decriminalizing Drug Use*, OPEN SOCIETY FOUNDATIONS (Aug. 2011), <https://www.opensocietyfoundations.org/reports/drug-policy-portugal-benefits-decriminalizing-drug-use>. The shifted focus to fighting the problem went from the "Ministry of Justice" to the "Ministry of Health." *Id.* Treating the addicts as patients instead of criminals is ultimately what this Note calls the United States to do: help those individuals fighting this incredibly difficult battle overcome the deeply rooted problem of addiction. Currently, in the United States, each year there are more than 1.5 million drug-related arrests. *Approaches to Decriminalizing Drug Use & Possession*, DRUG POLICY ALLIANCE (Feb. 2016), [http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Approaches%20to%20Decriminalization_\(Feb.%202016\).pdf](http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Approaches%20to%20Decriminalization_(Feb.%202016).pdf). "Decriminalization is the removal of criminal penalties for drug law violations." *Id.* Not only would decriminalization reduce the number of arrests and people incarcerated, but it would also increase the number of addicts getting treatment for their addiction.

¹⁰⁶ MEDLINE PLUS, *supra* note 70; *Drug Overdose Immunity and Good Samaritan Laws*, NATION CONFERENCE OF STATE LEGISLATURES (Aug. 1, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>; *What is Naloxone?*, OHIO MENTAL HEALTH & ADDICTION SERVICES: PROMOTING WELLNESS AND RECOVERY, (2016), <http://mha.ohio.gov/Default.aspx?tabid=817>; *See also* NALOXONEINFO.ORG, *Naloxone: Frequently Asked Questions*, http://naloxoneinfo.org/sites/default/files/Frequently%20Asked%20Questions-Naloxone_EN.pdf.

¹⁰⁷ OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, *supra* note 105; NATION CONFERENCE OF STATE LEGISLATURES, *supra* note 106.

of an opioid overdose on the brain and causes the user's breathing to return to normal once the drug takes effect.¹⁰⁸

In Ohio, the state budget currently dedicates one million dollars to making naloxone available to law enforcement and first responders.¹⁰⁹ Since May 2014, Ohio has been targeting the fifteen counties within the state which account for approximately eighty percent of fatal overdoses involving fentanyl in order to raise awareness and urge friends and family members of addicts to obtain naloxone to administer in the event of an overdose.¹¹⁰ One of the biggest problems, however, is that naloxone is not working as well when the overdose involves fentanyl.¹¹¹ For the typical heroin overdose, one or two doses of naloxone is administered, whereas a fentanyl overdose requires two or three times the typical naloxone dose.¹¹² Once the naloxone begins to reverse the overdose, the user begins to experience symptoms of withdrawal.¹¹³ A study conducted by the Centers for Disease Control and Prevention reported that naloxone is administered by other drug users and not by emergency responders in eighty-three percent of cases.¹¹⁴

4. Governmental action taken to attempt to combat the rising problem.

In 2014, Ohio House Bill 170 was signed into law, allowing law enforcement, family members, and addicts to carry and administer naloxone.¹¹⁵ Although the federal government still requires a prescription for naloxone, Ohio Revised Code § 4729.44 and Rule 4729-5-39 of the Ohio Administrative Code authorize naloxone to

¹⁰⁸ *Id.* Naloxone is only successful if it is administered to the overdosing individual before they die. Charles J DiMaggio, Rebecca E Giglio, Guohua Li, *Effectiveness of Bystander Naloxone Administration and Overdose Education Programs: A Meta-Analysis*, INJURY EPIDEMIOLOGY JOURNAL (May 22, 2015), <https://injepijournal.springeropen.com/articles/10.1186/s40621-015-0041-8>. Therefore, the success rates of naloxone depend mostly on the timing of the administration of the antidote. *Id.* This study showed that about 59% of overdoses are overcome when naloxone was administered by a lay person. *Id.*

¹⁰⁹ GOVERNOR'S CABINET. OPIATE ACTION TEAM, *supra* note 58.

¹¹⁰ *State Launches Public Awareness Campaign to Promote Life-Saving Drug Naloxone in Counties at Highest Risk for Fentanyl Overdoses*, OHIO DEPARTMENT OF HEALTH (May 12, 2016) <https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/news/News-Release----State-Public-Awareness-Campaign-Naloxone.pdf?la=en>.

¹¹¹ Mettler, *supra* note 102.

¹¹² *Id.*

¹¹³ OHIO MENTAL HEALTH & ADDICTION SERVICES: PROMOTING WELLNESS AND RECOVERY, *supra* note 106.

¹¹⁴ Peter J. Davidson, PhD, Michael K. Gilbert, MPH, T. Stephen Jones, MD, Eliza Wheeler, MPA, *Opioid Overdose Prevention Programs Providing Naloxone to Laypersons—United States, 2014*, CTRS. FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT (June 19, 2015), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6423a2.htm>; *see also* Seelye, *supra* note 22; *see also* Giglio, *supra* note 108 (there are no negative side effects of naloxone, and there is no danger of over-administering.)

¹¹⁵ O'Grady, *supra* note 34.

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be dispensed without a prescription by a pharmacist or a pharmacy intern.¹¹⁶ Additionally, most states have enacted “Good Samaritan Laws” relating to drug abuse. These laws provide immunity from drug possession and use charges when someone calls for emergency assistance if they or someone else is experiencing an opioid overdose.¹¹⁷ The Good Samaritan Laws typically only apply when the reporter is acting in good faith, meaning they cooperate with emergency personnel and do not call while law enforcement is executing a search warrant.¹¹⁸

Implementing drug courts is another action Ohio has taken in an effort to combat the epidemic. Ohio now has ninety-one drug courts in forty-eight counties that deal solely with those cases involving drugs.¹¹⁹ Many of the judges in these courts recognize heroin addiction as an illness and treat the addicts like patients as opposed to criminals.¹²⁰ Judge Scott VanDerKarr in Columbus is a pioneer of drug court judges in Ohio and the Opiate Extension Program (OEP).¹²¹ He dismisses the heroin charges, allowing the user to plead to a misdemeanor on contingency that the individual stays in the drug court program, complies with drug testing requirements and stays clean for two years.¹²²

The approach of drug courts is very different from traditional courts, and seems to have a different goal than when prosecutors charge an overdosing addict with internal possession of heroin.¹²³ Internal possession of heroin is when an individual possesses heroin by having it in his or her system, thereby “possessing” the drug.¹²⁴ Because prosecutors have discretion, it is possible, though not common, for prosecutors to charge someone who overdosed with possession.¹²⁵ For many, the charges add up and they receive lengthy sentences because of their addictions.¹²⁶ Even if the sentence includes probation, the criminal record follows the addicts, hindering their chances of being able to find a job or further their education.¹²⁷

¹¹⁶ Seelye, *supra* note 22; *see also* Ohio Rev. Code § 4729.44; *see also* Ohio Admin. Code R. 4729-5-39 (the person who overdosed must receive a referral for treatment within thirty days).

¹¹⁷ NATION CONFERENCE OF STATE LEGISLATURES, *supra* note 106.

¹¹⁸ *Id.*

¹¹⁹ Whitaker, *supra* note 50; O’Grady, *supra* note 34.

¹²⁰ Whitaker, *supra* note 50.

¹²¹ *Id.*

¹²² *Id.*; O’Grady, *supra* note 34.

¹²³ *Id.*

¹²⁴ Whitaker, *supra* note 50.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ O’Grady, *supra* note 34.

D. An Introduction to the case of National Federation of Independent Business v. Sebelius.

The seminal case on health care coverage in the United States was decided by the United States Supreme Court in 2012. There were several issues considered in this case, and the Court was seeking to determine whether or not Congress had the constitutional authority, under the Affordable Care Act, to enact the challenged provisions: the individual mandate and the Medicaid expansion provision.¹²⁸ Each issue was analyzed separately and in a different section.¹²⁹ The issue relevant to this Note is the issue regarding the individual mandate. The individual mandate must be analyzed in conjunction with the constitutional authority of Congress's enumerated powers: specifically, through the lenses of the Commerce Clause,¹³⁰ the Necessary and Proper Clause,¹³¹ and the Taxing and Spending Clause.¹³² Each of these clauses are set forth in the enumerated powers of Congress, found in Article I, Section 8 of the Constitution.¹³³

Congress enacted the Patient Protection and Affordable Care Act in 2010, with the purpose of increasing the number of Americans covered by health insurance and decreasing the cost of health care.¹³⁴ This included an individual mandate that required Americans to maintain "minimum essential" insurance coverage.¹³⁵ The provision also stated that a fine would be imposed on those who did not purchase the minimum coverage.¹³⁶ This fine was called the "shared responsibility payment."¹³⁷ Although the Court held that this was unconstitutional because it exceeded Congress's authority under the Commerce Clause¹³⁸ and the individual mandate was

¹²⁸ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2571–72 (2012).

¹²⁹ *Id.*

¹³⁰ U.S. CONST. art. I, § 8, cl. 3 (Congress has the authority to "regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."); *see Sebelius*, 132 S. Ct. at 2571–72.

¹³¹ U.S. CONST. art. I, § 8, cl. 18 (Congress has the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.")

¹³² U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and exchanges, to pay the debts and provide for the common defense and general welfare of the United States.")

¹³³ U.S. CONST. art. I, § 8.

¹³⁴ *Sebelius*, 132 S. Ct. at 2580.

¹³⁵ 26 U.S.C. § 5000A (2010).

¹³⁶ *Id.* at § 5000A(b)(1).

¹³⁷ *Id.*

¹³⁸ *See Sebelius*, 132 S. Ct. at 2591.

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not necessary and proper,¹³⁹ the individual mandate, nonetheless, was a tax that was within Congressional taxing power.¹⁴⁰

The *Sebelius* analysis about the individual mandate is relevant to this Note because there are similarities, which will be discussed in Part III, between the individual mandate and the mandate that this Note proposes. Therefore, the analysis can be logically applied in this situation.

ANALYSIS

All of the steps and actions that both the federal and state governments have taken to combat the opioid epidemic have had the same “Band-Aid effect.” Federal, state, and local governments have all taken steps to combat the heroin epidemic. More specifically, each has tried enacting legislation to make Narcan more available, which has saved some lives but is not getting at the root of the problem. As Mark Nowak said, “It is not a morning after pill.”¹⁴¹ Enacting stricter regulations on prescribing opiate pain medication is a better attempt to get to the root of the problem; however, individuals are already addicted and are looking elsewhere for substances to satisfy their addictions. Attempts to fight this battle are not working, and it is time a new solution is proposed.

When doctors initially began over-prescribing pain medication, some people innocently got addicted as an unintended consequence of trying to manage and control their pain. Others took the drugs recreationally but also became addicted because the drugs were so easily obtainable. Many state legislatures then decided to step in and tightened pain medication laws in an effort to reverse the problem of increased opioid overdoses. Making the drugs more difficult to access and cutting down on “doctor shopping” however, caused the addicted individuals to seek the high in a different form: heroin.

When opioid pain medication became harder for addicts to access and heroin use surged as a result, lawmakers grappled with finding a quick solution to the problem. Increasing access to Narcan is one of these efforts that, in theory, has good intentions and a possible solution. In practice, however, it merely has the Band-Aid effect. As discussed in Part II of this Note, pain medication affects the way the user perceives pain, but it does not actually heal the injury that is the source of that pain. In this aspect naloxone and pain medication have similar goals: to fix the immediate side-effect resulting from the problem without curing or treating the symptoms, and thus, not actually solving the problem.

A. *The Solution: A Congressional Mandate.*

This epidemic is crippling our entire country. It is time that Congress takes action to get to the root of the problem. Attempts have been made, but none of them have resulted in a positive change that is imperative to reversing the epidemic. Although lives have been saved by Narcan, and that is a positive effect, that is a temporary solution that has not had a substantial impact on the larger addiction problem as a

¹³⁹ See *Sebelius*, 132 S. Ct. at 2592.

¹⁴⁰ See *Sebelius*, 132 S. Ct. at 2594.

¹⁴¹ Mark Nowak, *A Hopeful Solution... But Not a Saving Grace: Narcan “It’s Not a Morning After Pill,”* BRYLIN BEHAVIORAL HEALTH SYSTEM (June 2, 2015), <https://www.brylin.com/narcan-addiction-treatment-part2/>.

whole. A Congressional mandate on insurance companies to cover rehabilitation costs for opiate and opioid addiction and for rehabilitation facilities to accept insurance under the Affordable Care Act is one solution that will work. This national solution is the only way to get to the crux of the epidemic and reverse some of the terrible addictions that developed from access to painkillers. State governments have given their best efforts in attempting to enact legislation to fight the problem, but despite these efforts, as Section II of this Note showed, the number of people turning to heroin and then overdosing is still increasing.¹⁴²

In order to keep the mandate narrow in scope, it will only be for opioid and opiate-related addictions, meaning rehabilitation for people who have developed an addiction to pain medication or heroin. Additionally, the rehabilitation will be for those whose addictions to pain medication developed with or without a legitimate prescription from a physician. The reason the mandate must extend to those currently addicted to opioid pain medication is because it is an effort to prevent those individuals from turning to heroin and developing an opiate addiction. The narrow scope of the mandate is intentional. It only extends to opioid and opiate-related addictions because that is the most urgent and debilitating drug epidemic in our country at this time. There are other drug and alcohol-related issues and addictions that plague the country, however, they do not amount to the vast spread of opiate and opioids.¹⁴³

Like the individual mandate in the Affordable Care Act, Congress would need to impose a penalty tax on the companies and facilities that refuse to follow the congressional mandate. The revenue that the Government would collect from this tax should then be distributed to state governments to supplement their funding for educating children through school on the dangers of opiates and other drugs.

Article I, Section 8 of the Constitution establishes the enumerated powers of Congress.¹⁴⁴ This is one of the most important sections of the Constitution, if not the most important, because it specifies everything that Congress can do within the limitations of the Constitution. The remainder of this analysis will discuss a few of Congress's enumerated powers to ultimately determine that Congress has the authority to mandate insurance companies to provide coverage to those seeking drug rehabilitation and to require rehabilitation facilities to accept that insurance coverage.

Critics might argue that this mandate will not work because too many Americans are uninsured and therefore will not benefit from the mandate. In 2015, even with the implementation of the Affordable Care Act, there were 28.5 million non-elderly Americans living without insurance.¹⁴⁵ This was thirteen million fewer than the number of uninsured Americans in 2013.¹⁴⁶ Although an increasing number of Americans are covered by a health insurance policy, there is still a large population who will not benefit from the mandate because they are not insured.

¹⁴² *Supra* notes 58-69.

¹⁴³ Perhaps if this mandate is successful with opioid and opiate addiction, Congress will consider extending it for other drug addictions or alcohol addiction.

¹⁴⁴ U.S. CONST. art. I, § 8.

¹⁴⁵ *Key Facts About the Uninsured Population*, KAISER FAMILY FOUNDATION (Sep. 29, 2016), <http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/>.

¹⁴⁶ *Id.*

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This counterargument, although valid, fails to recognize that most Americans are insured. There are almost 325 million Americans.¹⁴⁷ If there are about twenty-nine million uninsured Americans, then most of the people in the United States have some kind of health insurance coverage. Through the expansions of the Affordable Care Act, young adults can stay on their parents' insurance until the age of twenty-six.¹⁴⁸ As stated in Section II of this Note, young adults are arguably among the most at-risk population for developing an addiction to heroin at this time. Therefore, most Americans will fall within guidelines of the mandate because most do have some kind of health insurance coverage and will be able to benefit from the requirements imposed on the insurance companies and rehabilitation facilities.

Unfortunately it is unrealistic to find a solution that will benefit every single American. Thus, it is best to create a solution that will benefit the greatest number of Americans. While this mandate does exclude the population of people without insurance, it is a way to provide a solution to all others who do have insurance. It has already been established that a majority of Americans do have some type of health care coverage. Therefore, insured Americans, if addicted to opioids or opiates, can seek recovery through the mandate. There have already been several different attempts to combat this issue. This mandate is the best to help a large portion of those who are struggling and suffering from this disease.

B. Congress has the authority to make this mandate, but its authority does not stem from the Commerce Clause.

One of the reasons that the Government has such a vested interest in the drug epidemic, as previously stated in Section II of this Note, is because it has a negative impact on the economy.¹⁴⁹ Decreased productivity is among one of the most serious economic-related consequences of the problem.¹⁵⁰ Many Americans will likely struggle to positively contribute to the economy as long as they continue to rely on prescription painkillers or turn to heroin to obtain a more intense high. Furthermore, Narcan is expensive. State governments providing funding as an attempt to save as many lives as possible from overdoses by equipping not only paramedics with the antidote, but also law enforcement, school nurses, and firefighters. Based on these reasons, the Government has a strong economic interest in combatting this epidemic.

In the *Sebelius* case, one issue before the Court was whether Congress has the power, under the Commerce Clause, to mandate that people buy health insurance. Ultimately, the Court held that it is unconstitutional under the Commerce Clause to

¹⁴⁷ *United States Population, Live*, WORLDOMETERS, <http://www.worldometers.info/world-population/us-population/>. (last visited Oct. 26, 2017).

¹⁴⁸ PATIENT PROTECTION AND AFFORDABLE CARE ACT, PL 111-148 (March 23, 2010); 42 USCA § 300gg-14(a):

A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child (who is not married) until the child turns 26 years of age. Nothing in this section shall require a health plan or a health insurance issuer described in the preceding sentence to make coverage available for a child of a child receiving dependent coverage.

¹⁴⁹ *See supra* notes 39-50 and accompanying text.

¹⁵⁰ *Id.*

mandate that people buy health insurance.¹⁵¹ In reaching this conclusion, the Court performed a Commerce Clause analysis based on Congress's power to regulate commerce.¹⁵²

The Commerce Clause test that is currently used is the "Substantial Effects Test" that was set forth in *United States v. Lopez*.¹⁵³ *Lopez* marked the end of an era that vastly expanded the Commerce Clause.¹⁵⁴ During the New Deal Commerce Clause era, there was a wide expansion from what Congress was permitted to regulate under the Clause during the *Lochner* Court era.¹⁵⁵

Under the Substantial Effects Test, the first consideration is whether the activity Congress is trying to regulate is an economic activity. An activity is economic when it is related to production and consumption of a commodity. Current precedent considering this same question referred to "economic" and "activity" together because there was a preexisting activity that Congress was trying to regulate.¹⁵⁶ However, the distinguishing point in *Sebelius* is that there was no preexisting activity: the individual mandate did not regulate any existing activity.¹⁵⁷ Instead, Congress was trying to mandate an activity and compel "individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."¹⁵⁸ The Court explained that health insurance and health care consumption, although inherently integrated, are different things involving different transitions and providers.¹⁵⁹ The Court stated:

The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'¹⁶⁰

¹⁵¹ *Nat'l. Fed'n. of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2571–72 (2012).

¹⁵² U.S. CONST. art. I, § 8, cl. 3.

¹⁵³ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁵⁴ Lainie Ruthkow, JD, PhD, MPH and Jon S. Vernick, JD, MPH, *The U.S. Constitution's Commerce Clause, the Supreme Court, and Public Health*, US National Library of Medicine National Institutes of Health (Sep.-Oct. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3151195/>.

¹⁵⁵ *Id.*; see also Editorial Team, *The Supreme Court and Economic Freedom*, CHARLES KOCH INSTITUTE (July 10, 2012), <https://www.charleskochinstitute.org/the-supreme-court-and-economic-freedom/> (The *Lochner* Era was during the years between 1897-1937 and was characterized by "decisions striking down legislation or regulations that infringed on economic freedom.").

¹⁵⁶ *Sebelius*, 132 S. Ct. at 2591.

¹⁵⁷ *Id.* at 2587.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2591.

¹⁶⁰ *Id.*

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Congress has limited powers, as expressed by the Framers of the Constitution.¹⁶¹ The limits of Congress do not allow it regulate inactivity. The Constitution gives Congress the power to regulate commerce, not to compel it.¹⁶² Therefore, as the Court in *Sebelius* held, “the individual mandate thus cannot be sustained under Congress’s power to ‘regulate Commerce.’”¹⁶³

The individual mandate, which would regulate inactivity, was deemed unconstitutional. A Congressional mandate for insurance companies to cover rehabilitation and for rehabilitation facilities to accept insurance would also be considered an attempt to regulate inactivity. Therefore, mandating insurance companies to cover rehabilitation services and facilities to accept insurance would be unconstitutional, under the same analysis. The Court recognized that there is no real difference between activity and inactivity because both can have considerable effects on the economy and commerce.¹⁶⁴ The Court, however, also emphasized the difference between regulating commerce and compelling it. The Framers of the Constitution only gave Congress the authority to do the former.¹⁶⁵ The Court explained that compelling people to buy insurance was an attempt to regulate inactivity because choosing not to purchase insurance is not an activity. It is not an affirmative action that an individual is taking.¹⁶⁶

Although the addiction epidemic and subsequent treatment of that epidemic directly relates to the economy and commerce, “economic” and “activity” must still be considered separately. Congress would be compelling insurance companies and rehabilitation facilities to participate in the fight against the drug problem, which in turn, happens to be related to the economy. Choosing not to comply with the mandate would be precisely the type of inactivity analyzed in *Sebelius* of refusing to purchase health insurance. Compelling action is exactly what the *Sebelius* Court found was unconstitutional under the Commerce Clause. Under *Sebelius*, Congress still does not have the authority to regulate inactivity, meaning Congress does not have the authority to enact a statute mandating insurance coverage of rehabilitation programs, nor does it have the authority to require that rehabilitation facilities accept insurance.

Some will argue that Congress does have the authority under the Commerce Clause to make this mandate because the mandate would have an effect on interstate commerce and that covering rehabilitation costs or accepting health insurance is an activity. As already stated, one of the major reasons Congress has a vested interest in this epidemic is because of the profound impact it has had already on our economy.

The people arguing for Commerce Clause regulation in this situation do so because they believe regulating rehabilitation is an economic activity. It is related to production and consumption of a commodity. The commodity is a variety of consumable goods. Production is affected when company workers are addicted to and affected by the crippling effects of heroin and opioids. Furthermore,

¹⁶¹ U.S. CONST. art. I, § 8.

¹⁶² *Id.* at 3.

¹⁶³ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2573 (2012).

¹⁶⁴ *Id.* at 2589.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

consumption is negatively affected because those who are addicted cannot contribute regularly to the economy, as a consumer should, because much of the money many addicts are able to put together goes toward satisfying their addiction, not to contributing to society as a consumer.

Next, this argument claims that Congress would not be regulating an inactivity because insurance companies are actively participating in commerce due to the nature of their business. Furthermore, rehabilitation facilities do not operate independently of commerce. Some provide meals for their patients or have instructors come in to work with the patients. Monetary exchanges are essential to operating one of these facilities.

This argument, however, fails under *Sebelius*. This mandate is still driving insurance companies and rehabilitation facilities to start acting in a way in which they are not already acting. Although the arguments about how addiction affects the economy are valid, that does not mean that Congress has Constitutional authority simply because the economy is affected in some way. The insurance companies and rehabilitation facilities are not all currently not engaged in the activity that Congress wants to regulate, and therefore, the coverage of rehabilitation and the acceptance of that coverage cannot be deemed an “economic activity.” Therefore, because it qualifies as inactivity under *Sebelius*, and because *Sebelius* is still good law, Congress does not have the authority to make this mandate under the Commerce Clause.

C. Congress has the authority to mandate opioid and opiate rehabilitation under the Necessary and Proper Clause.

Congress is vested with the authority to “make all Laws which shall be necessary and proper for carrying into Execution.”¹⁶⁷ This clause gives Congress the power to act on its implied powers that are related to, but not specifically established through the enumerated powers. The provision gives Congress broad authority in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁶⁸ In determining whether Congressional action is Constitutional, it must be considered separately whether such action is both necessary and proper.

The Constitution works as an outline of America’s government and laws, stating only the general principles, meaning it does not include every detail. Including every detail within the Constitution would not work, as the government and laws are ever-changing. Therefore, the enumerated powers are somewhat vague. There are implied powers that are related to the enumerated powers, which are explicitly spelled out. The implied powers may be deduced from the details contained in the Constitution using logical reasoning. The enumerated powers do not, however, specify how Congress may go about effectuating those ends. If there are ends Congress may achieve, then there must be means in order to reach those ends.

When analyzing legislative action under judicial review, first, the Court will consider whether the action or statute is necessary. Both *McCulloch v. State*¹⁶⁹ and

¹⁶⁷ U.S. CONST. art. I, § 8, cl. 18.

¹⁶⁸ *McCulloch v. State*, 17 U.S. 316, 421 (1819).

¹⁶⁹ *Id.*

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*United States v. Comstock*¹⁷⁰ held that “necessary” meant “convenient” or “useful.”¹⁷¹ This “useful” definition provides Congress with flexibility in order to keep up with an ever-changing nation. The Constitution should be interpreted expansively because the details are not included. *McCulloch* introduced the plainly adaptive test for determining this element.¹⁷² The plainly adaptive test requires that the statute is rationally related to the implementation of an enumerated power or legitimate end.¹⁷³ If the statute is rationally related to the implementation of the enumerated power or legitimate end, it will be found to be necessary.

If a statute is found to be necessary, next, the Court must consider whether the statute is proper. If it is proper, then it is appropriate.¹⁷⁴ *Comstock* further explained that in order for it to be proper, it must be a modest addition to longstanding statutes, it must account for state interests, and it must be narrow in scope.¹⁷⁵ These factors contribute to a balancing test and is an attempt to limit federal power, making sure that it is not expanded too broadly. Relating back to *Sebelius*, the Court determined that the individual mandate could not be sustained under the Necessary and Proper Clause because in other instances where the Court did determine Congress had authority under the clause, its authority was derived from an enumerated power.¹⁷⁶

In the instance of creating regulation to solve the problem of opiate and heroin addiction, the mandate for rehabilitation is necessary and proper. The legitimate end would be Congress ultimately regulating interstate commerce. This is one of the enumerated powers of Congress. The enumerated power of regulating commerce must be read here in an expansive and broad way, granting flexibility to Congress.¹⁷⁷ When the Framers wrote the Constitution, they were not able to foresee the extreme addiction problem that we have in our country today and therefore did not include taking such action within the Constitution.¹⁷⁸ Thus, creating a solution to fix the opioid epidemic is both a necessary and proper action of Congress.

¹⁷⁰ *United States v. Comstock*, 560 U.S. 126, 133 (1965).

¹⁷¹ *Id.*

¹⁷² *McCulloch*, 17 U.S. at 316.

¹⁷³ *McCulloch*, 17 U.S. at 421.

¹⁷⁴ *Id.* at 316

¹⁷⁵ *Comstock*, 560 U.S. at 146.

¹⁷⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

¹⁷⁷ *United States v. Darby*, 312 U.S. 100, 118–19, (1941). (“While manufacture is not itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”); see also *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824) (The power to regulate commerce is the power to “prescribe the rule by which commerce is to be governed.”).

¹⁷⁸ *McCulloch*, 17 U.S. at 385:

It was impossible for the framers of the constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances, in such an unexampled state of political societies of ours, for ever changing and for ever improving.

This is relevant to the topic at and because the constitution must be flexible to allow Congress to make changes to the ever-changing society that we live in. If the Framers

The recommended mandate is plainly adapted to further this end because it would be imposing a law to help combat addiction that would ultimately positively affect the economy. The economy would be positively affected because there would be increased productivity from those previously addicted. This would in turn lead to less poverty among addicts who currently spend much of what money they can obtain on drugs to satisfy their addiction. These people would then ideally be contributing to the economy by participating in the workforce and consuming products for sale. Therefore, the mandate is necessary.

The mandate is also proper. It is proper and appropriate because it is a modest addition to a longstanding statute, it accounts for state interests, and it is narrow in scope. The mandate is narrow in scope because it is specifically designed to help those struggling with an opiate-related addiction. The mandate would not be expanded to those fighting other kinds of addictions, mostly because the opioid addictions are what is crippling our nation the most at this time. It is a big enough problem that state legislators have been proposing several different solutions, but none of them have been very effective. The government already has demonstrated that it is interested in combatting this problem. Furthermore, the proposed mandate accounts for state interests. It states that the funds raised by the penalty tax would be distributed back into the state governments in order to help fund their educational programs about the dangers of drug abuse. Finally, it would be a modest addition to the Controlled Substance Act.¹⁷⁹ The Controlled Substance Act already seeks to limit and impose laws regarding controlled substances in the United States.¹⁸⁰ This statute makes it unlawful to possess and sell controlled substances, regulating different classes of drugs differently.¹⁸¹ Because heroin and other opioid medications are already controlled, adding a mandate to treat people with addictions is nothing more than a modest addition to existing longtime statutes.

The mandate is both necessary and proper as is required by the test, and it relates back to implied powers within the commerce clause. Although under the Commerce Clause Congress cannot regulate inactivity, it does have the authority to make this mandate because it is necessary and proper.

Critics will counter the argument that the mandate is necessary and proper by arguing that ultimately, interstate commerce will not positively be affected by this mandate because rehabilitation is not actually effective for heroin addicts. Many will worry that all of this money will be invested into hopefully combatting the problem, but that money will be wasted because once the individuals are released from their program, they will be likely to relapse.

This counterargument, however, does not consider the fact that with this mandate, addicts will be placed into treatment programs that are appropriate for the extent and nature of their problem. Most people who enter and remain in a treatment program will stop using drugs and return to being productive members of society.¹⁸²

could not foresee the heroin epidemic, and did not provide for it in the Constitution, that does not mean that Congress is prohibited from taking action to correct it now.

¹⁷⁹ 21 U.S.C.A. Ch. 13 § 811 (West 2015).

¹⁸⁰ *Id.*

¹⁸¹ 21 U.S.C.A. Ch. 13 § 812 (West 2012). (Heroin is a schedule I controlled substance).

¹⁸² *Principles of Drug Addiction Treatment: A Research-Based Guide (Third Edition)*, NATIONAL INSTITUTE ON DRUG ABUSE, <https://www.drugabuse.gov/publications/principles->

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By placing people into the correct type of rehabilitation program that their individual addiction requires, the chances for success will increase, and the instances of relapse will decrease.¹⁸³

D. Congress has the authority under the Taxing and Spending Clause to mandate insurance companies to cover rehabilitation and to mandate rehabilitation facilities to accept health insurance.

The first of Congress's listed enumerated powers is the power to lay and collect taxes and to "provide for the common defense and general welfare of the United States."¹⁸⁴ This is arguably the most important enumerated power because it is listed first. The Constitution is set up like a great outline, and therefore places the most important aspects first. Furthermore, all statutes should be read, if such a way exists, in a way to save them from being deemed unconstitutional.¹⁸⁵

A second issue in *Sebelius* dealt with whether Congress has the power, under the Taxing and Spending Clause, to impose a penalty on people who do not buy health insurance. The Court held that it was Constitutional for Congress to impose this penalty. The main question that the Court had to determine was whether it can actually be a tax on people if it is penalizing an inaction. In other words, the Court was tasked with sorting out the difference between a penalty and a tax. In general, the primary purpose for the government to impose a tax is to collect revenue from its citizens. Within this, Congress can regulate behavior through imposing taxes. The primary purpose of the penalty embedded within the Affordable Care Act is to get people to buy health insurance.

The Government presented the penalty to the Court, and asked the Court to read it as a tax.¹⁸⁶ Its argument is meant to prove that the "mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes."¹⁸⁷ That is, a tax for those who choose not to purchase the insurance. The penalty fee is to be paid with other taxes, which the Government justification meant that there is a condition that triggers the tax.¹⁸⁸ The condition is not purchasing health insurance, and the tax is payment of the penalty to the IRS.

drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/how-effective-drug-addiction-treatment. See also Stuart Wolfpert, *People can Overcome Their Addictions, but Not Quickly, UCLA Psychologist Says*, UCLA NEWSROOM (Sept. 07, 2010), <http://newsroom.ucla.edu/releases/people-can-overcome-their-addictions-170880>, stating many times people are put into thirty-day programs because that is all that they can afford, and these types of programs are almost never effective, according to Adi Jaffe, a former addict who is completing his Ph.D. with a specialization in addiction.

¹⁸³ Wolfpert, *supra* note 182.

¹⁸⁴ U.S. CONST. art. I, § 8, cl. 1.

¹⁸⁵ *Hooper v. California*, 155 U.S. 648, 657 (1895).

¹⁸⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

¹⁸⁷ *Id.*

¹⁸⁸ Requirement to Maintain Minimum Essential Coverage, 26 U.S.C. § 5000A(b); (b)(1) ("If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or

The Court ultimately had three reasons for determining the shared responsibility payment is a tax: the amount due would be less than the cost of insurance, there is no Scierter requirement, and the IRS would collect the payment, just like other taxes.¹⁸⁹ The Government would collect revenue from the individual mandate set forth in the Affordable Care Act. Through the reasoning and holding of *Sebelius*, the Court upheld the constitutionality of Congress taxing inactivity. This was a broad reading and understanding of Congress's taxing power by the Court.

In addressing the mandate of insurance companies and rehabilitation facilities, the government would similarly be collecting revenue from the penalty-tax imposed on companies and facilities that refuse to abide by the requirement. As set forth in the Taxing Clause, Congress has the authority to provide for the general welfare of the United States. This proposed mandate is an effort to do just that: to provide for the general welfare of the United States. The country is dealing with an epidemic that is only getting worse. The mandate is a way for Congress to exercise its authority and implement legislation under the Affordable Care Act to provide for the general welfare. Although this is taxing inactivity, the *Sebelius* Court determined that the taxing power is a broad power that Congress enjoys under the Taxing and Spending Clause. Therefore, the mandate will be Constitutional.

CONCLUSION

Congress has the constitutional and moral authority under the Affordable Care Act and *Sebelius* to mandate the coverage of drug rehabilitation for opioid and opiate addiction by insurance companies and the acceptance of this coverage by rehabilitation facilities. The authority is derived from the Necessary and Proper Clause as well as the Taxing and Spending Clause, and specifically under the taxing power. Many people on the state and local levels have attempted to tackle the problem through various solutions, most notably with the increased availability of naloxone. However, despite best efforts, the attempts have not been enough. People are still dying. People are still experimenting or turning to heroin, despite being aware of the devastating effects that it has had on others. A Congressional mandate upon insurance companies and rehabilitation facilities is the only way to stop applying a Band-Aid to the problem instead of mending the root of the problem. The epidemic exists, and although continuing to educate young Americans about the dangers in hopes that they will not turn to the crippling drug is important, it falls short of the mark. We have too many people in our country who are unable to beat the horrifying addiction they struggle with unless the federal government steps in to help decimate this epidemic.

more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).").

¹⁸⁹ *Sebelius*, 132 S. Ct. at 2593.