IN THE SUPREME COURT OF OHIO

STATE OF OHIO *EX REL.* LEADINGAGE OHIO, *et al.,*	)	CASE NO. 2024-1075
Plaintiffs/Relators,	)	ORIGINAL ACTION IN MANDAMUS
v.	)	
THE OHIO DEPARTMENT OF MEDICAID, *et al.,*	)	
Defendants/Respondents.	)	

RELATORS' REPLY BRIEF

BARNES & THORNBURG LLP
Counsel of Record:
David Paragas (0043908)
41 S. High Street, Suite 3300
Columbus, Ohio 43215
Phone: (614) 628-1407
David.Paragas@btlaw.com

Kian Hudson (admitted *pro hac vice*)
11 South Meridian Street
Indianapolis, Indiana 46204
Phone: (317) 229-3111
Kian.Hudson@btlaw.com

ROLF GOFFMAN MARTIN LANG LLP
Aric D. Martin (0065765)
Joseph F. Petros III (0088363)
31105 Bainbridge Road, Suite 4
Cleveland, Ohio 44139
Phone: (216) 514-1100
Fax: (216) 626-7623
Martin@RolfLaw.com
Petros@RolfLaw.com

Attorneys for Relators

FROST BROWN TODD LLP
Counsel of Record:
Frank J. Reed
One Columbus, Suite 2300
10 West Broad Street
Columbus, OH 43215
freed@fbtlaw.com

Ryan W. Goellner
Nathaniel L. Truitt
3300 Great American Tower
301 East Fourth Street, Suite 3300
Cincinnati, OH 45202
rgoellner@fbtlaw.com
ntruitt@fbtlaw.com

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Other Authorities [cont'd]

INTRODUCTION

The ***admissions*** in Respondents' merit brief alone suffice to resolve this case. Respondents' brief does not dispute that:

- "Rate for direct care costs" (hereinafter, "Rate") and "cost per case-mix unit" (hereinafter, "Price") are ***defined statutory terms that have different meanings***. R.C. 5165.19; Respondents' Br. at 4–5.
- A nursing facility's Rate is the ***product*** of the facility's peer group's Price and the facility's "case-mix score." R.C. 5165.19; Respondents' Br. at 4–5.
- Each nursing facility's Rate ***does*** change as a result of rebasing. R.C. 5165.19; Respondents' Br. at 4–5.
- The 2023 Budget Legislation ***requires*** the Ohio Department of Medicaid ("ODM") to calculate the total funding available for quality incentive payments by taking "sixty per cent of the per diem amount by which ***the nursing facility's rate for direct care costs*** … changed as a result of the rebasing." R.C. 5165.26(E)(1)(a) (emphasis added); Respondents' Br. at 14.

Despite these undisputed points, Respondents admit, on the very first page of their brief, that ODM is only including in the quality incentive pool "60% of the amount by which each nursing facility's *Price* (cost per case-mix unit) had changed with the 2024–25 biennial budget." Respondents' Br. at 1 (emphasis in original). They thus concede that they are refusing to implement the plain text of the Budget Legislation. Rather than dispute this fact, their brief attempts to distract the Court with new, extraneous arguments (addressed below) that are unsupported, are flat-out wrong, and simply provide no legal justification for deviating from the unambiguous statutory text.

Respondents' brief confirms that their opposition amounts to nothing more than displeasure with the fact that the Budget Legislation requires them to pay high-quality nursing facilities larger incentives than Respondents had erroneously projected. They are refusing to follow the law as written because they mistakenly assumed they would be paying less than what the law requires. For the sake of the rule of law, the separation of powers, and Ohio's nursing facility residents, the Court should reject Respondents' insufficient excuses and order them to follow the law.

ARGUMENT

I. The Statute Clearly Requires ODM to Take 60% of Each Nursing Facility's "Rate for Direct Care Costs"—Not 60% of Each Peer Group's "Price"—in Calculating the "Total Amount to Be Spent on Quality Incentive Payments."

The Ohio General Assembly has expressly provided that ODM "***shall*** determine each nursing facility's per medicaid day quality incentive payment rate" by, among other things, calculating 60% of the amount by which each "***nursing facility's rate for direct care costs … changed as a result of the rebasing***" that ODM conducted in 2023 to update its cost data for nursing facilities. R.C. 5165.26(B), (E)(1)(a) (emphases added). This case simply requires the Court to answer a single question of statutory interpretation about this provision: Does "Rate" mean "Rate" (as Relators contend), or does it instead mean "Price" (as Respondents contend)?

This question is so straightforward as to answer itself. "When the text of the statute in question is plain and unambiguous, as is the case here, [the Court] give[s] effect to the legislature's intent by simply applying the law as written." *State v. Faggs*, 159 Ohio St. 3d 420, 2020-Ohio-523, 151 N.E.3d 593, 596 (citation omitted). "The same goes for statutorily defined terms." *Id.* (quoting *Terteling Bros., Inc. v. Glander*, 151 Ohio St. 236, 85 N.E.2d 379 (1949), paragraph one of the syllabus for proposition that "Where a statute defines terms used therein which are applicable to the subject matter affected by the legislation, such definition controls in the application of the statute"). Here, the General Assembly ***specifically used a defined term*** ("Rate") ***instead of using a different defined term*** ("Price"). That explicit legislative choice conclusively resolves this case.

Unable to respond to this clear-cut point, Respondents attempt to confuse the Court with extraneous detail and unnecessary arithmetic: The question here is no "statutory riddle" and does not require the Court to untangle a "complex statutory scheme[]" or conduct any calculations itself. Respondents' Br. at 2. It merely calls for the Court to order ODM to apply the statute as written.

Indeed, Respondents' brief confirms how straightforward this case is. Respondents' brief does not dispute that the Budget Legislation's formula for calculating quality incentive payments is mandatory, and it concedes that Rate and Price are ***defined terms with different meanings***. *See* Respondents' Br. at 4–5 (reciting statutory definitions). Respondents also acknowledge that they are ***not*** "allocat[ing] to quality incentive payments 60% of a facility's increase in their per Medicaid day rate for direct care costs" (*i.e.*, what the statute expressly requires), but instead are allocating 60% of the increase in the three peer groups' Prices. Respondents' Br. at 18–19.

Remarkably, Respondents do not attempt to reconcile their approach with the General Assembly's use of the defined term "Rate." Nor do they attempt to explain why the legislature referred to "Rate" instead of "Price"—a term section 5165.26 does not mention at all. Rather, Respondents insist the Court should disregard the legislature's chosen language based on the notion that "Rebasing changes only one thing— … the Price." Respondents' Br. at 18. That notion, however, is plainly false: As Relators explained in their opening merit brief (at 14), each facility's Rate is defined as the Price multiplied by the facility's case-mix score, which means that each nursing facility's Rate will, as a matter of simple arithmetic, ***automatically*** change due to a rebasing-caused redetermination of its peer group's Price. Respondents concede that "a facility's **rate for direct care costs** = the peer group's **Price** x the facility's **case-mix score**," and they ***do not dispute*** that this means each nursing facility's Rate will in fact change as a result of rebasing. Respondents' Br. at 4 (emphases in original; citing R.C. 5165.19(A)(1)). It is therefore not Relators who are ignoring the fact that the statute specifies 60% of the amount by which each facility's ***Rate*** changes "as a result of rebasing"—rather, it is Respondents who are ignoring the fact that each facility's Rate does, in fact, change "as a result of rebasing."

Further, as Relators' opening merit brief explained (at 13), Respondents' error in using the change in Price is underscored by the fact that the Price is a single number that applies to all nursing facilities in a given peer group. The statute the General Assembly enacted, in contrast, requires ODM to "[d]etermine for **each** nursing facility … sixty per cent of the per diem amount by which **the nursing facility's** rate for direct care costs … changed." R.C. 5165.26(E)(1) (emphasis added). If the General Assembly intended ODM to use the peer group Price (as Respondents claim), it would not have required ODM to perform separate calculations for "each facility." Yet again, Respondents ***do not dispute*** this point.

Moreover, in addition to contravening the express statutory text, Respondents' approach flouts the General Assembly's intent to allocate a greater portion of the rebasing-caused increase in nursing-facility funding to quality incentive payments ***without affecting the total amount of funding***. As Respondents acknowledge, "the new statute splits that increase 60/40: 60% of the increase goes to the quality incentive pool, and 40% of the increase goes to the new base rate for direct care costs." Respondents' Br. at 8. In other words, the 60/40 split is supposed to be budget neutral. And under Relators' plain-text approach, that is precisely what the statute does. The 60% allocated to the quality incentive pool plus the 40% maintained in facilities' base rates adds up to 100% of the increase in funding resulting from rebasing. Basic arithmetic dictates that calculating 60% and 40% of the amount by which each nursing facility's Rate changed first requires a determination of the full 100% amount by which the Rate changed. Respondents are skipping this very important basic step in their calculations: They are thus including 40% of one thing (the "Rate") in each facility's base rate, and 60% of another thing (the "Price") in the quality incentive pool. This produces a disjointed, non-budget-neutral result whereby the 60/40 split allocating 60% of funds to the quality incentive pool actually ***decreases*** the total amount of funding.

In sum, Respondents are refusing to follow the General Assembly's unambiguous instructions for calculating the amount of quality incentive payments for nursing facilities. Relators have a clear legal right, and Respondents a corresponding legal duty, to ensure these calculations are performed the way the General Assembly expressly requires. For these reasons, and because Respondents do not dispute that Relators lack an adequate remedy at law, the Court should issue a peremptory writ of mandamus compelling ODM to follow the law the General Assembly enacted.

II. The Secondary Arguments in Respondents' Brief Are Irrelevant and Incorrect.

Unable to dispute the plain language of the Budget Legislation, Respondents' merit brief raises several arguments that they did not make previously in their rate reconsideration response—and that are therefore forfeited. *See, e.g., In re Application of Duke Energy Ohio, Inc.*, 148 Ohio St. 3d 510, 2016-Ohio-7535, 71 N.E.3d 997, ¶ 24 (declining to "accept appellate counsel's post hoc rationalizations" that relied on arguments not made in prior administrative proceedings); *Griffith v. Ohio Bureau of Emp. Servs.*, 1984 WL 6397, at *5 (Ohio Ct. App. Dec. 27, 1984) (noting courts should limit their "review to the agency's ground for denial").

Regardless, Respondents' arguments are also entirely unsupported, wrong, and irrelevant to the statutory interpretation issue before the Court. Respondents' arguments rely on purported affidavits that have the same fatal flaw for which this Court *sua sponte* dismissed Relators' first complaint: Like Rule 12.02(B)(2) governing affidavits submitted with the complaint, Rule 12.06(A) requires that affidavits submitted in the presentation of evidence "shall be made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit." Respondents' affidavits fail to satisfy this requirement, and the Court should not allow Respondents to submit new affidavits now, at this late juncture, after briefing has been fully completed.

In any event, even if the Court were to consider Respondents' proffered new affidavits, the material therein provides no legitimate excuse for Respondents' refusal to follow the law.

a) Respondents' suggestion of bad incentives is nonsensical and is no reason to violate the statute's plain language.

Respondents' contention that implementing the statute as written would somehow incentivize poorer quality makes no sense. The issue in this lawsuit is the amount of funding that goes into the aggregate quality incentive pool—not the amount that any particular nursing facility is subsequently entitled to receive from that pool. The amount an individual nursing facility receives in quality incentive payments is dependent upon how that facility scores on prescribed quality metrics. The more points it achieves, the higher its quality incentive payment. The bottom 25% of nursing facilities in quality points receive no incentive payment, aside from possibly a small amount if they meet the statutory occupancy standard. Case-mix score plays no part in this facility-specific determination.

Furthermore, to the extent Respondents are saying that higher case-mix scores will result in more funding, that is true regardless of whether 60% is diverted to the quality incentive pool or not. If not for the Budget Legislation's mandate that 60% of the change in Rate go into the quality incentive pool, then higher case-mix scores would result in any additional funding going toward ***every*** nursing facility's base rate—not into the quality incentive pool that is subsequently divided only among the highest-quality nursing facilities. The incentive for individual nursing facilities (especially poorer quality ones) to gin up their case-mix scores is therefore greater *without* the Budget Legislation's 60% mandate. And in any event, it is wholly inappropriate to second-guess such questions of policy and legislative intent—particularly where, as here, the language of the statute is unambiguous. *See Wilson v. Lawrence*, 150 Ohio St. 3d 368, 2017-Ohio-1410, 81 N.E.3d

1242, ¶ 11 ("It is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation.").

b) Respondents' assertion regarding federal financial participation is unsupported, wrong, and inapposite.

Respondents' assertion that no federal matching funds will be available if the Budget Legislation were to be implemented as written is not only entirely unsupported, but demonstrably wrong. Respondents make this conclusory statement without any citation to legal authority or any explanation as to how they arrive at it. Respondents' Br. at 24 (citing Director Aff. at ¶ 26, which in turn cites—nothing).

Indeed, a review of the relevant federal regulations reveals that Respondents' citation-less assertion is patently incorrect. Federal regulations promulgated by the Centers for Medicare & Medicaid Services (CMS) provide "a two year time limit … for a State to claim Federal financial participation in expenditures under State plans approved under…the Social Security Act." 45 C.F.R. § 95.1. Specifically, CMS "will pay a State for a State agency expenditure…if the State files a claim with us for that expenditure within 2 years after the calendar quarter in which the State agency made the expenditure." *Id.* § 95.7. CMS "consider[s] a State agency's expenditure for services…to have been made in the quarter in which any State agency made a payment to the service provider." *Id.* § 95.13(b). CMS additionally provides an exception to this two-year limit for "[a]ny claim resulting from a court-ordered retroactive payment." *Id.* § 95.19(c). Respondents thus have two years from any expenditure made in 2025 to file a claim and obtain federal financial participation. Nothing prevents Respondents from properly applying the Budget Legislation and then filing a claim for federal matching funds.

It is also important to note that the Medicaid State Plan Amendment submitted to and approved by CMS mirrors the language of the Budget Legislation exactly with respect to rebasing

and the calculation of funds for the quality incentive pool. *See* State Plan Amendment # 23-0023 at 001.3, 001.7, 001.18.1.[*] Accordingly, compelling Respondents to apply the Budget Legislation's plain text would likewise be in accordance with the State Plan.

Further, even putting aside all these flaws, Respondents' unsupported assertion regarding federal funding is also entirely irrelevant to the issue at hand. Respondents cite Revised Code Section 5162.06 (at 23–24 of their brief), but that provision simply requires that any "component or aspect of a component of the medicaid program" be eligible for federal funding before it is "implemented." R.C. 5162.06. The issue here is not whether the nursing facility component or quality incentive aspect of that component is eligible for federal funding or should be implemented. Those components obviously are eligible for federal funding and are being implemented. The question is simply whether Respondents are complying with Ohio law. They are not. And their unsupported and unexplained reference to federal funding does not justify their flagrant violation of the law.

c) Respondents' accusation of unclean hands does not excuse Respondents' violation of the statute's plain language.

Finally, Respondents retreat to the "unclean hands" doctrine, citing an 82-year-old decision of this Court to argue that certain Relator(s)' "unclean hands" bar mandamus relief here. Respondents' Br. at 24 (citing *State ex rel. Albright v. Haber*, 139 Ohio St. 551, 553 (1942)). Like the others, this argument fails on multiple, independently sufficient grounds.

Respondents' contention fails at the outset because, contrary to their suggestion otherwise, this Court has ***never*** applied the unclean hands doctrine to bar a mandamus action. *See State ex rel. Miller v. Hamilton Cnty. Bd. of Elections*, 165 Ohio St. 3d 13, 2021-Ohio-831, 175 N.E.3d 486, 491 (noting the Court has "occasionally recognized [the doctrine's] ***potential*** applicability in

[*] Available at https://www.medicaid.gov/medicaid/spa/downloads/OH-23-0023.pdf.

mandamus actions" (emphasis added; citing *Albright* and *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 53)). Nor do Respondents even attempt to explain how the doctrine could possibly excuse Respondents' violation of the Budget Legislation with respect to ***every nursing facility in Ohio*** or even with respect to ***every Relator in this lawsuit***.

Respondents' argument also fails on the merits, as their own brief confirms. Respondents ***do not dispute*** the testimony in Relators' affidavits that Respondents never shared their nonsensical interpretation and calculation method with Relators until on or around July 13, 2023—well after the statute was enacted. Respondents simply assert that they shared their top-line cost estimates, from which they say Relators should have deduced that Respondents were not reading the statute correctly. *See* Respondents' Br. at 26 (asserting Relators "should have known … the amount allocated to quality incentive payments would be based on the increase to price"). This audacious accusation that Relators should have somehow figured out Respondents' calculation methodology on their own—in the face of Respondents' admitted failure to share it with them—comes nowhere close to establishing unclean hands on the part of Relators. The unclean hands doctrine requires a showing that the party against which it is asserted "engaged in ***reprehensible conduct, not merely negligent conduct***." *Miller*, 2021-Ohio-831, 165 Ohio St. 3d 13, 16, 175 N.E.3d 486, 491 (emphasis added); *see also, e.g., Morgan*, 2006-Ohio-6365, ¶ 54, 112 Ohio St. 3d 33, 42, 857 N.E.2d 1208, 1218 (refusing to apply unclean hands doctrine because the relator had "not yet been found guilty of criminal misconduct" even though respondent provided evidence that relator "received compensation that she was not entitled to, and that she falsified official documents to gain said compensation"). Indeed, this Court has squarely "reject[ed] the … argument that it is reprehensible conduct … to rely on a duly enacted statute in later litigation." *State ex rel. Coughlin*

v. Summit Cty. Bd. of Elections, 2013-Ohio-3867, 136 Ohio St. 3d 371, 995 N.E.2d 1194, ¶ 16. Discussions between Relators and Respondents—none of whom are legislators—should have no bearing whatsoever on the application of an unambiguous statute that affects nursing facilities and their residents throughout the state.

CONCLUSION

Despite Respondents' attempt to characterize this case as extremely complex, the Budget Legislation's mandate is actually quite simple: Instead of leaving 100% of the Rate increase from rebasing in each nursing facility's base rate, the General Assembly required that 60% of that Rate increase be taken out and put into the quality incentive pool. While Respondents have correctly withheld 60% of the Rate increase from every nursing facility's base rate (*i.e.*, by correctly allocating only 40% of the Rate increase to the base rate), they have put only a fraction of that withheld amount into the quality incentive pool (*i.e.*, by only putting in 60% of the ***Price*** increase instead of 60% of the ***Rate*** increase). That error violates the unambiguous statutory mandate and produces a result that is obviously nonsensical and directly undermines the General Assembly's efforts to incentivize high quality nursing facilities.

This Court has said: "When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said, and give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language." *Wilson*, 2017-Ohio-1410 at ¶ 11. Relators therefore respectfully request that this Court issue a peremptory writ of mandamus ordering Respondents to calculate and pay all nursing facility quality incentive payments, dating from July 1, 2023 forward, as required by the plain, unambiguous language of Revised Code section 5165.26. In particular, Relators request that the Court order Respondents to use the "rate for direct care costs," rather than the "price," in

performing the calculation under division (E)(1)(a) of section 5165.26 for the July 1, 2023 rate-setting and any subsequent rate-setting. Relators ask that the Court order Respondents to perform this calculation, and make any payments due or past due pursuant thereto, within a reasonable time and no later than thirty (30) days after the issuance of the writ. Relators further request an award of their costs, expenses, and reasonable attorneys' fees incurred in this action, and any other relief the Court deems just and equitable.

Respectfully submitted,

BARNES & THORNBURG LLP

/s David Paragas
David Paragas (0043908)
41 S. High Street Suite 3300,
Columbus, Ohio 43215
Phone: (614) 628-1407
Fax: (614) 628-1433
David.Paragas@btlaw.com

Kian Hudson (admitted *pro hac vice*)
11 South Meridian Street
Indianapolis, Indiana 46204
Phone: (317) 229-3111
Kian.Hudson@btlaw.com

ROLF GOFFMAN MARTIN LANG LLP

/s Aric D. Martin
Aric D. Martin (0065765)
Joseph F. Petros III (0088363)
31105 Bainbridge Road, Suite 4
Cleveland, Ohio 44139
Phone: (216) 514-1100
Fax: (216) 626-7623
Martin@RolfLaw.com
Petros@RolfLaw.com

Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December, 2024, a true and accurate copy of the foregoing was electronically filed with the Court and served on parties of record listed below via electronic mail:

Frank J. Reed
Frost Brown Todd LLP
One Columbus, Suite 2300
10 West Broad Street
Columbus, OH 43215
freed@fbtlaw.com

Ryan W. Goellner
Nathaniel L. Truitt
Frost Brown Todd LLP
3300 Great American Tower
301 East Fourth Street, Suite 3300
Cincinnati, OH 45202
rgoellner@fbtlaw.com
ntruitt@fbtlaw.com

Counsel for Respondents Ohio Department Of Medicaid and Maureen M. Corcoran, Director

/s/ David Paragas
David Paragas