PUBLISHED

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Decker, Judges Humphreys, Beales, Huff, O'Brien, AtLee, Malveaux, Athey, Fulton, Ortiz, Causey, Friedman, Chaney, Raphael, Lorish, Callins and White
Argued at Richmond, Virginia

JORDAN DARRELL MORRIS

v. Record No. 1194-21-2

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE LISA M. LORISH
MAY 9, 2023

UPON A REHEARING EN BANC

FROM THE CIRCUIT COURT OF HENRICO COUNTY
Randall G. Johnson, Jr., Judge

H. Pratt Cook, III (Law Office of H. Pratt Cook, III, on briefs), for appellant.

Stephen J. Sovinsky, Assistant Attorney General (Jason S. Miyares, Attorney General, on brief), for appellee.

Virginia's overdose reporting statute, Code § 18.2-251.03, shields from arrest or prosecution individuals who, in good faith, seek or obtain emergency medical assistance because they are experiencing a drug overdose. The trial court found Morris did not qualify for immunity under the statute. A panel of this Court reversed, dividing on how to interpret and apply the definition of "overdose" set out in Code § 18.2-251.03(A), as well as the requirement that an individual be "experiencing an overdose." After rehearing en banc, we affirm the trial court for a different reason—Morris failed to meet the independent requirement in Code § 18.2-251.03(B)(2) that he "remain[] at the scene of the overdose or at any alternative location to which he . . . has been transported until a law-enforcement officer responds to the report of an overdose."

BACKGROUND

After law enforcement first encountered Jordan Darrell Morris outside the Short Pump emergency room, Morris was charged with possession of a Schedule I or II controlled substance (in violation of Code § 18.2-250) and driving under the influence of drugs, first offense (in violation of Code § 18.2-266).

The Commonwealth gave notice of its intent to use at trial a lab analysis showing that Morris's blood tested positive for cocaine and that cocaine residue was found on a smoking device in the car he was driving. Morris moved to suppress the drug evidence and to dismiss the drug-possession charge under the immunity provision of Code § 18.2-251.03. Morris argued that he "was actively seeking medical care for himself when the Henrico police developed the evidence against him." The motion explained:

> Morris was trying to seek medical attention at Short Pump Emergency Room when he stopped the vehicle in the middle of the roadway adjacent to the emergency hospital. Henrico police officers Cirillo and Steelman observed that Morris was under the influence of drugs, and Morris told them he had recently smoked crack cocaine. Morris told the officers he was contemplating suicide because of drugs and made suicidal statements at the hospital.

The Commonwealth's written opposition asserted that Morris "had produced no evidence or testimony from any medical personnel present that evening, nor any other evidence, that he was experiencing an overdose."

At a hearing on Morris's suppression motion and motion to dismiss, both sides "agreed to proffer the facts." Paraphrasing the police report, Morris's counsel represented that Henrico police officers observed a white Ford Edge trying to turn onto the road next to the Short Pump emergency room. The vehicle nearly struck a curb in the turn lane and then stopped in the middle of the road, blocking through-traffic. The officers approached the vehicle, driven by

Morris, and asked him to park the car. Morris said that "he was there to get help," telling the officers that he had smoked crack cocaine. The officers thought he appeared to be under the influence of drugs and escorted Morris into the emergency room.

As medical personnel drew a blood sample, Morris "made suicidal statements." In response to law enforcement questioning, Morris said that he worked at Food Lion; he was high while at work and asked to sit in his boss's car to call his mother; he had called his mother "because he was thinking about committing suicide"; and he had driven away from the Food Lion and had driven around awhile before heading to the Short Pump emergency room. When asked whether his mother had told him to "go to the ER," Morris said he "chose to do so himself" because "he was thinking about suicide." When an officer asked why he was considering suicide, Morris responded, "drugs." Morris said that he used heroin, fentanyl, and cocaine, that he had smoked crack cocaine in his boss's car, and that he "came to the ER to get help for the suicidal thoughts and his drug problem." Morris alerted the officers to a crack pipe in the vehicle, which they found tucked in the crevice of the passenger seat. The Commonwealth agreed to "the Defense version" of the facts.

The Commonwealth argued that Morris was required to present expert testimony that he was in fact experiencing an overdose and that it was not enough to simply take his word for it. Morris's counsel argued that the immunity statute applied because the lab tests showed cocaine in Morris's blood, Morris drove himself to the emergency room seeking treatment, and he said three times that he was suicidal because of his drug use.

Ruling from the bench, the trial court denied Morris's motions to suppress the drug evidence and to dismiss the drug possession charge. The court saw "no evidence that [Morris] was experiencing a life-threatening condition." It was "not going so far as to say" that a medical professional had to be called as a witness to prove an overdose—circumstantial evidence could

suffice. But the court found the proffer insufficient: "[J]ust because" the drugs "affected his behavior [did] not mean we're in a life-threatening situation." The court also observed that there must be "some showing" that Morris's expression of wanting to kill himself "was caused by the ingestion of cocaine and this overdose situation."

Morris subsequently pleaded no contest to the charges against him, reserving his right to appeal the immunity ruling on the drug-possession charge. The trial court accepted the pleas, finding Morris guilty on both charges.

ANALYSIS

The proper interpretation of Code § 18.2-251.03 is a question of law that we review de novo. *Broadous v. Commonwealth*, 67 Va. App. 265, 268 (2017).

Virginia's overdose reporting statute was first enacted in 2015, 2015 Va. Acts chs. 418, 436 (codified at Code § 18.2-251.03), and has been amended three times since then, each time expanding its protections. In its current form, the statute provides full immunity from "arrest or prosecution" for qualifying individuals (prior versions had characterized the immunity as an "affirmative defense"). And it now covers not only someone who helps another experiencing an overdose, but also the person who "is experiencing an overdose"—assuming other criteria in the statute are met. Before these expansions, we observed that the "clear purpose" of the law was to "encourage . . . prompt emergency medical treatment [for] those who have suffered an overdose as a result of ingesting a controlled substance." *Broadous*, 67 Va. App. at 271. The recent amendments reinforce this goal.

We briefly review the structure of the statute before applying it to the facts proffered below. The statute opens by defining "overdose" as "a life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such

substances." Code § 18.2-251.03(A). Then, the statute sets out four requirements before an individual is shielded from "arrest or prosecution" for specified controlled substance offenses:

> 1. Such individual (i) in good faith, seeks or obtains emergency medical attention (a) for himself, if he is experiencing an overdose, or (b) for another individual, if such other individual is experiencing an overdose; (ii) is experiencing an overdose and another individual, in good faith, seeks or obtains emergency medical attention for such individual, by contemporaneously reporting such overdose to [specified emergency responders]; or (iii) in good faith, renders emergency care or assistance, including [specified means];
>
> 2. Such individual remains at the scene of the overdose or at any alternative location to which he or the person requiring emergency medical attention has been transported until a law-enforcement officer responds to the report of an overdose. If no law-enforcement officer is present at the scene of the overdose or at the alternative location, then such individual shall cooperate with law enforcement as otherwise set forth herein;
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> 3. Such individual identifies himself to the law-enforcement officer who responds to the report of the overdose; and
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> 4. The evidence for the prosecution of an offense enumerated in this subsection was obtained as a result of the individual seeking or obtaining emergency medical attention or rendering emergency care or assistance.

Code § 18.2-251.03(B). Next, the statute includes a carve-out from immunity:

> The provisions of this section shall not apply to any person who seeks or obtains emergency medical attention for himself or another individual, to a person experiencing an overdose when another individual seeks or obtains emergency medical attention for him, or to a person who renders emergency care or assistance to an individual experiencing an overdose while another person seeks or obtains emergency medical attention during the execution of a search warrant or during the conduct of a lawful search or a lawful arrest

Code § 18.2-251.03(C). The remaining parts of the statute are not relevant here.

The trial court found Morris had not shown that he was experiencing a life-threatening condition caused by controlled substances. We conclude instead that the "the best and narrowest

ground for decision is the determination that the trial court reached the right result for a reason different than the one upon which it appears ultimately to have relied." *Vandyke v. Commonwealth*, 71 Va. App. 723, 731 (2020); *see Commonwealth v. White*, 293 Va. 411, 419 (2017) (recognizing the doctrine of judicial restraint requires appellate courts to decide cases on the best and narrowest grounds). As this case proceeded by agreed proffer,[1] all of the "evidence necessary to that alternate ground was before the trial court," and that evidence was "undisputed." *Vandyke*, 71 Va. App. at 732.

Where, as here, the individual (allegedly) experiencing the overdose is the one seeking immunity, the statute does not apply unless the individual "remains at the scene of the overdose or at any alternative location to which he . . . has been transported until a law-enforcement officer responds to the report of an overdose." Code § 18.2-251.03(B)(2).[2] The subsection continues: "If no law-enforcement officer is present at the scene of the overdose or at the alternative location, then such individual shall cooperate with law enforcement as otherwise set forth herein." *Id.* The Commonwealth argued on brief that Morris cannot meet this requirement because he "borrowed a car and drove to the emergency room—failing to stay at the scene of the alleged overdose" and he also had not "been transported" to the hospital. At oral argument,

[1] The fact that Morris proceeded by limited proffer below is one of the reasons that it would be unwieldy to resolve whether Morris met the definition of "overdose," or whether the evidence was sufficient to show he was "experiencing" an overdose. Layered on this slim factual showing, Morris's counsel incorrectly argued below that the statute set out an "affirmative defense" (relying on the prior version of the law), and the trial court appears to have relied on that representation, which further obscures our ability to review these questions.

[2] For purposes of this analysis, we assume, without deciding, that suicidal ideation meets the definition of overdose in Code § 18.2-251.03(A). *See McGinnis v. Commonwealth*, 296 Va. 489, 501 (2018) (recognizing that "where the ability of the Court to review an issue on appeal is in doubt . . . 'assum[ing] without deciding' that the issue can be reviewed" may allow the Court "to resolve the appeal on the best and narrowest grounds").

Morris contended that the "scene of the overdose" was fluid and continuous, following him everywhere that he went while experiencing suicidal thoughts.

While the "remains at the scene" requirement has been a part of every version of Virginia's overdose reporting statute, we have never analyzed it until now. As always, when interpreting a statute, "our primary objective is 'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute." *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418 (2011)). "[W]e examine a statute in its entirety, rather than by isolating particular words or phrases." *Cummings v. Fulghum*, 261 Va. 73, 77 (2001). And the "plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." *Brown v. Commonwealth*, 75 Va. App. 388, 405 (2022) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459 (1983)).

Morris urges us to strip the words "scene" and "overdose" from all surrounding context. As his argument goes, anywhere a person is experiencing "a life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances" is the "scene" of the overdose. By merely existing in a state of overdose at any location, a person has then, necessarily, remained at the scene. And as long as they eventually cooperate with law enforcement, they would meet the statutory criteria.

The problem with Morris's interpretation is that it renders superfluous most of Code § 18.2-251.03(B)(2). The only rational reading of the legislature's choice of the word "remain" is that the individual stay in place—either at the "scene" where the overdose occurred, or the

"alternative location" to which the person has been transported.[3] "Remain" would be superfluous if the individual need not in fact "remain" anywhere. The problem extends to the second half of the sentence about "any alternative location to which he . . . has been transported." Any such "alternative location" would already be covered by Morris's expansive proposed reading of "scene." Indeed, if the legislature had intended this outcome, the statute as applied to the individual experiencing the overdose could just say:

> Such individual ~~remains at the scene of the overdose or at any alternative location to which he or the person requiring emergency medical attention has been transported until a law-enforcement officer responds to the report of an overdose. If no law-enforcement officer is present at the scene of the overdose or at the alternative location, then such individual~~ shall cooperate with law enforcement as otherwise set forth herein.

We reject this reading, which would cause us to run aground of a fundamental principle of statutory interpretation: we must presume that every part of a statute has "some effect and no part will be considered meaningless unless absolutely necessary." *City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75 (2016) (quoting *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 483 (2008)).[4]

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[3] As for this latter option, we assume that when the legislature used the phrase "to which he *has been transported*" (emphasis added), the "legislature understood the basic rules of grammar." *Petit Frere v. Commonwealth*, 19 Va. App. 460, 464 (1995). "Voice shows whether the subject acts (active voice) or is acted on (passive voice)—that is, whether the subject performs or receives the action of the verb." The Chicago Manual of Style § 5.115 (16th ed. 2010). Thus, absent context suggesting the legislature intended a different result, "any alternative location to which he or the person requiring emergency medical attention *has been transported*" excludes a location to which the person experiencing an overdose has transported himself. (Emphasis added).

[4] Because the conditions set forth in Code § 18.2-251.03(B)(1)-(4) are conjunctive, we respectfully disagree with our concurring colleague that it is inharmonious to read (B)(1) as establishing the three categories of individuals who may qualify for immunity and (B)(2) as adding additional necessary criteria.

Instead, we conclude the statute requires an individual experiencing an overdose to remain at the location where the "life-threatening condition" began, or at the location to which he has been transported by another. The overdose reporting statute is designed to *save* lives and to encourage individuals experiencing an overdose, and those around them, to seek medical attention without fear. An interpretation that would permit individuals actively under the influence of controlled substances or alcohol to operate a motor vehicle could *endanger* lives.

Turning to the proffered facts here, Morris was "high" at work when he asked to borrow his boss's car. He smoked crack cocaine in that car. He also called his mother from the car "because he was thinking about committing suicide." At some point, Morris drove himself away from the Food Lion and drove around for a "little bit" before heading to the Short Pump emergency room. Police officers observed the car trying to turn onto the road next to the Short Pump emergency room, but then the vehicle nearly struck a curb in the turn lane and stopped in the middle of the road, blocking through-traffic. Officers then approached the vehicle. Morris said that "he was there to get help," and the officers then escorted Morris into the emergency room.

Based on these facts, we cannot pinpoint the exact location where the event giving rise to the need for emergency care occurred. But we need not determine the exact location to know that the scene of the purported overdose was necessarily a location where Morris was *before* he decided to seek medical care, and thus somewhere *other* than where he stopped the car in the middle of the road next to the emergency room.[5] To receive immunity from prosecution, the

[5] Any suggestion that Morris first expressed a need for medical care only *after* law enforcement approached his vehicle stopped in the middle of the road runs aground on Code § 18.2-251.03(C). This subsection complements the statute's earlier good faith requirement by excluding from immunity anyone who first seeks medical care only *after* law enforcement has begun "execut[ing] . . . a search warrant" or "conduct[ing] . . . a lawful search or a lawful arrest." *Id.*

statute required Morris to remain wherever he began experiencing the drug-induced life-threatening condition. He did not do so. Thus, the trial court did not err in refusing to dismiss the drug possession charge.

CONCLUSION

For these reasons, we affirm the ruling of the trial court below.

Affirmed.

Raphael, J., with whom Ortiz, J., joins, concurring.

I agree with the majority that this appeal can be decided on narrower grounds that do not resolve the main issues briefed during our rehearing en banc. I also agree that Morris was not entitled to immunity from prosecution because he did not "remain[] at the scene of the overdose" and was not transported by someone else to an "alternative location," as contemplated by subsection (B)(2) of Code § 18.2-251.03. The earlier panel decision focused, instead, on whether subsection (B)(1) called for a subjective or objective standard in determining that Morris was "experiencing an overdose." *Morris v. Commonwealth*, 75 Va. App. 257, 268-77 (2022). Writing for the panel majority, I concluded that the statute applied a subjective standard. *Id.* The dissent thought that an objective standard applied. *Id.* at 287-96 (Russell, J., dissenting). During en-banc review, the Commonwealth argued for the first time that Morris was not immune from prosecution because he did not remain at the scene of the overdose, as required by subsection (B)(2). In reversing the panel and affirming the trial court, the Court here properly relies on that argument under the right-for-a-different-reason doctrine, consistent with our obligation to "look for the best and *fewest* grounds on which to resolve this appeal." *Theologis v. Weiler*, 76 Va. App. 596, 603 (2023).

I do agree with Judge Callins that the majority's plain-language reading of subsection (B)(2) will lead to odd results when, for example, a person suffering an overdose within walking distance of an emergency room is denied immunity if he walks there himself, rather than calling the police or waiting for medical transport. Still, the majority has the better reading of the statutory text that drives that conclusion, and I therefore concur in the majority's opinion.

I write separately to address the issues that go unresolved here, which may arise in future litigation and which the General Assembly may wish to clarify.

I.

Since New Mexico enacted the first medical-amnesty law in 2007, *see* 2007 N.M. Laws 260, every State in the country has followed suit except Kansas and Wyoming.[6] States have taken different approaches to incentivize seeking medical help for persons overdosing on drugs or alcohol. Some permit defendants to use the summoning of medical help in response to an overdose event as a mitigating circumstance at sentencing; some permit the defendant to raise the summoning of assistance as an affirmative defense to criminal liability; and some provide immunity from arrest and prosecution.[7]

One 2020 survey noted that such statutes are "[o]ften called 'medical amnesty laws' (MALs), 'medical immunity laws,' or 'Good Samaritan laws.'"[8] Some States have called them "Good Samaritan Overdose Laws" or "911 Immunity Laws," *Morris*, 75 Va. App. at 266 (quoting Nicole Schill, *The Fatal Shortcomings of Our Good Samaritan Overdose Statutes and Proposed Model Statute*, 25 Cardozo J. Equal Rts. & Soc. Just. 123, 126 (2018)), even though these statutes typically protect the victim as well as the good Samaritan, and even if help arrives without calling 911. Until the General Assembly tells us what to call Code § 18.2-251.03, I find that "medical amnesty" best captures the essence of the statute in the fewest words. As this Court explained six years ago, "[t]he clear purpose of the statute is to provide what amounts to a

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[6] For helpful jurisdictional surveys, see Legislative Analysis & Public Policy Association, *Good Samaritan Fatal Overdose Prevention and Drug-Induced Homicide: State Laws* (Dec. 2021), http://legislativeanalysis.org/wp-content/uploads/2021/12/GOODSA1.pdf; Government Accounting Office, *Most States Have Good Samaritan Laws and Research Indicates They May Have Positive Effects* (Mar. 2021), https://www.gao.gov/assets/gao-21-248.pdf.

[7] *See* GAO Report, *supra* note 6, at 12-13; *see also* Nicole Schill, *The Fatal Shortcomings of Our Good Samaritan Overdose Statutes and Proposed Model Statute*, 25 Cardozo J. Equal Rts. & Soc. Just. 123, 138-42 (2018).

[8] *See* Thomas M. Griner, et al., *State-by-State Examination of Overdose Medical Amnesty Laws*, 40 J. Legal Med. 171, 174 (2020).

'safe harbor' from prosecution to encourage the provision of prompt emergency medical treatment to those who have suffered an overdose as a result of ingesting a controlled substance." *Broadous v. Commonwealth*, 67 Va. App. 265, 271 (2017).

As enacted in 2015, Virginia's statute first followed the "affirmative defense" approach. 2015 Va. Acts chs. 418, 436 (codified at Code § 18.2-251.03). As *Broadous* recognized, the General Assembly "obviously made a policy determination that encouraging others, who may themselves be guilty of violating the laws involving controlled substances, to call 911 in an effort to save a life is more important than their prosecution." 67 Va. App. at 271. Still, we concluded that the statute's plain language did "not extend the affirmative defense protection to another individual who merely receives emergency medical attention because someone else reported the overdose." *Id.* at 272.

The General Assembly has revisited the statute three times since then, each time expanding its protections. The 2019 amendment eliminated a requirement that the defendant must have cooperated in any criminal investigation relating to the substance that caused the overdose. 2019 Va. Acts ch. 626 (deleting Code § 18.2-251.03(B)(4)).

The 2020 amendment made two more changes. 2020 Va. Acts ch. 1016. It upgraded the nature of the amnesty from an "affirmative defense" to an immunity from "arrest or prosecution." Code § 18.2-251.03(B) (Supp. 2020). The amendment also superseded the ruling in *Broadous*, extending immunity to a person who "is experiencing an overdose" when "another individual, in good faith, seeks or obtains emergency medical attention for such individual." *See* Code § 18.2-251.03(B)(1)(ii); *McCarthy v. Commonwealth*, 73 Va. App. 630, 646 (2021) (describing the 2020 amendments).

The 2021 amendment further expanded the amnesty provided to good Samaritans. The amendment immunizes a person who, "in good faith, renders emergency care or assistance,

including cardiopulmonary resuscitation (CPR) or the administration of naloxone or other opioid antagonist for overdose reversal, to an individual experiencing an overdose while another individual seeks or obtains emergency medical attention in accordance with this subdivision." 2021 Va. Acts Sp. Sess. I ch. 29 (codified at Code § 18.2-251.03(B)(1)(iii)).

Because State medical-amnesty laws like ours are relatively new, numerous questions about their scope and interpretation need to be resolved to clarify how these laws should operate in practice. This case has revealed a number of those legal wrinkles.

II.

The Court's resolution of this appeal on a single narrow ground leaves unanswered the main question briefed by the parties during en-banc review: does an objective or subjective standard govern whether a person is "experiencing an overdose" within the meaning of Code § 18.2-251.03(B)(1)? Three possible standards could apply: two of them are objective; one is subjective.

The first possibility would be a "scientifically objective standard": the trier of fact must be persuaded that the person experiencing an overdose was, in fact, overdosing. To date, no State appears to have adopted that standard, although one dissenting judge recently argued for it. *See State v. Rowe*, 354 So. 3d 1187, 1196 (La. 2022) (Crain, J., dissenting). As Justice Crain explained, "'Overdose' is a medical term requiring medical evidence to prove." *Id.* He would have held that Louisiana's statute provided immunity only when the defendant or the person he was trying to save was suffering "an actual 'overdose,'" not when the victim "only *appears* to have overdosed." *Id.* at 1197. But the majority of the Louisiana Supreme Court rejected that standard, noting that such a "narrow and highly-technical reading subverts the purpose of the law, which is to remove the fear of prosecution and to encourage bystanders to seek help." *Id.* at 1194.

> If a third party fears that an apparent overdose may not be severe enough to later receive confirmation by a medical expert, the witness might equivocate about calling 911. The chilling effect of the application of the law endorsed by the [court of appeals] majority in this case could counteract the very problem sought to be addressed by the provision.

Id.

The earlier panel opinion here noted the same problem. *See Morris*, 75 Va. App. at 274-75. As I wrote for the majority, a scientifically objective standard would frustrate our statute's "'clear purpose . . . to encourage . . . prompt emergency medical treatment' for overdose victims." *Id.* at 274 (alterations in original) (quoting *Broadous*, 67 Va. App. at 271). To have immunity, the defendant would have to prove—likely through medical evidence and expert testimony—that he was in fact overdosing, or that the victim for whom he called for emergency medical assistance was overdosing. That high bar would discourage reporting; it would chill overdose victims from seeking help and deter good Samaritans from calling for help for fear of their own liability for drug possession. *Id.* at 274-75.

The second possible standard would be a reasonable-person standard: would a reasonable person in the defendant's position have believed that he was experiencing an overdose, or that the victim for whom he called for assistance was experiencing an overdose? Thirty-five States have codified a reasonable-person standard in their medical-amnesty laws.[9] The reasonable-

[9] *See* Ark. Code Ann. § 20-13-1703 ("that a *reasonable person* would believe to be resulting from, the consumption or use" of alcohol or drugs (emphasis added)); Cal. Health & Safety Code § 11376.5(e) ("a *reasonable person* of ordinary knowledge would believe the condition to be a drug-related overdose that may result in death, disability, or serious injury" (emphasis added)); Conn. Gen. Stat. § 21a-279(d) (exempting "any person (1) who in good faith, seeks medical assistance for another person who such person *reasonably believes* is experiencing an overdose . . . , (2) for whom another person, in good faith, seeks medical assistance, *reasonably believing* such person is experiencing an overdose . . . , or (3) who *reasonably believes* he or she is experiencing an overdose" (emphases added)); Del. Code Ann. tit. 16, § 4769(a)(2) ("if a layperson could *reasonably believe* that the condition is in fact an overdose and requires medical assistance" (emphasis added)); D.C. Code § 7-403(a)(1)(A)-(C) (protecting

"a person who: (A) *Reasonably believes* that he or she is experiencing a drug or alcohol-related overdose . . . .; (B) *Reasonably believes* that another person is experiencing a drug or alcohol-related overdose . . . .; (C) Is *reasonably believed* to be experiencing a drug or alcohol-related overdose . . .; or (D) Is a bystander to a situation described in subparagraph (A), (B), or (C)" (emphases added)); Ga. Code Ann. § 16-13-5(a)(1) ("that a *reasonable person* would believe to be resulting from the consumption or use of a controlled substance or dangerous drug by the distressed individual" (emphasis added)); Haw. Rev. Stat. § 329-43.6(a)(2) ("that a layperson would *reasonably believe* to be a drug or alcohol overdose that requires medical assistance" (emphasis added)); Ind. Code Ann. § 35-38-1-7.1(b)(12) ("an individual who *reasonably appeared* to be in need of medical assistance due to the use of alcohol or a controlled substance" (emphasis added)); Iowa Code § 124.418(1)(a)(3) ("The person's condition is the result of, or a prudent layperson would *reasonably believe* such condition to be the result of, the consumption or use of a controlled substance." (emphasis added)); Ky. Rev. Stat. Ann. § 218A.133(1)(a) ("that a layperson would *reasonably believe* requires medical assistance" (emphasis added)); Md. Code Ann., Crim. Proc. § 1-210(c) ("*reasonably believes* that the person is experiencing a medical emergency after ingesting or using alcohol or drugs" (emphasis added)); Mich. Comp. Laws § 333.7403(7)(a) ("that a layperson would *reasonably believe* to be a drug overdose that requires medical assistance" (emphasis added)); Minn. Stat. Ann. § 604A.05, Subd. 5 ("that a layperson would *reasonably believe* to be a drug overdose that requires immediate medical assistance" (emphasis added)); Miss. Code Ann. § 41-29-149.1(2)(a) ("that a layperson would *reasonably believe* to be resulting from the consumption or use of a controlled substance or dangerous drug for which medical assistance is required" (emphasis added)); Mo. Rev. Stat. § 195.205(1) ("that a person would *reasonably believe* to be a drug or alcohol overdose that requires medical assistance" (emphasis added)); Neb. Rev. Stat. § 28-472(6) ("which condition a layperson would *reasonably believe* requires emergency medical assistance" (emphasis added)); Nev. Rev. Stat. § 453C.150(5) ("that an ordinary layperson would *reasonably believe* to be a drug or alcohol overdose that requires medical assistance" (emphasis added)); N.H. Rev. Stat. Ann. § 318-B:28-b(I)(a) ("an acute condition resulting from or believed to be resulting from the use of a controlled drug which a layperson would *reasonably believe* requires medical assistance" (emphasis added)); N.Y. Penal Law § 220.78(3)(a) ("if a prudent layperson, possessing an average knowledge of medicine and health, could *reasonably believe* that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care" (emphasis added)); N.C. Gen. Stat. Ann. § 90-96.2(a) ("that a layperson would *reasonably believe* to be a drug overdose that requires medical assistance" (emphasis added)); N.D. Cent. Code § 19-03.1-23.4 ("the overdosed individual must have been in a condition a layperson would *reasonably believe* to be a drug overdose requiring immediate medical assistance" (emphasis added); Okla. Stat. tit. 63, § 2-413.1(A)(1) (directing peace officer not to take person into custody for "offense involving a controlled dangerous substance . . . if the peace officer . . . *reasonably believes* that . . . the person requested emergency medical assistance for an individual who *reasonably appeared* to be in need of medical assistance due to the use of a controlled dangerous substance" (emphases added)); Or. Rev. Stat. Ann. § 475.898(7)(b) ("that a person would *reasonably believe* to be a condition that requires medical attention" (emphasis added)); 35 Pa. Cons. Stat. § 780-113.7(f) ("a prudent layperson, possessing an average knowledge of medicine and health, would *reasonably believe* that the condition is in fact a drug overdose and requires immediate medical attention" (emphasis added)); S.C. Code Ann. § 44-53-1910(2)

person standard is objective because it does not turn on whether the defendant subjectively believed that he was overdosing or that the person for whom he called for help was overdosing.[10]

("that a layperson would *reasonably believe* to be a drug or alcohol overdose that requires medical assistance" (emphasis added)); S.D. Codified Laws § 34-20A-109(1) ("that a person would *reasonably believe* to be a drug overdose that requires medical assistance" (emphasis added)); Tenn. Code Ann. § 63-1-156(a)(2) ("that a *reasonable person* would believe to be resulting from the consumption or use of a controlled substance or other substance by the distressed individual" (emphasis added)); Utah Code Ann. § 58-37-8(16)(a)(i) ("*reasonably believes* that the person or another person is experiencing an overdose event due to . . . a controlled substance or other substance" (emphasis added)); Vt. Stat. Ann. tit. 18, § 4254(a)(1) ("that a layperson would *reasonably believe* requires medical assistance" (emphasis added)); W. Va. Code § 16-47-4(a) ("a person who *reasonably appears* to be experiencing an overdose (emphasis added)); Wis. Stat. § 961.443(1)(a) ("if a *reasonable person* would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance" (emphasis added)).

Some States that use a reasonable-person standard have other provisions suggesting a hybrid approach. *Compare* Mont. Code Ann. § 50-32-609(1)(a) (protecting good Samaritan who "seeks medical assistance for another person who is experiencing an actual or *reasonably perceived* drug-related overdose" (emphasis added)), *with id.* § 50-32-609(1)(b) (protecting defendant "who experiences a drug-related overdose and is in need of medical assistance"). *See also* Colo. Rev. Stat. § 18-1-711(5) ("that a layperson would *reasonably believe* to be a drug or alcohol overdose that requires medical assistance" (emphasis added)). *But see People v. Harrison*, 465 P.3d 16, 23 (Colo. 2020) (holding that Colorado's statute "requires both that a person report in good faith what she subjectively perceives is an acute condition caused by the consumption or use of drugs or alcohol and that a layperson would reasonably believe that the reported condition is a drug or alcohol overdose needing medical assistance").

Louisiana has a textually different standard for alcohol- than drug-overdose events. *Compare* La. Rev. Stat. Ann. § 14:403.9(A)(1) (directing peace officer not to take person into custody for "offense involving alcohol" if the peace officer "*reasonably believes*" that the person in good faith "requested emergency medical assistance for an individual who *reasonably appeared* to be in need of medical assistance" (emphases added)), *with* La. Rev. Stat. Ann. § 14:403.10(B)(1) (providing immunity for drug-possession offenses for "person who *experiences* a drug-related overdose and is in need of medical assistance" (emphasis added)). *But see Rowe*, 354 So. 3d at 1195 (harmonizing those two code sections by imposing a reasonable-person gloss on § 14:403.10(B)).

[10] *Cf. Allison v. Brown*, 293 Va. 617, 629 n.5 (2017) (describing an "objective standard" in the context of informed-consent law by reference to what "a reasonably prudent person in the plaintiff's position" would have done, while a "subjective standard" asks what "*this patient*" would have done); *Pergolizzi v. Bowman*, 76 Va. App. 310, 338 (2022) (noting that the objective standard may still account for the party's subjective belief in determining what a reasonable person in the same position would have done).

The third possible standard would be a subjective one: did the defendant subjectively believe that he was overdosing or that the victim for whom he sought medical assistance was overdosing? As the Commonwealth acknowledged at oral argument, several State medical-amnesty laws use a subjective standard. For instance, Florida's law immunizes a person who seeks medical assistance for himself if the defendant "experiences, or has *a good faith belief that he or she is experiencing*, an alcohol-related or a drug-related overdose and receives medical assistance." Fla. Stat. Ann. § 893.21(3) (emphasis added). A similar standard applies when the defendant seeks medical assistance for a third person "believed to be experiencing" an overdose. *Id*. § 893.21(1). Maine uses the term "suspected drug-related overdose" in its immunity statute. Me. Rev. Stat. Ann. tit. 17-A, § 1111-B. And Texas uses "possible overdose" in its affirmative-defense statutes. *See, e.g.*, Tex. Health & Safety Code Ann. §§ 481.115(g), 481.041(e).

Which of those three standards best describes Virginia's medical-amnesty statute? Virginia extends medical amnesty to a defendant who, "in good faith, seeks or obtains emergency medical attention (a) for himself, if he is experiencing an overdose, or (b) for another individual, if such other individual is experiencing an overdose." Code § 18.2-251.03(B)(1)(i). Immunity is also available to a defendant who "is experiencing an overdose and another individual, in good faith, seeks or obtains emergency medical attention for such individual." Code § 18.2-251.03(B)(1)(ii). Virginia is not alone. Eight other States use variations of the

"experiencing an overdose" formulation in their medical-amnesty laws.[11] Courts in those jurisdictions have not yet determined, however, whether such language imposes a subjective standard, a reasonable-person standard, or a scientifically objective standard.

The three-judge panel here divided on that question. *Compare Morris*, 75 Va. App. at 268-77 (opinion by Raphael, J.), *with id.* at 290-96 (Russell, J., dissenting). I continue to believe that it creates a subjective standard for the reasons explained before. But I acknowledge that reasonable jurists can disagree about that.

In light of that uncertainty, our General Assembly may wish to clarify whether *experiencing an overdose* calls for a subjective or an objective standard. It could make unmistakably clear that the standard is subjective. For instance, Florida's statute asks whether the defendant "has a good faith belief that he or she is experiencing" an overdose, Fla. Stat. Ann. § 893.21(2), a subjective inquiry. It could adopt a reasonable-person standard, like most of our sister States have done. *See supra* note 9. Or it could follow Justice Crain's dissenting view in *Rowe* and make clear that scientific evidence of an actual overdose is required.

Without such clarification, however, doubt will linger. The Attorney General pointed out during our en-banc argument that the General Assembly used a "believed to be experiencing" formulation in a different part of the Code; Code § 54.1-3408 authorizes medical professionals in specified cases to "dispense naloxone or other opioid antagonist . . . for overdose reversal to a

[11] *See* Ariz. Rev. Stat. Ann. § 13-3423(A) ("someone experiencing a drug-related overdose"); Idaho Code Ann. § 37-2739C(2) ("experiences a drug-related medical emergency"); Ohio Rev. Code Ann. § 2925.11(B)(2)(a)(viii) ("who is experiencing a drug overdose"); Mass. Gen. Laws Ann. ch. 94C, § 34A(b) ("who experiences a drug-related overdose"); N.J. Stat. Ann. § 2C:35-30(a), (b)(1) ("someone experiencing a drug overdose"); N.J. Stat. Ann. § 2C:35-31(a) ("who experiences a drug overdose"); N.M. Stat. Ann. § 30-31-27.1(B) ("who experiences an alcohol- or drug-related overdose"); R.I. Gen. Laws § 21-28.9-4(a) ("someone experiencing a drug or alcohol overdose"); Wash. Rev. Code Ann. § 69.50.315(2) ("who experiences a drug-related overdose").

person who is *believed to be experiencing* or about to experience a life-threatening opioid overdose." Code § 54.1-3408(X) (emphasis added). Our jurisprudence has often noted that such drafting differences are meaningful.[12] The omission of that believed-to-be-experiencing formulation in Code § 18.2-251.03 unquestionably adds doubt to how our medical-amnesty statute should be interpreted.[13]

Today's en-banc decision leaves these important questions for another day. The answer will have to come through future litigation or, better yet, clarifying language from the General Assembly.

III.

Another question raised by this case but not answered today is who bears the burden of proof when determining whether the defendant is entitled to immunity. Courts in other States have divided on that issue. *Compare People v. Harrison*, 465 P.3d 16, 23 (Colo. 2020) ("[T]he prosecution must prove beyond a reasonable doubt that the defendant's conduct was not legally authorized by the affirmative defense."), *with People v. O'Malley*, 183 N.E.3d 928, 935-36 (Ill. App. Ct. 2021) (imposing burden of production and persuasion on defendant), *appeal denied*, 175 N.E.3d 148 (Ill. 2021), *State v. W.S.B.*, 180 A.3d 1168, 1183 (N.J. Super. Ct. App.

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[12] *See, e.g.*, *Morgan v. Commonwealth*, ___ Va. ___, ___ (Dec. 29, 2022) ("[W]hen the General Assembly has used specific language in one instance but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [the Court] must presume that the difference in the choice of language was intentional." (second alteration in original) (quoting *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011))).

[13] The absence of such language, however, does not necessarily prove that the unadorned "experiencing an overdose" formulation is an objective one. It simply begs the question of whether the unadorned version imposes a subjective standard to begin with. Even assuming that the standard is objective, that still would not tell us whether to apply a scientifically objective standard or a reasonable-person standard. Any doubt about the proper construction, moreover, would have to be resolved in favor of the defendant under both the rule of lenity and the doctrine of liberally construing remedial statutes. *See Morris*, 75 Va. App. at 273-74.

Div. 2018) (same), *and State v. Williams*, 888 N.W.2d 1, 6 (Wis. Ct. App. 2016) (same). That question was not answered here because both sides assumed that Morris bore the burden of proving his entitlement to immunity under the statute. *See Morris*, 75 Va. App. at 280 n.10.

A related question is whether it makes any practical difference that the 2020 amendment, 2020 Va. Acts ch. 1016, changed Virginia's medical-amnesty law from an "affirmative defense" statute to one that makes the defendant "immune from prosecution," Code § 18.2-251.03(E). That immunity means that a covered defendant will not be "subject to arrest or prosecution" on drug- or alcohol-possession charges. Code § 18.2-251.03(B). It is unclear, however, how that apparently stronger protection works in practice.

Still, the parties' assumption here that the defendant bears the burden of production and persuasion was probably correct under Code § 18.2-263. That statute imposes "the burden of proof" on the defendant to establish "any exception, excuse, proviso, or exemption contained in this article [Article 1, Drugs] or in the Drug Control Act [Code §§ 54.1-3000 to -3472]." Code § 18.2-263. The medical-amnesty statute resides in Article 1 of title 18.2. So Code § 18.2-263 appears to impose the burdens of both production and persuasion on the defendant. The General Assembly did not say otherwise when it converted the medical-amnesty law from an affirmative-defense statute to an immunity statute.

When the defendant bears the burden of persuasion, it is perilous to proceed by proffer, as Morris did here. The statute calls for an inquiry into whether the alleged-overdose condition was one "resulting" from drug or alcohol use, Code § 18.2-251.03(A), whether the defendant "in good faith" sought emergency medical attention, § 18.2-251.03(B)(1)(i), and whether the defendant or the person for whom he was seeking emergency attention was "experiencing an overdose," *id.* As Judge Callins demonstrates in her concurrence, these issues may involve tricky causation questions. Given the array of elements needed to establish immunity, an

evidentiary hearing may provide a better vehicle than a proffer to enable the factfinder to see the evidence, hear the witnesses' testimony, and make appropriate factual findings and credibility determinations.

IV.

Today's decision also leaves open for another day the extent to which drug-induced suicidal ideation qualifies as an "overdose" within the meaning of the statute. All members of the prior three-judge panel agreed that suicidal ideation *may* qualify, depending on the circumstances. *See Morris*, 75 Va. App. at 277-78 & n.9 (opinion by Raphael, J., joined by Ortiz, J.); *id.* at 297 n.24 (Russell, J., dissenting). The Commonwealth agreed, as long as a clear causal link is shown. *See* Brief for the Commonwealth En Banc at 32 n.16 ("The Commonwealth's position is . . . that suicidal ideations cannot satisfy the statute (absent a showing of a direct causal, perhaps neurological, link).").

States have taken different approaches to defining "overdose" in their medical-amnesty laws. Virginia's statute defines an overdose by reference to a measurable standard: "*a life-threatening condition* resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances." Code § 18.2-251.03(A) (emphasis added). Several States use a similar standard. *See, e.g.*, Alaska Stat. § 11.71.311(b) ("life-threatening emergency"); 720 Ill. Comp. Stat. Ann. 570/414(a) ("life-threatening emergency"). Other States identify conditions short of life-threatening ones that also qualify as an overdose, such as an "acute medical condition" that might result in "disability" or "serious injury," Cal. Health & Safety Code § 11376.5(e); "an acute condition" that "a layperson would reasonably believe requires medical assistance," N.H. Rev. Stat. Ann. § 318-B:28-b(I)(a); or simply "a condition a layperson would reasonably believe to be a drug overdose requiring immediate medical assistance," N.D. Cent. Code § 19-03.1-23.4.

Many States have defined an overdose by creating a list of conditions that qualify. For instance, Arkansas defines an overdose as a drug- or alcohol-induced "acute condition . . . including without limitation: (A) Extreme physical illness; (B) Decreased level of consciousness; (C) Respiratory depression; (D) Coma; (E) Mania; or (F) Death." Ark. Code Ann. § 20-13-1703(1). Most States using this approach, like Arkansas, make clear that the listed symptoms are only examples of overdose conditions, not an exclusive list.[14] Although none of our sister States specifically mentions suicidal ideation when listing such examples, twenty States include "mania."[15] And more than a dozen of those list "hysteria" as well.[16]

Some States follow a hybrid approach, combining a standard that defines when an overdose occurs with a list of sample conditions. Some follow an *either-or* model. Hawaii, for

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[14] *See* Colo. Rev. Stat. § 18-1-711(5) ("including, but not limited to"); Del. Code Ann. tit. 16, § 4769(a)(2) (same); Ga. Code Ann. § 16-13-5(a)(1) (same); Iowa Code § 124.418(1)(a) (same); Minn. Stat. Ann. § 604A.05, Subd. 5 ("an acute condition, including"); Miss. Code Ann. § 41-29-149.1(2)(a) ("including, but not limited to"); Mo. Rev. Stat. § 195.205(1)(1) (same); W. Va. Code § 16-47-3(1) (same). *But see* D.C. Code § 7-403(i)(3) ("an acute condition of physical illness, coma, mania, hysteria, seizure, cardiac arrest, cessation of breathing, or death, which is or reasonably appears to be the result of consumption or use of drugs or alcohol and relates to an adverse reaction to or the quantity ingested of the drugs or alcohol, or to a substance with which the drugs or alcohol was combined").

[15] *See* Ark. Code Ann. § 20-13-1703(1)(E); Colo. Rev. Stat. § 18-1-711(5); Del. Code Ann. tit. 16, § 4769(a)(2); D.C. Code § 7-403(i)(3); Ga. Code Ann. § 16-13-5(a)(1); Haw. Rev. Stat. § 329-43.6(a)(1); Ky. Rev. Stat. Ann. § 218A.133(1)(a); Mich. Comp. Laws §§ 333.7403(7)(a), 333.7404(6)(a); Minn. Stat. Ann. § 604A.05, Subd. 5; Miss. Code Ann. § 41-29-149.1(2)(a); Mo. Rev. Stat. § 195.205(1)(1); Neb. Rev. Stat. § 28-472(6); N.C. Gen. Stat. Ann. § 90-96.2(a); Nev. Rev. Stat. § 453C.150(5); N.Y. Penal Law §§ 220.78(3)(a), 90-96.2(a); Or. Rev. Stat. Ann. § 475.898(7)(b); 35 Pa. Cons. Stat. § 780-113.7(f); S.C. Code Ann. § 44-53-1910(2); S.D. Codified Laws § 34-20A-109(1); Tenn. Code Ann. § 63-1-156(a)(2); W. Va. Code § 16-47-3(1).

[16] *See* Colo. Rev. Stat. § 18-1-711(5); Del. Code Ann. tit. 16, § 4769(a)(2); D.C. Code § 7-403(i)(3); Ky. Rev. Stat. Ann. § 218A.133(1)(a); Minn. Stat. Ann. § 604A.05, Subd. 5; Neb. Rev. Stat. § 28-472(6); Or. Rev. Stat. Ann. § 475.898(7)(b); 35 Pa. Cons. Stat. § 780-113.7(f); N.Y. Penal Law §§ 220.78(3)(a), 90-96.2(a); N.C. Gen. Stat. Ann. § 90-96.2(a); S.C. Code Ann. § 44-53-1910(2); S.D. Codified Laws § 34-20A-109(1); W. Va. Code § 16-47-3(1).

example, defines a drug or alcohol overdose as *either* (1) "A condition, including but not limited to extreme physical illness, decreased level of consciousness, respiratory depression, coma, mania, or death, that is the result of consumption or use of a controlled substance or alcohol," *or* (2) "A condition that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance." Haw. Rev. Stat. § 329-43.6(a).[17] Other States require both showings. Thus, Kentucky defines an overdose as "[1] an acute condition of physical illness, coma, mania, hysteria, seizure, cardiac arrest, cessation of breathing, or death which reasonably appears to be the result of consumption or use of a controlled substance . . . *and* [2] that a layperson would reasonably believe requires medical assistance." Ky. Rev. Stat. Ann. § 218A.133(1)(a) (emphasis added).[18]

The General Assembly, of course, is better suited than the judiciary to decide whether *overdose* is best defined by a standard, a list of conditions, or both. It is also best suited to evaluate the medical evidence surrounding the connection between drug use and acute medical conditions, including suicidal ideation. In the meantime, under the standard in our current medical-amnesty law, an urge to kill oneself—at least depending on the degree of the impulse and its causal relation to the drugs ingested—certainly appears to qualify as an overdose

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[17] For States with similar *either-or* approaches, see Mich. Comp. Laws §§ 333.7403(7)(a), 333.7404(6)(a); Nev. Rev. Stat. § 453C.150(5); N.Y. Penal Law § 220.78(3)(a); 35 Pa. Cons. Stat. § 780-113.7(f).

[18] For other States using this *both-and* approach, see Neb. Rev. Stat. § 28-472(6); N.C. Gen. Stat. Ann. § 90-96.2(a); Or. Rev. Stat. Ann. § 475.898(7)(b); S.C. Code Ann. § 44-53-1910(2); S.D. Codified Laws § 34-20A-109(1); Tenn. Code Ann. § 63-1-156(a)(2).

condition—"a life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances." Code § 18.2-251.03(A).

* * *

In a recent report mandated by Congress, the General Accounting Office reviewed 17 studies on the effectiveness of State "Good Samaritan Laws." *See* Government Accounting Office, *Most States Have Good Samaritan Laws and Research Indicates They May Have Positive Effects* (Mar. 2021), https://www.gao.gov/assets/gao-21-248.pdf.[19] The GAO "found a consistent pattern between enactment of Good Samaritan laws and lower rates of overdose deaths," but "the effectiveness of these laws is likely to vary across jurisdictions based on several factors." *Id.* at 25. Those factors include "public awareness of Good Samaritan laws," the public's "willingness to call 911," and "law enforcement knowledge." *Id.* at 25-27. The GAO also noted that State laws differ across the country in whether they offer immunity from arrest or prosecution, an affirmative defense to criminal liability, or a mitigating factor in sentencing. *Id.* at 12. The report did not identify any data, however, to illuminate how differences among State laws might correlate with reduced overdose deaths.

Predicting that relationship calls for legislative judgment that falls outside the judiciary's wheelhouse. This case has identified some of the key interpretive questions that remain open under Virginia's medical-amnesty law. Future cases may provide the opportunity to litigate them. But the General Assembly is in the best position to provide definitive answers. And it can do so by making judgments that we cannot make, given that our "judicial review does not

[19] The GAO report was required by the Comprehensive Addiction and Recovery Act of 2016, § 703, Pub. Law No. 114-198, 130 Stat. 695, 741 (2016). The Act defined a "Good Samaritan law" as "law of a State or unit of local government that exempts from criminal or civil liability any individual who administers an opioid overdose reversal drug or device, or who contacts emergency services providers in response to an overdose." *Id.* § 703(b)(3)(1).

evaluate 'the propriety, wisdom, necessity and expediency of legislation.'" *Appalachian Power Co. v. State Corp. Comm'n*, ___ Va. ___, ___ (Aug. 18, 2022) (quoting *Willis v. Mullett*, 263 Va. 653, 658 (2002)).

Callins, J., concurring in the judgment.

I agree with the majority that Morris does not meet the requirements to qualify for immunity under Code § 18.2-251.03. But I write separately because I see narrower grounds upon which to affirm the trial court's judgment. *See Commonwealth v. White*, 293 Va. 411, 419 (2017) ("As we have often said, '[t]he doctrine of judicial restraint dictates that we decide cases 'on the best and narrowest grounds available.'" (alteration in original) (quoting *Commonwealth v. Swann*, 290 Va. 194, 196 (2015))). The majority holds that Morris does not qualify for immunity because he left the "scene of the overdose," in contravention of Code § 18.2-251.03(B)(2). I would hold that Morris's proffer was insufficient to establish a causal nexus between his ingestion of a controlled substance and the overdose. *See* Code § 18.2-251.03(A).

Affirming on this alternative ground would foreclose the need to grapple with the grammar in the (B)(2) requirement in Code § 18.2-251.03. The majority's interpretation of this requirement would render the entire statute inconsistent. *See Oraee v. Breeding*, 270 Va. 488, 498 (2005) ("[W]e have a duty, whenever possible, 'to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" (quoting *Va. Elec. & Power Co. v. Bd. of Cnty. Supervisors of Prince William Cnty.*, 226 Va. 382, 388 (1983))). Thus, this narrower pathway to an affirmance would "affect[] the least number of cases," *Butcher v. Commonwealth*, 298 Va. 392, 396 (2020), and align with our commitment to judicial restraint.

I. <u>The trial court did not err in finding that Morris does not meet the requirements to qualify for immunity under Code § 18.2-251.03.</u>

Upon hearing argument on the application of Code § 18.2-251.03, the trial court posed the following questions to counsel:

> [E]ven if it's determined that [Morris] is suicidal . . . does there not have to be [s]ome kind of causation between the suicidal thoughts

> and the overdose as opposed to some other reason? . . . Is there a requirement that the suicidal thoughts life threatening situation was caused by drugs and the overdose situation?

The trial court was unconvinced by Morris's affirmative answer. Indeed, the trial court expressly found that Morris's proffer failed to show that Morris's suicidal ideations were caused by his ingestion of drugs. The trial court concluded,

> But even though he said that he was ingesting, even though he said he was thinking about killing himself, does not mean he was suicidal in and of itself. I think there has to be something a little bit more than just his expression that he's thinking about killing himself and that he's thinking about that because of the use of drugs.
>
> [Morris is] a lay person. . . . [H]e doesn't have the qualifications from the facts presented to the Court to make that determination. No more than somebody showing up and saying my arm hurts, I have a pain in my heart region, because I ate something this morning. No, the doctor is going to run tests and make sure it's not a heart attack. Just because a patient shows up at the emergency room and says they have a symptom because of something else, does not make it so. And the Court cannot rely on that to make a legal determination.
>
> So for those reasons, I am going to find that Mr. Morris has failed to establish that he was experiencing a life-threatening condition such that he can receive the benefit of Code Section 18.2-251.03.

The trial court did not go so far as to state that expert testimony is required to establish a causal link between the ingestion of a drug and overdose.[20] But neither did the trial court find that

[20] Notwithstanding the trial court's comments, it also noted that it only had available to it the proffer of Morris's "expression" and explained that "there has to be something a little bit more than just his expression that he's thinking about killing himself and that he's thinking about that because of the use of drugs." Affirming the trial court's finding that there was insufficient evidence included in Morris's proffer to establish a causal link does not foreclose the possibility that such a link could be established with non-medical evidence.

In addition, the trial court found that expert testimony is not a necessary prerequisite to establish an overdose, stating,

Morris's proffer laid an evidentiary foundation sufficient to support his claim. The trial court did not err in its finding that Morris did not qualify for the protections under Code § 18.2-251.03 because the evidence did not establish a firm causal link showing that Morris's drug use caused the suicidal ideation.[21] While it is true that the two occurrences—the drug use and the suicide ideation—were bounded together by time, the evidence falls short of showing a connection between the two. And although, according to the proffer, Morris connected the drug use and the suicidal ideations, the factfinder was entitled to disbelieve this uncorroborated tender. *See Flanagan v. Commonwealth*, 58 Va. App. 681, 702 (2011). The evidence offered no insight into when the onset of suicidal thoughts occurred and what precise role, if any, the drugs had in causing those thoughts.

II. <u>An alternative interpretation of (B)(2) that effects the intent of the legislature.</u>

Rather than affirming on this ground, the majority stakes its analysis on Code § 18.2-251.03(B)(2), holding that "[t]o receive immunity from prosecution, the statute required

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> I'm not going to go so far as to say that [evidence of a life-threatening condition] can only be presented through medical personnel so that anybody presenting this motion has to summons a doctor to Court. And it doesn't have to be satisfied with direct evidence. I think you can infer from the evidence that there is a life-threatening situation.

Although I would hold that medical evidence is unnecessary to find either that an overdose has taken place or a causal nexus between ingestion of a drug and an overdose, under these circumstances, the trial court's findings were supported by the evidence before it.

[21] It is because Morris did not request an evidentiary hearing that the evidence before the trial court was limited to Morris's deficient proffer. As it did here, a trial court may find such a proffer insufficient to show that Code § 18.2-251.03 applies, if it fails to establish a causal link between an overdose and drug use. *Cf. McCarthy v. Commonwealth*, 73 Va. App. 630, 649 (2021) ("Because that person could no longer be 'subject to arrest or prosecution' under the current version of the statute, the person would at a minimum be able to seek some sort of pre-trial relief when the prosecution is initiated and need no longer wait until trial to prove an affirmative defense.").

Morris to remain wherever he began experiencing the drug-induced life-threatening condition." As recognized, (B)(2) requires that an individual "remain[] at the scene of the overdose or at any alternative location to which he or the person requiring emergency medical attention *has been* transported . . . ." Code § 18.2-251.03(B)(2) (emphasis added). But for two reasons, I find that the majority has settled on an interpretation of (B)(2) that essentially defeats the intent and purpose of the legislature in enacting the statute, that is—as this Court unanimously agrees—to save lives.

a. The (B)(2) and (B)(1) requirements must be harmonized.

First, the majority focuses on the use of the passive "has been" to hold that Morris cannot receive immunity under the statute because he drove *himself* to the hospital. While the majority's interpretation of (B)(2) passes grammatical muster, it strictly adheres to the rules of grammatical voice to the detriment of the entire statute. This interpretation of the (B)(2) requirement fails to harmonize with other provisions in the statute. Specifically, (B)(1) provides that the statute applies if "[s]uch individual (i) in good faith, *seeks or obtains emergency medical attention (a) for himself*, *if he is experiencing an overdose* . . . ." Code § 18.2-251.03(B)(1) (emphasis added). (B)(1) allows individuals to receive immunity if they seek or obtain emergency medical attention for themselves when experiencing an overdose. Focusing on the phrase "has been transported" in (B)(2) significantly impinges on (B)(1)'s protections for individuals seeking or obtaining emergency medical care, where seeking or obtaining that care would require leaving the scene of the overdose.

Under the majority's interpretation, a person who overdoses a block away from a hospital would not be able to walk over to the hospital to receive help and still receive protection under the statute. Similarly, a lone individual who overdoses without access to a phone or a cellular signal, and thus without the ability to call for help, could not seek or obtain needed emergency

medical care without forfeiting immunity under Code § 18.2-251.03. These examples reveal the friction between the majority's reading of (B)(2) and the protections in (B)(1).

As the majority notes, the statute's "clear purpose" is to "encourage . . . prompt emergency medical treatment [for] those who have suffered an overdose as a result of ingesting a controlled substance." *Broadous v. Commonwealth*, 67 Va. App. 265, 271 (2017). The majority's holding conflicts with this legislative goal. Its reading of the statute would preclude individuals from seeking or obtaining the emergency medical attention provided for in (B)(1), rather than facilitate it, leaving those individuals in the same position that they would have been in the statute's absence. As such, this reading is neither consistent with (B)(1) nor with the broader legislative goals encoded into Code § 18.2-251.03.

"[W]hile legislative intent 'must be gathered from the words used, . . . unreasonable or absurd results must not be reached by too strict adherence to literal interpretation.'" *Colbert v. Commonwealth*, 47 Va. App. 390, 394 (2006) (second alteration in original) (quoting *Buzzard v. Commonwealth*, 134 Va. 641, 653 (1922)). The majority's strict reading of (B)(2) results in an inconsistency that impairs (B)(1), without an explanation of why the phrase "has been transported" should take precedence over "seeks or obtains emergency medical attention." The majority acknowledges if there were "context suggesting the legislature intended a different result," it would impact their construction of (B)(2). The plain language of (B)(1) supplies ample evidence that the legislature intended a different result. *See Delaune v. Commonwealth*, 76 Va. App. 372, 381 (2023) ("[O]ur primary objective is 'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute." (alteration in original) (quoting *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012))); *see also Colbert*, 47 Va. App. at 394 ("The proper course [in] all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with

the context, and promotes in the fullest manner the apparent policy and objects of the legislature." (alteration in original) (quoting *Jones v. Rhea*, 130 Va. 345, 372 (1921))).

Accordingly, this strict adherence to literal interpretation renders a result that gives priority to grammatical voice over the substantive terms of the statute, using the statute's reliance on the passive voice to vitiate (B)(1) to a point such that what remains is a near husk of a statute, which fails to deliver on the legislature's intent. However, there is an alternative that avoids rendering the statute internally inconsistent. Rather than use The Chicago Manual of Style to fashion an interpretation of (B)(2)'s use of the passive voice that impairs the statute, it is possible to harmonize the substantive, *clear* terms of (B)(1) with (B)(2)'s use of the passive voice by finding that (B)(2) echoes or amplifies (B)(1). This interpretive approach gives utility to both subdivisions as opposed to rendering the earlier (B)(1) meaningless in light of the latter (B)(2). Thus, I would take a harmonizing approach to interpret (B)(2)'s use of the passive voice in light of the clear terms in (B)(1), holding that individuals who transport *themselves* to an alternative location for medical attention satisfy the requirement in (B)(2) that "[s]uch individual remain[] at the scene of the overdose or at any alternative location to which he . . . has been transported[.]" Code § 18.2-251.03(B)(2).

b. The majority's interpretation of (B)(2) is unworkable on its own terms.

Second, even as it acknowledges that pinning down the precise location of Morris's overdose sets before this Court an impracticable task, the majority nevertheless opines that "the purported overdose was necessarily a location where Morris was *before* he decided to seek medical care, and thus somewhere *other* than where he stopped the car in the middle of the road next to the emergency room." This holding assumes that the "scene" of an overdose can be neatly delimited and traced to a geographically bounded location, a single set of coordinates on a

map. But Morris may have begun experiencing the purported overdose in a vehicle,[22] which, by its nature, is mobile. It is imaginable that there are circumstances in which the "scene" of an overdose is transitory rather than immobile.

However, in holding both that "an individual experiencing an overdose [must] remain at the location where the 'life-threatening condition' began" and that Morris did not meet the (B)(2) requirement in Code § 18.2-251.03, the majority implicitly rejects the possibility of a transitory overdose scene. Such rejection fashions a standard that will ultimately prove unworkable. Trial courts will be required to perform the impossible task of teasing out the *fixed* location of where an overdose began, even where a defendant was in a vehicle, *on the move*. And, even where a defendant is not experiencing an overdose in a vehicle, the majority interpretation requires that trial courts draw clear lines around the "scene" of an overdose, by requiring that they pinpoint the place of its beginning.

The ingestion of a drug is not the same as an overdose. The two may happen in quick succession, but they may not. It is also imaginable that an individual experiencing an overdose may not have the cognitive awareness needed to *stay* in the location where that overdose began. Requiring that trial courts sift through this morass and determine the precise location where an overdose began is no more reasonable than requiring that an individual experiencing an overdose stay at the location of the overdose, even when doing so may result in fatality or may be

[22] The record lends credence to this inference. According to his proffer, Morris first began experiencing suicidal ideations "in his boss's car," while on the phone with his mother. Then, while driving, Morris decided to go to the emergency room because "he was thinking about suicide." The suicide ideations are what triggered the life-threatening condition. Morris experienced the ideations in the vehicle.

otherwise infeasible. A harmonizing interpretation of the statute would obviate such outcomes and, in turn, better serve trial courts, defendants, and the statute itself.

It is for these reasons that I concur in judgment only.

Chaney, J. dissenting from the judgment.

The General Assembly intended Code § 18.2-251.03 to save lives by encouraging persons who have a good faith belief that they are experiencing a life-threatening condition due to a drug overdose to seek medical treatment without fear of criminal prosecution. However, the majority's unreasonably narrow construction of Code § 18.2-251.03 would eliminate immunity for those who either walk a few blocks to an emergency room or otherwise transport themselves to a hospital after a drug overdose. To arrive at this counter-intuitive construction, the majority exploits a grammatical awkwardness and arrives at counter-intuitive results because the location of the overdose is wherever someone has a good faith belief that they have a life-threatening condition relating to the ingestion of drugs. The only purpose of the statutory clause relating to being transported is to require that the person seeking immunity not leave the scene for the purpose of interfering with law enforcement since cooperation with law enforcement is required. It is undisputed that Morris brought himself to law enforcement's attention and cooperated. Thus, I respectfully dissent.