

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CITY OF HUNTINGTON and
CABELL COUNTY COMMISSION,

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Petitioners,

v.

CASE NO. 24-166

AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*

Respondents.

BRIEF OF WEST VIRGINIA UNITED HEALTH SYSTEMS, INC., AND
VANDALIA HEALTH, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS
AND AN AFFIRMATIVE RESPONSE TO THE CERTIFIED QUESTION

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
IDENTITY, INTEREST AND AUTHORITY TO FILE OF AMICI CURIAE.....	1
INTRODUCTION.....	2
ARGUMENT.....	3
Under West Virginia common law, the substantial harm Caused by Respondents’ distribution of opioids constitutes a public nuisance.....	3
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases	Pages
<u>West Virginia</u>	
<i>Brooke County Comm’n v. Purdue Pharma, L.P.</i> , No. 17-C-248, p.13 (W.Va. Marshall Cty. Cir. Ct. Dec. 28, 2018) writ denied, <i>State ex rel. Cardinal Health, Inc. v. Hummel</i> , No. 19-2010 (W.Va. June 4, 2019).....	5
<i>Duff v. Morgantown Energy Ass’n</i> , 187 W.Va. 712, 716 n. 5, 421 S.E.2d 253, 257 n. 5 (1992).....	3
<i>Hark v. Mountain Fork Lumber Co.</i> , 127 W.Va 586, 34 S.E.2d 348 (1945).....	3
<i>In Re Opioid Litigation</i> , No. 21-C-9000 DISTRIBUTOR (W.Va. M.L.P. July 1, 2022)(Transaction ID 67786397).....	6
<i>In re Opioid Litigation</i> , Civil Action No. 21-C-2000 PHARM at 30 (W.Va. MLP Aug. 3, 2022)	7
<i>Monongalia County, et al. v. Purdue Pharma, L.P., et al.</i> , Nos. 18-C-222-236 (W.Va. M.L.P. Oct. 31, 2019) writ denied, <i>State ex rel. AmerisourceBergen Drug Corp. v. Moats</i> , No. 19-1051 (W.Va. Jan. 30, 2020).....	5
<i>Sharon Steel Corp. v. City of Fairmont</i> , 175 W.Va. 479, 334 S.E.2d 616 (1985).....	4, 7 11
<i>State ex rel. Morrisey v. AmerisourceBergen Drug Corp.</i> , No. 12-c-141, 2014 WL 12814021 at *10 (W.Va. Boone Cty. Cir. Ct. Dec. 12, 2014) writ denied, <i>State ex rel. AmerisourceBergen Drug Corp. v. Thompson</i> , No. 15-1026 (W.Va. Jan 5, 2016).....	5
<i>State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.</i> , 200 W.Va. 221, 488 S.E.2d 901 (1997).....	4

Cases

Pages

Federal

City of Huntington v. AmerisourceBergen Drug Corp., 609 F.Supp. 408, 475
(S.D. W.Va. 2022)..... 2, 7

City of Huntington v. AmerisourceBergen Drug Corp., 96 F.4th 642,
2024 U.S. App. LEXIS 6399 *16-17 (4th Cir. 2024)..... 3, 7

In re: National Prescription Opiate Litigation, MDL 2804,
Case No. 17-md-2804 (N.D. OH Jan. 22, 2024)..... 1

In re Nat'l Prescription Opiate Litig., 406 F. Supp. 3d 672, 674
(N.D. Ohio 2019)..... 5

In re Nat'l Prescription Opiate Litig. (West Boca Med. Ctr.), 452 F. Supp. 3d 745
(N.D. Ohio 2020)..... 5

Other States

Alabama v. Purdue Pharma L.P., No. 03-CV-2019-901174.00,
slip op. 11-12 (Ala. Cir. Ct. Nov. 13, 2019)..... 5

Alaska v. McKesson Corp., No. 3AN-18-10023CI, slip op. 7
(Alaska Super. Ct. Aug. 28, 2019)..... 5

Arkansas v. Purdue Pharma L.P., 2019 WL 1590064 (Ark. Cir. Ct. Apr. 5, 2019)..... 5

City & Cnty. of San Francisco v. Purdue Pharma L.P., 491 F. Supp. 3d 610, 669
(N.D. Cal. Sept. 30, 2020)..... 5

City of Boston v. Purdue Pharma, LP, 2020 WL 416406
(Mass. Super. Ct. Jan. 3, 2020)..... 5

City of Surprise v. Allergan PLC, 2020 Ariz. Super. LEXIS 476, at *63-66
(Ariz. Super. Ct. Oct. 28, 2020)..... 5

County of Delaware v. Purdue Pharma, L.P., No. CV-2017008095, slip ops.
(Pa. Ct. Com. Pl. Mar. 13, 2020, Dec. 4, 2019, and Oct. 25, 2019)..... 5-6

Cases	Pages
<i>In re Opioid Litig.</i> , 2018 WL 3115102, at *28 (N.Y. Sup. Ct. June 18, 2018) (“New York Opioids”).....	5
<i>In re Texas Opioid Litig. (Cnty. of Dallas)</i> , No. 2018-77098, slip op. (Tex. Dist. Ct. June 9, 2019).....	6
<i>Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.</i> , No. 18-CI-00846, slip op. (Ky. Cir. Ct. July 18, 2019).....	5
<i>Michigan ex rel. Kessel v. Cardinal Health, Inc.</i> , No. 19016896-NZ, slip op. 2 (Mich. Cir. Ct. Mar. 24, 2021), reversing on recons. slip op. (Mich. Cir. Ct. Nov. 17, 2020).....	5
<i>Mississippi v. Cardinal Health, Inc.</i> , No. 25CII:18-cv00692, slip op. (Miss. Cir. Ct. Apr. 5, 2021).....	5
<i>Missouri ex rel. Schmitt v. Purdue Pharma, L.P.</i> , No. 1722-CC10626, slip op. 7-8 (Mo. Cir. Ct. Apr. 6, 2020).....	5
<i>Nevada v. McKesson Corp.</i> , No. A-19-796755-B, slip order (Nev. Dist. Ct. Jan. 3, 2020).....	5
<i>New Hampshire v. Purdue Pharma Inc.</i> , 2018 WL 4566129 (N.H. Super. Ct. Sept. 18, 2018).....	5
<i>New Mexico ex rel. Balderas v. Purdue Pharma L.P.</i> , No. D-101-CV-2017-02541, slip ops. (N.M. Dist. Ct. Dec. 17, 2020 and Sept. 10, 2019).....	5
<i>Oklahoma ex rel. Hunter v. Johnson & Johnson</i> , 499 P.3d 719 (Okla. 2021).....	7
<i>Rhode Island ex rel. Neronha v. Purdue Pharma L.P.</i> , 2019 WL 3991963, at *9 (R.I. Super. Ct. Aug. 19, 2019).....	6
<i>South Carolina v. Purdue Pharma L.P.</i> , No. 2017-CP40-04872, slip order (S.C. Ct. Com. Pl. Apr. 12, 2018).....	6
<i>Tennessee ex rel. Slatery v. Purdue Pharma L.P.</i> , 2019 WL 2331282, at *5 (Tenn. Cir. Ct. Feb. 22, 2019).....	6
<i>Vermont v. Cardinal Health, Inc.</i> , No. 279-3-19 Cncv, slip op. (Vt. Super. Ct. May 12, 2020).....	6

Cases	Pages
<i>Washington v. Purdue Pharma L.P.</i> , 2018 WL 7892618 (Wash. Super. Ct. May 14, 2018).....	6
 <u>Statutes and Rules</u>	
W.Va Code §31D-34-302 (2024).....	2
 <u>Miscellaneous</u>	
Restatement (Second) of Torts §821B (1979).....	4, 6, 11
Restatement (Third) of Torts: Liability for Economic Harm §8 (2020).....	2-3, 6
Brief of Legal Scholars as <i>Amici Curiae</i> in Support of Neither Party, No. 22-1819(L), ECF No. 47-1 (4 th Cir. Jan. 3, 2023).....	8

***AMICI CURIAE* IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE**

West Virginia United Health Systems, Inc. d/b/a West Virginia University Health Systems (“WVUHS”) and Vandalia Health, Inc. (“Vandalia”) are West Virginia nonprofit corporations who together comprise the two largest hospital systems in West Virginia (collectively referred to hereinafter as “WV Hospitals”).¹ WVUHS-affiliated hospitals in West Virginia include Berkeley Medical Center, Braxton County Memorial Hospital, Camden-Clark Medical Center, Grant Memorial Hospital, Jackson General Hospital, Jefferson Medical Center, Potomac Valley Hospital, Princeton Community Hospital, Reynolds Memorial Hospital, Saint Francis Hospital, St. Joseph’s Hospital of Buckhannon, Summersville Regional Medical Center, Thomas Memorial Hospital, United Hospital Center, Weirton Medical Center, West Virginia University Hospitals, Wetzel County Hospital and Wheeling Hospital. Vandalia-affiliated hospitals include Broaddus Hospital, Charleston Area Medical Center d/b/a CAMC General Hospital, CAMC Memorial Hospital, CAMC Teays Valley Hospital, and CAMC Women and Children’s Hospital, CAMC Greenbrier Valley Medical Center, CAMC Plateau Medical Center, Davis Memorial Hospital, Monongalia County General Hospital, Preston Memorial Hospital, Stonewall Jackson Memorial Hospital and Webster Memorial Hospital. None of these hospitals are located in the City of Huntington or Cabell County.

Each of the WVUHS-affiliated hospitals and all but two of the Vandalia-affiliated hospitals are currently plaintiffs in the multi-district opioid litigation pending in the United States District Court for the Northern District of Ohio before Judge Polster – *In re: National Prescription Opiate Litigation*, MDL 2804, Case No. 17-md-2804. Each of the Respondents are

¹ No party or counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. Further, *Amici Curiae* provided notice to all counsel of record of their intent to file this

also defendants in that action.

As West Virginia corporations, WVUHS and Vandalia are authorized to file this *amici curiae* brief pursuant to W.Va Code §31D-34-302 (2024).

INTRODUCTION

An epidemic of opioid addiction has been raging throughout the State of West Virginia for nearly two decades. The existence of this unprecedented public health crisis cannot be disputed. WV Hospitals comprise thirty-two West Virginia hospitals spread throughout the state. WV Hospitals' resources and budgets have been stretched and broken under the weight of the flood of victims of this epidemic. These hospitals have experienced a dramatic surge in overdose patients; addicted mothers and NAS babies; patients suffering from HIV, hepatitis, and endocarditis secondary to intravenous drug use; and patients suffering from opioid use disorder (OUD) as either a primary or secondary diagnosis. Studies undertaken on behalf of WV Hospitals have demonstrated that OUD patients are generally in poorer health than non-addicted patients; they experience longer hospital stays; and they consume a disproportionate share of hospital resources. Most of the additional care and resources expended by the hospitals on OUD patients is uncompensated.

The district court found that a common law action for public nuisance in West Virginia could not be brought to ameliorate the opioid epidemic brought on by the Respondents' distribution of opioids in Huntington/Cabell County. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp. 408, 475 (S.D. W.Va. 2022). The district court predicated its decision on its prediction the Supreme Court of Appeals would adopt the reasoning of the Restatement

(Third) of Torts: Liability for Economic Harm §8 (2020) and find that public nuisance causes of action may not be brought to address harmful conditions caused by products. *Id.* at 474. The federal court of appeals, perhaps finding the contrary decisions of two West Virginia circuit courts and West Virginia’s mass litigation panel (MLP) to be more persuasive than the district court, has certified the following question to the Supreme Court of Appeals:

Under West Virginia’s common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance and, if so, what are the elements of such a public nuisance claim?

City of Huntington v. AmerisourceBergen Drug Corp., 96 F.4th 642, 2024 U.S. App. LEXIS 6399 *3 (4th Cir. 2024).

From the prior decisions of the Supreme Court of Appeals, the decisions of the WV circuit courts and the MLP, the language of the Restatement (Second) of Torts and the overwhelming weight of authority outside West Virginia addressing the issue, the certified question should be answered in the affirmative, and the Court should find that the conditions caused by the distribution of a controlled substance can constitute a public nuisance under West Virginia common law.

ARGUMENT

Under West Virginia common law, the substantial harm caused by Respondents’ distribution of opioids constitutes a public nuisance.

The Supreme Court of Appeals has defined a public nuisance to be “an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.” *Hark v. Mountain Fork Lumber Co.*, 127 W.Va 586, 595-96, 34 S.E.2d 348, 354 (1945); *Duff v. Morgantown Energy Ass’n*, 187 W.Va. 712, 716 n. 5, 421 S.E.2d 253, 257 n. 5 (1992). This

definition is consistent with the Restatement which defines a public nuisance as an “unreasonable interference with a right common to the general public.” Restatement (Second) of Torts §821B(1)(1979). The Restatement further provides that the “[c]ircumstances that may sustain a holding that an interference is unreasonable include[s]...whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.” Id. at §821B(2)(a).

The abatement of harm to the health and safety of the public is the paramount justification of a common law public nuisance claim. *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 245, 488 S.E.2d 901, 925 (1997). The Court has found common law public nuisance to be “a flexible area of the law that is adaptable to a wide variety of factual situations.” *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 483, 334 S.E.2d 616, 621 (1985). The flexibility inherent in public nuisance claims is reflected in the comment to the Restatement which notes that a “public nuisance does not necessarily involve interference with use and enjoyment of land.” Restatement (Second) of Torts §821B, comment h.

Nearly every court addressing this question has rejected the District Court’s determination that the conditions arising from the opioid epidemic in West Virginia may not be addressed in a public nuisance claim. Before the Mass Litigation Panel (MLP), the Respondent Distributors moved for summary judgment on the grounds that (1) public nuisance is limited to claims arising out of the use of real property and (2) that public nuisance cannot arise from the sale or distribution of products. In rejecting both contentions and denying the Respondents’ motion for summary judgment, the MLP cited the nearly unanimous holdings of several West Virginia circuit courts, Judge Polster in the MDL and numerous courts outside West Virginia. Judge Moats and Judge Swope found the denial of the Distributors’ motion for summary

judgment aligned with -

other West Virginia trial courts including this Panel – which have found that governmental opioid claims are cognizable as public nuisance claims. The previous decision of this Panel in *Monongalia County*², along with the decision by Judge Thompson in *Morrisey*³ and Judge Hummel in *Brooke County*⁴ were all the subject of unsuccessful writ proceedings in the Supreme Court of Appeals brought by these same Defendants. Moreover, these decisions are consistent with Judge Polster’s decisions in the MDL⁵, along with the courts in 22 other states that have recognized public nuisance claims in the opioid litigation.⁶ These courts

² *Monongalia County, et al. v. Purdue Pharma, L.P., et al.*, Nos. 18-C-222-236 (W.Va. M.L.P. Oct. 31, 2019) writ denied, *State ex rel. AmerisourceBergen Drug Corp. v. Moats, No. 19-1051 (W.Va. Jan. 30, 2020)*.

³ *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-c-141, 2014 WL 12814021 at *10 (W.Va. Boone Cty. Cir. Ct. Dec. 12, 2014) writ denied, *State ex rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W.Va. Jan 5, 2016).

⁴ *Brooke County Comm’n v. Purdue Pharma, L.P.*, No. 17-C-248, p.13 (W.Va. Marshall Cty. Cir. Ct. Dec. 28, 2018) writ denied, *State ex rel. Cardinal Health, Inc. v. Hummel*, No. 19-2010 (W.Va. June 4, 2019).

⁵ *In Re Nat’l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 674 (N.D. Ohio 2019).

⁶ The 22 other states recognizing public nuisance claims in opioid litigation cited by the MLP (*see Id.* n.4), include *Alabama v. Purdue Pharma L.P.*, No. 03-CV-2019-901174.00, slip op. 11-12 (Ala. Cir. Ct. Nov. 13, 2019); *Alaska v. McKesson Corp.*, No. 3AN-18-10023CI, slip op. 7 (Alaska Super. Ct. Aug. 28, 2019); *City of Surprise v. Allergan PLC*, 2020 Ariz. Super. LEXIS 476, at *63-66 (Ariz. Super. Ct. Oct. 28, 2020); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064 (Ark. Cir. Ct. Apr. 5, 2019) (denying motion to dismiss the state’s public nuisance claims); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 669 (N.D. Cal. Sept. 30, 2020); *In re Nat’l Prescription Opiate Litig. (West Boca Med. Ctr.)*, 452 F. Supp. 3d 745 (N.D. Ohio 2020); *Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.*, No. 18-CI-00846, slip op. (Ky. Cir. Ct. July 18, 2019); *City of Boston v. Purdue Pharma, LP*, 2020 WL 416406 (Mass. Super. Ct. Jan. 3, 2020); *Michigan ex rel. Kessel v. Cardinal Health, Inc.*, No. 19016896-NZ, slip op. 2 (Mich. Cir. Ct. Mar. 24, 2021), *reversing on recons.* slip op. (Mich. Cir. Ct. Nov. 17, 2020); *Mississippi v. Cardinal Health, Inc.*, No. 25CII:18-cv00692, slip op. (Miss. Cir. Ct. Apr. 5, 2021); *Missouri ex rel. Schmitt v. Purdue Pharma, L.P.*, No. 1722-CC10626, slip op. 7-8 (Mo. Cir. Ct. Apr. 6, 2020); *Nevada v. McKesson Corp.*, No. A-19-796755-B, slip order (Nev. Dist. Ct. Jan. 3, 2020); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129 (N.H. Super. Ct. Sept. 18, 2018); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541, slip ops. (N.M. Dist. Ct. Dec. 17, 2020 and Sept. 10, 2019); *In re Opioid Litig.*, 2018 WL 3115102, at *28 (N.Y. Sup. Ct. June 18, 2018) (“*New York Opioids*”); *County of Delaware v. Purdue Pharma, L.P.*, No. CV-2017008095, slip ops. (Pa. Ct. Com. Pl. Mar. 13,

have specifically rejected the arguments of these and other opioid defendants that governmental public nuisance are limited to claims arising out of the use of property. And, a number of these courts have also rejected these Defendants' arguments that product-based public nuisance claims are not cognizable.

Order Denying Defs.' MSJ re "Factual Issue #2", *In Re Opioid Litigation*, No. 21-C-9000 DISTRIBUTOR (W.Va. M.L.P. July 1, 2022)(Transaction ID 67786397).

The district court relied on the Restatement (Third) of Torts to justify its judgment for Respondents. The district court's reliance on the Restatement (Third) of Torts is misplaced as it has not been adopted by this Court and is inapplicable to the Petitioners' claims. As has been noted *supra*, the Supreme Court of Appeals has adopted the reasoning and language of the Restatement (Second) of Torts in establishing the parameters of public nuisance cases in West Virginia. Conversely, the Court has not adopted Restatement (Third) of Torts §8. By its express terms, Restatement (Third) does not apply to public officials such as the Petitioners. "In addition to the common law claims recognized here, public officials may bring civil or criminal actions against a defendant who creates a public nuisance. An action of that type is the most common response to a defendant's invasion of a public right." Restatement (Third) of Torts §8, comment a (2020). As can be seen from this comment, Restatement (Third) of Torts §8 does not apply to civil actions for public nuisance brought by public officials - a fact acknowledged by the federal court of appeals in its certification order. "Moreover, the test of section 8 expressly outlines the limits of its application by acknowledging that it applies to private suits rather than to public

2020, Dec. 4, 2019, and Oct. 25, 2019); *Rhode Island ex rel. Neronha v. Purdue Pharma L.P.*, 2019 WL 3991963, at *9 (R.I. Super. Ct. Aug. 19, 2019); *South Carolina v. Purdue Pharma L.P.*, No. 2017-CP40-04872, slip order (S.C. Ct. Com. Pl. Apr. 12, 2018); *Tennessee ex rel. Slatery v. Purdue Pharma L.P.*, 2019 WL 2331282, at *5 (Tenn. Cir. Ct. Feb. 22, 2019); *In re Texas Opioid Litig. (Cnty. of Dallas)*, No. 2018-77098, slip op. (Tex. Dist. Ct. June 9, 2019); *Vermont v. Cardinal Health, Inc.*, No. 279-3-19 Cncv, slip op. (Vt. Super. Ct. May 12, 2020); *Washington v. Purdue Pharma L.P.*, 2018 WL 7892618 (Wash. Super. Ct. May 14, 2018).

nuisance claims brought by public officials.” *City of Huntington v. AmerisourceBergen Drug Corp.*, 96 F.4th 642, 2024 U.S. App. LEXIS 6399 *16-17 (4th Cir. 2024). The MLP has rejected the district court’s holding that common law public nuisance claims do not apply to the opioid epidemic. Order Denying Pharmacy Defs.’ Motions to Dismiss, *In re Opioid Litigation*, Civil Action No. 21-C-2000 PHARM at 30 (W.Va. MLP Aug. 3, 2022).⁷

The district court further justified its decision to reject the Petitioners’ claims on the grounds that Supreme Court of Appeals has only applied public nuisance to claims involving the interference with public property or public resources. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp.2d 408, 472 (S.D. W.Va. 2022). The district court believed that extending public nuisance claims beyond the real property context would be contrary to the “history and traditional notions of nuisance.” *Id.* Nothing in the language or reasoning of this Court’s decisions prevent a public authority from bringing an action for public nuisance to combat an assault on the public health, safety and welfare as pernicious as the opioid epidemic. Indeed, the district court’s narrow interpretation of the Supreme Court of Appeals’ public nuisance jurisprudence contravenes this “flexible area of the law that is adaptable to a wide variety of factual situations.” *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 483, 334 S.E.2d 616, 621 (1985).

The notion that public nuisance has traditionally been restricted to claims arising from real property is simply incorrect. In *amici curiae* brief before the federal court of appeals, a group of prominent legal scholars have traced the history of public nuisance under the English

⁷ The district court also cited *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021) as support for its rejection of the Petitioners’ claims. The district court’s reliance on *Hunter* is misplaced. *Hunter* involved the interpretation of Oklahoma’s public nuisance statute. Moreover, it is a nonbinding decision which has been rejected by numerous lower court decisions in West Virginia. *See supra*.

common law. They have found that “contrary to the district court’s understanding, at common law, public nuisance actions included liability for harmful product sales. Both Sheppard and Blackstone explicitly included harmful products in their lists of offenses. They each classify as infringements on public rights certain activities and products that some commentators today might classify as implicating exclusively private rights, recognizing that the circumstances can yield not only individualized injury but also common harm.” Brief of Legal Scholars as *Amici Curiae* in Support of Neither Party, No. 22-1819(L), ECF No. 47-1 at p. 8 (4th Cir. Jan. 3, 2023) (JA 46-81). In particular, the *amici* identified the recognition of public nuisance claims under the common law against “*apothecaries* who sell products unfit for human consumption.” *Id.* at p. 7.

The Respondents hope to convince the court that the application of public nuisance to the opioid epidemic would upset common law traditions and conventions. To the contrary, it is the district court which has rejected common law traditions and conventions by its dismissal of the Respondents’ public nuisance claims. The district court failed to recognize that this “flexible” and “adaptable” area of the law has long served a vital role in the support of the state’s preeminent responsibility in protecting “the public health, the public safety, the public peace, public comfort and public convenience.

CONCLUSION

The Petitioners' action seeking the abatement of the public health and public safety crisis wrought by the opioid epidemic is precisely the kind of action justifying a common law public nuisance claim. The opioid epidemic constitutes a "condition that unlawfully operates to hurt and indefinite number of persons." Furthermore, the Respondents' actions in bringing on this crisis involves "a significant" and unlawful "interference with the public health, the public peace, the public comfort or the public convenience." The Respondents' conduct is subject to public nuisance liability. The Supreme Court should answer the certified question in the affirmative.

Respectfully submitted,

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v.

CASE NO. 24-166

AMERISOURCEBERGEN DRUG
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Respondents.

CERTIFICATE OF SERVICE

I, Stephen B. Farmer, Co-counsel for *Amici Curiae* West Virginia University Health Systems, Inc. and Vandalia Health, Inc., do hereby certify that I have served the foregoing **“BRIEF OF WEST VIRGINIA UNITED HEALTH SYSTEMS, INC. AND VANDALIA HEALTH, INC. AS *AMICI CURIAE* IN SUPPORT OF PETIONERS AND AN AFFIRMATIVE RESPONSE TO THE CERTIFIED QUESTION”** via File & ServeXpress on April 24, 2024 to the following:

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