IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 24-166

CITY OF HUNTINGTON, WEST VIRGINIA, and CABELL COUNTY COMMISSION,
Petitioners

v.

AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., and MCKESSON CORPORATION,
Respondents

AMICUS CURIAE BRIEF SUBMITTED BYAMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF RESPONDENTS AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., AND MCKESSON CORPORATION

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I. STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues. This is one of those cases. ATRA has an interest in ensuring that, contrary to petitioner's proposed scope of public nuisance law, West Virginia's tort system is predictable, consistent with due process and the rule of law, and does not punish businesses for harms that they did not cause.

II. ARGUMENT

"However grave the problem of opioid addiction is in [this State], public nuisance law does not provide a remedy for this harm." *State ex rel. Hunter v. Johnson & Johns*on, 499 P.3d 719, 723 (Okla. 2021). Although this statement was penned by the Oklahoma Supreme Court, it applies with equal force in West Virginia. The simple answer to the Fourth Circuit's straightforward question—"Under West Virginia's common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance"—is "no." This Court never has extended public nuisance liability to the theory of liability propounded by petitioners here. Under the guise of public nuisance, petitioners and other state and municipal entities across the country are engaged in regulation by litigation, improperly displacing other law such as the law of products liability. This Court should exercise judicial restraint, apply relevant separation of powers principles, and decline to create a public nuisance "monster that would devour in one gulp the entire law of tort."

[1] Pursuant to West Virginia Rule of Appellate Procedure 30(b), the parties have consented to amicus briefs, and the required notice has been provided.

Tioga Pub. Sch. Dist. No. 15 of Williams Cnty., State of N.D. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

A. Public Nuisance Traditionally Has Been Limited to Conduct that Interferes with the Use of Real Property.

1. Public Nuisance Is About Land, Not Products.

Public nuisance law developed in the 12th century in England as a means for the Crown to enjoin infringement on its land and to force an offending party to abate any damages.[2] As early American courts adopted the English common law, public nuisance retained its traditionally narrow scope: "to enjoin nontrespassory invasions on the use and enjoyment of public lands."[3] The tort was limited to conduct that interfered with a "public right," meaning a right to access shared resources like public roads and waterways. *See State v. Lead Indus. Ass'n*, 951 A2d 428, 455 (R.I. 2007) (describing the "long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way").[4] It existed primarily as an injunctive remedy permitting the government to abate interference with public resources. *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 441, 859 S.E.2d 374, 384 (2021) ("injunctive relief is frequently the means by which a public nuisance is prevented or abated").

Public nuisance remained well defined for hundreds of years. But beginning in the 1970s, some plaintiff's attorneys first began testing the novel theory that downstream harm caused by the sale of lawful products can constitute a public nuisance.[5] These cases came on the heels of the

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[2] *See* Victor E. Schwartz et. al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 631 (2010) ("*Game Over?*").
[3] Schwartz, *Game Over?*, 62 Okla. L. Rev. 632.
[4] *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 545 (2006) (stating that most early "public nuisance cases involved the obstructions of public highways and waterways, though some involved using property in ways that conflicted with public morals or social welfare") ("*The Law of Public Nuisance*").
[5] *See generally* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 749–52 (2003); Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638–58. Notably, Professor Gifford,

advent of strict products liability law, which emerged in the 1960s and "literally swept the country."[6] These new public nuisance claims were, at least in part, an attempt to sidestep the elements of strict products liability, negligence, and failure to warn causes of action.[7] New public nuisance lawsuits typically target companies that "manufacture products that may be used by third parties to harm others or that . . . plaintiffs view as contributing to some larger social ill."[8] Public nuisance lawsuits have targeted gun manufacturers for harm caused by gun violence,[9] energy producers for allegedly contributing to climate change,[10] lead paint and pigment manufacturers for harm caused to children by the ingestion of old paint,[11] asbestos producers for exposure-related diseases,[12] and cigarette manufacturers for medical costs associated with treating smokers.[13]

Overall, these new public nuisance lawsuits have failed.[14] But some large settlements have kept the public nuisance movement alive. Most importantly, the tobacco litigation brought by

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former Dean of the West Virginia University College of Law, concludes that "[c]ourts should not replace the substantial bodies of mature doctrinal and policy analysis available to guide them in products liability actions with a vaguely defined tort that is being used in ways utterly foreign to its historical context." 71 U. Cin. L. Rev. at 837.

[6] Gifford, 71 U. Cin. L. Rev. at 744.

[7] *See, e.g.*, Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637; Schwartz, *The Law of Public Nuisance*, 45 Washburn L.J. at 552 ("By filing claims under public nuisance theory, personal injury lawyers hope to expand liability for harm caused by products by avoiding a number of time-tested products liability rules, such as defect, the statute of limitation, and the rule against recovery for purely economic loss.").

[8] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 631.

[9] *See, e.g.*, *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

[10] *See, e.g.*, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

[11] *See e.g.*, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

[12] *See, e.g.*, *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992).

[13] *See, e.g.*, *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997).

[14] *See generally* Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637–59; Philip Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" the Emperor's New Clothes of Modern Litigation?* 37 Mealey's Personal Injury Report 1, 8 (2022); *Tioga Pub. Sch. Dist. #15 v. U.S. Bypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (asbestos); *Celotex Corp.*, 493 N.W.2d 513 (asbestos); *In re Lead Paint Litig.*, 924 A2d 484, 494–95 (N.J. 2007) (lead paint); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455 (R.I. 2008) (lead paint); *Benjamin Moore & Co.*, 226 S.W.3d 110 (lead paint); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (firearms); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (firearms).

forty-six States against the industry led to a $246 billion settlement in 1998.[15] Although the only court addressing the validity of the plaintiffs' public nuisance theory in the tobacco litigation rejected it,[16] the enormous settlement fueled subsequent public nuisance litigation.[17]

Opioids are the latest subject of public nuisance attack. Like the tobacco litigation, a national settlement totaling over $50 billion has resolved many claims, but many remain.[18] Notably, the Oklahoma Supreme Court, the only high court thus far to address an opioid public nuisance claim, rejected it, reversing a $465 million verdict against Johnson & Johnson, reasoning that: public nuisance "has historically been linked to the use of land by the one creating the nuisance" and that "[c]ourts have limited public nuisance claims to these traditional bounds"; public nuisances "have no beneficial use and only cause annoyance, injury, or endangerment," but here "the lawful products, prescription opioids, have a beneficial use of treating pain"; and if applied to lawful products "would create unlimited and unprincipled liability for product manufacturers." *Johnson & Johnson*, 499 P.3d at 724–24.[19]

2. This Court Never Has Applied Public Nuisance Law to the Manufacturing, Distributing, or Selling of Lawful Products.

Although this Court has not *defined* public nuisance consistently, its *application* of the doctrine has been consistent with public nuisance law elsewhere. Specifically, this Court has only

[15] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638.
[16] *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973–74 (E.D. Tex. 1997) (the court was "unwilling to accept the state's invitation to expand a claim for public nuisance").
[17] Goldberg, 37 Mealey's Personal Injury Report at 3.
[18] Aneri Pattani, *Opioid Settlement Payouts Are Now Public—And We Know How Much Local Governments Got*, available at https://www.npr.org/sections/health-shots/2023/06/16/1182580973/opioid-settlement-fund-amounts#:~:text=The%20national%20opioid%20settlements%20are%20the%20second-largest%20public,now%20largely%20transitioned%20to%20illicit%20drugs%2C%20like%20fentanyl, last visited on May 19, 2024.
[19] On certified question from the Sixth Circuit, the Ohio Supreme Court is currently reviewing whether the distribution of opioids can serve as the basis of a public nuisance claim. *See Nat'l Prescription Opiate Litig. v. Purdue Pharma, L.P.*, 222 N.E.3d 661 (Ohio 2023).

applied public nuisance to claims involving the use or misuse of real property. At different times and in different opinions, this Court has said that a public nuisance:

- "is anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable," *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 621 (1985) (quoting *Martin v. Williams*, 141 W. Va. 595, 610–11, 93 S.E.2d 835, 844 (1956));

- "is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort," *id.* (quoting *Williams*, 141 W. Va. at 610–11, 93 S.E.2d at 844);

- "is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons," *Duff v. Morgantown Energy Assocs. (M.E.A.)*, 187 W. Va. 712, 716, 421 S.E.2d 253, 257 (1992);

- "usually seeks to have some harm which affects the public health and safety abated," *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 245, 488 S.E.2d 901, 925 (1997); and,

- "does not have an exact definition," *Id.* at 245 n.28, 488 S.E.2d at 925 n.28.

Despite the difference in the language used by this Court to define public nuisance over the years, one thing has remained constant: this Court has never applied public nuisance law to the manufacturing, distributing, and selling of lawful products.

Petitioners have not cited any authority where this Court has applied public nuisance law to harm allegedly caused by a lawful product. Instead, petitioners rely on the relatively broad language this Court has used to define public nuisance, and to West Virginia district court decisions declining to reject public nuisance opioid claims as a matter of law. *See* Petitioner's Brief ("PB") 15–19. But district court decisions are not binding on this Court. And the certified question in this case arises from Judge Faber's thorough and well-reasoned application of West Virginia public nuisance law. Most importantly, a review of the underlying claims that this Court has approved as constituting a public nuisance tells a different story than the one told by petitioners.

As is clear from this Court's lengthy string cite of cases in *Sharon Steel Corp.*, public nuisance is about land and real property, *not* products liability. 175 W. Va. at 483–84, 334 S.E.2d at 621 (citing and describing this Court's nuisance precedent). Early cases from this Court made clear that public nuisance is only available to abate interferences with land and real property. For example, in *State v. Ehrlick*, this Court described it as "elementary" that the subject matter jurisdiction of courts of equity (i.e., "the court of chancery") is "civil *property*." 65 W. Va. 700, 64 S.E. 935, 938–39 (1909) (emphasis added).[20] This Court further stated that courts of equity "are conversant only with *questions of property* and the maintenance of civil rights"; "[*i*]*njury to property*, whether actual or prospective, is the foundation on which the jurisdiction rests"; courts of equity have "no jurisdiction in matters merely criminal or merely immoral, *which do not affect any right to property*"; and "[n]or do matters of a political character come within the jurisdiction of a court of chancery." *Id.* (emphasis added) (quotations and citations omitted).

In short, the jurisdiction of West Virginia courts to issue an equitable injunction and order abatement is limited to public nuisances involving *property rights*, the classic case being the abatement of "purprestures, signifying inclosures." *Id.*, 64 S.E. at 939. The government may proceed in equity to abate a public nuisance against "[o]ne who erects a structure in a street, road, park, harbor, or river, or makes inclosures thereon," because such a person may be said "to take over to himself, or inclose for his sole benefit, the portion so occupied, and withdraw it from the use and enjoyment of all the citizens, to the injury and detriment of the general public." *Id.* (citing Story's Equity Jurisprudence).

Similarly, in *State v. Baltimore & Ohio Railroad Co.*, this Court held that a mere criminal act—such as carrying liquor on a common carrier—does not authorize a court of equity to issue

[20] Disapproved of on other grounds by *State ex rel. Morrisey v. W. Va. Off. of Disciplinary Couns.*, 234 W. Va. 238, 764 S.E.2d 769 (2014).

an injunction and order abatement. 78 W. Va. 526, 89 S.E. 288, 292 (1916). Instead, to authorize such an imposition, "the nuisance, whether public or private, *must injure property or substantially interfere with the enjoyment thereof*, directly or indirectly, or constitute *a purpresture, excluding citizens from the enjoyment of their civil rights in highways and other public grounds and places*, or otherwise interfere with the enjoyment of such rights, or obstruct the transaction of public business." *Id.* (emphasis added). In other words, public nuisance is an equitable remedy whereby an injunction and abatement order may be issued where a cognizable nuisance has either injured property or substantially interfered with the enjoyment of it. The sale of a product—even if the sale is illegal—is not a public nuisance under West Virginia law.

B. The Attempted Expansion of Public Nuisance to Claims Against Product Manufacturers Is Designed to Evade Product Liability and Regulatory Law.

1. This Court Has Adopted the Law of Products Liability.

Products liability causes of action are well developed around the country and in West Virginia. This Court's decision in *Morningstar v. Black & Decker Manufacturing Co.* laid the groundwork for modern West Virginia strict products liability law, recognizing three categories of strict product liability claims: "design defectiveness; structural defectiveness; and use defectiveness arising out of the lack of, or the inadequacy of, warnings, instructions and labels." 162 W. Va. 857, 888 253 S.E.2d 666, 682 (1979). The purpose of strict products liability is, in part, to expand liability by obviating the need to prove negligence in the manufacturing of the product; instead of proving negligence, a plaintiff must prove a product defect, among other things. *Id.* at 876, 253 S.E.2d at 676. West Virginia continues to recognize that "product liability actions may be premised on three independent theories—strict liability, negligence, and warranty." *McNair v. Johnson & Johnson*, 241 W. Va. 26, 33, 818 S.E.2d 852, 859 (2018) (cleaned up).

Products liability "balance[s] the interests of consumers, manufacturers and suppliers, and the public at large by facilitating plaintiffs' recovery and providing manufacturers with an incentive to exercise due care in making their products."[21] This balance is achieved by, among other things, expanding liability by not requiring proof of negligence, requiring factual and proximate causation, and precluding recovery for purely economic losses.[22]

2. Prescription Drugs Are Regulated Heavily.

This Court has observed that "prescription drugs are *unique* because of the *extensive federal regulation of that product by the FDA*." *McNair*, 241 W. Va. at 40–41, 818 S.E.2d at 866–67 (emphasis added). For a prescription drug to obtain approval from the FDA to be marketed in interstate commerce, the manufacturer must prove that "the drug is safe and effective and that the manufacturer's proposed label is accurate and adequate," which "takes more than a decade and costs well over a billion dollars." *Id.* at 30, 40, 818 S.E.2d 856, 866.

"[I]n the case of opioid drugs, Congress and the various state legislatures have enacted a comprehensive statutory scheme that is implemented by a complex and pervasive regulatory framework overseen and enforced by multiple agencies and boards controlling the development, testing, production, manufacturing, distribution, labeling, advertising, prescribing, sale, possession, use, misuse, abuse, theft, resale, and inter-state transportation of opioid drugs."[23] Judge Faber recognized this extensive regulation, noting that the "Controlled Substances Act ('CSA') establishes a closed system for drugs classified as controlled substances" whereby "[e]very party in the closed system must be registered by the Drug Enforcement Agency ('DEA')";

[21] Schwartz, *The Law of Public Nuisance*, 45 Washburn L.J. at 578.
[22] *See, e.g.*, *Restatement (Third) of Torts: Products Liabilty* §§ 1-2, 15 (1998).
[23] The Honorable Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. Rev. 517, 537 (2019).

"DEA-registered manufacturers may sell controlled substances only to DEA-registered distributors and pharmacies; DEA-registered distributors may distribute controlled substances only to DEA-registered dispensers (such as pharmacies and hospitals); and DEA-registered dispensers may dispense controlled substances only pursuant to prescriptions written by DEA-registered prescribers." *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 421–22 (S.D. W. Va. 2022). The "closed system allows the DEA to monitor the flow of controlled substances from the manufacturer to the patient with the goal of ensuring that prescription drugs do not flow into the illicit marketplace." *Id.*

Further, the CSA and its implementing regulations require "[a]ll applicants and registrants [to] provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 C.F.R. § 1301.71(a). Opioid distributors are also required to "design and operate a system to disclose to the registrant suspicious orders of controlled substances" and must "inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant." 21 C.F.R. § 1301.74(b). Doctors prescribing opioids are regulated by federal and state regulations. *See, e.g.*, 21 C.F.R. § 1306.03. "The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription." 21 C.F.R. § 1306.04(a).

Opioids are also extensively regulated by, among other things, the West Virginia Uniform Controlled Substances Act, West Virginia Code § 60A-2-201 *et seq.*, The Larry W. Border Pharmacy Practice Act, West Virginia Code § 30-5-1 *et seq.*, and corresponding state regulations.

3. Products Liability and Regulatory Law—Not Public Nuisance Law—Should Govern Liability Claims Based on the Manufacturing, Distributing, and Selling of Prescription Opioids.

Considering the extensive regulation of opioids, and the robust nature of contemporary products liability law, this Court should decline petitioners' invitation to expand the scope of common law public nuisance. Indeed, although this Court has the authority to expand the common law,[24] it regularly refuses to do so. *See, e.g.*, *Aikens v. Debow*, 208 W. Va. 486, 490, 541 S.E.2d 576, 580 (2000) (declining to expand the common law to permit a claimant to recover for purely economic loss sustained because of an interruption in commerce caused by negligent injury to the property of a third person); *Blanda v. Martin & Seibert, L.C.*, 242 W. Va. 552, 562, 836 S.E.2d 519, 529 (2019) (public-policy exception to at-will employment doctrine).[25]

This Court's decisions in *Morningstar*, *Stevens*, and *McNair*—all addressing certified questions involving liability for the manufacturing and selling of lawful products—are instructive and should guide this Court's decision whether to expand the common law to allow liability for public nuisance claims involving the manufacturing, distributing, and selling of lawful products. In *Morningstar*, this Court was asked whether the *Rylands v. Fletcher* Doctrine[26]—involving absolute liability for abnormally dangerous activities—applies in tort product liability law. 162 W. Va. at 892, 253 S.E.2d at 684. Although this Court had adopted the doctrine in the context of

[24] *See, e.g.*, *State v. Hutton*, 235 W. Va. 724, 737, 776 S.E.2d 621, 634 (2015) ("This Court has made clear that we have authority to alter the common law.").
[25] *See also State v. Louk*, 237 W. Va. 200, 207, 786 S.E.2d 219, 226 (2016) (born-alive rule); *State v. Nixon*, 178 W. Va. 338, 340, 359 S.E.2d 566, 568 (1987) (jury disqualification); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998) (insurance good faith and fair dealings); *City of Fairmont v. Retail, Wholesale, & Dep't Store Union, AFL-CIO*, 166 W. Va. 1, 10–12, 283 S.E.2d 589, 594–95 (1980) (damages for public employees striking).
[26] *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) is an English case involving mining operations.

blasting operations[27] and water escaping from a tank,[28] it declined to expand its application to defendant's manufacturing of a power saw, reasoning that the doctrine's "essential characteristic is that the activity or object is abnormally or exceptionally dangerous," and, in an "ordinary product liability case, the product, if safely made, is not dangerous, but becomes so only by virtue of a defect." *Id.* at 892–93, 253 S.E.2d at 684. Notably, this Court refused to make the power saw manufacturer "an insurer" whereby harm caused by the product "creates absolute liability on the part of the defendant and no negligence or defect need be shown." *Id.* Instead, this Court held—consistent with the common law—that for liability to be imposed on a manufacturer of a product, the plaintiff must prove either negligence or product defect. *Id.*

In *Stevens*, this Court was asked whether casinos or the manufacturers of video lottery terminals owe a duty of care to "protect casino patrons from becoming addicted to gambling by using these machines or terminals." *Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 534, 788 S.E.2d 59, 62 (2016). This Court answered the question in the negative, largely because of West Virginia's thorough "statutory and regulatory scheme governing video lottery terminals at the State's racetracks." *Id.* at 537, 788 S.E.2d at 65. Although the "efficacy of the legislatively prescribed remedies may fairly be subject to debate," nevertheless, "it has always been the province of the Legislature to decide the public policy of this State" and if it "has made a mistake, it is a political one, and it alone can correct it." *Id.* at 538, 788 S.E.2d at 66 (cleaned up). Finally, this Court concluded that "the statutory scheme and the plaintiff's common law claim are so incompatible that they cannot both occupy the same space." *Id.* (cleaned up).

[27] *See Whitney v. Ralph Myers Contracting Corp.*, 146 W. Va. 130, 139, 118 S.E.2d 622, 627 (1961) (stating that if a defendant undertakes "unusual hazards" or "a risk, which he ought not to take without also taking upon his shoulders the consequence of that risk, he shall pay for any damage that ensues").
[28] *See Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 70 S.E. 126, 127 (1911).

In *McNair*, the Fourth Circuit certified the following question to this Court: "Whether West Virginia law permits a claim of failure to warn and negligent misrepresentation against a *branded* drug manufacturer when the drug ingested was produced by a *generic* manufacturer." 241 W. Va. at 30, 818 S.E.2d at 856 (emphasis added). This Court answered the question in the negative, refusing to expand the common law to include this claim because it was "unwilling to make brand manufacturers *the de facto insurers* for competing generic manufacturers," reasoning that "[d]eep pocket jurisprudence is law without principle." *Id.* at 36–37, 818 S.E.2d at 862–63 (emphasis added) (quotation and citation omitted). Further, "a line must be drawn between competing policy considerations of providing a remedy for everyone who is injured and of extending exposure to tort liability *almost without limits*." *Id.* at 40, 818 S.E.2d at 866 (emphasis added) (quotation omitted). Finally, extending liability in this situation was against the public policy of the State, given West Virginia statutes limiting liability for failure to warn claims, and "because of the extensive federal regulation of [prescription drugs] by the FDA." *Id.* This Court practiced judicial deference, finding "that the proper remedy for consumers harmed by generic drugs rests with Congress or the FDA." *Id.* at 41, 818 S.E.2d at 867.

Under *Morningstar*, *Stevens*, and *McNair*, this Court should reject public nuisance liability based on the manufacturing, distributing, or selling of prescription opioids. These cases reveal a consistent policy from this Court to limit the liability of manufacturers and sellers of products to traditional negligence and strict product liability claims. It should do so again here.

C. The Manufacturing, Distributing, and Selling of Prescription Opioids Is Not a Nuisance Per Se.

Petitioners' theory is that the distribution of opioids in Huntington and Cabell County was unreasonable, and thus nuisance liability is available. PB 34–36. But the problem with petitioners' argument is that Judge Faber correctly found that "the distribution of medicine to support the

legitimate medical needs of patients as determined by doctors exercising their medical judgment in good faith cannot be deemed an unreasonable interference with a right common to the general public." *City of Huntington*, 609 F. Supp. 3d at 475. Further, Judge Faber found that:

- "Plaintiffs did not prove that defendants failed to maintain effective controls against diversion," *id.* at 438;
- "[P]laintiffs did not prove that defendants' due diligence with respect to suspicious orders was inadequate," *id.* at 438;
- "[P]laintiffs did not prove that defendants supplied opioids to pharmacies engaged in diversion," *id.* at 449;
- "Plaintiffs failed to show that the volume of prescription opioids distributed in Cabell/Huntington was because of unreasonable conduct on the part of defendants," *id.*;
- "Plaintiffs offered no evidence that defendants ever distributed controlled substances to any entity that it knew was dispensing for any purpose other than to fill legitimate prescriptions written by doctors," *id.* at 469;
- "There was no evidence that defendants played any role in changing the standard of care for the treatment of pain or endorsed these changes," which "led to an increase in the medical use of prescription opioids," *id.* at 460;
- "The volume of prescription opioids in Cabell/Huntington was determined by the good faith prescribing decisions of doctors in accordance with established medical standards," *id.* at 475.

This Court's precedent forecloses petitioners' argument, which is essentially nuisance per se liability. Since at least the 19th century, this Court has been clear that a "lawful business cannot be a nuisance per se." *McGregor v. Camden*, 47 W. Va. 193, 34 S.E. 936, 937 (1899) (concluding that oil and gas drilling is not a nuisance per se because the "drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare"). This Court has repeatedly rejected nuisance per se claims based on operation of a lawful business. *See, e.g.*, *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 456–57, 647 S.E.2d 879, 892–93 (2007) (recognizing "that a lawful business or a business authorized to be conducted by the

government cannot constitute a nuisance per se," and concluding that a lawful wind power facility operating under a government license was not a nuisance per se).[29]

Prescription opioids are not a nuisance per se. Amicus curiae does not dispute that there is a genuine public health crisis involving opioid abuse and misuse. But as Judge Faber rightly noted, the distribution of opioids was not only approved but *encouraged* under West Virginia law and policy. *City of Huntington*, 609 F. Supp. 3d at 459. Further, both the Drug Enforcement Agency and the U.S. Food and Drug Administration have endorsed properly managed medical use of opioids as safe and effective pain management. *Id.* at 448.

D. Petitioners' Proposed Expansion of Public Nuisance Law Is Void for Vagueness Under Due Process Principles.

"Vague laws invite arbitrary power." *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring).[30] Petitioners' proposed scope of public nuisance law is so vague and imprecise as to "invite the exercise of arbitrary power" by "leaving the people in the dark about what the law demands" and allowing plaintiffs' attorneys and courts to "make it up." *Id.* This Court should reject petitioners' request to create an unconstitutionally vague cause of action by judicial fiat, and then magnify the harm by applying that law *ex post facto* to respondents' conduct. *See Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964) ("If a state legislature is barred by the Ex Post Facto Clause from passing [legislation making conduct unlawful that was lawful at the

[29] *See also Martin v. Williams*, 141 W. Va. 595, 599, 93 S.E.2d 835, 838 (1956) ("The operation of a used car lot is a lawful business, and, as a general rule, it cannot be a nuisance per se."); *Harless v. Workman*, 145 W. Va. 266, 280, 114 S.E.2d 548, 556 (1960) (concluding that the lawful operation of a coal crushing and transportation business was not a nuisance per se); *Frye v. McCrory Stores Corp.*, 144 W. Va. 123, 129, 107 S.E.2d 378, 382 (1959) (concluding that because the "vault under the public sidewalk wherein the explosion occurred was constructed and maintained pursuant to proper authority, its existence could not be regarded as a nuisance per se").

[30] Justice Gorsuch notes that before the American Revolution, the Founders cited vague and "pretended" crimes as one of their reasons for revolution. *Sessions*, 584 U.S. at 175 (Gorsuch, J., concurring).

time it was done], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").[31]

Petitioners argue that "[c]onditions caused by the distribution of a controlled substance constitute a public nuisance when they *interfere with a public right*, including public health and safety, by *hurting or inconveniencing* an indefinite number of persons." PB 2 (emphasis added). This Court should reject petitioners' proposed scope of public nuisance as violating due process under both the United States and West Virginia Constitutions. U.S. CONST. amend V.; W. Va. CONST. art. III, § 10. This Court has held that "vagueness challenges seek to vindicate two principles of due process: fair notice by defining prohibited conduct so that such behavior can be avoided, and adequate standards to prevent arbitrary and discriminatory law enforcement." *State v. James*, 227 W. Va. 407, 419, 710 S.E.2d 98, 110 (2011).

Although void-for-vagueness challenges most commonly involve criminal statutes, common law claims and civil statutes must also pass due-process standards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (reversing punitive damage award based on common law tort claims because the award constituted an irrational and arbitrary deprivation of property); *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 546, 328 S.E.2d 144, 153 (1984) (applying due process vagueness doctrine to a statute regulating economic matters)[32]; *Sessions*, 584 U.S. at 183 (Gorsuch, J., concurring) (reasoning that "the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of

[31] *See also Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect" where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue") (cleaned up).

[32] *Holding modified on other grounds by Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

the criminal or the civil law"). Just as a punitive damages award can violate due process, a nuisance abatement order violates due process if the standards governing the issuance of the order are not sufficiently clear.

Here, petitioners' proposed scope of public nuisance liability is nearly boundless. They argue that a "plaintiff bringing a public nuisance claim must show interference with a right common to the general public" (i.e., interference with a "public right"). PB 30 (cleaned up). Notably, petitioners do not attempt to define what a "public right" is.

A "public right" is generally defined as a "right belonging to all citizens and usually vested in and exercised by a public office or political entity." Black's Law Dictionary (11th ed. 2019); *see also* 4 William Blackstone, *Commentaries* *5 (discussing "the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity"). Under longstanding public nuisance law, the "term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way." *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 453 (R.I. 2008).[33] In contrast, the manufacturing, distributing, and selling of products "rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance," because the "sheer number of violations does not transform the harm from individual injury to communal injury." *Id.* at 448 (cleaned up).

[33] *See also State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935, 938–39 (1909) (describing an "extensive class of cases . . . composed of those having for their object the *vindication of public rights in respect to property*, such as obstructions to highways, public grounds, harbors, and landings," in which "the Attorney General may proceed in equity on behalf of the public to abate the nuisance, if it be one") (emphasis added); *State v. Baltimore & O.R. Co.*, 78 W. Va. 526, 89 S.E. 288, 292 (1916) (holding that for a nuisance to be enjoined "the nuisance, whether public or private, must injure property or substantially interfere with the enjoyment thereof, directly or indirectly, or constitute a purpresture, excluding citizens from the enjoyment of their civil rights in highways and other public grounds and places, or otherwise interfere with the enjoyment of such rights, or obstruct the transaction of public business") (emphasis added); *Foley v. Doddridge Cnty. Ct.*, 54 W. Va. 16, 46 S.E. 246, 251 (1903) (discussing the "general rule, hoary with age, founded on public policy and necessity, that the obstruction of a public way is a public indictable nuisance, and that no lapse of time will legitimate it"), *holding modified on other grounds by State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997).

Petitioners have not alleged—much less proven—the interference with an indivisible resource such as air, water, or public rights of way. Instead, petitioners argue that opioid distribution has interfered with the three following "public rights":

- *First*, the right to public health. Petitioners argue that excessive distribution of opioids can contribute to increased levels of addiction, increased rates of infectious disease and a rise in neonatal abstinence syndrome, and the risk of overwhelming public health resources (PB 31);

- *Second*, the right to public safety. Petitioners argue that excessive distribution of opioids can affect public safety by contributing to an increase in addiction-related crime, other dangerous activities, and widespread abuse of controlled substances in public spaces (PB 32);

- *Third*, the right to public property and resources not being overburdened. Petitioners argue that an epidemic can burden law enforcement, first responders, healthcare workers, the courts, employers, teachers, and families, that court dockets can become congested, jails and prisons overcrowded, the foster care system overburdened, and public property and public spaces harmed (PB 32–33).

These alleged violations of "public rights" bear almost no resemblance to traditional public nuisance law in West Virginia or nationally, which requires interference with an indivisible resource such as air, water, or public rights of way. Numerous courts have rejected similar claims based on the sale of products that allegedly interfered with the public right to health, wellness, and safety. *See, e.g.*, *Johnson & Johnson*, 499 P.3d at 726 (rejecting opioid public nuisance claim and concluding that "a public right is a right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights-of-way") (cleaned up).[34]

[34] *See also Lead Indus., Ass'n, Inc.*, 951 A.2d at 453 (holding that the "health, safety, peace, comfort or convenience of the residents of the [s]tate," including to be free from lead point poisoning, "standing alone does not constitute an allegation of interference with a public right"); *City of Chi.*, 821 N.E.2d at 1114 (holding there is no public right "to be free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons"); *Benjamin Moore & Co.*, 226 S.W.3d at 116 (holding harm caused by lead paint did not involve interference to a public right to health); 4 *Restatement (Second) Torts* § 821B, cmt. g at 92 (the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured is not a public right).

If public nuisance law can be applied here, then liability is limitless.[35] Based on petitioners' argument, an accumulation of individual hurts or inconveniences is enough to trigger liability. But under well-established public nuisance law, and due process standards, more must be proven than interference with general notions of health, safety, and welfare. As this Court has rightly acknowledged: "Tort law is essentially a recognition of limitations expressing finite boundaries of recovery. . . . It is a question of public policy. Each segment of society will suffer injustice, whether situated as plaintiff or defendant, if there are no finite boundaries to liability[.]" *Aikens v. Debow*, 208 W. Va. 486, 502, 541 S.E.2d 576, 592 (2000) (emphasis added).

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 588 U.S. 445, 447 (2019). Petitioners' proposal violates this basic constitutional standard, because their "nebulous descriptions of duty fail to provide any effective guidance about what is and is not permitted."[36] These standards, therefore, are vague and unconstitutional law and should be rejected by this Court. *See Garcelon v. Rutledge*, 173 W. Va. 572, 574, 318 S.E.2d 622, 625 (1984) ("As a matter of basic procedural due process, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.") (cleaned up).

E. To Be Liable for Public Nuisance, a Defendant Must Exercise Sufficient Control Over the Source of the Interference with the Public Right.

As already argued, this Court should answer the certified question in the negative. But if this Court determines that distribution of a controlled substance may constitute a public nuisance,

[35] *See, e.g.*, *Lead Indus., Ass'n, Inc.*, 951 A.2d at 454 (refusing to violate the "widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally," by changing the "meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.").

[36] Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 989–90 (2023).

it should nevertheless decline to adopt petitioners' proposed elements of the offense. *See* PB 29 (listing three elements). Notably absent from petitioners' proposal is the requirement that a defendant "exercise sufficient control over the source of the interference with the public right." *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001). The element of *control* is necessary for at least two reasons.

First, if a defendant does not have sufficient control over the source of the nuisance-causing product, then they cannot be held liable for lack of proving proximate cause. *See, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002) (holding that because "the gun manufacturers do not exercise significant control over the source of the interference with the public right . . . the causal chain is too attenuated to make out a public nuisance claim"). Under West Virginia law, to establish an abatable public nuisance, a plaintiff must prove both "the injury and the proximate cause." *Valentine v. Wheeling Elec. Co.*, 180 W. Va. 382, 385 n.4, 376 S.E.2d 588, 591 n.4 (1988). A proximate cause is a cause in fact that is also a legal cause justifying the imposition of liability; remote causes cannot be proximate causes. *See Phillips v. Ritchie Cnty.*, 31 W. Va. 477, 7 S.E. 427, 430 (1888) (holding that the defective condition of a road, although a "remote cause," was not the legal or proximate cause of a vehicle accident because the driver's recklessness was the "direct and sole legal cause of it").

Second, a defendant cannot abate—i.e., "eliminate or nullify," Black's Law Dictionary (11th ed. 2019)—a nuisance that it does not control. *See Johnson & Johnson*, 499 P.3d at 728 ("Without control, a manufacturer also cannot remove or abate the nuisance—which is the remedy the State seeks from J&J in this case.").[37]

[37] *In re Lead Paint Litig.*, 924 A.2d at 499 (stating "a public nuisance, by definition, is related to conduct, performed in a location *within the actor's control*, which has an adverse effect on a common right," and "a public entity which proceeds against the one *in control* of the nuisance may only seek to abate, at the expense of the one *in control of the nuisance*") (emphasis added).

Instead of requiring control, petitioners propose that "[a] distributor of a controlled substance can be held liable for public nuisance if its distribution ***is a cause*** of the harmful conditions at issue." PB 3 (emphasis added). But what type of cause: a direct cause? A proximate cause? A substantial factor cause? Under petitioners' broad proposal, the farmer who plants the poppy seed is liable for public nuisance because the planting of that seed "is a cause" of the downstream public health crises caused by opioids. Surely, petitioners' proposal is unreasonable and unbounded. This Court should reject Plaintiffs' position. *Rubin Res., Inc. v. Morris*, 237 W. Va. 370, 374, 787 S.E.2d 641, 645 (2016) (the purpose of requirement of but-for causation in attorney negligence case "is to safeguard against speculative and conjectural claims"). As noted by Chief Justice Armstead, the "damages alleged by [petitioners], despite their characterization of such damages as abatement, clearly fall within the definition of compensatory damages." *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 449, 859 S.E.2d 374, 392 (2021) (Armstead, J., concurring in part, and dissenting in part).[38] The requirements of control and proximate causation help ensure that any abatement damages are not impermissibly speculative.[39]

Judge Faber correctly held that control is lacking here, reasoning that the "core of plaintiffs' case is the assertion that the alleged nuisance within their borders was caused by oversupply and diversion of opioids from their legitimate channels, resulting in overuse, addiction and the

[38] These claimed damages include "billions in governmental and economic costs allegedly incurred in providing a wide array of public services in response to the influx of opioids into their communities such as increased expenses for first responders, autopsies, morgues, drug rehabilitation, foster care, and drug-related criminal activity." *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 246 W. Va. 245, 249, 868 S.E.2d 724, 728 (2021).

[39] It is worth noting that the damages petitioners seek are also barred by the economic loss rule and the free public services doctrine. Under West Virginia law, the economic loss rule bars recovery in tort for purely economic damage, not accompanied by damage to property or involving personal injury. *Aikens*, 208 W. Va. at 495, 541 S.E.2d at 585. And under the seminal case of *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.* authored by future Supreme Court Justice Anthony Kennedy, public expenditures made in the performance of governmental functions are not recoverable in tort. 719 F.2d 322, 323 (9th Cir. 1983).

'gateway' to malicious illegal substances such as heroin and fentanyl," that this "oversupply and diversion were made possible, beyond the supply of opioids by defendants, by overprescribing by doctors, dispensing by pharmacists of the excessive prescriptions, and diversion of the drugs to illegal usage," and that each of these causes are "*effective intervening causes beyond the control of defendants."* *City of Huntington*, 609 F. Supp. 3d at 482 (emphasis added). Judge Faber's reasoning is sound and his factual findings unimpeachable. This Court should adopt his analysis and conclude that under West Virginia law, to prove proximate cause in a public nuisance claim, a plaintiff must establish that the defendant exercised control over the instrumentality alleged to have caused the nuisance when the damage occurred.[40]

III. CONCLUSION

For the foregoing reasons, amicus curiae, American Tort Reform Association, requests that this Court answer the certified question in the negative and adopt Judge Faber's reasoned analysis rejecting public nuisance claims based on opioid diversion and misuse.

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[40] *See also Lead Indus., Ass'n, Inc.*, 951 A.2d at 452–53 (holding that control is an element of public nuisance); *City of Chi.*, 821 N.E.2d at 1113 (same).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 24-166

CITY OF HUNTINGTON, WEST VIRGINIA, and CABELL COUNTY COMMISSION,
Petitioners

v.

AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., and MCKESSON CORPORATION,
Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of May, 2024, the foregoing ***"Amicus Curiae Brief Submitted by American Tort Reform Association in Support of Respondents AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation***" was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel of record.

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