

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CASE NO. 24-166

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**City of Huntington, West Virginia,**  
Petitioner,

v.

**AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation,**  
Respondents,

and

**Cabell County Commission**  
Petitioner,

v.

**AmerisourceBergen Drug Corporation, Cardinal Health, Inc., McKesson Corporation, CVS  
Health Corporation, Walgreens Boots Alliance, Inc., The Kroger Company, and Rite Aid  
Corporation,**  
Respondents.

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**BRIEF OF DR. JEFFREY L. LEABERRY, M.D. AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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*Urging the Court to Answer the Certified Question in the Affirmative*

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## STATEMENT OF AMICUS CURIAE

Dr. Jeffrey L. Leaberry, M.D. (“**Dr. Leaberry**”), with the consent of all parties, respectfully submits this Brief<sup>1</sup> as *amicus curiae* in support of Petitioners, the City of Huntington, West Virginia and the Cabell County Commission (“**Petitioners**” or “**Cabell/Huntington**”), pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure. Dr. Leaberry is a native West Virginian and board certified anesthesiologist who attained his medical degree from the Joan C. Edwards School of Medicine at Marshall University in Huntington, West Virginia. For nearly three (3) decades, Dr. Leaberry has practiced medicine in the City of Huntington and surrounding area. In his capacity as a practicing physician, Dr. Leaberry has witnessed firsthand the havoc wrought by the opioid crisis plaguing Cabell/Huntington. His experience confirms just how profoundly Respondents’ unreasonable distribution of opioids has “operate[d] to hurt or inconvenience an indefinite number of persons” in Cabell/Huntington. *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 241, 488 S.E.2d 901, 921 (1997). The abatement of that public nuisance is of personal importance to Dr. Leaberry not only as a member of the medical profession, but also as a parent and leader in the Cabell/Huntington community.

## ARGUMENT

“The U.S. opioid crisis is an extraordinary public health crisis that started at least two decades ago and has accelerated over the past decade.” *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419 (S.D. W. Va. 2022). Aptly, the State of West Virginia has been described “as ‘ground zero’ for” this national crisis and as “the hardest-hit state in the country.” *Id.* As Dr. Leaberry knows through experience, Cabell/Huntington rank among “the

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<sup>1</sup> In accordance with Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, Dr. Leaberry affirms this Brief was neither “authored . . . in whole or in part” by “counsel for a party,” nor did “counsel for a party” (or any “person other than the amicus curiae”) make “a monetary contribution specifically intended to fund the preparation or submission” of this Brief.

West Virginia communities hardest hit by the opioid epidemic.” *Id.* at 419–20. The opioid crisis plaguing Cabell/Huntington has not merely “increased crime rates, decreased property values, and adversely affected neighborhoods.” *Id.* at 421. It has endangered the youngest and most vulnerable of West Virginians: the infants and children who represent the future of the Mountain State. In recent memory, **ten percent** (10%) of the babies born at Cabell Huntington Hospital suffered from neonatal abstinence syndrome, and some **one-third** (1/3) of the infants admitted to the neonatal intensive care unit “were babies withdrawing from opioids.” *Id.* at 420. For every ten (10) children introduced into the foster care system, eight (8) were placed there because of “substance abuse issues.” *Id.* The adverse effects of the opioid crisis on the “intellectual, social, and emotional development” of West Virginia’s children cannot be understated. *Id.*

The magnitude of the crisis facing the citizens of Cabell/Huntington is evident. Yes, the U.S. Centers for Disease Control and Prevention have confirmed that West Virginia has experienced more deaths per one-hundred thousand (100,000) members of our population for too long. Yes, Huntington experienced a single day when twenty-six (26) people died as the result of an overdose. Yes, the record evidence in this case and others conclusively proved that the U.S. Drug Enforcement Administration tracks the distribution of opioids in this State and found it to be excessive by every standard. But, no, despite these tragic facts, Cabell/Huntington are still suffering. And unless or until the conditions causing the opioid crisis in Cabell/Huntington are abated, these and other harms will not only persist, but will continue to grow in gravity and deleterious effect.

Dr. Leaberry is a concerned healthcare provider who has devoted his professional life to curing the diseased and reversing the approach of death. That billions of dollars have been spent already to address this opioid crisis cannot be denied. It is no longer debatable whether opioids

harm and kill. Rather, all able West Virginians must do whatever is necessary to reverse and eliminate the past, present, and future harm this crisis poses to the public health, safety, and welfare. This Court should play its part by recognizing a comprehensive public nuisance cause of action and defining a viable remedy. And that remedy must take into account Respondents' culpability for causing the crisis in the first place.

Respondents manufactured the conditions leading to the opioid crisis in Cabell/Huntington through steadfastly holding their own corporate self-interest in higher regard than the health, safety, and welfare of the people of West Virginia. Between 1997 and 2018, Respondents shipped at least **81.2 million** doses of opioids to Cabell/Huntington (App. 3146–3149)—more than **triple** the per capita rate as compared to the rest of the United States (App. 6656). Stated differently, Respondents shipped enough opioids into Cabell/Huntington to supply **each and every person residing there with more than forty (40) pills every year** for a period of twenty years. (See App. 3163.) In light of these astronomical figures, it is no wonder why more than one (1) out of every ten (10) persons living in Cabell/Huntington (and nearby Wayne County) “are or have been addicted to opioids.” *City of Huntington*, 609 F. Supp. 3d at 420. That the volume of opioids distributed to Cabell/Huntington exceeded the boundaries of any medically justifiable need is beyond legitimate dispute.

Notwithstanding compelling evidence of Respondents' wrongdoing, the erroneous decision of the U.S. District Court for the Southern District of West Virginia (the “**U.S. District Court**”) has left Cabell/Huntington to face this crisis alone. The U.S. District Court's plain error of law has forced Cabell/Huntington to spend scarce resources in an effort to remediate the harm Respondents caused and continue to cause. For example, retired Huntington Fire Chief Jan Rader achieved status as a national hero for developing intervention strategies that enabled Huntington's

emergency medical technicians to successfully intervene and save the lives of thousands of victims harmed by the opioid crisis. Similarly, St. Mary's Medical Center, Cabell Huntington Hospital, and Marshall Health assessed this public health crisis and repurposed a former pharmacy building to create the innovative Provider Response Organization for Addiction Care and Treatment program, more commonly known as PROACT. And years before PROACT, Cabell County Emergency Medical Services, the Huntington Police Department, Marshall University, local behavioral health agencies, and faith leaders formed the Huntington Quick Response Team in an effort to reduce overdoses in Cabell/Huntington. Likewise, national and state leaders have traveled to Huntington to observe and learn about the interventions deployed at Lily's Place, a community-based facility in downtown Huntington that treats innocent infants who are diagnosed with neonatal abstinence syndrome. To further protect the youngest among us, Cabell Huntington Hospital developed one of the nation's first newborn units dedicated to caring for drug-exposed babies. The Cabell-Huntington Health Department and Marshall University School of Pharmacy partnered to create Cabell County's Harm Reduction Program, which became the first organization in the State to provide syringe exchange, naloxone distribution, education, and medical services to promote public health and safety. These and other response organizations are in place, and the human will exists within the Cabell/Huntington communities to reverse this drug-induced epidemic. But these programs and initiatives, though incredibly important in their own right, require substantially greater funding to sustain operations and make a difference. Holding Respondents to account could effectively address the opioid crisis and expand the public initiatives that presently exist.

Of course, Respondents desire to escape the consequences of the crisis they created and continue to fuel. Like the U.S. District Court, Respondents urge this Court to adopt a myopic

reading of West Virginia’s law of public nuisance. They would unnecessarily and unwisely cabin public nuisances to situations concerning “the misuse, or interference with, public property or resources.” *Id.* at 472. It would be “inconsistent with the history and traditional notions of nuisance” to recognize public nuisances arising from “the marketing and sale of opioids,” or so Respondents would say. *Id.*

But to accept Respondents’ position is to elevate past forms of historic practice over present needs to confront contemporary problems with modern solutions. The law of West Virginia “embodies the story” of the State’s development, “and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” Oliver Wendell Holmes, *The Common Law* 1 (1881), available at [https://dn720001.ca.archive.org/0/items/bwb\\_T2-DPA-953/bwb\\_T2-DPA-953.pdf](https://dn720001.ca.archive.org/0/items/bwb_T2-DPA-953/bwb_T2-DPA-953.pdf) (last accessed Apr. 22, 2024). Instead, “the peculiar boast and excellence of the common law” is its “[f]lexibility and capacity for growth and adaptation”—not its rigid adherence to past practice. *Baughman v. Wal-Mart Stores, Inc.*, 215 W. Va. 45, 48, 592 S.E.2d 824, 827 (2003) (per curiam) (quoting *Roach v. Harper*, 143 W. Va. 869, 877, 105 S.E.2d 564, 568 (1958)). After all, the “common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.” *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 872, 253 S.E.2d 666, 674 (1979) (quoting *Dippel v. Sciano*, 155 N.W.2d 55, 62 (Wis. 1967)). “The majestic literature of common law jurisprudence bears windy witness to the flexibility of judicial device and to the boundless promise of judicial ingenuity.” *State ex rel. Herald Mail Co. v. Hamilton*, 165 W. Va. 103, 119, 267 S.E.2d 544, 552 (1980) (McGraw, J., concurring). Like the common law generally, “nuisance is 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).



True enough, this Court has yet to determine “whether the common law of public nuisance may apply to conditions caused by distribution of a potentially dangerous product.” *City of Huntington v. AmerisourceBergen Drug Corp.*, 96 F.4th 642, 649 (4th Cir. 2024). But equity’s first principles suggest the answer to that question. Adopting the position Respondents urge would not only run afoul of the “familiar maxim of the law that there is no wrong without a remedy,” *Clifton v. Clifton*, 83 W. Va. 149, 98 S.E. 72, 72 (1919), but also would disregard the “fundamental rule of the common law that no man shall be permitted to profit by his own wrong,” Syl. Pt. 2, in part, *State v. Phoenix Mut. Life Ins. Co.*, 114 W. Va. 109, 170 S.E. 909 (1933). For *decades*, Respondents pumped untold quantities of opioids into Cabell/Huntington at per capita rates far beyond those of other communities in the United States. (*See* App. 3146–3149, 6656.) In doing so, Respondents enriched themselves at terrible expense to the Cabell/Huntington communities. If this Court refuses to label the opioid crisis ravaging Cabell/Huntington as a public nuisance of Respondents’ creation, then the residents of Cabell/Huntington would be left without legal or equitable recourse to combat this generation-defining public health crisis. Similar localities throughout the State of West Virginia would be powerless to stop the influx of inordinate quantities of opioids or remedy the injuries they cause, despite compelling evidence of Respondents’ legal and moral responsibility for creating and continuing to fuel this statewide epidemic. Equity cannot contemplate—much less demand—such a result.

To the contrary, “[c]ourts of equity have an ancient and unquestionable jurisdiction to prevent or abate public nuisance.” *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 441, 859 S.E.2d 374, 384 (2021) (alteration in original) (quoting *Town of Weston v. Ralston*, 48 W. Va. 170, 194, 36 S.E. 446, 456 (1900) (Brannon, J., concurring)). According to Dr. G. Caleb Alexander (“an expert in opioid abatement intervention”), nothing short of

implementing “a **\$2.5 billion** abatement plan” would be sufficient to halt the ruinous conditions occasioned by Respondents’ thirst for profit. *City of Huntington*, 96 F.4th at 645 (emphasis added). Those funds are necessary to “address ‘[p]revention, treatment, recovery, and special populations’” affected by the crisis Respondents wrought. *Id.* Unquestionably, the opioid epidemic rises to the level a public nuisance demanding immediate abatement in equity. The law of West Virginia is flexible enough to meet this crisis and provide the relief the citizens of Cabell/Huntington not only need, but deserve.

### **CONCLUSION**

Dr. Leaberry urges the Court to answer affirmatively the question certified by the U.S. Court of Appeals for the Fourth Circuit and adopt the elements formulated by Petitioners, for equity demands that Respondents be held to account for having caused—and for continuing to cause—the conditions giving rise to such immeasurable human suffering.

**DR. JEFFREY L. LEABERRY, M.D.,**

**By Counsel,**

/s/ Michael J. Farrell

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Respondents.

**CERTIFICATE OF SERVICE**

I, the undersigned counsel for **Dr. Jeffrey L. Leaberry, M.D.**, do hereby certify that on **April 24, 2024**, a true and correct copy of the foregoing **Brief of Dr. Jeffrey L. Leaberry, M.D. as Amicus Curiae in Support of Petitioners**, was electronically filed with the Clerk of the Court using the West Virginia E-Filing System, which will send notification of such filing to all West Virginia E-Filing participants.

/s/ Michael J. Farrell

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