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, et al.,
Respondents.

On Certified Question from the United States
Court of Appeals for the Fourth Circuit
Civil Action Nos. 22-1819 & 22-1822

AMICUS CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANTS

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CERTIFIED QUESTION ADDRESSED BY *AMICUS CURIAE*

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?

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) files this brief as *amicus curiae*. The parties received timely notice of and provided consent to the filing of this brief. PLAC and its members support the federal district court's ruling adhering to long-standing public nuisance law. They are concerned that the liability theories advanced here, which are not grounded in traditional legal principles, threaten open-ended, industry-wide liability for a wide variety of products that may have foreseeable risks or inherent externalities. Manufacturers and sellers of these products, from pharmaceuticals to oil and gas to household chemicals, engage in commerce in such products every day. PLAC is concerned that allowing the public nuisance liability sought here would lead to more litigation against these manufacturers and sellers regardless of fault, existing regulatory structures intended to balance product risks, or the benefits the products provide.

Accordingly, PLAC submits this brief to provide the Court with the traditional parameters of public nuisance law; a history of repeated attempts to expand the tort beyond those parameters, as well as the widespread rejection by courts around the country of those efforts (including in opioid litigation); the reasons courts have found that public nuisance law is inapplicable to manufacturers and sellers of products, including for costs arising from third-parties' use or misuse of products; and the desirability of leaving product-based liability to product liability law and governing public risks associated with categories of products to applicable regulatory regimes.

PLAC is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the

law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 *amicus curiae* briefs on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

STATEMENT OF THE CASE

Amicus adopts Defendants' Statement of the Case to the extent needed for the discussion of public nuisance law set forth in this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Opioid abuse is a serious problem that demands serious, policy-based solutions. It calls for a legislative response, not a judicial one based on litigation where manufacturers, distributors and sellers of products are sued irrespective of traditional causes of action. Liability laws in West Virginia and other states do not impose liability for the types of harms alleged here on companies that put lawful, beneficial products into the stream of commerce. These claims do not satisfy the elements of any liability theory—including public nuisance law, which requires an unlawful interference with a public right that would cause injury to people exercising that public right. The hallmarks of this litigation, therefore, are novel use of legal theories and attenuated notions of wrongdoing. Most state high courts, when given the opportunity, have rejected these claims, ruling that fundamental liability principles, including under the tort of public nuisance, cannot be cast aside. The Court should do the same under longstanding West Virginia law.

Here, plaintiffs are pursuing companies involved in making and selling prescription opioid medication, trying to subject them to liability for costs associated with treating or otherwise

responding to individuals who abuse opioids. They assert that the social, economic and health effects of illegal use of opioids qualify as a public nuisance, and manufacturers and sellers of these lawful (and indeed FDA-approved) medicines can be liable for these issues. However, there is a substantial dissonance between the allegations against the defendants and allowable public nuisance claims. Public nuisance law—in West Virginia and other states—does not impose blame or obligations for these harms on companies that put lawful, beneficial products into the stream of commerce—particularly when, as here, the products remain highly beneficial to many people and continue to be approved by the U.S. Food and Drug Administration. A public nuisance, by definition, has no redeeming qualities, so that selling a beneficial product is not a public nuisance.

The federal district court, in dismissing the claims at bar, properly applied both the nature and elements of a public nuisance cause of action under West Virginia law. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp.3d 408, 472 (S.D. W. Va. 2022) (noting the claims are "inconsistent with the history and traditional notions" of public nuisance in West Virginia). Public nuisance theory, here and around the country, has a long, distinct history, and it applies to a specific type of situation. In short, governments can use the tort to stop local disruptive activities that unlawfully interfere with the public's right to use communal property. It typically addresses "environmental problems" related to unlawful interferences with land or water use. *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 621 (W. Va. 1985); *see also Sticklen v. Kittle*, 287 S.E.2d 148 (W. Va. 1981) (noting it generally involves improper "use of real property").

Accordingly, a public nuisance cause of action has specific elements. First, plaintiffs must assert a "public right," which is a well-defined term referring to a right that "affects the general public" as a whole. *See Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945). In *Duff v. Morgantown Energy Associates (M.E.A.)*, the court explained that damage to a public

road, traffic congestion and delays, and general noise and fumes from the use of a public road could be public nuisances. 421 S.E.2d 253, 261 (W. Va. 1992). By contrast, harm to individuals and their private properties from the same alleged misconduct implicated only individual rights that were subject to other torts, including private nuisance. *See id*. at 260. Second, the conduct giving rise to a public nuisance cause of action "always arises out of unlawful acts." *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584 (W. Va. 1953) (citing 39 Am. Jur., Nuisances, Section 8). As this Court continued, an act that is "lawful, or is authorized by a valid statute . . . cannot be a public nuisance." *Id.* And third, the unlawful act had to have proximately caused the public nuisance. *See Sergent v. City of Charleston*, 549 S.E.2d 311, 320 (W. Va. 2001).

For these reasons, personal injuries to individuals from the use or misuse of products, and derivative costs related to the treatment or other response to such individuals, do not implicate the tort of public nuisance: (1) the injuries were not incurred in the exercise of such a public right; (2) defendants were engaged in the sale of a lawful, beneficial and regulated product; and (3) the injuries alleged were not proximately caused by defendants' sale of the products. The tort of public nuisance neither applies to this situation nor imposes the unprincipled liability sought here. Rather, West Virginia's products liability law governs the sale of products, and should continue to do so.

Amicus fully appreciates that opioid abuse in West Virginia and other states is a critical public health issue, but that alone is not a tort. Plaintiffs' claims conflict with the purpose, terms and remedies of West Virginia public nuisance law. To this end, *amicus* urge the Court to resist calls by Plaintiffs and their *amici* to turn public nuisance law into a "super tort" that can be imposed whenever there is a broad, societal problem and a perceived failure by the legislative and regulatory bodies to address that problem. Accordingly, amicus respectfully requests that the Court respond

"no" to the certified question, reinforce the longstanding nature and elements of a public nuisance cause of action, and rejected the broad expansion of public nuisance law sought here.

ARGUMENT

I. THIS LITIGATION CONTINUES A 50-YEAR EFFORT TO EXPAND PUBLIC NUISANCE TO CLAIMS AGAINST PRODUCT MANUFACTURERS AND SELLERS BY EVADING APPLICABLE LAW

Plaintiffs' attempt to recast the tort of public nuisance in this case represents a radical departure from traditional public nuisance law in West Virginia and elsewhere. Going back to English common law—and more than 250 years of American jurisprudence—public nuisance law has provided governments with the ability to force people to stop and abate unlawful interferences with the public's rights to use public land, communal property, and waterways. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743-47 (2003). Also, by definition, public nuisances provide no benefits to anyone. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 565-66 (2006). If a person causes a public nuisance through such unlawful conduct, *that* person—not the manufacturer of the product used to create the public nuisance—is responsible for the nuisance. Governments can sue those individuals for injunctive relief (to stop the nuisance-causing conduct), and to abate the public nuisance (so there is no longer an ongoing interference with a public right). *See id*. at 570-72. Governments traditionally are not entitled to monetary damages, as sought here. *See id*. West Virginia has long followed these parameters.

Since the 1970s, however, there has been an effort to transform public nuisance from its traditional moorings as a local public land and water use tort into a tool for requiring large businesses, rather than individual wrongdoers or society as a whole, to remediate environmental damage or pay costs of social harms associated with categories of products, regardless of wrongful conduct or causation. *See id*. at 547-48. Proponents of this effort believed that suing individual

wrongdoers would be inefficient, whereas presumed deep-pocketed manufacturers and sellers could address the issue on a macro scale. In these cases, the elements of the public nuisance tort—(1) the existence of a public right, (2) unlawful interference with that public right, (3) causation of the public nuisance, and (4) control over the public nuisance—cannot be satisfied with respect to the companies that manufactured and sold the products into the stream of commerce. So, those seeking to transform public nuisance have been trying to change the tort's requirements.

The first act of this effort was pursuing changes to the public nuisance chapters of the Restatement (Second) when it was being drafted in hopes of breaking "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other things, advocates for reform sought to change "public *right*" to anything in the public *interest*, and to remove the wrongful conduct requirement entirely. This would be as radical as removing duty and breach from negligence. Their goal was to sue companies for widespread social and environmental harms even when defendants were engaged in lawful commerce and traditional public rights were not involved. Those transformational changes failed to enter the black letter of the Restatement.

The advocates' first test case also failed. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971). In that case, they pursued businesses that sold products or engaged in activities that allegedly contributed to smog in Los Angeles. The intermediate appellate court dismissed the claims as inconsistent with the purpose and terms of public nuisance law. *See id.* at 645. As the court explained, the plaintiffs were "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court." *Id.* The

advocates then expressed frustration that courts faithfully adhered to the tenets of public nuisance law as a "gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy deployed here of using public nuisance law to try to circumvent products liability and marketing laws intensified in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (observing changes sought by the environmentalists "invite[d] mischief in other areas—such as products liability"). These cases targeted manufacturers and sellers of products that had inherent risks or could be used or misused in ways that created harm, including widespread harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984) *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1990) (PCBs); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco). Again, judges applied traditional public nuisance principles and rejected this strategy; the cases were dismissed.

In each of these cases, the courts explained the clear dissonance between the manufacture and sale of goods and public nuisance liability, regardless of the product. Manufacturers and sellers "may not be held liable on a nuisance theory for injuries" caused by a product. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. App. 1992); *see also Am. Tobacco Co*., 14 F. Supp. 2d at 973 ("The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law."). Otherwise, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. Product sellers would be liable whenever someone uses a product to cause harm regardless of their "culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). The United States Court of Appeals for the Seventh Circuit made this point clear, stating that once the defendant seller sold its products to Westinghouse, "Westinghouse was in control of the product purchased and was

solely responsible for the nuisance *it* created by not safely disposing of the product." *Westinghouse*, 891 F.2d at 614 (emphasis added).

The idea of using public nuisance theory in this way gained momentum after the tobacco litigation in the mid-1990s settled for nearly $250 billion. What many people do not realize is that this novel framing of public nuisance law was tested in court and rejected. As the court explained, "The overly broad definition of the elements of public nuisance urged by the State is simply not found in [state] case law." *American Tobacco Co.*, 14 F. Supp. 2d at 973. Yet, given the size of the settlement, the use of public nuisance became a misleading part of the litigation's lore. Soon thereafter, lawyers strategizing over suing the firearms industry for local government costs associated with gun violence turned to public nuisance law, even though they acknowledged this pursuit had "legal problems" and had "never [won] in court." David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1172 (2000). Nevertheless, they claimed certain industry marketing practices facilitated the illegal secondary market and use of firearms, thereby interfering with public health and safety. *Id.*

These lawsuits largely failed as a matter of law. As the Illinois Supreme Court explained, "we do not intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials," but it also could not recognize a cause of action "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to" invoke it. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114-16 (Ill. 2004); *see also Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (affirming "the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights").

Thus, in response to these early cases, the nation's courts spoke with clarity and uniformity: the boundaries of public nuisance law do not extend to the manufacturing, selling and promotion of products. It remained a local land and water use tort.

II. THE COURT SHOULD JOIN OTHER STATES IN AFFIRMING THAT PUBLIC NUISANCE LAW CANNOT BE CONVERTED INTO AN ALL-ENCOMPASSING CAUSE OF ACTION

Nevertheless, these cases have continued to be filed and, on a few occasions, trial courts in other states have allowed these divergences from public nuisance law. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022). Some judges have been candid about their desire to address a problem—even if the liability finding was admittedly not based on the law. *See*, *e.g.*, *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) (not wanting to "turn a blind eye" to lead poisoning); Transcript, *In re Nat'l Prescriptions Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018) (trial judge stating his focus was not "figuring out the answer to interesting legal questions," but to "do something" about prescription drug abuse). Most courts, though, have resisted creating a catch-all cause of action for making companies pay for social and environmental problems regardless of fault, causation, the existence of a public right, or any other element of traditional tort law.

To this end, when high courts in other states have had the opportunity, they have enforced the traditional moorings of public nuisance law in their states. Their rulings are consistent with this Court's application of public nuisance law and provide an important guide for responding to the types of claims at bar. They have explained that, as here, public nuisance law has distinct elements that do not allow governments to recover for costs related to individuals' product-based injuries. First, as this Court has held, they have reaffirmed that the term "public right" refers to something specific, *i.e.*, the right of the public to use a shared government resource, namely a

public road, communal space, or waterway. A public nuisance is a dangerous condition interfering with the public's ability to use that resource. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 447 (R.I. 2008) (calling the existence of a public right "the *sine qua non* of a cause of action for public nuisance") (citing 58 Am.Jur.2d Nuisances § 39 at 598-99 (2002)). In that case, the Rhode Island Supreme Court overturned a trial court's ruling that manufacturers of lead pigment and paint could be subject to public nuisance liability for certain risks of the product (lead poisoning). *See id*. Rather, a public right is limited to "the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way." *Id*. at 448 (citation omitted).

This concept of "public right," therefore, does not include generalized notions of "public health" or "public safety," including to be free from gun violence, lead poisoning, or opioid abuse. There is a distinction between public rights governed by public nuisance law and health and safety matters in the public interest. Indeed, there are many types of harm that may be of public interest because they are widespread, but they do not implicate a "public right" under public nuisance law:

> That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates a "public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.

Id. (quoting Gifford, 71 U. Cin. L. Rev. at 815). As the Rhode Island high court explained, "[h]owever grave the problem of lead poisoning . . . [Plaintiff] has not and cannot allege facts that would fall within the parameters of what would constitute a public nuisance." *Id*. The Illinois Supreme Court echoed this point that the "public right" element limits when the tort can be used: there is no "public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that

may create a risk of harm." *Chicago*, 821 N.E.2d at 1114-16. These risks may invoke private rights or be of public interest, but they are not "public rights" actionable under public nuisance law.

Second, public nuisance liability requires a specific type of misconduct. Consistent with West Virginia law, courts have held that a person must have engaged in unlawful activity when interfering with the public right in order to be subject to liability for a public nuisance. For example, blocking a public road as part of an illegal protest may be a public nuisance, but blocking the road pursuant to a government contract to repair that road is not. Historically, this misconduct requirement has been quasi-criminal in nature, such as illegally dumping pollutants in a river. These activities have no redeeming qualities, are highly localized, and interfere with an identifiable public resource. For these reasons, selling a lawful product, particularly one approved by the government for the benefits it provides, does not create public nuisance liability—even if the product, here prescription medicine, comes with risks of harm. The New Jersey Supreme Court explained: "In public nuisance terms . . . the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it." *In re Lead Paint Litig.*, 924 A.2d at 501. Said another court: "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien." *Detroit Bd. of Educ.*, 493 N.W.2d at 521.

Third, courts around the country have also made clear—just as the federal court below detailed—that causation in public nuisance cases is the same as any other tort: "Causation is a basic requirement in any public nuisance action. . . . In addition to proving that the defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause." *State v. Lead Indus. Ass'n*, 951 A.2d at 450. In product cases such as the one here, the health, safety or environmental issue asserted is often the result of acts—sometimes criminal acts—of third parties. For this reason,

some governments have asked courts to lower causation standards in public nuisance cases so they can subject companies to liability for merely contributing to the risk of harm or to substitute the chain of commerce for the chain of causation. Courts have rejected these efforts to create abstract or aggregate notions of causation under public nuisance law. As the Missouri Supreme Court held, "To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (en banc). Otherwise, governments would frame a case "as a public nuisance action rather than a product liability suit" to lower liability standards. *City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

Fourth, a defendant must *control* the instrumentality causing the public nuisance when the nuisance is created. Control is a "basic element of the tort." *Lead Indus. Ass'n*, 951 A.2d at 449. As the New Jersey Supreme Court made clear, "a public nuisance, by definition, is related to conduct, performed in a location with the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499. In product cases, courts have explained that "the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product" does not control the product when the nuisance is created. Gifford, 71 U. Cin. L. Rev. at 820. These elements of public nuisance "might appear . . . general," but they all have specific meanings. *In re Lead Paint Litig.,* 924 A.2d at 494.

Finally, courts have held that governments are not allowed to obtain monetary damages, including for assisting residents dealing with *effects* of a public nuisance as sought here. *See e.g.*, *In re Paraquat Prods. Liab. Litig.*, MDL No. 3004, 2022 WL 451898 (S.D. Ill. Feb. 14, 2022) (noting governments cannot "seek damages for their alleged injuries rather than abatement of any true public nuisance"). The only remedies available to governments are injunctive relief to make

the person stop causing the public nuisance, and abatement to make the person remediate the public nuisance. This makes sense. The government's job is to protect the ability of its people to use the right of way. Once the nuisance has been cleared, this responsibility has been met. If an individual person sustained a personal injury from the public nuisance, then he or she can sue for his or her own damages. *See McMechen v. Hitchman-Glendale Consol. Coal Co.*, 107 S.E. 480, 482 (W. Va. 1921) (stating the distinction between "abatement of nuisances and recovery of damages for injuries occasioned by wrongful acts, constituting nuisances," is "apparent" and "vast").

Today, as a result of these state high court rulings, many courts apply "what appears to be an absolute rule": if a product after being sold, creates or contributes to a nuisance, the manufacturer or seller is not liable unless it "controls or directs" the public-nuisance causing activity. *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511 (S.D.N.Y. 2022). Indeed, the Third Restatement has affirmed that public nuisance liability has been rejected in product cases "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through products liability, which has been developed and refined with sensitivity to the various policies at stake." Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. G (2020).

Accordingly, personal injuries from products (and derivative treatment or other response costs), no matter how pervasive, cannot be converted into public nuisance liability. And, it is not sufficient for a public nuisance claim to allege the manufacturer or seller "knew of the dangers" but "failed to tackle the problem." *In re Paraquat Prods. Liab. Litig.*, 2022 WL 451898, at *11. Otherwise, everyone would be able to "sue almost everyone else [for] pretty much everything that harms us." Amanda Bronstad, *Judge Dismisses Opioid Suits that Sought 'Junk Justice' for Connecticut Cities*, Law.com, Jan. 9, 2019. "All a creative mind would need to do is construct a

scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. 2003).

For all of these reasons, this Court should continue to confine West Virginia public nuisance law to its traditional parameters and not permit its unprincipled expansion such that manufacturers and sellers of lawful products can be subject to liability for the various costs deriving from third parties' use or misuse of those products.

III. THE NATION'S COURTS HAVE LARGELY REJECTED EXPANDING THE TORT OF PUBLIC NUISANCE IN RESPONSE TO ALLEGATIONS COMPARABLE TO THOSE HERE

Adhering to these traditional principles, many courts have properly rejected Plaintiffs' expansive theory of public nuisance liability in opioid cases similar to this one. In a high-profile case, the Oklahoma Supreme Court overturned a trial court ruling that would have applied the state's public nuisance law to manufacturing, marketing, and selling of opioid medications. *See State ex rel. Hunter v. Johnson & Johnson,* 499 P.3d 719 (Okla. 2021). In doing so, it embraced rulings that traced the origins and history of the tort, noting that public nuisance applies only to "conduct, performed in a location within the actor's control, which harmed those common rights of the general public." *Id*. at 724 (citing Restatement (Second) of Torts § 821B cmt. b (1979)). Indeed, the court reiterated that "[o]ne factor in rejecting this imposition of liability for public nuisance is that [the plaintiff] has failed to show a violation of a public right." *Id*. at 726.

In that case, as here, the plaintiff "characterized its suit as an interference with the public right of health." *Id.* at 727. The Oklahoma Supreme Court, though, explained that the invocation of public health does not implicate a public right governed by public nuisance law: the litigation "does not involve a comparable incident to those in which we have anticipated that an injury to

public health would occur, *e.g.*, diseased animals, pollution in drinking water, or the discharge of sewer on property." *Id.* "Such property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use of treating pain." *Id.* "[A] public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all types of use and misuse of prescription medications." *Id.*

The Oklahoma Supreme Court then reinforced that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id*. at 725. The responsibility of product manufacturers and sellers "is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id*. at 728. Nor should a manufacturer or seller be held liable for its products after its products entered the stream of commerce, and any public nuisance allegedly caused by opioid abuse occurs after the product has been sold. *See id*. at 729. The Oklahoma high court also cautioned that applying public nuisance liability to products "would create unlimited and unprincipled liability for product manufacturers." *Id*. at 725.

Other courts in similar cases have reached the same conclusions. As the federal district court in this litigation explained, public nuisance does not apply to "the marketing and sale" of a product, only the "misuse, or interference with, public property or resources." *City of Huntington*, 609 F. Supp. 3d at 472. The theory does not hinge on whether the product is associated with known or knowable risks the company failed to prevent. Otherwise the theory could be used "against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *Id*. at 474. The court joined the chorus of courts against creating a "super tort":

> The phrase "opening the floodgates of litigation" is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the

> sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled.

Id.

To be sure, these courts have acknowledged "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money," but they also have *acted* based on the reality that "it's bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990, at *8 (Conn. Super. Ct., Jan. 8, 2019); *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019) (dismissing opioid-related claims; the state's public nuisance law does not extend the sale of goods where, as here, one party sold to another a product that *later* is alleged to constitute a nuisance). Under different facts, the Supreme Court of Iowa made this point, stating "[d]eep pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted); *cf.* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1998) (noting the "anarchy" that prevails if jurists take the view that "[a]s long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so"). Put simply, public nuisance law does not create liability for harms caused by lawful products or shift costs associated with their risks to manufacturers and sellers.

IV. PRODUCT LIABILITY LAW AND APPLICABLE REGULATORY REGIMES, NOT THE TORT OF PUBLIC NUISANCE, SHOULD REMAIN THE BODIES OF LAW FOR GOVERNING PRODUCT-BASED RISKS

The Court should also answer the certified question in the negative to ensure that products liability remains the body of tort law governing risks associated with products. Product defect causes of action have their own purposes, elements, and remedies. They manage the risks product manufacturers and sellers can control, namely putting lawful, non-defective products into the

stream of commerce. These laws, not public nuisance, should continue to be the basis of liability for claims related to products. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

To be clear, products liability does not subject companies to industry-wide liability merely for selling and marketing products with known risks of harm. This concept, termed "category liability," has been widely rejected. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997). As Professors Henderson and Twerski have explained, the effect of "holding producers liable for all the harm their *products* proximately cause" is effectively to "prohibit altogether the continued commercial distribution of such products." Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329 (emphasis added); *see also* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998) (reporting "courts have not imposed liability for categories of products that are generally available and widely used"). Manufacturers and sellers cannot police customers to ensure products are not misused or neglected in ways that create a public nuisance. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973) ("[L]iability for products is clearly not that of an insurer.").

Allowing courts to manage these risks through public nuisance law is particularly inappropriate for prescription drugs given that the U.S. Food and Drug Administration ("FDA") is directly engaged in the risk assessments and balancing Plaintiffs are asking the courts to do here. All aspects of prescription drugs are highly regulated, from their risks and benefits to human health to their design and labeling. *See* 21 U.S.C. § 821 *et seq*. Even their distribution chain is highly regulated. Defendants are registered with state and federal authorities to sell prescription drugs, the medicines must be dispensed at licensed pharmacies, and each person must obtain a

prescription from a physician to purchase them. Further, the FDA has been working on risk management plans based on improved surveillance, education, and warnings calling attention to unlawful diversion of opioid medicines specifically. *See* U.S. Food & Drug Admin., Opioid Medications, https://www.fda.gov/drugs/information-drug-class/opioid-medications ("One of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs.").

Using the blunt judicial tool of public nuisance law to supplant or second-guess these policy decisions will undermine this regulatory regime. Some well-respected academics, including in this litigation, have argued that traditional public nuisance law should be revised to provide a remedy whenever regulatory and legislative processes are perceived to have failed to address a significant public health or welfare issue. *See* Goldberg, 31 Mealey's Emerging Toxic Torts at 8 (setting forth both sides of this debate). This view, though, admittedly casts aside notions of wrongdoing; its advocates posit that public nuisance liability should allow the impact of a public health or welfare issue to be spread among all users of a product. *See id.* In public nuisance climate litigation, plaintiffs want everyone to pay more for coal, oil and gas because of the impact of these fuels on climate change. Here, they believe people who use opioid medications properly should pay more for their medicines so the companies can pay treatment costs of those who do not. Professor Thomas Merrill directly responded to these arguments: "The new public nuisance violates the most elemental aspect of the rule of law: that legal duties be sufficiently predictable to guide those to whom they apply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 987-88 (2023). The tort would become "a Rorschach blot," where courts could apply it without regard to established principles. *Id*. at 988.

Ensuring liability law properly aligns with an applicable statutory or regulatory regime is a significant concern for *amicus* and its members because manufacturers and sellers of all types of products with inherent risks—from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer and public risks. Weighing costs, benefits and social value of producing and using these products and factoring in any adverse effects is part of the delicate balancing for which only legislatures, and administrative agencies pursuant to legislative authority, are suited. If a company violates any such regulation, there are enforcement remedies tailored to that violation.

Here, the Court should not allow the circumvention of these regulatory or enforcement laws by misapplying and expanding public nuisance law. Plaintiffs' theory finds no support in West Virginia's public nuisance law or the public nuisance law of other states. Under the traditional elements of public nuisance law—public right, unlawful conduct, proximate causation, control and abatement—their public nuisance claims must be dismissed.

CONCLUSION

For these reasons, the Court should answer the certified question in the negative. Under West Virginia's common law, the manufacture, sale and distribution of a product, including a regulated and controlled substance as in this case, does not give rise to public nuisance liability. Such claims do not satisfy the elements of a public nuisance claim, namely the existence of a public right, unlawful conduct interfering with that public right, proximate causation and abatement.

Respectfully submitted,

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Dated: May 20, 2024

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, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Natalie B. Atkinson, do hereby certify that on May 20, 2024, service of the foregoing ***AMICUS CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANTS*** was filed electronically using the File and ServeXpress system reflecting service upon all counsel of record.

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