

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-166

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

v.

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

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

REPLY BRIEF FOR PETITIONERS

Paul T. Farrell, Jr. (WVSB No. 7443)
FARRELL & FULLER, LC
270 Muñoz Rivera Avenue
Suite 201
San Juan, Puerto Rico 00918
(304) 654-8281
paul@farrellfuller.com
Counsel for Petitioners

Anne McGinness Kearse (WVSB No. 12547)
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, South Carolina 29464
(843) 216-9000
akearse@motleyrice.com
Counsel for Petitioner
City of Huntington, West Virginia

Anthony J. Majestro (WVSB No. 5165)
Christina L. Smith (WVSB No. 7509)
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite 807
Charleston, West Virginia 25301
(304) 346-2889
amajestro@powellmajestro.com
csmith@powellmajestro.com
Counsel for Petitioner
Cabell County Commission

David C. Frederick*
Lillian V. Smith*
Ariela M. Migdal*
Kathleen W. Hickey*
Gavan W. Duffy Gideon*
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dfrederick@kellogghansen.com
lsmith@kellogghansen.com
amigdal@kellogghansen.com
khickey@kellogghansen.com
ggideon@kellogghansen.com
Counsel for Petitioners

* Motion to appear *pro hac vice* pending

June 4, 2024

(Additional Counsel Listed On Next Page)

Michael A. Woelfel (WVSB No. 4106)
Matthew J. Woelfel (WVSB No. 10393)
WOELFEL & WOELFEL LLP
801 Eighth Street
Huntington, West Virginia 25701
(304) 522-6249
Counsel for Petitioner
Cabell County Commission

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
GLOSSARY	viii
INTRODUCTION	1
ARGUMENT	2
I. WEST VIRGINIA PUBLIC NUISANCE LAW ENCOMPASSES PETITIONERS’ OPIOID CLAIMS	2
A. West Virginia’s Public Nuisance Law Includes Conditions Harmful To Health And Safety, Including Those Caused By Unlawful Opioid Distribution	2
B. Respondents’ Limitations On Public Nuisance Law Are Unfounded.....	3
1. Respondents offer no persuasive reason to reject the decisions of the MLP, circuit courts, federal MDLs, and most other States	4
2. Public nuisance has no “products” exception	6
a. Restatement (Third) § 8 does not apply to governmental public nuisance claims	8
b. West Virginia’s Legislature declined to intervene in state opioid litigation or limit public nuisance claims involving “products”	9
3. Petitioners’ claims implicate public rights.....	11
4. The Court should not eliminate “condition” from the definition of public nuisance.....	12
C. Public Policy Considerations Support Recognizing A Public Nuisance Action Based On Distribution Of Controlled Substances.....	13

II. THE COURT SHOULD ADOPT PETITIONERS’ ELEMENTS FOR A PUBLIC NUISANCE BASED ON DISTRIBUTION OF A CONTROLLED SUBSTANCE.....16

A. The Conditions Caused By Distribution Must Interfere With A Public Right, And The Distribution Must Be Unreasonable16

B. The Unreasonable Distribution Must Be A Cause Of The Harm17

C. Equitable Remedies, Including Abatement, Are Appropriate To Remediate A Public Nuisance Caused By The Unreasonable Distribution Of A Controlled Substance.....19

CONCLUSION.....20

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Federal

Alaska v. Express Scripts, Inc., 2024 U.S. Dist. LEXIS 92100
(D. Alaska May 22, 2024).....3, 5, 9, 11, 15

City & Cnty. of San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936
(N.D. Cal. 2022).....5, 6

City of Huntington v. AmerisourceBergen Drug Corp.:
609 F. Supp. 3d 408 (S.D. W.Va. 2022).....4
96 F.4th 642 (4th Cir. 2024)2, 8, 9

Direct Sales Co. v. United States, 319 U.S. 703 (1943)1, 14, 15, 19

Gonzales v. Raich, 545 U.S. 1 (2005).....14

Masters Pharm., Inc. v. DEA, 861 F.3d 206 (D.C. Cir. 2017).....14

McKinsey & Co. Nat’l Prescription Opiate Litig., In re, 2024 U.S. Dist. LEXIS
88772 (N.D. Cal. May 16, 2024) 3-5, 9, 11, 15

NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003)18

Nat’l Prescription Opiate Litig., In re:
589 F. Supp. 3d 790 (N.D. Ohio 2022).....5
622 F. Supp. 3d 584 (N.D. Ohio 2022).....6

Parris v. 3M Co., 2022 U.S. Dist. LEXIS 113185 (N.D. Ga. June 27, 2022)5

West Virginia

Abrams v. West Virginia Racing Commission, 164 W.Va. 315, 263 S.E.2d 103
(1980).....2

Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000).....18

Am. Modern Home Ins. Co. v. Corra, 222 W.Va. 797, 671 S.E.2d 802 (2008)2

Brooke Cnty. Comm’n v. Purdue Pharma L.P., 2018 WL 11242293
(W.Va. Cir. Ct. Dec. 28, 2018)4, 11, 17, 18

<i>Carter v. Monsanto Co.</i> , 212 W.Va. 732, 575 S.E.2d 342 (2002).....	18
<i>Daniels v. Cranberry Fuel Co.</i> , 111 W.Va. 484, 163 S.E. 24 (1932).....	18
<i>Duff v. Morgantown Energy Assocs. (M.E.A.)</i> , 187 W.Va. 712, 421 S.E.2d 253 (1992).....	6, 7, 17, 19
<i>Evans v. Farmer</i> , 148 W.Va. 142, 133 S.E.2d 710 (1963).....	19
<i>Hark v. Mountain Fork Lumber Co.</i> , 127 W.Va. 586, 34 S.E.2d 348 (1945)	15, 20
<i>Humphrey v. Westchester P’ship</i> , 2019 W.Va. LEXIS 225 (W. Va. May 21, 2019).....	18
<i>Martin v. Williams</i> , 141 W.Va. 595, 93 S.E.2d 835 (1956).....	12, 13, 19
<i>Matthews v. Cumberland & Allegheny Gas Co.</i> , 138 W.Va. 639, 77 S.E.2d 180 (1953).....	17
<i>McCormick v. Walmart Stores, Inc.</i> , 215 W.Va. 679, 600 S.E.2d 576 (2004).....	18
<i>McGregor v. Camden</i> , 47 W.Va. 193, 34 S.E. 936 (1899).....	12
West Virginia Mass Litigation Panel Decisions, <i>Opioid Litig., In re:</i>	
Am. Order Regarding Pretrial Rulings, No. 21-C-9000 MFR (W.Va. M.L.P. May 23, 2022) (Transaction ID 67650385)	5, 11
Order Denying Defs.’ Mots. To Dismiss, <i>City of Beckley v. Allergan PLC</i> , No. 20-C-34 MCH (W.Va. M.L.P. Oct. 18, 2022) (Transaction ID 68267633)	4
Order Denying Distributor Defs. Mot. To Dismiss, re “Factual Issue #2,” No. 21-C-9000 DISTRIBUTOR (W.Va. M.L.P. July 1, 2022) (Transaction ID 67786397)	1, 5, 9, 11
Order Denying Distributor Defs. Mot. To Dismiss, <i>Monongalia Cnty.</i> <i>Comm’n v. Purdue Pharma L.P.</i> , Nos. 18-C-222 MSH et al. (W.Va. M.L.P. Oct. 31, 2019) (Transaction ID 64374611), <i>writ denied, State ex rel.</i> <i>AmerisourceBergen Drug Corp. v. Moats</i> , No. 19-1051 (W.Va. Jan. 30, 2020)	4, 11
Order Denying Kroger’s Mot. To Dismiss, <i>State ex rel. Morrissey v. The</i> <i>Kroger Co.</i> , No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) (Transaction ID 68388011).....	4, 11, 16
Order Denying Pharmacy Defs.’ Mots. To Dismiss, No. 21-C-9000- PHARM (W.Va. M.L.P. Aug. 3, 2022) (Transaction ID 67895252)	5, 11, 17

Order on Defendants’ Expedited Motion for Protective Order Regarding Early Trial Preservation Deposition for Dr. Rahul Gupta, <i>In re Opioid Litig.</i> , No. 19-C-9000 (W.Va. M.L.P. Sept. 10, 2021) (Transaction ID 66923080)	4
Order Regarding Trial of Liability for Public Nuisance, No. 19-C-9000 (W.Va. M.L.P. Feb. 19, 2020) (Transaction ID 64739341)	10
<i>Sharon Steel Corp. v. City of Fairmont</i> , 175 W.Va. 479, 334 S.E.2d 616 (1985).....	2, 17
<i>State v. Butler</i> , 239 W.Va. 168, 799 S.E.2d 718 (2017).....	10
<i>State v. Ehrlick</i> , 65 W.Va. 700, 64 S.E. 935 (1909)	12
<i>State v. Farley</i> , 192 W.Va. 247, 452 S.E.2d 50 (1994)	2-3
<i>State ex rel. Advance Stores Co. v. Recht</i> , 230 W.Va. 464, 740 S.E.2d 59 (2013)	2
<i>State ex rel. AmerisourceBergen Drug Corp. v. Moats:</i>	
No. 19-1051 (W.Va. Jan. 30, 2020).....	4
245 W.Va. 431, 859 S.E.2d 374 (2021).....	10, 19
<i>State ex rel. AmerisourceBergen Drug Corp. v. Thompson</i> , No. 15-1026 (W.Va. Jan. 5, 2016).....	4
<i>State ex rel. Morrissey v. AmerisourceBergen Drug Corp.</i> , 2014 WL 12814021 (W.Va. Cir. Ct. Dec. 12, 2014), <i>writ denied</i> , <i>State ex rel. AmerisourceBergen Drug Corp. v. Thompson</i> , No. 15-1026 (W.Va. Jan. 5, 2016).....	4, 7, 11, 16
<i>State ex rel. Riffle v. Ranson</i> , 195 W.Va. 121, 464 S.E.2d 763 (1995)	9, 10
<i>State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.</i> , 200 W.Va. 221, 488 S.E.2d 901 (1997)	1, 2, 5, 6, 11, 13, 19, 20
<i>Taylor v. Culloden Pub. Serv. Dist.</i> , 214 W.Va. 639, 591 S.E.2d 197 (2003)	2
<i>Valentine v. Sugar Rock, Inc.</i> , 234 W.Va. 526, 766 S.E.2d 785 (2014).....	18
<i>Webb v. Sessler</i> , 135 W.Va. 341, 63 S.E.2d 65 (1950).....	18
<i>Wehner v. Weinstein</i> , 191 W.Va. 149, 444 S.E.2d 27 (1994).....	17
<i>West v. Nat’l Mines Corp.</i> , 168 W.Va. 578, 285 S.E.2d 670 (1981).....	12, 19
<i>Wilson v. Phoenix Powder Mfg. Co.</i> , 40 W.Va. 413, 21 S.E. 1035 (1895).....	5-7

<i>Witteried v. City of Charles Town</i> , 2018 WL 2175820 (W.Va. May 11, 2018).....	19
--	----

State (other than West Virginia)

<i>Alaska v. Walgreen Co.</i> , 2024 Alas. Trial Order LEXIS 1 (Alaska Super. Ct. Mar. 1, 2024).....	5
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004).....	8
<i>City of Cincinnati v. Beretta U.S.A. Corp.</i> , 768 N.E.2d 1136 (Ohio 2002).....	6
<i>Delaware ex rel. Jennings v. Monsanto Co.</i> , 299 A.3d 372 (Del. 2023).....	5, 8
<i>Delaware ex rel. Jennings v. Purdue Pharma L.P.</i> , 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019).....	5
<i>E. Me. Med. Ctr. v. Teva Pharms. USA, Inc.</i> , 2023 WL 2161256 (Me. Bus. Ct. Feb. 13, 2023)	5
<i>Fayetteville Ark. Hosp. Co. v. Amneal Pharm.</i> , No. 72CV-20-156 (Ark. Cir. Ct. Dec. 16, 2022).....	5
<i>Ganim v. Smith & Wesson Corp.</i> , 780 A.2d 98 (Conn. 2001).....	8
<i>Lead Paint Litig., In re</i> , 924 A.2d 484 (N.J. 2007).....	8
<i>Michigan ex rel. Nessel v. Cardinal Health, Inc.</i> , 2020 Mich. Cir. LEXIS 1796 (Mich. Cir. Ct. Nov. 17, 2020).....	5
<i>Oklahoma ex rel. Hunter v. Johnson & Johnson</i> , 499 P.3d 719 (Okla. 2021)	5
<i>Rhode Island v. Lead Indus. Ass’n, Inc.</i> , 951 A.2d 428 (R.I. 2008).....	8

STATUTES, REGULATIONS, AND RULES

Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970), codified as amended at 21 U.S.C. § 801 <i>et seq.</i> :	1, 3, 7, 14, 19
§ 801.....	19
Okla. Stat. tit. 50:	
§ 1.....	5
§ 2.....	5

W.Va. Code:

§ 5-31-1(a)10

§ 5-31-310

§ 7-1-3kk.....1, 5, 8, 10

§ 8-12-5(22)1, 5, 8, 10

§ 51-1A-32

21 C.F.R. § 1301.71(a).....14

OTHER MATERIALS

Brief of Legal Scholars as *Amici Curiae* in Support of Neither Party, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 22-1819(L), ECF No. 47-1 (4th Cir. Jan. 3, 2023).....6, 7, 9, 13, 15

Compl., *State ex rel. McGraw v. Purdue Pharma L.P.*, No. 01-C-137-S (W.Va. Cir. Ct. June 11, 2001), <https://www.reuters.com/investigates/special-report/assets/usa-courts-secrecy-judges/wv-complaint.pdf>.....10

Order Granting Plaintiffs Cabell County Commission and City of Huntington’s Motion To Sever, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-2804-DAP, ECF No. 2990 (N.D. Ohio Dec. 16, 2019)10

Restatement (Second) of Torts (1979).....5, 9, 11, 17, 18

Restatement (Third) of Torts: Liability for Economic Harm (2020).....5, 8, 9

SB 572, 86th Leg., 2d Sess. (W.Va. 2023), <https://perma.cc/3QGH-4QRU>10

GLOSSARY

ABDC	AmerisourceBergen Drug Corp.
ATRA	American Tort Reform Association
Cert. Order	<i>City of Huntington v. AmerisourceBergen Drug Corp.</i> , 96 F.4th 642 (4th Cir. 2024)
CSA	Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970), codified as amended at 21 U.S.C. § 801 <i>et seq.</i>
DEA	Drug Enforcement Agency
Legal Scholars Br.	Brief of Legal Scholars as <i>Amici Curiae</i> in Support of Neither Party, <i>City of Huntington v.</i> <i>AmerisourceBergen Drug Corp.</i> , No. 22-1819(L), ECF No. 47-1 (4th Cir. Jan. 3, 2023) (JA46-81)
MDL	Multi-District Litigation
MLP	West Virginia Mass Litigation Panel
<i>MLP Distributors SJ Opinion</i>	Order Denying Defs.’ MSJ re “Factual Issue #2,” <i>In re Opioid Litig.</i> , No. 21-C-9000 DISTRIBUTOR (W.Va. M.L.P. July 1, 2022) (Transaction ID 67786397)
<i>MLP Kroger MTD Order</i>	Order Denying Kroger’s Mot. To Dismiss, <i>State ex</i> <i>rel. Morrisey v. The Kroger Co.</i> , No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) (Transaction ID 68388011)
<i>MLP Manufacturers SJ Opinion</i>	Am. Order Regarding Pretrial Rulings, <i>In re Opioid</i> <i>Litig.</i> , No. 21-C-9000 MFR (W.Va. M.L.P. May 23, 2022) (Transaction ID 67650385)
<i>MLP Monongalia Distributors Order</i>	Order Denying Distributor Defs. Mot. To Dismiss, <i>Monongalia Cnty. Comm’n v. Purdue Pharma L.P.</i> , Nos. 18-C-222 MSH et al. (W.Va. M.L.P. Oct. 31, 2019) (Transaction ID 64374611), <i>writ denied</i> , <i>State</i> <i>ex rel. AmerisourceBergen Drug Corp. v. Moats</i> , No. 19-1051 (W.Va. Jan. 30, 2020)
<i>MLP Pharm MTD Order</i>	Order Denying Pharmacy Defs.’ Mots. To Dismiss, <i>In re Opioid Litig.</i> , No. 21-C-9000-PHARM (W.Va. M.L.P. Aug. 3, 2022) (Transaction ID 67895252)

Pet. Br.	Opening Brief for Petitioners (Apr. 19, 2024) (Transaction ID 72790243)
Resp. Br.	Respondents' Brief (May 20, 2024) (Transaction ID 73112322)
W. Va. Mfrs. Ass'n Br.	Amici Curiae Brief Submitted by the West Virginia Manufacturers Association and Janssen Pharmaceuticals, Inc. in Support of Respondents AmerisourceBergen Drug Corp., Cardinal Health, Inc., and McKesson Corp. (May 20, 2024) (Transaction ID 73113306)
WVSCA	West Virginia Supreme Court of Appeals

INTRODUCTION

This Court long has held that governmental plaintiffs may sue to abate public harms and has defined a public nuisance as “an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.”¹ Likewise, West Virginia Code § 7-1-3kk and § 8-12-5(22)—which Respondents ignore—authorize public entities to bring actions “for the elimination of hazards to public health and safety and to abate or cause to be abated anything . . . determine[d] to be a public nuisance.” That authority and this Court’s cases establish that governments may bring actions to abate harms to the public health and safety. These principles confirm that a public nuisance claim may stem from unreasonable distribution of a controlled substance. West Virginia trial courts and the Mass Litigation Panel (“MLP”) have applied those principles correctly in cases addressing the extraordinary crisis posed by the opioid epidemic and properly rejected the limitations Respondents seek to impose.

Respondents’ only answer is to call these decisions “unsound” and “devoid of meaningful reasoning.” Resp. Br. at 29 (referring to MLP decisions, including the opinion by Judges Moats and Swope denying Respondents’ summary-judgment motions).² Their argument that applying those principles here would open the floodgates of litigation against food and other product vendors ignores opioid distributors’ extensive duties under the Controlled Substances Act (“CSA”). These duties exist precisely because the “primary effect” of selling opiates “in unlimited quantities” is “to create black markets for dope and to increase illegal demand and consumption.”³

¹ *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 241, 488 S.E.2d 901, 921 (1997).

² See Order Denying Defs.’ MSJ re “Factual Issue #2,” *In re Opioid Litig.*, No. 21-C-9000 DISTRIBUTOR (W.Va. M.L.P. July 1, 2022) (Transaction ID 67786397) (“*MLP Distributors SJ Opinion*”).

³ *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1943).

ARGUMENT⁴

I. WEST VIRGINIA PUBLIC NUISANCE LAW ENCOMPASSES PETITIONERS' OPIOID CLAIMS

A. West Virginia's Public Nuisance Law Includes Conditions Harmful To Health And Safety, Including Those Caused By Unlawful Opioid Distribution

This Court defines a public nuisance as “an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons”⁵ and recognizes that a governmental entity can bring a public nuisance action to “abate[]” “harm which affects the public health and safety.”⁶ The foundational cases describe nuisance as “a flexible area of the law that is adaptable to a wide variety of factual situations.”⁷ That flexibility extends to “business and private actions that have deleterious health” consequences “as a byproduct of their operations.”⁸

The extraordinary harm to the public's health, safety, property, and resources caused by unreasonable opioid distribution meets the traditional definition of a public nuisance.⁹

⁴ This Court properly may answer a question certified to it by a federal court “if the answer *may* be determinative of *an issue* in a pending cause in the certifying court.” W.Va. Code § 51-1A-3 (emphases added); *see also, e.g., Am. Modern Home Ins. Co. v. Corra*, 222 W.Va. 797, 798 n.2, 671 S.E.2d 802, 803 n.2 (2008) (same). The certified question undisputedly satisfies that requirement. *See City of Huntington v. AmerisourceBergen Drug Corp.*, 96 F.4th 642, 644 (4th Cir. 2024) (“Cert. Order”) (“A negative answer to this question is outcome determinative in the present appeal.”); Resp. Br. at 2 (same). Respondents cite *State ex rel. Advance Stores Co. v. Recht*, 230 W.Va. 464, 740 S.E.2d 59 (2013), but that case concerned the proper scope of remand after this Court answers a certified question from a state court. *See id.* at 470, 740 S.E.2d at 65. *Abrams v. West Virginia Racing Commission*, 164 W.Va. 315, 263 S.E.2d 103 (1980), is the only West Virginia decision cited in *Advance Stores* that declined to answer a question certified by a *federal* court, and the question rested on an issue of federal constitutional law. *See id.* at 108, 263 S.E.2d at 322.

⁵ *Kermit Lumber*, 200 W.Va. at 241, 488 S.E.2d at 921.

⁶ *Id.* at 245, 488 S.E.2d at 925.

⁷ *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 483, 334 S.E.2d 616, 621 (1985).

⁸ *Taylor v. Culloden Pub. Serv. Dist.*, 214 W.Va. 639, 648, 591 S.E.2d 197, 206 (2003).

⁹ Respondents rely (at 3-10) on the findings of fact. Because these findings derived from the district court's legal errors, this Court owes them no deference. *See State v. Farley*, 192 W.Va.

Respondents have no serious response to the severe public health and safety crisis caused by the opioid epidemic. Pet. Br. at 3-4. That crisis has overwhelmed public resources like hospitals, law enforcement, and jails which continue to respond to overdoses and other opioid-related emergencies. *See id.* Opioid addiction afflicts a significant percentage of Cabell/Huntington’s population and will consume public resources for many years. *See id.*

West Virginia courts have recognized public nuisance claims based on these conditions. *See id.* at 10-12 & nn.9-23. Their unanimous decisions span a decade, before and after the district court’s erroneous judgment in this case. The MLP has applied public nuisance law to the distribution of controlled substances in these cases, and this Court has denied writs. *See id.* Indeed, most courts to consider the issue—in more than 22 States—have refused to dismiss opioid public nuisance cases, *see id.* at 18 & n.41, including two decisions issued in May 2024.¹⁰

B. Respondents’ Limitations On Public Nuisance Law Are Unfounded

Respondents ask this Court to revise its definition of a public nuisance. They argue (at 13-14) that “act or condition” means only “act” and not “condition.” They claim, contrary to precedent, that governments may not bring actions to remedy harms to the public health and safety. And they argue that the “adaptab[ility]” of public nuisance law “to a wide variety of factual situations” cannot cover unreasonable distribution of “lawful products”—a limitation foreign to West Virginia law. The Court should reject these new limitations.

247, 253, 452 S.E.2d 50, 56 (1994) (“no deference attaches to” fact findings when the lower court “applies the wrong legal standard”). The court’s overly narrow interpretation of distributors’ legal duties under the CSA drove its mistaken conclusions that Respondents did not act culpably and were not a legal cause of the nuisance. Its findings must be revisited under the proper legal standard.

¹⁰ *See Alaska v. Express Scripts, Inc.*, 2024 U.S. Dist. LEXIS 92100 (D. Alaska May 22, 2024); *In re McKinsey & Co. Nat’l Prescription Opiate Litig.*, 2024 U.S. Dist. LEXIS 88772, at *122, *127 (N.D. Cal. May 16, 2024).

1. Respondents offer no persuasive reason to reject the decisions of the MLP, circuit courts, federal MDLs, and most other States

Respondents have no compelling response to the unanimous conclusions of West Virginia’s courts permitting governmental opioid claims. They attack (at 28-29) *Brooke County Commission v. Purdue Pharma L.P.* and *State ex rel. Morrissey v. AmerisourceBergen Drug Corp.*¹¹ for failing to consider the question deeply, but both applied this Court’s straightforward public nuisance precedent. Subsequent MLP decisions built on their analyses.¹² As Respondents note (at 30 & n.39), the MLP disagreed with the district court’s interpretation of West Virginia law in this case.¹³ Respondents incorrectly accuse (at 30 & n.40) the MLP of imputing to the district court a requirement of harm to real property that the district court never adopted. The MLP, however, merely disagreed with that court’s limitation of public nuisance to conduct interfering with public property or resources.¹⁴

¹¹ 2018 WL 11242293 (W.Va. Cir. Ct. Dec. 28, 2018); 2014 WL 12814021 (W.Va. Cir. Ct. Dec. 12, 2014), *writ denied*, *State ex rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W.Va. Jan. 5, 2016).

¹² Order Denying Distributor Defs.’ Mot. To Dismiss at 3, *Monongalia Cnty. Comm’n v. Purdue Pharma L.P.*, Nos. 18-C-222 MSH et al. (W.Va. M.L.P. Oct. 31, 2019) (Transaction ID 64374611) (“*MLP Monongalia Distributors Order*”), *writ denied*, *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W.Va. Jan. 30, 2020); Order Denying Kroger’s Mot. To Dismiss ¶ 33, *State ex rel. Morrissey v. The Kroger Co.*, No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) (Transaction ID 68388011) (“*MLP Kroger MTD Order*”).

¹³ *See also McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *127-28 (Breyer, J.) (dismissing public nuisance claims involving non-governmental West Virginia plaintiff on other grounds). Respondents object (at 22-23 & nn.27-28) to the MLP’s citation of Dr. Rahul Gupta’s testimony in a different case, but that testimony was given via evidentiary deposition for use in *all* MLP cases. *See* Order on Defendants’ Expedited Motion for Protective Order Regarding Early Trial Preservation Deposition for Dr. Rahul Gupta, *In re Opioid Litig.*, No. 19-C-9000 (W.Va. M.L.P. Sept. 10, 2021) (Transaction ID 66923080).

¹⁴ *See* Order Denying Defs.’ Mots. To Dismiss ¶ 20, *City of Beckley v. Allergan PLC*, No. 20-C-34 MSH (W.Va. M.L.P. Oct. 18, 2022) (Transaction ID 68267633); *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 472 (S.D. W.Va. 2022) (claiming this Court has applied public nuisance law only to “conduct that interferes with public property or resources”). Respondents contradict themselves—disclaiming (at 17) a requirement that the claim

Respondents offer no reason to depart from the weight of authority recognizing public nuisance claims in the opioid context. *See* Pet. Br. at 17. They cite (at 25-27) outlier decisions, three of which were reconsidered¹⁵ or rejected by courts in the same State,¹⁶ and two of which involved private plaintiffs.¹⁷ West Virginia and most courts to address it have rejected the Oklahoma Supreme Court’s decision in *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021),¹⁸ which interpreted Oklahoma statutory and common law limiting public nuisance to criminal nuisances and those “causing physical injury to property.”¹⁹ This narrow understanding cannot be squared with West Virginia’s broad definition.²⁰

arise out of the use of property, while arguing (at 16) that cases like *Kermit Lumber* and *Wilson* are different because they involved “use of the defendant’s property.”

¹⁵ *See Michigan ex rel. Nessel v. Cardinal Health, Inc.*, 2020 Mich. Cir. LEXIS 1796, at *13-15 (Mich. Cir. Ct. Nov. 17, 2020) (reconsidering dismissal of the public nuisance claim).

¹⁶ *See Express Scripts*, 2024 U.S. Dist. LEXIS 92100, at *10 (rejecting *Alaska v. Walgreen Co.*, 2024 Alas. Trial Order LEXIS 1 (Alaska Super. Ct. Mar. 1, 2024)); *Delaware ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 383 (Del. 2023) (en banc) (rejecting as “unsupported” *Delaware ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019), and relying on Restatement (Second) of Torts to hold that a product-based hazard to public safety could support public nuisance liability).

¹⁷ *See Fayetteville Ark. Hosp. Co. v. Amneal Pharm.*, No. 72CV-20-156, at 4 (Ark. Cir. Ct. Dec. 16, 2022); *E. Me. Med. Ctr. v. Teva Pharms. USA, Inc.*, 2023 WL 2161256, at *6 (Me. Bus. Ct. Feb. 13, 2023).

¹⁸ *See* Am. Order Regarding Pretrial Rulings at 4, *In re Opioid Litig.*, No. 21-C-9000 MFR (W.Va. M.L.P. May 23, 2022) (Transaction ID 67650385) (“*MLP Manufacturers SJ Opinion*”); *MLP Distributors SJ Opinion* at 6; Order Denying Pharmacy Defs.’ Mots. To Dismiss ¶ 65, *In re Opioid Litig.*, No. 21-C-9000-PHARM (W.Va. M.L.P. Aug. 3, 2022) (Transaction ID 67895252) (“*MLP Pharm MTD Order*”); *In re Nat’l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 815 (N.D. Ohio 2022) (rejecting *Hunter* as contrary to Ohio law); *Parris v. 3M Co.*, 2022 U.S. Dist. LEXIS 113185, at *6 (N.D. Ga. June 27, 2022) (same); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1007 (N.D. Cal. 2022) (same, California law); *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *122-27 (rejecting arguments based on *Hunter* for California, Nevada, Utah, Colorado, Tennessee, Kentucky, and West Virginia law).

¹⁹ 499 P.3d at 724; *see* Okla. Stat. tit. 50, §§ 1, 2.

²⁰ *See* W.Va. Code §§ 7-1-3kk, 8-12-5(22) (authorizing counties and municipalities to take action to “eliminat[e] . . . hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance”). *Hunter* also relied on inapplicable provisions of the Restatement (Third). *See infra* pp. 8-9.

2. Public nuisance has no “products” exception

This Court never has recognized a “lawful products” exception to public nuisance and should decline Respondents’ request (at 15-17) to do so. Petitioners do not claim opioids are defective, but that Respondents acted unreasonably by distributing 81 million opioid pills into Cabell/Huntington,²¹ causing widespread diversion. Numerous jurisdictions have recognized public nuisance claims in connection with regulated products.²² This Court’s decisions demonstrate the *flexibility* of public nuisance law, which has evolved over time in response to unique conditions that harm the public, including transporting coal (*Duff*) and manufacturing explosives (*Wilson*). Respondents contend (at 17) that “this flexibility has bounds,” but they offer no principled basis for drawing the line at products—a limitation untethered to the remedial purposes of public nuisance law.

In any event, public nuisance law long has covered items manufactured, sold, transported, and otherwise distributed in commerce, including powder,²³ coal,²⁴ lumber,²⁵ and “products” made by apothecaries.²⁶ Respondents’ attempts (at 16) to distinguish this Court’s cases lack coherence. Petitioners agree that “selling lumber” or selling opioids is not itself a nuisance. But the *manner* in which defendants operate their businesses (*e.g.*, transporting coal in *Duff*, manufacturing the

²¹ See JA3146-3149, JA6671, JA6674, JA6677.

²² See, *e.g.*, *City & Cnty. of San Francisco*, 620 F. Supp. 3d at 1008 (discussing how “the opioid epidemic interferes with . . . public rights”); *In re Nat’l Prescription Opiate Litig.*, 622 F. Supp. 3d 584, 598-600 (N.D. Ohio 2022) (recognizing opioid-related injuries to public health as public nuisance under Ohio law); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1145 (Ohio 2002) (recognizing public nuisance suit against gun manufacturers).

²³ See *Wilson v. Phoenix Powder Mfg. Co.*, 40 W.Va. 413, 21 S.E. 1035 (1895) (explosive powder endangering residential area).

²⁴ See *Duff v. Morgantown Energy Assocs. (M.E.A.)*, 187 W.Va. 712, 421 S.E.2d 253 (1992) (*per curiam*).

²⁵ See *Kermit Lumber*, 200 W.Va. 221, 488 S.E.2d 901.

²⁶ See Legal Scholars Br. at 7 & n.5 (JA58) (citing Sheppard, *The Court Keepers Guide*).

product in a dangerous fashion and location in *Wilson*) can create a nuisance. Here, the nuisance arose from Respondents' failures to comply with their CSA duties. Respondents argue (at 16-17) that this case relates "solely to opioids after they have left distributors' control," but ignore evidence that they violated their CSA duties while the opioids were under their control.

Respondents' *amici*, the West Virginia Manufacturers Association et al., retreat from Respondents' categorical product-based limitation²⁷ and argue that historical "products" precedents were limited to nuisances per se. But those limitations are not found in West Virginia law. West Virginia recognizes public nuisances per se, which arise from conduct or conditions that are always nuisances, and nuisances per accidens, which may be nuisances based on the circumstances or manner in which activities are conducted.²⁸ Historically, it was not the sale per se of products like food or medicine that constituted a public nuisance; it was the sale of "products unfit for human consumption."²⁹ Likewise, Petitioners' claim that Respondents' distribution of opioids is a nuisance rests on the circumstances and manner of their distribution.

In any event, *amici* mischaracterize Petitioners' claims (at 6-7) as supposedly not based on unlawful conduct. But Respondents violated their legal duties under the CSA. *Amici*'s concerns about "limitless liability" are therefore unfounded.³⁰ Similarly, *amicus* ATRA's claim that public nuisance in this context displaces the law of product liability is misplaced. As *amici* Legal Scholars explain (at 9 (JA62)), "[w]hile product liability claims are 'focused on the harms specifically borne by discrete individuals,' public nuisance claims serve a different function,

²⁷ W. Va. Mfrs. Ass'n Br. at 2-3, 6-7 (May 20, 2024).

²⁸ See *Duff*, 187 W.Va. at 716 n.8, 421 S.E.2d at 257 n.8.

²⁹ Legal Scholars Br. at 7 (JA58).

³⁰ See *Morrisey*, 2014 WL 12814021, at *9 n.10 (distinguishing "lawful distribution of controlled substances, similar to the lawful sale of firearms," from distribution of controlled substances in violation of "regulations and industry standards"); see also *infra* p. 14-15.

focusing on ‘harms to the public,’ including public health, social welfare, and security.”

Respondents (at 25) cite five state Supreme Court opinions that rejected applying public nuisance law to products, but four did not address opioids. Two involved guns and did not categorically reject public nuisance claims regarding products.³¹ Two concerned lead paint, which, unlike opioids, was not subject to strict regulatory requirements.³² Respondents ignore the Delaware Supreme Court’s rejection of a ban on product-based public nuisance claims.³³

a. Restatement (Third) § 8 does not apply to governmental public nuisance claims

Respondents, like the district court, erroneously rely on portions of Restatement (Third) § 8, which concerns only claims for damages for *economic loss* brought by a *private party* who has suffered a special injury—*i.e.*, an injury “distinct in kind from those suffered by members of the affected community in general.”³⁴ As the Fourth Circuit recognized, § 8 “expressly outlines the limits of its application by acknowledging that it applies to private suits, rather than to public nuisance claims brought by public officials.”³⁵ Respondents’ argument (at 25 n.30) that comment a to § 8 excludes only statutory public nuisance claims brought by public officials ignores the fact that Petitioners’ claims *are* authorized by statutes.³⁶ And the comment’s exclusion is not limited

³¹ See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001) (holding plaintiff lacked standing but “acknowledg[ing] that the definition of a common-law public nuisance is . . . capacious enough to include” allegations regarding guns); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114 (Ill. 2004) (holding plaintiffs insufficiently alleged public nuisance, without categorically rejecting product-based public nuisance claims).

³² See *In re Lead Paint Litig.*, 924 A.2d 484, 488-89 (N.J. 2007); *Rhode Island v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 456-57 (R.I. 2008).

³³ See *Jennings*, 299 A.3d at 383.

³⁴ Restatement (Third) § 8.

³⁵ Cert. Order, 96 F.4th at 651. Respondents also ignore that comment a to § 8 expressly distinguishes a public nuisance action by a public official as “the most common response to a defendant’s invasion of a public right.” Restatement (Third) § 8 cmt. a.

³⁶ See W.Va. Code § 7-1-3kk (county authority); *id.* § 8-12-5(22) (municipal authority).

to statutory claims. It notes that “public officials may bring civil or criminal actions against a defendant who creates a public nuisance” “[i]n addition to the common-law claims recognized here.”³⁷ It states that “[t]he definition of ‘public nuisance’ for those purposes is widely [but not exclusively] a matter of statute, and tends to be considerably broader than the common-law definition recognized by this Section as a basis for a private suit.”³⁸

Respondents ignore that the majority of courts have rejected the argument that § 8 bars governmental abatement claims concerning the opioid epidemic,³⁹ as well as the Restatement (Third)’s conclusion that Restatement (Second) § 821B and § 821C are “not confined to liability for economic loss.” And they do not contest that the Restatement (Second) remains the American Law Institute’s definitive authority as to governmental nuisance actions.⁴⁰

b. West Virginia’s Legislature declined to intervene in state opioid litigation or limit public nuisance claims involving “products”

The West Virginia Legislature’s repeated actions—and inactions—express its intent not to limit public nuisance claims arising out of opioid distribution.⁴¹ As this Court held in *State ex rel. Riffle v. Ranson*, “[i]f the Legislature explicitly limits application of a doctrine or rule to one

³⁷ Restatement (Third) § 8 cmt. a (emphasis added).

³⁸ Restatement (Third) § 8 cmt. a. Similarly unpersuasive is Respondents’ argument (at 24) that the Restatement cites cases involving governmental plaintiffs. These cases appear only in a reporter’s note and reject public nuisance claims for “economic harm” caused by defective products. *Id.* § 8 reporter’s note g. Petitioners seek abatement, not recovery for economic harm, and do not allege defective products. *See supra* p. 6; *infra* p. 20.

³⁹ While Respondents (at 25 n.31) distinguish some cases Petitioners cite as involving Restatement (Third) provisions other than § 8, they ignore numerous decisions refusing to apply § 8 in governmental opioid actions, *see* Pet. Br. at 23-24 & n.61 (quoting *MLP Distributors SJ Opinion* at 5-6; citing Cert. Order, 96 F.4th at 651); *id.* at 24 n.62 (citing cases). Recent decisions have continued to apply the Restatement (Second) and rejected § 8’s application. *See McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *122; *Express Scripts*, 2024 U.S. Dist. LEXIS 92100, at *11-13.

⁴⁰ *See* Pet. Br. at 25 (citing Legal Scholars Br. at 15 (JA66)).

⁴¹ *See* Pet. Br. at 26-28.

specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional.”⁴² The Legislature limited counties’ and municipalities’ ability to bring common-law claims regarding firearms.⁴³ This Court should therefore treat the failure to create exclusions for other products as purposeful.⁴⁴ Respondents provide no support for their argument (at 30-31 & n.43) that *Ranson* does not apply to common-law claims, and they ignore the statutory basis for Petitioners’ claims.⁴⁵ The Legislature’s actions are “clear expressions of intent”⁴⁶ when they involve changes to the common law rather than statutes.

Respondents discount (at 31-32) the Legislature’s actions regarding opioids, which support Petitioners’ claims. SB 572 as introduced sought to create a “product” exception to common-law public nuisance claims, but it was not enacted.⁴⁷

⁴² 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995).

⁴³ Pet. Br. at 24, 27.

⁴⁴ Respondents argue (at 31 n.43) that *Ranson* does not apply because public nuisance claims involving opioids were “then-unknown” in 2003, but West Virginia officials have attempted to abate the opioid epidemic since 2001, when the Attorney General filed the first public nuisance claims. See Compl. at 16-19, *State ex rel. McGraw v. Purdue Pharma L.P.*, No. 01-C-137-S (W.Va. Cir. Ct. June 11, 2001) (reproduced at <https://www.reuters.com/investigates/special-report/assets/usa-courts-secrecy-judges/wv-complaint.pdf>).

⁴⁵ JA1949, JA1978, JA1982, JA2919, JA2923, JA2931 (citing W.Va. Code §§ 7-1-3kk, 8-12-5(22)).

⁴⁶ *State v. Butler*, 239 W.Va. 168, 176, 799 S.E.2d 718, 726 (2017).

⁴⁷ See SB 572, 86th Leg., 2d Sess., at p. 10, lines 15-17; p. 11, lines 48-52 (W.Va. 2023) (introduced Feb. 6, 2023), <https://perma.cc/3QGH-4QRU>. Respondents incorrectly characterize (at 32) the legislation creating an opioid abatement fund for money received in opioid case settlements as an appropriations act, but it contained no appropriations. See W.Va. Code §§ 5-31-1(a), 5-31-3. They also argue that claims other than public nuisance were asserted in the settled opioid cases, but those claims were severed or dismissed. See Order Granting Plaintiffs Cabell County Commission and City of Huntington’s Motion To Sever, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-2804-DAP, ECF No. 2990 (N.D. Ohio Dec. 16, 2019); Order Regarding Trial of Liability for Public Nuisance, *In re Opioid Litig.*, No. 19-C-9000 (W.Va. M.L.P. Feb. 19, 2020) (Transaction ID 64739341); see also *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W.Va. 431, 441, 859 S.E.2d 374, 384 (2021) (noting abatement is “frequently the means by which a public nuisance is prevented or abated”).

3. Petitioners' claims implicate public rights

West Virginia courts⁴⁸ and most other courts⁴⁹ have rejected Respondents' argument (at 18) that governmental opioid claims implicate only individuals' "private right" not to be injured, not a public right. Petitioners do not seek to recover for personal injuries to individuals; they seek to abate the opioid epidemic's harm to established *public* rights: public health, safety, resources, and property.⁵⁰ The Restatement defines unreasonable interference with public rights as conduct involving "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."⁵¹

Respondents (at 19-21) want to exclude public nuisance actions aimed at remedying harms to public health and safety, but a condition harming public health, safety, and welfare is the archetypal public nuisance.⁵² Actions to abate the opioid epidemic target public resources needed to abate the crisis, including public hospitals, health and emergency services, and agencies responsible for child welfare and treatment of addiction and overdose. Such public agencies and entities address the public health epidemic and require the remedy of abatement.

Respondents distinguish (at 18) this case from the example of highway obstruction, but the opioid epidemic affects every member of the public, harming public safety as much as an obstructed road. The epidemic has made the public unwilling to "go [to Huntington], especially

⁴⁸ See *Brooke Cnty.*, 2018 WL 11242293, at *7 (holding plaintiffs "adequately alleged that Defendants interfered with a public right"); *Morrissey*, 2014 WL 12814021, at *10 (same); see also *MLP Monongalia Distributors Order* at 11-14; *MLP Distributors SJ Opinion* at 7-9; *MLP Manufacturers SJ Opinion* at 4; *MLP Pharm MTD Order* ¶¶ 69-71; *MLP Kroger MTD Order* ¶ 55.

⁴⁹ See *MLP Distributors SJ Opinion* at 8 (citing cases) (noting that courts in 22 States have rejected the claim "that no public rights are at issue in these opioid cases"); see also *Express Scripts*, 2024 U.S. Dist. LEXIS 92100, at *11; *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *127.

⁵⁰ See Pet. Br. at 3-4; *supra* p. 3 (listing harms).

⁵¹ Restatement (Second) § 821B(2)(a).

⁵² See *Kermit Lumber*, 200 W.Va. at 245, 488 S.E.2d at 925.

after dark.” JA3438. Neighborhoods burnt out by crime and drug trafficking prevent the public from enjoying public spaces just as “if a party pollutes a public reservoir.” Resp. Br. at 19.

Respondents’ argument (at 19-20) that “public health” affects only individual rights contradicts common sense. Excluding crime and diminished public resources from “public rights” makes just as little sense, as most courts have held.⁵³ Respondents discount the epidemic’s strain on governmental resources⁵⁴ and ignore that this makes resources unavailable for other uses. West Virginia law defines public rights to include interference with the “public business.”⁵⁵

4. The Court should not eliminate “condition” from the definition of public nuisance

Respondents have no basis for reading the word “condition” out of this Court’s definition of public nuisance. As they recognize (at 34), all parties agree that nuisance-creating conduct must be present. *See infra* pp. 16-17. Here, the conduct is unlawful and unreasonable opioid distribution, so Petitioners would prevail even on Respondents’ conception of public nuisance. But nothing in this Court’s cases warrants eradicating the definition’s inclusion of conditions created by that conduct. Courts may use their equitable powers to require defendants “to remedy the *conditions* giving rise to the nuisance.”⁵⁶

Respondents’ distinction makes no sense, because the condition results from the conduct. Take *Martin v. Williams*: Respondents argue (at 14) that the problematic condition concerned the

⁵³ *See* Pet Br. at 30-33.

⁵⁴ *See* Pet. Br. at 4-5.

⁵⁵ Syl. Pt. 7, *State v. Ehrlick*, 65 W.Va. 700, 701, 64 S.E. 935, 936 (1909).

⁵⁶ *West v. Nat’l Mines Corp.*, 168 W.Va. 578, 591, 285 S.E.2d 670, 678-79 (1981) (citing *McGregor v. Camden*, 47 W.Va. 193, 34 S.E. 936 (1899)) (emphasis added). Respondents’ quarrel with the certified question likewise is misplaced. The question asks whether “conditions caused by the distribution of a controlled substance” can support public nuisance liability. It thus refers both to the harmful “conditions” and to the conduct—“distribution of a controlled substance”—that gives rise to or “cause[s]” those conditions. Nothing about the certified question suggests that conduct is not involved in creating the harmful conditions.

conduct in question, operating a used car lot. The remedy illustrates that the “condition,” however, can persist after the conduct that gave rise to it. Abatement included removing lights, displays, and equipment that remained after the business closed.⁵⁷ Likewise, in *Kermit Lumber*, the defendants had to remediate a hazardous “condition”—contamination of a former business site and nearby river—that remained long after the defendants’ conduct.⁵⁸ Limiting nuisances to ongoing conduct would eliminate well-established nuisances like contamination that remains following polluting conduct (sometimes manifesting years later).

Respondents concede (at 13-14) that this Court’s nuisance cases can involve conditions, but seek to limit these to “physical conditions directly related to that conduct and located at a specific place,” such as “a public space.” Archetypal public nuisance cases involved a range of conditions harmful to the public welfare, including excess noise and harm to the public health.⁵⁹

C. Public Policy Considerations Support Recognizing A Public Nuisance Action Based On Distribution Of Controlled Substances

Public nuisance law plays an important role in remedying harms to the broader community or “an indefinite number of persons.”⁶⁰ These cannot be redressed by private lawsuits brought by individuals, as this case illustrates.⁶¹ Public nuisance law places responsibility for abating these

⁵⁷ 141 W.Va. 595, 596, 93 S.E.2d 835, 836 (1956).

⁵⁸ 200 W.Va. at 241, 488 S.E.2d at 921.

⁵⁹ See Legal Scholars Br. at 6 n.3 (JA57) (quoting John Baker’s *An Introduction to English Legal History* explaining that, at common law, “public nuisance was not limited to health hazards” and included “such diverse wrongs as keeping a dovecote, using amplified sound at night, beating feathers in the street, damaging the highway with an excessively large goods vehicle, and being a common scold”). Respondents’ argument (at 14) that harmful conditions do not extend to “personal injuries” misapprehends governmental opioid actions, which seek abatement, not recovery of damages for personal injuries. See *supra* p. 11; see also Legal Scholars Br. at 12 (JA63) (“even those who have never taken a painkiller are adversely affected when public spaces are crowded with unhoused people, crime rates increase, and emergency rooms fill”).

⁶⁰ *Kermit Lumber*, 200 W.Va. at 241, 488 S.E.2d at 921; see Legal Scholars Br. at 11 (JA62).

⁶¹ See Pet. Br. at 3-5; *supra* p. 3 (describing strain on public resources).

harms on those who caused them. Otherwise, taxpayers would foot the bill to abate public problems created by private tortfeasors. And taxpayer funds alone are unlikely to suffice in addressing large-scale public nuisances, such as the opioid epidemic.

Public nuisance law thereby complements regulatory enforcement regimes. The opioid epidemic arose from a heavily regulated industry, but failure to comply with duties such as reporting suspicious orders can hobble DEA's efforts.⁶² Notwithstanding DEA enforcement actions against them, Respondents violated their CSA duties, with catastrophic results.⁶³ When tortfeasors hurt the public despite regulatory enforcement, public nuisance law provides a much-needed remedy to ensure they clean up the mess.

Respondents' parade of horrors is unfounded. They argue (at 33-34) that public nuisance law threatens consumer goods from fast food and sugar to car fumes, but those scenarios differ fundamentally from this case. Congress and DEA regulate every entity in the closed supply chain of controlled substances, because improper distribution poses severe public threats.⁶⁴ Federal law does not impose that level of regulatory oversight on most consumer products. Accordingly, many courts have concluded that public nuisance law is appropriate in the opioid context, *see supra*

⁶² Distributors of prescription opioids must report suspicious orders to DEA and investigate them before shipping. *See* 21 C.F.R. § 1301.71(a); *Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 212-13 (D.C. Cir. 2017). Respondents shipped orders before reporting them. *See* JA3186, JA3193 (ABDC); JA2241-2243 (Cardinal); JA4485, JA4490 (McKesson).

⁶³ *See* Pet. Br. at 6-8 (industry noncompliance weakened regulatory oversight of the opioid supply chain). Respondents' counterstatement omits any mention of DEA's repeated enforcement actions against them or the fact that they settled those enforcement actions by agreeing to improve their diversion-control systems (which they never meaningfully did) and, in some cases, paying hundreds of millions of dollars in financial penalties. *See id.*; JA6627.

⁶⁴ *See Direct Sales*, 319 U.S. at 712 (the "primary effect" of selling opiates "in unlimited quantities" is "to create black markets for dope and to increase illegal demand and consumption"); *see also Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005) (Congress enacted CSA with particular concern for "prevent[ing] the diversion of drugs from legitimate to illicit channels").

pp. 4-5, but have not said the same for candy or Big Macs.⁶⁵

Even for highly regulated products, West Virginia law already imposes rational limits on public nuisance claims. Public nuisance liability arises only from unreasonable or unlawful conduct,⁶⁶ leading courts to reject unwarranted concerns about “opening the floodgates.”⁶⁷ Respondents complain (at 34) of a “pile on” because they have faced lawsuits by plaintiffs—including various cities, counties, and political subdivisions⁶⁸—for harms resulting from the same conduct. That litigation only confirms the widespread public harms and fundamentally different risks caused by improper distribution of opioids.

Respondents’ warning (at 32) that recognizing public nuisance claims based on products could cause “economic harm and social costs” ignores the real and devastating harms wrought by their conduct. Respondents caused a public health crisis that will affect Cabell/Huntington residents for many years. West Virginia law supports holding Respondents accountable.

⁶⁵ See *Direct Sales*, 319 U.S. at 711 (noting “difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latter’s inherent capacity for harm and from the very fact they are restricted”); *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *151.

⁶⁶ See *infra* p. 16-17; Legal Scholars Br. at 10 (JA61) (public nuisance “hinges on the unreasonableness of the alleged nuisance”).

⁶⁷ See *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *124-25 (“Rather than ‘devour[ing] in one gulp the entire law of tort, . . . public nuisance law has continued to coexist peaceably alongside other tort causes of action in places like California and Ohio, which have recognized public nuisance actions of this general form for some time.”); see also *Express Scripts*, 2024 U.S. Dist. LEXIS 92100, at *11.

⁶⁸ Cases brought by private plaintiffs against Respondents differ from this one because West Virginia law imposes additional limits on the claims and remedies available to private plaintiffs. See *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 596, 34 S.E.2d 348, 354 (1945) (requiring private plaintiffs to show special injury and noting, “[o]rordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public”).

II. THE COURT SHOULD ADOPT PETITIONERS' ELEMENTS FOR A PUBLIC NUISANCE BASED ON DISTRIBUTION OF A CONTROLLED SUBSTANCE

The certified question asks this Court to identify the elements of a claim based on “conditions caused by the distribution of a controlled substance” specifically. Such a claim has three elements: (1) the complained-of conditions interfere with a public right, such as public health and safety, and hurt or inconvenience an indefinite number of persons, not an individual victim; (2) the distribution is unreasonable, either through its unlawfulness or because it is unreasonable in relation to the locality involved; and (3) the unreasonable distribution was a cause of the harmful conditions. A plaintiff that satisfies these elements can seek equitable remedies to abate the conditions caused by the unreasonable distribution.

A. The Conditions Caused By Distribution Must Interfere With A Public Right, And The Distribution Must Be Unreasonable

A plaintiff asserting a public nuisance claim based on conditions caused by the distribution of a controlled substance must establish that the conditions interfere with a public right by harming public health and welfare, public safety, or public property and resources.⁶⁹ Unlawful distribution of controlled substances can give rise to public nuisance liability when it affects an indefinite number of people. A distributor’s failure to comply with statutory and regulatory diversion-control duties can constitute unreasonable conduct for public nuisance purposes, as courts in this State and elsewhere repeatedly and correctly have recognized.⁷⁰

A public plaintiff also can establish civil nuisance liability against a distributor by demonstrating that otherwise lawful conduct is unreasonable “in relation to the particular locality

⁶⁹ Pet. Br. at 30-33; *see also supra* pp. 11-12.

⁷⁰ *See, e.g., MLP Kroger MTD Order* ¶ 35 (“[C]onduct prohibited by the WVSCA may support a public nuisance claim.”); *Morrisey*, 2014 WL 12814021, at *9 n.10 (public nuisance claim where “Defendants’ distribution of controlled substances in West Virginia violated well-established regulations and industry standards”).

involved”⁷¹; unlawful conduct “is not *required*.”⁷² Respondents do not contend otherwise and thus concede the point. Nor do Respondents dispute that distribution of a controlled substance can be unreasonable in relation to a particular locality based on volume that far exceeds any justifiable medical need. *See* Pet. Br. at 8, 35-36. Instead, they merely recite (at 8-9) the district court’s flawed factual findings regarding reasonableness. Those findings are not before this Court, and the evidence would need to be reevaluated on remand under the correct legal standard.

B. The Unreasonable Distribution Must Be A Cause Of The Harm

To establish liability, a plaintiff must show that the unreasonable distribution was a cause of the harm. A distributor may be liable for causing a public nuisance even if it did not solely create or maintain the harm (*e.g.*, doctors prescribed more opioids), and even if third parties’ actions were also a foreseeable cause of the harm (*e.g.*, thefts and sales by criminal actors), as long as the harm was a foreseeable result of the unreasonable distribution.⁷³ Respondents, like the district court, ignore these causation principles. As Petitioners argued to the Fourth Circuit, this standard is “consistent with [West Virginia’s] proximate-cause requirement for negligence,” JA241, which likewise embraces principles of concurrent liability and foreseeability.⁷⁴ In addition, West Virginia recognizes that, “in public nuisance claims, ‘where the welfare and safety of an entire community is at stake, the cause need not be so proximate as in individual negligence

⁷¹ *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257 (quoting Syl. Pt. 5, *Sharon Steel*, 175 W.Va. at 480, 334 S.E.2d at 617).

⁷² *MLP Pharm MTD Order* ¶ 63 (citing *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257).

⁷³ *See Brooke Cnty.*, 2018 WL 11242293, at *6-7; Restatement (Second) § 840E.

⁷⁴ *See Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va, 639, 653, 77 S.E.2d 180, 188 (1953) (proximate cause “necessarily includes the element of reasonable anticipation that some injury might result from the act complained of”); *Wehner v. Weinstein*, 191 W.Va. 149, 155, 444 S.E.2d 27, 33 (1994) (defendant’s conduct “need not be the sole cause of the injury” as long as it is “one of the efficient causes thereof, without which the injury would not have resulted”).

cases.’”⁷⁵ Contrary to Respondents’ argument (at 36), these articulations do not conflict. Rather, together they state the causation standard for public nuisance claims, which, unlike tort claims, seek to abate community-wide harms.

Respondents dispute Petitioners’ characterization of the public nuisance causation requirement but cite no authority to support their argument that the rules of tort liability apply in the same way to public nuisance actions. They rely primarily (at 37) on *private* nuisance cases and a Restatement provision addressing *private* nuisance liability, misidentifying them as public nuisance authority.⁷⁶ The two public nuisance cases Respondents cite (at 37) relate to statutory nuisance per se claims and are otherwise inapt.⁷⁷ Any proximate-cause requirement for public nuisance necessarily involves foreseeability.⁷⁸ Petitioners proved that the opioid crisis in

⁷⁵ *Brooke Cnty.*, 2018 WL 11242293, at *7 (quoting *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003)).

⁷⁶ See *Carter v. Monsanto Co.*, 212 W.Va. 732, 737, 575 S.E.2d 342, 347 (2002) (addressing “private nuisance,” but not public nuisance); *McCormick v. Walmart Stores, Inc.*, 215 W.Va. 679, 682, 600 S.E.2d 576, 579 (2004) (holding that, for private nuisance, “the original wrongful conduct” must be “a proximate cause of the injuries,” and reaffirming that a “person who [creates a nuisance] may be liable for injuries to downstream property owners and users—despite the fact that there are intervening [actors]”); *Webb v. Sessler*, 135 W.Va. 341, 349, 63 S.E.2d 65, 69 (1950) (analyzing proximate cause only as to negligence claim, not private nuisance claim); Restatement (Second) § 822 & cmt. e (discussing “legal cause” requirement for “private nuisance” claims).

⁷⁷ See *Valentine v. Wheeling Elec. Co.*, 180 W.Va. 382, 385 n.4, 376 S.E.2d 588, 591 n.4 (1988) (not ruling on causation issues in nuisance per se case); *Daniels v. Cranberry Fuel Co.*, 111 W.Va. 484, 487-88, 163 S.E. 24, 26 (1932) (affirming trial court setting aside jury verdict based on plaintiff’s failure to prove a nuisance per se claim under statute, as well as plaintiff’s failure to show that the conduct alleged to violate the statute was a proximate cause of the harm).

⁷⁸ Respondents point (at 8) to the district court’s finding that the harms Petitioners alleged were “too remote” to establish proximate cause. Remoteness is not a separate element of proximate cause. Rather, the “doctrine of remoteness is a component of proximate cause,” the test for which centers on foreseeability: the conduct “must be such as might have been reasonably expected to produce an injury.” *Aikens v. Debow*, 208 W.Va. 486, 491, 541 S.E.2d 576, 581 (2000); see also *Humphrey v. Westchester P’ship*, 2019 W.Va. LEXIS 225, at *19 (W. Va. May 21, 2019) (proximate cause not found where acts “were so remote in time and so remote from any alleged acts or omissions . . . as to be completely unforeseeable”).

Cabell/Huntington was a foreseeable result of Respondents' unreasonable distribution practices.⁷⁹

C. Equitable Remedies, Including Abatement, Are Appropriate To Remediate A Public Nuisance Caused By The Unreasonable Distribution Of A Controlled Substance

Courts may order equitable relief, including abatement, to remediate a nuisance,⁸⁰ and may require defendants “to remedy the *conditions* giving rise to the nuisance.”⁸¹ Abatement “may entail the payment of money by a defendant” to eliminate a harmful condition without converting the remedy into damages.⁸² Contrary to Respondents' argument (at 39), West Virginia courts have not limited abatement to removing environmental contamination or enjoining harmful conduct⁸³ and have ordered abatement remedies that neither enjoin conduct nor involve environmental contamination.⁸⁴

⁷⁹ See JA240-247. Respondents' insistence (at 5-7) that good-faith doctors and a changing standard of care fueled the epidemic ignores Respondents' concurrent role in causing the epidemic by violating their CSA duties. See *supra* p. 17-18. Respondents shipped triple the per-capita rate of opioids to Cabell/Huntington compared to the rest of the country. See Pet. Br. at 8. Diversion and a mounting epidemic were a foreseeable result. See *Direct Sales*, 319 U.S. at 712; 21 U.S.C. § 801 (“The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”); *Evans v. Farmer*, 148 W.Va. 142, 153-54, 133 S.E.2d 710, 717 (1963) (“[O]ne doing an unlawful act is answerable for all consequences that may ensue in the ordinary course of events, even those immediately and directly brought about by an intervening cause if that cause was set in motion or made probable by the act of the original wrongdoer.”).

⁸⁰ See *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257.

⁸¹ *West*, 168 W.Va. at 591, 285 S.E.2d at 678-79 (citing *McGregor*) (emphasis added).

⁸² *Moats*, 245 W.Va. at 441, 859 S.E.2d at 384; see *Kermit Lumber*, 200 W.Va. at 243 n.26, 488 S.E.2d at 923 n.26 (a nuisance can be “abatable at a reasonable cost, or by the expenditure of labor or money, by the defendant”); see also *Witteried v. City of Charles Town*, 2018 WL 2175820, at *3 (W.Va. May 11, 2018).

⁸³ See *Kermit Lumber*, 200 W.Va. at 245, 488 S.E.2d at 925 (defining public nuisance actions as “seek[ing] to have some harm which affects the public health and safety abated”).

⁸⁴ See, e.g., *Martin*, 141 W.Va. at 596, 93 S.E.2d at 836 (requiring removal of lights, installations, and structures of used car lot); *Witteried*, 2018 WL 2175820, at *3 (requiring payment of costs to demolish structure).

Respondents cite *Kermit Lumber* (at 39) to argue that abatement cannot address “downstream harms,” like treatment for residents who consumed contaminated water, but the plaintiffs there never requested that remedy. Petitioners here seek funding for measures to abate the “hurt or inconvenience” to “the general public” caused by Respondents’ distribution of opioids.⁸⁵ As in *Kermit Lumber*, the requested remedy “seeks to have some harm which affects the public health and safety abated.”⁸⁶ Respondents assert (at 39) that the requested abatement remedy has no “direct relation” to their conduct, but the public health conditions Petitioners seek to abate are direct manifestations of the public nuisance Respondents caused. *See supra* pp. 18-19. Nor does the requested abatement seek “remuneration for the costs” of the opioid epidemic, as Respondents contend (at 39). Petitioners do not seek compensation for injuries. They seek funding for forward-looking measures necessary to abate the ongoing opioid epidemic.

CONCLUSION

The Court should answer the first part of the certified question in the affirmative and the second part, concerning the elements of the claim, as set forth herein.

⁸⁵ *Hark*, 127 W.Va. at 595-95, 34 S.E.2d at 354.

⁸⁶ 200 W.Va. at 245, 488 S.E.2d at 925.

/s/ Paul T. Farrell, Jr.

Paul T. Farrell, Jr. (WVSB No. 7443)
FARRELL & FULLER, LC
270 Muñoz Rivera Avenue
Suite 201
San Juan, Puerto Rico 00918
(304) 654-8281
paul@farrellfuller.com
Counsel for Petitioners

/s/ Anne McGinness Kearse

Anne McGinness Kearse (WVSB No. 12547)
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, South Carolina 29464
(843) 216-9000
akearse@motleyrice.com
Counsel for Petitioner
City of Huntington, West Virginia

Michael A. Woelfel (WVSB No. 4106)
Matthew J. Woelfel (WVSB No. 10393)
WOELFEL & WOELFEL LLP
801 Eighth Street
Huntington, West Virginia 25701
(304) 522-6249
Counsel for Petitioner
Cabell County Commission

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Respectfully submitted,

/s/ Anthony J. Majestro

Anthony J. Majestro (WVSB No. 5165)
Christina L. Smith (WVSB No. 7509)
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite 807
Charleston, West Virginia 25301
(304) 346-2889
amajestro@powellmajestro.com
csmith@powellmajestro.com
Counsel for Petitioner
Cabell County Commission

David C. Frederick*
Lillian V. Smith*
Ariela M. Migdal*
Kathleen W. Hickey*
Gavan W. Duffy Gideon*
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dfrederick@kellogghansen.com
lsmith@kellogghansen.com
amigdal@kellogghansen.com
khipkey@kellogghansen.com
ggideon@kellogghansen.com
Counsel for Petitioners
* Motion to appear *pro hac vice* pending

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of June 2024, the foregoing REPLY BRIEF FOR PETITIONERS was served using the File and ServeXpress system, which will send notification of such filing to all counsel of record.

/s/ Anthony J. Majestro

Anthony J. Majestro (WVSB No. 5165)