IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-166

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

v.

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

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

OPENING BRIEF FOR PETITIONERS

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GLOSSARY

ABDC	AmerisourceBergen Drug Corp.
Cert. Order	*City of Huntington v. AmerisourceBergen Drug Corp.*, 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 *et seq.*
DEA	Drug Enforcement Agency
Legal Scholars Br.	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) (JA46-81)
MDL	Multi-District Litigation
MLP	West Virginia Mass Litigation Panel
MLP Distributors SJ Opinion	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 Kroger MTD Order	Order Denying Kroger's Mot. To Dismiss, *State ex rel. Morrisey v. The Kroger Co.*, No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) (Transaction ID 68388011)
MLP Manufacturers SJ Opinion	Am. Order Regarding Pretrial Rulings, *In re Opioid Litig.*, No. 21-C-9000 MFR (W.Va. M.L.P. May 23, 2022) (Transaction ID 67650385)
MLP Monongalia Distributors Order	Order Denying Distributor Defs. Mot. To Dismiss, *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), *writ denied*, *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W.Va. Jan. 30, 2020)
MLP Pharm MTD Order	Order Denying Pharmacy Defs.' Mots. To Dismiss, *In re Opioid Litig.*, No. 21-C-9000-PHARM (W.Va. M.L.P. Aug. 3, 2022) (Transaction ID 67895252)
WVSCA	West Virginia Supreme Court of Appeals

INTRODUCTION

This case presents an application of West Virginia's common law of public nuisance to the ravages of the opioid epidemic. In Cabell County and Huntington ("Cabell/Huntington" or "Petitioners"), opioid addiction is widespread—afflicting more than 10% of the population. The crisis has fractured families and gutted neighborhoods. In a population of 100,000, more than a thousand people have died from opioid overdoses. Three opioid distributors—Respondents AmerisourceBergen Drug Corp., Cardinal Health, Inc., and McKesson Corp.—provided 89% of the oxycodone shipped to Cabell/Huntington. They shipped more than 81 million opioids to Cabell/Huntington pharmacies, far beyond any medically justifiable need.

For many decades, this Court has recognized public nuisances in a variety of circumstances based on unreasonable conditions, created by defendants, that harm the public. A trilogy of key precedents—*Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616 (1985); *Duff v. Morgantown Energy Assocs. (M.E.A.)*, 187 W.Va. 712, 421 S.E.2d 253 (1992) (per curiam); and *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 488 S.E.2d 901 (1997)—has defined a public nuisance broadly as "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *E.g.*, *Kermit Lumber*, 200 W.Va. at 241, 488 S.E.2d at 921. Those precedents establish that a governmental entity can bring a nuisance action to have "harm which affects the public health and safety abated." *Id.* at 245, 488 S.E.2d at 925. And they describe nuisance as "a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel*, 175 W.Va. at 483, 334 S.E.2d at 621.

Petitioners, tasked by the West Virginia Legislature with the power and duty to take appropriate and necessary actions to eliminate hazards to public health and safety and to abate or cause to be abated public nuisances, filed lawsuits seeking to abate the public nuisance that Respondents caused. Petitioners' cases were consolidated in federal district court. Following a

bench trial, the court held that West Virginia public nuisance law does not recognize a claim for the unreasonable distribution practices that were a cause of the opioid crisis in Cabell/Huntington.

On appeal, the Fourth Circuit noted the broad language used by this Court in describing public nuisance. It also read the district court's decision as conflicting with the unanimous decisions of West Virginia trial courts, including the Mass Litigation Panel ("MLP"), that have recognized claims like Petitioners'. The panel certified to this Court the following question:

> 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?

This Court should answer the first part of the certified question in the affirmative, and then expound on the elements as set forth in this brief, which draws from this Court's case law. West Virginia law defines public nuisance broadly to include conditions harmful to public health and safety. The conditions caused by Respondents' distribution of opioids—including addiction, overdose deaths, crime, and decimated neighborhoods—interfere with established public rights: public health, safety, property, and resources. Concluding that public nuisance encompasses governmental opioid claims accords with the holdings of West Virginia trial courts, the MLP, the federal court overseeing thousands of opioid suits, and the weight of judicial authority in other States.

The Court also should issue the following syllabus points, based on its precedents, to define the elements of a public nuisance claim arising from the distribution of a controlled substance:

1. Conditions caused by the distribution of a controlled substance constitute a public nuisance when they interfere with a public right, including public health and safety, by hurting or inconveniencing an indefinite number of persons.

2. Distribution of a controlled substance can support public nuisance liability if the distribution is unreasonable, either because it is unlawful or because it is unreasonable in relation to the particular locality involved.

3. A distributor of a controlled substance can be held liable for public nuisance if its distribution is a cause of the harmful conditions at issue.

4. Equitable remedies, including abatement, are appropriate to remediate a public nuisance caused by the distribution of a controlled substance.

These syllabus points will reaffirm the ability of governmental entities to abate conditions that interfere with public health and safety, caused by unreasonable conduct like Respondents'.

ASSIGNMENTS OF ERROR

The federal district court opined that West Virginia law does not recognize a public nuisance claim based on the distribution of a controlled substance. Petitioners maintain that the district court erred in reaching that conclusion, which also caused that court to err as to any subsidiary questions fairly encompassed within the Fourth Circuit's certification order.

STATEMENT OF THE CASE

A. Cabell/Huntington Are "Ground Zero" Of The Opioid Epidemic

The opioid epidemic represents "an extraordinary public health crisis" in Cabell/Huntington "that started at least two decades ago and has accelerated over the past decade."[1] West Virginia is "ground zero" of the national opioid epidemic, *Huntington*, 609 F. Supp. 3d at 419, and Cabell/Huntington is "among the West Virginia communities hardest hit," Cert. Order, 96 F.4th at 647. The opioid epidemic in Cabell/Huntington has harmed the public's health, safety, property, and resources. *See Huntington*, 609 F. Supp. 3d at 484.

Public health. As of 2017, more than 10% of Huntington and Cabell residents had been or then were addicted to opioids. *See* Cert. Order, 96 F.4th at 647. In 2017, Cabell's fatal overdose rate was 213.9 per 100,000 people per year, or 14 times the national rate (15 per 100,000). *See*

[1] *City of Huntington v. AmerisourceBergen Drug Corp.*, 96 F.4th 642, 647 (4th Cir. 2024) ("Cert. Order") (quoting *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419 (S.D. W.Va. 2022) ("*Huntington*")).

id.; JA4194. From 2001 to 2018, 1,002 individuals died from opioid-related overdoses in Cabell/Huntington. *See* Cert. Order, 96 F.4th at 647. Prescription opioids are the primary driver of addiction; once addicted, some people in Cabell/Huntington turned to illicit opioids like heroin and fentanyl. JA3098, JA3536-3541, JA3585, JA3632-3633, JA4138, JA6098. Prescription opioids remain "an ongoing and significant cause" of Cabell/Huntington overdose deaths. Cert. Order, 96 F.4th at 647. Rates of infectious diseases associated with injection of illicit opioids—including HIV, Hepatitis B, and Hepatitis C—have increased rapidly and far exceed national averages. *See id.*

The effects on public health institutions and resources have been profound. Hospitals in Cabell/Huntington have treated hundreds of pregnant women for opioid addiction, also called opioid use disorder. *See id.* Thousands of babies—at times, up to 10% of all newborns—in Cabell/Huntington have been born with neonatal abstinence syndrome due to pregnant mothers' opioid use. *See id.* West Virginia has the highest rate of neonatal abstinence syndrome in the country. *See Huntington*, 609 F. Supp. 3d at 420. Cabell's rate reached nine times the national rate in 2016. *See* JA3555-3556.

Public safety. The opioid epidemic has harmed public safety in Cabell/Huntington. In the early 2000s, only "a small area" of Cabell/Huntington "had drug offenses." *Huntington*, 609 F. Supp. 3d at 421. As the opioid epidemic grew, drug crimes intensified, becoming "prevalent throughout" the area by 2014 and "engulf[ing] every neighborhood" by 2016. *Id.*; *see also* Cert. Order, 96 F.4th at 647. The opioid epidemic threatened public safety to such an extent that people became "afraid to go [to Huntington], especially after dark." JA3438.

Public property and resources. Decreasing property values, abandoned homes, and unemployment decimated neighborhoods. *See* Cert. Order, 96 F.4th at 647. Cabell County's sheriff testified that neighborhoods have hundreds of empty and "burnt out, tore up houses" and

that the area has "an addicted workforce" that "can't pass a drug test." JA3436-3437. The number of children placed in foster care has doubled, mostly due to parental substance abuse, straining child welfare agencies and resources. *See* Cert. Order, 96 F.4th at 647; *Huntington*, 609 F. Supp. 3d at 420. Foster care entries increased so much that agencies could not meet the "demand for child placements." *Huntington*, 609 F. Supp. 3d at 420. The opioid crisis also has put an immense strain on public resources, such as emergency services, law enforcement, jails, and prisons. *E.g.*, JA3434-3435 (police departments had to search for funding to cover overtime pay).

B. Distributors Of Controlled Substances Have Important Diversion-Control Duties

Prescription opioids have "a high potential for abuse" that can lead to "severe psychological or physical dependence." 21 U.S.C. § 812(b)(2) (classifying prescription opioids as "Schedule II" controlled substances). Because their improper distribution and use has "a substantial and detrimental effect on the health and general welfare of the American people," *id.* § 801(2), federal law (and state analogs) regulates prescription opioids tightly at all stages of the supply chain. Congress enacted the Controlled Substances Act ("CSA") to control "legitimate and illegitimate traffic" with a particular concern for "the need to prevent the diversion of drugs from legitimate to illicit channels."[2] The CSA creates a "closed regulatory system" of distribution requiring all who manufacture, distribute, prescribe, or dispense controlled substances (including prescription opioids) to register with the Drug Enforcement Agency ("DEA"), the federal agency that enforces the CSA.[3] Distributors, including Respondents, ship orders of prescription opioids placed by pharmacies, which then dispense the opioids to consumers with prescriptions.[4]

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[2] *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). "Diversion" refers to the transfer of controlled substances "into other than legitimate medical, scientific, and industrial channels." 21 U.S.C. § 823(b)(1); *see id.* § 801(2).

[3] *Raich*, 545 U.S. at 13; *see* 21 U.S.C. §§ 822-823.

[4] *See Huntington*, 609 F. Supp. 3d at 421.

Distributors must comply with the CSA and its implementing regulations to prevent the diversion of controlled substances. All regulated entities in the supply chain, known as "registrants," must "provide effective controls and procedures to guard against . . . diversion of controlled substances." 21 C.F.R. § 1301.71(a).

Distributors must "design and operate a system" to prevent diversion. *Id.* § 1301.74(b). They must (1) identify suspicious orders, (2) report suspicious orders to DEA, and (3) investigate suspicious orders before shipping them, or else decline to ship. *See id.*[5] "Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." *Id.* The duty to investigate requires distributors to "exercise 'due diligence' before shipping any suspicious order,"[6] including contacting the pharmacy "to request an explanation" for the order's unusual characteristics and "verif[ying] that explanation."[7]

C. Respondents Inundated Cabell/Huntington With Millions Of Pills Without Investigating Suspicious Orders

1. Respondents violated their duties under the CSA

Respondents violated their diversion-control duties by failing to identify or block shipments of suspicious orders of opioids. Respondents admitted that, for years, they shipped suspicious orders without investigating them. JA3203, JA3221 (ABDC); JA2241-2243 (Cardinal); JA2223, JA3303, JA3312 (McKesson).

In 2005, DEA met with Respondents to convey the rising problem of opioid diversion and warned them that failing to maintain effective controls against diversion would create a crisis. JA3457-3458, JA3461, JA4688-4705. DEA sent Respondents letters reiterating their diversion-

[5] *See also Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 212-13 (D.C. Cir. 2017).

[6] *Id.* at 221-22 (quoting *Southwood Pharms., Inc.*, 72 Fed. Reg. 36,487, 36,500 (DEA July 3, 2007)).

[7] *Id.* at 218-19.

control duties and highlighting the "serious and growing health problem" of prescription drug abuse, stressing Respondents' "statutory responsibility to exercise due diligence to avoid filling suspicious orders that might be diverted into other than legitimate . . . channels." JA4612-4613.

Between 2006 and 2008, DEA brought enforcement actions against Respondents. In these actions, DEA told Respondents that their systems for identifying and stopping suspicious orders were insufficient and violated their statutory duties. JA6024-6025 (McKesson); JA3468, JA4347-4348 (ABDC); JA4650-4670 (Cardinal). Respondents settled these enforcement actions and agreed to improve diversion controls throughout their nationwide operations. JA4324, JA4410 (ABDC); JA6026-6028, JA6049-6050 (McKesson); JA3255-3257 (Cardinal).

But Respondents did not improve their practices. Instead, they shipped even greater quantities of opioids to Cabell/Huntington pharmacies. JA6638-6639 (ABDC); JA6644-6645 (Cardinal); JA6650-6651 (McKesson). Respondents used sales employees to conduct due diligence, even though Respondents compensated those workers based on how many opioids they sold. JA3217 (ABDC); JA3278, JA5895-5898 (Cardinal). McKesson applied looser policies to chain pharmacies like Rite Aid (which ordered more opioids), conducting little to no due diligence on their orders and allowing them to police themselves. JA2258-2259, JA2261-2264, JA3331-3332.

DEA took enforcement action again in 2012, suspending a Cardinal distribution center for distributing "egregious quantities" of opioids while "fail[ing] to conduct meaningful due diligence." JA4629-4631. Joseph Rannazzisi, head of DEA's Office of Diversion Control, testified that the allegations reflected "systemic failure." JA3471-3476. Cardinal settled, admitting that its diversion-control efforts were "inadequate." JA4618. In 2014, DEA warned McKesson that it "remain[ed] concerned that McKesson fail[ed] to appreciate the serious and systemic nature of the CSA-related problems that DEA has observed in its several investigations into [McKesson's] operations." JA4359. In 2017, McKesson agreed to pay $150 million to resolve alleged CSA

violations at 12 distribution centers, including its facility supplying Cabell/Huntington. JA6620-6633.

2. Respondents delivered an unreasonable volume of opioids to Cabell/Huntington, including to pharmacies serving the region's most notorious prescribers

Respondents shipped tens of millions of opioids to Cabell/Huntington pharmacies, far beyond any medically justifiable need. From 1997 to 2018, they shipped at least 81.2 million dosage units of opioids to Cabell/Huntington, a community of only 100,000 people—an average of more than 40 opioid pills per person every year for 20 years. JA3146-3149, JA3163. Respondents shipped triple the per-capita rate to Cabell/Huntington compared with the rest of the country. JA6656. They supplied 89% of Cabell/Huntington's oxycodone, an opioid that caused more overdose deaths in West Virginia from 2001 to 2015 than any other. JA6070, JA6680.

Respondents supplied Cabell/Huntington's highest over-prescribers of opioids, including pharmacies and doctors that authorities eventually shut down. JA3229, JA6003-6004 (ABDC); JA4724, JA4741 (McKesson); JA3596-3597 (Cardinal). They shipped vast quantities of opioids to the pharmacies serving Cabell/Huntington's two highest over-prescribers: Dr. Deleno Webb and Dr. Philip Fisher, who ranked in the top 0.02% and 0.03%, respectively, of opioid prescribers *nationwide*. JA3593. Dr. Webb surrendered his medical license in 2017 after a state investigation into his excessive prescribing, and Dr. Fisher's license was suspended in 2011 following state investigations related to the deaths of at least seven of his patients. JA3606, JA3612-3614. Before losing their licenses, Drs. Webb and Fisher together prescribed more than 24 million dosage units of opioids in Cabell/Huntington, and Respondents supplied most of these pills. JA3600-3601, JA3603; *see* JA3229, JA6003-6004 (ABDC); JA4724, JA4741 (McKesson); JA3596-3597 (Cardinal).

D. Equitable Remedies Are Appropriate To Abate The Public Nuisance Faced By Cabell/Huntington

The harms of the opioid epidemic in Cabell/Huntington can be abated. Epidemiologist Dr. Caleb Alexander, Cabell/Huntington's expert on abating the opioid epidemic, testified it would take 15 years to do so using four measures: (1) preventing new cases of opioid use disorder and further diversion; (2) treating people with opioid use disorder to reduce the risk of death, homelessness, unemployment, and other harms; (3) instituting recovery efforts, including drug courts, vocational training, and mental health counseling, to reduce opioid-related crime; and (4) intervening with special populations, including pregnant women, new mothers, post-incarcerated individuals, and children and families affected by the epidemic. JA3644, JA3651-3653, JA3656-3657, JA3659-3660, JA3662-3663, JA3668, JA3671-3672.

E. Procedural History

1. Huntington's and Cabell's federal opioid litigation

Exercising the authority granted by the West Virginia Legislature to take "appropriate and necessary 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,"[8] Huntington and Cabell filed these suits in 2017. *See* Cert. Order, 96 F.4th at 644; JA1862, JA1946. The federal Judicial Panel on Multidistrict Litigation transferred them to the U.S. District Court for the Northern District of Ohio under 28 U.S.C. § 1407(a), along with thousands of suits that other municipalities brought against opioid manufacturers, distributors, and dispensers (collectively, the federal opioid MDL). *See* Cert. Order, 96 F.4th at 644 n.1; *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio). After the MDL court directed Cabell/Huntington to streamline their claims to serve as a bellwether case, Cabell/Huntington "narrowed their claims to a public nuisance suit against the

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

three distributor defendants." Cert. Order, 96 F.4th at 644 n.1. On January 14, 2020, the MDL court remanded these cases to the Southern District of West Virginia (Judge Faber), which consolidated them for trial. *See id.*

2. Parallel state opioid litigation

As this case proceeded through the MDL and federal pre-trial proceedings, parallel litigation by other West Virginia cities and counties proceeded against the same defendants for similar harms in West Virginia's circuit courts, following litigation by the State. In 2014, in *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, a West Virginia court refused to dismiss the State's public nuisance claims against Respondents for their role in the opioid epidemic.[9] This Court declined review.[10] In 2018, in *Brooke County Commission v. Purdue Pharma L.P.*, another West Virginia court followed *Morrisey*, denying Respondents' motion to dismiss municipal public nuisance claims.[11] This Court again denied review.[12]

The MLP, composed of seven judges appointed by the Chief Justice, also handles more than 80 opioid cases brought by West Virginia governmental entities.[13] Its "function is to efficiently manage and resolve mass litigation, like the Opioid Litigation."[14] The MLP "has concluded in multiple instances that the distribution of opioids can form the basis of a public nuisance claim under West Virginia common law." Cert. Order, 96 F.4th at 649-50. In a 2019 decision by Judge Moats, then-Chair of the MLP, the MLP denied Respondents' motion to dismiss

[9] *See* 2014 WL 12814021, at *8-9 & n.9 (W.Va. Cir. Ct. Dec. 12, 2014).

[10] *See State ex rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W.Va. Jan. 5, 2016).

[11] *See* 2018 WL 11242293 (W.Va. Cir. Ct. Dec. 28, 2018) (Hummel, J.).

[12] *See State ex rel. Cardinal Health, Inc. v. Hummel*, No. 19-0210 (W.Va. June 4, 2019).

[13] *See State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W.Va. 431, 436, 859 S.E.2d 374, 379 (2021).

[14] *Id.*

opioid public nuisance claims, calling *Brooke County* "well-founded."[15] This Court again denied review.[16] In 2022, the MLP (Moats & Swope, JJ.) denied distributors' similar summary-judgment motions.[17] It held that "West Virginia public nuisance law encompasses [governmental plaintiffs'] opioid claims," citing West Virginia decisions, this Court's repeated writ denials, the MDL court's rulings, and rulings in 22 other States.[18]

3. Trial, appeal, and certification

After a bench trial in 2021, the federal district court ruled in favor of Respondents.[19] It did so despite finding that a two-decade-long opioid epidemic in Cabell/Huntington caused widespread harms. *See Huntington*, 609 F. Supp. 3d at 419-22. It found that the opioid epidemic also harmed the public by "increased crime rates, decreased property values, and adversely affected neighborhoods throughout Cabell and Huntington." *Id.* at 419, 421.

As a threshold matter, the court held that "the sale, distribution, and manufacture of opioids" is not actionable under West Virginia public nuisance law. *Id.* at 475. It held that public nuisance claims are limited to "conduct that interferes with public property or resources" and cannot address "distribution or sale of a product," including opioids. *Id.* at 472. The court "predicted that the state court would decline to extend West Virginia's common law of public

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[15] 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*").

[16] *See State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W.Va. Jan. 30, 2020).

[17] *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*"); *see also* 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*") (denying manufacturers summary judgment on public nuisance).

[18] *See MLP Distributors SJ Opinion* at 2 & n.1, 6.

[19] *See* Cert. Order, 96 F.4th at 645; *see also Huntington*, 609 F. Supp. 3d at 412.

nuisance" to distribution of opioids. Cert. Order, 96 F.4th at 645 (citing *Huntington*, 609 F. Supp. 3d at 472, 475). It deemed the MLP's contrary decisions on the issue "not persuasive" and lacking "an in-depth consideration of the question." *Huntington*, 609 F. Supp. 3d at 474. The court rejected Cabell/Huntington's proposed abatement remedy, holding that it was "not properly understood" as abatement. Cert. Order, 96 F.4th at 645.

Following the district court's ruling, the MLP (Moats & Swope, JJ.) reaffirmed its decisions permitting governmental opioid public nuisance claims in West Virginia state court.[20] The MLP disagreed with the federal court's interpretation of West Virginia law and held that the "placement of an artificial external constraint on the common law cause of action for public nuisance is inconsistent" with this Court's flexible conception of public nuisance.[21] This Court again denied review.[22] In a separate decision, the MLP emphasized that the district court's opinion in this case is "neither predictive nor consistent with West Virginia law on public nuisance."[23]

Cabell/Huntington timely appealed. A unanimous panel of the Fourth Circuit certified the instant question as "outcome determinative in the present appeal." Cert. Order, 96 F.4th at 644. The Fourth Circuit's opinion stated that it "d[id] not view as dispositive the fact that [this Court] has not yet applied principles of public nuisance to the distribution of a product" and that it "hesitate[d] to infer such limits on West Virginia's common law of public nuisance" in light of

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[20] *See* Order Denying Pharmacy Defs.' Mots. To Dismiss ¶¶ 62-82, *In re Opioid Litig.*, No. 21-C-9000-PHARM (W.Va. M.L.P. Aug. 3, 2022) (Transaction ID 67895252) ("*MLP Pharm MTD Order*").

[21] *Id.* ¶ 70; *see also* Order Denying Kroger's Mot. To Dismiss ¶ 62, *State ex rel. Morrisey v. The Kroger Co.*, No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) (Transaction ID 68388011) ("*MLP Kroger MTD Order*") (same).

[22] *See State ex rel. CVS Pharmacy, Inc. v. Moats*, No. 22-635 (W.Va. Sept. 8, 2022).

[23] Order Denying Defs.' Mots. To Dismiss ¶ 21, *City of Beckley v. Allergan PLC*, No. 20-C-34 MSH (W.Va. M.L.P. Oct. 18, 2022) (Moats & Swope, JJ.) (Transaction ID 68267633) (denying pharmacies' motions to dismiss).

decisions by this Court and West Virginia trial courts. *Id.* at 649. The Fourth Circuit stated that it "do[es] not think that the authorities cited by the defendants," including out-of-state authorities and the Restatement (Third) of Torts: Liability for Economic Harm (2020), "control the outcome of this case." *Id.* at 650.

SUMMARY OF ARGUMENT

I. West Virginia law defines public nuisance broadly to include conditions harmful to public health and safety. West Virginia follows the Restatement (Second) of Torts (1979), which defines a public nuisance as "an unreasonable interference with a right common to the general public." *Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6 (quoting Restatement (Second) § 821B(1)). The conditions caused by Respondents' unreasonable opioid distribution practices—including addiction, overdose deaths, infectious disease, crime, and decimated neighborhoods—interfere with public health, safety, property, and resources.

West Virginia circuit courts and the MLP have permitted governmental plaintiffs to bring public nuisance claims just like these, including against Respondents. These decisions are correct and are consistent with the decisions of the federal opioid MDL court and the weight of authority in other States recognizing public nuisance claims based on the opioid epidemic.

The district court departed from those cases. It held that West Virginia law does not allow public nuisance claims concerning the distribution and sale of products, and it limited nuisance claims to those interfering with public property or resources. These limitations on public nuisance are not found in West Virginia law. The court also relied on a misreading of an inapplicable section of the Restatement (Third)—which West Virginia has not adopted—concerning private parties' public nuisance claims for economic loss, not governmental abatement actions.

II. A public nuisance claim based on conditions caused by the distribution of a controlled substance requires three elements: (1) the complained-of conditions interfere with a

public right, such as public health, public safety, or public property and resources; (2) defendants' distribution is unreasonable, either because defendants acted unlawfully—including by violating legal diversion-control duties—or because their distribution was unreasonable in relation to the locality involved; and (3) the harmful conditions are a consequence of defendants' unreasonable distribution. A plaintiff that satisfies these elements can seek equitable remedies to remediate the harmful conditions caused by the unreasonable distribution of controlled substances, such as widespread addiction, the rise in overdose deaths, increased drug-related crime, and other harms to public health and safety. Abatement is an equitable remedy cognizable under West Virginia public nuisance law.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument pursuant to West Virginia Rule of Appellate Procedure 20(a) is necessary as this appeal presents an issue of first impression in a case involving issues of fundamental public importance.

ARGUMENT

I. STANDARD OF DECISION

This Court applies a de novo standard "in addressing the legal issues presented by a certified question from a federal district or appellate court."[24] This Court "will give the question plenary review[ ] and may consider any portions of the federal court's record that are relevant to the question of law to be answered."[25]

[24] Syl. Pt. 1, *Light v. Allstate Ins. Co*., 203 W.Va. 27, 506 S.E.2d 64 (1998).

[25] Syl. Pt. 2, *Valentine v. Sugar Rock, Inc.*, 234 W.Va. 526, 766 S.E.2d 785 (2014).

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

A. West Virginia's Broad Definition Of A Public Nuisance Includes Conditions That Harm Public Health And Public Safety

This Court has defined public nuisance broadly as "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons."[26] This definition readily encompasses the harms to the public's health, safety, and resources that give rise to governmental opioid claims. In *Sharon Steel*, this Court held that, in West Virginia, "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations."[27]

Public nuisance traditionally protects the public's right to be free from interference with public health and safety. In *Kermit Lumber*, this Court recognized that "[a] public nuisance action usually seeks to have some harm which affects the public health and safety abated."[28] *Kermit Lumber* emphasized that, while "[t]he term 'public nuisance' does not have an exact definition, . . . [g]enerally, it has been described as 'the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public.'"[29]

This Court has observed that West Virginia's definition of public nuisance "is consistent with the *Restatement (Second) of Torts* § 821B(1) (1979)."[30] In *Duff*, the Court drew upon the Restatement (Second)'s definition of a public nuisance as "an unreasonable interference with a

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[26] *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257 (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595-96, 34 S.E.2d 348, 354 (1945)).

[27] 175 W.Va. at 483, 334 S.E.2d at 621.

[28] 200 W.Va. at 245, 488 S.E.2d at 925.

[29] *Id.* at 245 n.28, 488 S.E.2d at 925 n.28 (citations omitted).

[30] *Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6.

right common to the general public."[31] Under the Restatement (Second)'s test, interferences with "public health" and "public safety" constitute public nuisances.[32]

Undisputed evidence in this case describes conditions in Cabell/Huntington that harm and inconvenience an indefinite number of persons and injure the public's health, safety, property, and resources. *See supra* pp. 3-5 (describing such harms). Nuisance claims provide an indispensable remedy for these public harms: "[w]ere it not for the availability of nuisance actions as a remedy, it seems certain an inestimable number of business and private actions that have deleterious health and environmental results as a byproduct of their operations would have continued unabated."[33] Here, Petitioners' claims that Respondents acted unreasonably in their distribution of prescription opioids and interfered with the public's rights to health and safety fit squarely within these broad definitions.

An important component of West Virginia's definition is that a public nuisance must harm an *indefinite* number of persons, not a specific individual. And it is "the duty of the proper public officials to vindicate the rights of the public."[34] As the Fourth Circuit noted in discussing an *amicus* brief of legal scholars, "[a]mici argue that while product liability claims focus on 'harms specifically borne by discrete individuals,' 'public nuisance claims serve a different function, focusing on "harms to the public," including public health, social welfare, and security.' Similarly,

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[31] *Id.* (quoting Restatement (Second) § 821B(1)); *see also* 58 Am. Jur. 2d *Nuisances* § 25 (defining public nuisance as "an unreasonable interference with a right common to the general public or all members of the community," including "the public's right to life, health, and the use of property") (footnote omitted).

[32] Restatement (Second) § 821B(1) cmt. b; *see also Rhodes v. E.I. Du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 768 (S.D. W.Va. 2009).

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

[34] *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257; *see also* W.Va. Code § 7-1-3kk (charging counties with the power and duty to take "appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance"); *id.* § 8-12-5(22) (same, municipalities).

amici explain that public nuisance claims address conditions that 'unreasonably interfere with the rights of people who are not themselves harmed by consumption of the product.' "[35]

The conditions in Cabell/Huntington demonstrate how that factor applies to governmental opioid litigation. Up to 10% of newborns in Huntington are born with neonatal abstinence syndrome due to pregnant mothers' opioid use; Huntington hospitals must care for those newborns as they experience withdrawal. JA7571. Communities have experienced an increase in crime, with drug offenses that occurred in "only a small area of Huntington" in 2004 "engulf[ing] every neighborhood" by 2016. JA7574. Placements into foster care doubled, most due to parental substance abuse. JA7572. Infectious diseases—including HIV, Hepatitis B, and Hepatitis C—spread rapidly. JA7572-7573; *see also supra* pp. 3-5 (additional evidence of public effects).

B. West Virginia's Circuit Courts And MLP Have Held Correctly That Public Nuisance Encompasses Governmental Opioid Claims, In Accordance With The Federal MDL And The Weight Of Judicial Authority In Other States

West Virginia trial courts and the MLP have "concluded in multiple instances that the distribution of opioids can form the basis of a public nuisance claim under West Virginia common law."[36] Just days before the district court entered judgment in this case, the MLP entered an order denying Respondents' motion for summary judgment, which argued that the plaintiffs' public nuisance cases were not cognizable under West Virginia law.[37] This ruling expanded on the MLP's earlier rejection of the same challenges to the governmental public nuisance claims.[38] The MLP

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[35] Cert. Order, 96 F.4th at 649 n.11 (quoting Brief of Legal Scholars as *Amici Curiae* in Support of Neither Party at 11-12, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 22-1819(L), ECF No. 47-1 (4th Cir. Jan. 3, 2023) (JA62-63)). The Legal Scholars Brief filed in the Fourth Circuit is reproduced in its entirety in the Joint Appendix at JA46-81 ("Legal Scholars Br.").

[36] Cert. Order, 96 F.4th at 649-50.

[37] *See MLP Distributors SJ Opinion* at 1-6.

[38] *See MLP Manufacturers SJ Opinion* at 4.

noted the unanimity of opinions authored by West Virginia state court judges and this Court's denial of three writs of prohibition that Respondents filed challenging those rulings.[39]

As the MLP observed, its decisions and those of West Virginia judges are consistent with the decisions in the federal opioid MDL.[40] The decisions of the MLP and West Virginia's courts likewise accord with those in 22 other States that have recognized public nuisance claims in the opioid litigation.[41] Many of these have, in doing so, relied upon the definition and parameters for

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[39] *See MLP Distributors SJ Opinion* at 2 n.1 (citing *Morrisey*, 2014 WL 12814021, at *10; *Brooke Cnty.*, 2018 WL 11242293, at *7; *MLP Monongalia Distributors Order* (adopting and applying the reasoning and rulings from *Brooke County*)).

[40] *See MLP Distributors SJ Opinion* at 2 & n.3 (citing *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 674 (N.D. Ohio 2019)).

[41] *See id.* at 2-3 & n.4 (citing *Alabama v. Purdue Pharma L.P.*, No. 03-CV-2019-901174.00, slip op. 11-12 (Ala. Cir. Ct. Nov. 13, 2019); *Alaska v. McKesson Corp.*, No. 3AN-18-10023CI, slip op. 7 (Alaska Super. Ct. Aug. 28, 2019); *City of Surprise v. Allergan PLC*, 2020 Ariz. Super. LEXIS 476, at *63-66 (Ariz. Super. Ct. Oct. 28, 2020); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064 (Ark. Cir. Ct. Apr. 5, 2019); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 669 (N.D. Cal. Sept. 30, 2020); *In re Nat'l Prescription Opiate Litig. (West Boca Med. Ctr.)*, 452 F. Supp. 3d 745 (N.D. Ohio 2020); *Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.*, No. 18-CI-00846, slip op. (Ky. Cir. Ct. July 18, 2019); *City of Boston v. Purdue Pharma, LP*, 2020 WL 416406 (Mass. Super. Ct. Jan. 3, 2020); *Michigan ex rel. Kessel v. Cardinal Health, Inc.*, No. 19016896-NZ, slip op. 2 (Mich. Cir. Ct. Mar. 24, 2021), *reversing on recons.* slip op. (Mich. Cir. Ct. Nov. 17, 2020); *Mississippi v. Cardinal Health, Inc.*, No. 25Cll:18-cv00692, slip op. (Miss. Cir. Ct. Apr. 5, 2021); *Missouri ex rel. Schmitt v. Purdue Pharma, L.P.*, No. 1722-CC10626, slip op. 7-8 (Mo. Cir. Ct. Apr. 6, 2020); *Nevada v. McKesson Corp.*, No. A-19-796755-B, slip order (Nev. Dist. Ct. Jan. 3, 2020); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129 (N.H. Super. Ct. Sept. 18, 2018); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541, slip ops. (N.M. Dist. Ct. Dec. 17, 2020 and Sept. 10, 2019); *In re Opioid Litig.*, 2018 WL 3115102, at *28 (N.Y. Sup. Ct. June 18, 2018) ("*New York Opioids*"); *County of Delaware v. Purdue Pharma, L.P.*, No. CV-2017008095, slip ops. (Pa. Ct. Com. Pl. Mar. 13, 2020, Dec. 4, 2019, and Oct. 25, 2019); *Rhode Island ex rel. Neronha v. Purdue Pharma L.P.*, 2019 WL 3991963, at *9 (R.I. Super. Ct. Aug. 19, 2019); *South Carolina v. Purdue Pharma L.P.*, No. 2017-CP40-04872, slip order (S.C. Ct. Com. Pl. Apr. 12, 2018); *Tennessee ex rel. Slatery v. Purdue Pharma L.P.*, 2019 WL 2331282, at *5 (Tenn. Cir. Ct. Feb. 22, 2019); *In re Texas Opioid Litig.* (*Cnty. of Dallas*), No. 2018-77098, slip op. (Tex. Dist. Ct. June 9, 2019); *Vermont v. Cardinal Health, Inc.*, No. 279-3-19 Cncv, slip op. (Vt. Super. Ct. May 12, 2020); *Washington v. Purdue Pharma L.P.*, 2018 WL 7892618 (Wash. Super. Ct. May 14, 2018)).

public nuisance set forth in the same provision of the Restatement (Second) that West Virginia has adopted.[42]

C. The District Court And Respondents Rely On An Inapplicable Section Of The Restatement (Third) And Outlier Cases To Advance Limitations On Public Nuisance Inconsistent With West Virginia Law

The federal district court in this case departed from this Court's flexible definition of a public nuisance and imposed limitations on that definition not found in West Virginia law. It restricted public nuisance to claims concerning public property and resources (while also failing to recognize that Petitioners' claims *do* concern public property and resources). Respondents advance similar limitations, seeking to bar public nuisance claims related to products.

West Virginia's circuit courts and the MLP have rejected these limitations, correctly, as inconsistent with West Virginia law.[43] For example, in *Brooke County*, the circuit court held that "a claim for public nuisance is not limited to property disputes and that West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases like this."[44] These decisions mirror courts in other States and the MDL rejecting such limitations.[45]

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[42] *See Alabama*, *supra*, at 11-12; *Alaska*, *supra*, at 4 n.10; *City of Surprise*, 2020 Ariz. Super. LEXIS 476, at *61-64; *Arkansas*, 2019 WL 1590064, at *3; *Nat'l Prescription Opiate Litig*., 452 F. Supp. 2d at 773-74 (Florida law); *Kentucky*, *supra*, at 3; *Mississippi*, *supra*, at 2-3; *New Hampshire*, 2018 WL 4566129, at *13; *New Mexico v. Purdue Pharma L.P.*, 2022 WL 6822694, at *2 (N.M. Dist. Ct. June 15, 2022); *New York Opioids*, 2018 WL 3115102, at *27; *Rhode Island*, 2019 WL 3991963, at *9; *Tennessee*, 2019 WL 2331282, at *5; *Vermont*, *supra*, at 5-8.

[43] *See*, *e.g.*, *Morrisey*, 2014 WL 12814021, at *9 (holding that West Virginia's claims against opioid distributors "fit squarely" within this definition of public nuisance); *see also infra* n.46 (collecting MLP opinions rejecting the argument that public nuisance claims are limited to those arising out of use of property).

[44] *Brooke Cnty.*, 2018 WL 11242293, at *7.

[45] *See*, *e.g.*, *City of Boston v. Purdue Pharma, L.P.*, 2020 WL 977056, at *5 (Mass. Super. Ct. Jan. 31, 2020) (rejecting "Distributor Defendants' arguments that public nuisance is limited to property or land-based claims"); *Nat'l Prescription Opiate Litig.*, 452 F. Supp. 3d at 774-75 (rejecting argument by distributor defendants that nuisance law in Florida requires an interference with the use and enjoyment of property); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 2477416,

1. Public nuisance does not require harm to or use of public property or resources, and, in any event, this case involves such harm

This Court has not limited public nuisance claims to those arising out of the use of property or involving harm to property. The MLP and West Virginia courts consistently have held that no such limitation exists. In a November 2022 order signed by Judges Moats and Swope, the MLP explained that, even if the governmental plaintiff (there, the State) "had not alleged property damage as one of its harms, it need not do so to state a claim for public nuisance. The MLP has repeatedly so held."[46] This Court should adopt those holdings.

The district court, at the urging of Respondents, limited public nuisance to activities concerning "the misuse, or interference with, public property or resources." JA7704-7705. It cited no precedent expressly limiting West Virginia nuisance claims to claims arising out of the use of property. Rather, the court's decision was rooted in a narrow misreading of *Sharon Steel* that

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at *14 (N.D. Ohio Apr. 1, 2019) ("Based on those legislative and judicial sources, the court concludes that the Montana Supreme Court would not hold that the definition of nuisance is limited to acts or conditions that interfere with property rights and that it would recognize as actionable a public nuisance claim that is based on a defendant's alleged affirmative misconduct in the manufacture, distribution and sale of the products at issue in this action."), *report and recommendation adopted in relevant part*, 2019 WL 3737023 (N.D. Ohio June 13, 2019).

[46] *MLP Kroger MTD Order* ¶ 60 (citing Order Denying Pharmacy Defs.' Mot. To Dismiss Ex. A at 11, *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 64374772) ("The Court finds and concludes that public nuisance is not limited to property disputes and that West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases like this."); *MLP Monongalia Distributors Order* Ex. A at 13 (same); *MLP Manufacturers SJ Opinion* at 4 ("The Court further notes that at least 22 states have found public nuisance claims based on the marketing of prescription opioids to be viable."); *MLP Distributors SJ Opinion* at 3 (rejecting argument that "governmental public nuisance claims are limited to claims arising out of the use of property")); *see also Lemongello v. Will Co.*, 2003 WL 21488208, at *2 (W.Va. Cir. Ct. June 19, 2003) ("This Court finds that West Virginia law does not limit claims of public nuisance to those dealing with real property."); *Morrisey*, 2014 WL 12814021, at *9 (denying dismissal of West Virginia's public nuisance claim based on public health and safety harms); Restatement (Second) § 821B cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land.").

failed to give effect to that opinion's "broad[er] definition" and its emphasis on the doctrine's "flexib[ility]" and "adaptab[ility]" to "a wide variety of factual situations."[47]

In *Sharon Steel*, the Court listed examples of interferences previously held to constitute nuisances. But this list does not support the limitation adopted by the federal court and advocated by Respondents. Nothing in the opinion suggested that the list was, or was intended to be, exhaustive. Nor did the Court indicate that a link to property was necessary to the decisions that it listed. Some of the cases cited in *Sharon Steel* involved interferences with public health and safety. And in the same opinion, this Court held that "[a] nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort."[48] This test is the controlling holding of that case, as evidenced by its recognition and adoption by other West Virginia courts.[49]

Sharon Steel's broader definition of public nuisance is consistent with the Restatement (Second)'s, which notes that, "[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."[50] Courts in other jurisdictions likewise have rejected attempts to limit its application to claims arising out of the use of property.[51]

The common law long has recognized public nuisance claims based on interference with the public health and welfare, not just public property.[52] Petitioners' claims are "not a novel modern invention," but fully consistent with historical authorities, including a seventeenth-century treatise recognizing public nuisance claims against "apothecaries" for unsafe products.[53]

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[47] *See Sharon Steel*, 175 W.Va. at 483, 334 S.E.2d at 621.

[48] *Id.*

[49] *See supra* n.46 (collecting cases).

[50] Restatement (Second) § 821B cmt. h.

[51] *See supra* n.41.

[52] *See* Legal Scholars Br. at 2, 6-9 (JA53, JA57-60).

[53] *Id.* at 2 (JA53).

Finally, even if nuisance claims were limited to those involving "public property or resources," as the district court held, governmental opioid claims would fall squarely within that category. The MLP has held that the State's opioid claims alleged harms to public property and resources such as "children placed in foster care, babies born addicted to opioids, criminal behavior, poverty, and property damage," and that "greater demand for emergency services, law enforcement, addiction treatment, and other social services places an unreasonable burden on governmental resources."[54] The MLP reasoned that the State may be able to demonstrate that "the diversion of prescription opioids and an epidemic of opioid misuse and addiction have contributed harms to the State and public that include loss of use of public space, property, and resources due to drug abuse and related criminal behavior."[55]

2. This Court should reject Respondents' "products" limitation on public nuisance claims

The district court excluded claims arising out of the sale of products from the definition of public nuisance.[56] In doing so, it misconstrued West Virginia law, relied on an inapplicable and unadopted Restatement provision, and ignored the Legislature's acceptance of such claims.

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[54] *MLP Kroger MTD Order* ¶ 59 (cleaned up).

[55] *Id*. (citing Tr. 447:17-21, *In re Opioid Litig.: Manufacturer Cases*, No. 21-C-9000-MFR (W.Va. M.L.P. Apr. 5, 2022) (testimony of Rahul Gupta, M.D.) ("We also had people that were deliberately injecting themselves in shopping mall bathrooms, gas stations, other places . . . ."); *id.* at 489:8-12 ("As part of the Department of Health and Human Resources, we are also responsible for foster care, and we found that a substantial portion of foster care was—was being driven—increases being driven by [the] substance use crisis . . . .")).

[56] *See Huntington*, 609 F. Supp. 3d at 471-75.

a. The district court incorrectly relied on the Restatement (Third), which is inapplicable to governmental public nuisance claims seeking abatement and contrary to this Court's precedents

In rejecting Petitioners' public nuisance claims, the district court relied on § 8 of the Restatement (Third) of Torts: Liability for Economic Harm.[57] That was error. The portion on which the court relied applies only to a public nuisance claim brought by a private party seeking damages; it is inapplicable to governmental public nuisance claims seeking abatement.

By its terms, Restatement (Third) § 8 does not govern Petitioners' governmental abatement claim. Titled "Public Nuisance Resulting in Economic Loss," § 8 addresses claims for *economic loss* by a *private party* who has suffered an injury "distinct in kind from those suffered by members of the affected community in general."[58] Its text merely articulates the classic requirement that a private party bringing a public nuisance claim for damages establish what is known as a "special injury."[59] A comment to § 8 expressly states that the provision is *not* intended to apply to public nuisance actions brought by government officials.[60] As Judges Moats and Swope held in the state court opioid cases brought against Respondents by other public entities:

> [T]he [MLP] concludes that Section 8 of the Third Restatement does not apply to the Plaintiffs' abatement claim here. Section 8 of Third Restatement applies to

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[57] *See id.* at 472.

[58] Restatement (Third) § 8.

[59] *E.g.*, *Hark*, 127 W.Va. at 596, 34 S.E.2d at 354 ("Ordinarily, 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. But if the act or condition causes special injury to one or a limited number of persons and substantial permanent damages result which cannot be fully compensated in an action at law, a suit to abate a nuisance so existing may be maintained by a private individual.") (citations omitted).

[60] Restatement (Third) § 8 cmt. a ("In addition to the common-law claims recognized here, public officials may bring civil or criminal actions against a defendant who creates a public nuisance. . . . The definition of 'public nuisance' for those purposes is widely 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."); *see also* Cert. Order, 96 F.4th at 651 ("[T]he text of section 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.").

> claims for economic loss by a private party who has suffered an injury "distinct in kind from those suffered by members of the affected community in general." The comments to Section 8 state that Section 8 is not intended to apply to public nuisance actions seeking abatement brought by public officials. Plaintiffs have disclaimed all damage claims, and this action seeks only equitable relief. Thus, the [MLP] concludes Section 8 is inapplicable to governmental abatement claims.[61]

Other courts and commentators also have recognized that Restatement (Third) § 8 does not apply to governmental abatement claims.[62]

The district court also misread the Restatement (Third) § 8's comment that "most courts" have rejected "public nuisance based on the sale and distribution of a product."[63] Consistent with § 8's limited scope, that comment addresses "claims for economic losses [that] plaintiffs have suffered on account of" dangerous products, "such as tobacco, firearms, and lead paint."[64] The comment does not address actions by a government actor to abate a condition harmful to the public as a whole, like the opioid epidemic.[65]

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[61] *MLP Distributors SJ Opinion* at 5-6 (citation and footnotes omitted); *see also* Cert. Order, 96 F.4th at 651 (recognizing "the potentially limited application of the Third Restatement to the present case").

[62] *See In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 824 (N.D. Ohio 2022) ("Defendants['] . . . reliance on the Restatement (Third) of Torts: Liab. For Econ. Harm § 8 cmt. g is misplaced. As Plaintiffs point out, § 8 applies only to claims for economic loss brought by a private party who suffered an injury 'distinct in kind from those suffered by members of the affected community in general.'"); *City of Surprise*, 2020 Ariz. Super. LEXIS 476, at *64-65 ("Restatement Third § 8 applies to common law claims brought by private plaintiffs, not civil actions brought by public officials.") (citing Restatement (Third) § 8 cmt. a); *Vermont*, *supra* n.41, at 8 (§ 8 "does not account for . . . losses incurred by the public as a whole"); David A. Dana, *Public Nuisance Law when Politics Fails*, 83 Ohio St. L.J. 61, 72 n.50 (2022) ("The Restatement (Third) of Torts does not address public nuisance as a general matter, except in a very limited section related to public nuisance actions brought by private plaintiffs for economic loss, and it seems to reaffirm the continuing validity of Section 821B of the Second Restatement.").

[63] JA7704 (citing Restatement (Third) § 8 cmt. g).

[64] Restatement (Third) § 8 cmt. g.

[65] *See id.* cmt. a (distinguishing a public nuisance action by a public official, which "is the most common response to a defendant's invasion of a public right"); Legal Scholars Br. at 15 (JA66) (comment g "does not purport to conclusively interpret the scope of public nuisance").

The Restatement (Second) remains the American Law Institute's definitive authority with respect to governmental nuisance actions.[66] The Restatement (Third) "instructs readers to refer to the Restatement (Second)"—specifically § 821B and § 821C—"for a general discussion of public nuisance that extends beyond 'liability for economic loss.'"[67] It explains that, unlike § 8 of the Restatement (Third), § 821B and § 821C of the Restatement (Second) are "not confined to liability for economic loss."[68] Section 821C distinguishes individual actions for damages requiring special injury from actions by public officials seeking abatement.[69] The Restatement (Third) remains a work in progress and has yet to address governmental public nuisance actions.[70]

The district court arrived at this error by reasoning that this Court "followed the Restatement of Torts" in "discussing the scope of public nuisance under West Virginia law," citing *Duff*.[71] *Duff*, which predated the Restatement (Third) by decades, quoted the Restatement (*Second*)'s definition of a public nuisance: "an unreasonable interference with a right common to the general public."[72] *Duff* does not support applying an inapplicable provision of the Restatement (Third) to a governmental nuisance case.[73]

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[66] *See* Legal Scholars Br. at 15 (JA66).

[67] Cert. Order, 96 F.4th at 651 (quoting Restatement (Third) § 8 reporter's note a).

[68] Restatement (Third) § 8 reporter's note a; *see also id.* reporter's note f ("For additional discussion not limited to cases of economic loss, see Restatement Second, Torts § 821C (AM. LAW INST. 1979)").

[69] *See* Restatement (Second) § 821C.

[70] *See* Legal Scholars Br. at 15 (JA66).

[71] JA7704 (citing *Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6).

[72] 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6 (quoting Restatement (Second) § 821B(1)); *see also Bansbach v. Harbin*, 229 W.Va. 287, 291-92, 728 S.E.2d 533, 537-38 (2012) (citing Restatement (Second)); *Hendricks v. Stalnaker*, 181 W.Va. 31, 34-35, 380 S.E.2d 198, 201-02 (1989) (same).

[73] In any event, the Restatement (Third) has many critics and, unlike its predecessor, has not been widely adopted. *See*, *e.g.*, *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000) (stating that Restatement (Third) "goes beyond the law" and is "contrary to the law in Kansas");

b. West Virginia's legislature declined to intervene in state opioid litigation or limit public nuisance claims involving "products"

West Virginia's Legislature, despite being on notice of ongoing governmental opioid litigation, never has limited such claims. The Attorney General filed public nuisance actions against Respondents and other defendants as early as 2012. West Virginia law required the Attorney General to "notify and provide copies of pleadings" to the Legislature "upon commencement of the action and prior to entering into any settlement agreement."[74] The Legislature took no action to stop these cases. Funds the State received from those settlements were subject to legislative appropriation.[75] Last year, the Legislature approved an agreement creating an opioid abatement fund to be run by the West Virginia First Foundation.[76]

The Legislature should be deemed to have ratified the numerous state court decisions approving the viability of public nuisance claims arising out of the distribution of opioids. "[R]epeated" actions or inactions by the Legislature can constitute "clear expressions of intent."[77] Here, rather than barring the State's opioid public nuisance claims, the Legislature appropriated the funds received from the cases and approved a statewide opioid abatement fund. There is no

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Tincher v. Omega Flex, Inc., 104 A.3d 328, 394-99 (Pa. 2014) (declining to adopt a product liability portion of the Restatement (Third) and discussing other courts across the country that have done the same); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997) (observing that provision of Draft Restatement (Third) "has been a source of substantial controversy among commentators" and stating that rule promulgated in the Draft Restatement (Third) was inconsistent with the court's "independent review of the prevailing common law").

[74] W.Va. Code § 55-17-5(a).

[75] *See*, *e.g.*, Eric Eyre, *$20.8M from opioid settlement distributed for treatment beds in WV*, West Va. Press, Dec. 5, 2017 (noting "[n]ine drug treatment programs in West Virginia will receive a combined $20.8 million in funding—money state lawmakers set aside earlier this year from lawsuit settlements with drug companies accused of fueling the state's opioid epidemic"), https://wvpress.org/copydesk/wv-press-videos/20-8m-opioid-settlement-distributed-treatment-beds-wv/.

[76] W.Va. Code § 5-30-1(a).

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

basis for finding that the Legislature intended to shift to taxpayers the enormous expenditures needed to abate public nuisances created by private entities.

Respondents have argued that allowing public nuisance claims in cases involving products usurps the role of the West Virginia Legislature. JA344-345. This argument ignores the Legislature's approval of the application of public nuisance to claims involving the sale of products. Common-law public nuisance cases involving the sale of products have been filed in the courts of this State for more than 20 years.[78] The Legislature took no action to stop them, with one exception that establishes that the Legislature recognizes that West Virginia law does not exclude public nuisance claims arising out of the sale of products. In 2003, the Legislature enacted W.Va. Code § 55-18-1, limiting public nuisance cases arising out of the "lawful design, marketing, manufacture or sale of firearms."[79] The Legislature did not bar firearm nuisance claims; it merely declared such sales are not "*a nuisance per se*"[80] and restricted claims on behalf of a city or county, reserving those claims for the State.[81] This exception demonstrates the Legislature's recognition of public nuisance claims arising out of the sale of other products. Under the doctrine of *expressio unius est exclusio alterius*, "[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should

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[78] *Lemongello*, 2003 WL 21488208, at *2 (holding, in case alleging that defendants' sale of handguns supplied an illegal handgun market, that "West Virginia law does not limit claims of public nuisance to those dealing with real property").

[79] W.Va. Code § 55-18-1(a).

[80] *Id.* (emphasis added). The elimination of a "nuisance per se" claim was not a complete bar on nuisance claims. *See Harless v. Workman*, 145 W.Va. 266, 274, 114 S.E.2d 548, 552 (1960) (distinguishing a nuisance per se, which is a nuisance under any circumstances, from a nuisance in fact or per accidents, which becomes a nuisance by reason of circumstances).

[81] *See* W.Va. Code § 55-18-2 ("The authority to bring suit and the right to recover against any firearms or ammunition manufacturer, seller, trade association or dealer of firearms by or on behalf of any county or municipality in this state for damages, *abatement* or injunctive relief resulting from or relating to the design, manufacture, marketing, or sale of firearms or ammunition to the public is reserved exclusively to the state.") (emphasis added).

assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation."[82]

The Legislature likewise took no action to stop governmental opioid cases. While a West Virginia Senate bill, SB 572, as introduced, expressly created a "product" exception to common-law public nuisance claims,[83] the proposed bill specifically excluded pending cases.[84] The bill was amended heavily in the Senate Judiciary Committee. As amended, SB 572 created an exception to common-law public nuisance claims only for certain products—opioids not among them.[85] But even this bill did not pass.[86] No bills addressing public nuisance cases arising out of product sales, much less opioids, were introduced during the 2024 legislative session.

3. The district court and Respondents rely on outlier, non-binding authority inconsistent with West Virginia law

Petitioners and the federal district court erroneously rely on the Oklahoma Supreme Court's decision in *Oklahoma ex rel. Hunter v. Johnson & Johnson*. *Hunter* is an outlier decision based on the Oklahoma Supreme Court's historical interpretation of a state statute to limit public nuisance to criminal nuisances and those "causing physical injury to property" or rendering it "uninhabitable." 499 P.3d 719, 724 (Okla. 2021); *see* Okla. Stat. tit. 50, §§ 1, 2. By contrast, this Court has emphasized the adaptability of West Virginia nuisance law.[87]

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[82] *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995).

[83] SB 572, 86th Leg., 2d Sess., at p. 10, lines 15-17 (W.Va. 2023) (introduced Feb. 6, 2023), https://www.wvlegislature.gov/Bill_Text_HTML/2023_SESSIONS/RS/bills/sb572%20intr.pdf.

[84] *See id.* at p. 11, lines 48-52.

[85] *See* SB 572, 86th Leg., 2d Sess., at p. 10, lines 7-21 (W.Va. 2023) (Committee Substitute Feb. 24, 2023), https://www.wvlegislature.gov/Bill_Text_HTML/2023_SESSIONS/RS/bills/sb572%20sub1.pdf.

[86] *See* W.Va. Legis., Bill Status – 2023 Regular Session: Senate Bill 572, https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=572&year=2023&sessiontype=RS&btype=bill.

[87] *See supra* Argument II.A; *Sharon Steel*, 175 W.Va. at 483, 334 S.E.2d at 621.

The MLP rejected *Hunter* as a bar to West Virginia opioid public nuisance claims, finding that Oklahoma's nuisance statutes are not equivalent to West Virginia law.[88] The federal MDL court likewise rejected the decision as a matter of both Ohio and Georgia law. Finally, *Hunter* relied on the Restatement (Third), without addressing its inapplicability to governmental abatement actions. Because *Hunter* misapplied even the authority upon which it relied, it should have no persuasive force here. To the extent the Court consults authority beyond West Virginia law, the contrary opioid decisions of 22 other States are far more persuasive.

III. A PUBLIC NUISANCE CLAIM BASED ON THE DISTRIBUTION OF A CONTROLLED SUBSTANCE REQUIRES INTERFERENCE WITH A PUBLIC RIGHT, UNREASONABLE CONDUCT, AND CAUSATION

Under West Virginia law, a public nuisance claim based on conditions caused by the distribution of a controlled substance has three elements: *First*, the complained-of conditions must interfere with a public right, hurting or inconveniencing an indefinite number of persons, not an individual victim. *Second*, the defendant's conduct in distributing the controlled substance must be unreasonable, either because it is unlawful or because it is unreasonable in relation to the locality. *Third*, the distribution must be a cause of the harmful conditions at issue.[89] If these elements are met, equitable remedies including abatement are appropriate to remediate the conditions caused by the unreasonable distribution practices.

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[88] *See*, *e.g.*, *MLP Distributors SJ Opinion* at 6.

[89] *See*, *e.g.*, *MLP Kroger MTD Order* ¶¶ 54-69 (assessing interference with a public right, the reasonableness of defendants' conduct, and causation); *MLP Pharm MTD Order* ¶¶ 62-82 (same); *see also* 58 Am. Jur. 2d *Nuisances* § 168 (similar elements).

A. The Conditions Caused By Distribution Must Interfere With A Public Right

A plaintiff bringing a public nuisance claim must show interference with a "right common to the general public."[90] The defendant's conduct, or the condition it creates, must "affect[ ] the safety, health, or morals of the public, or work[ ] some substantial annoyance, inconvenience, or injury to the public."[91] This requirement distinguishes a public nuisance from a private nuisance: A private nuisance involves injury to "one person or a limited number of persons only," and "recovery is limited to" the individuals injured.[92] A public nuisance, by contrast, "affects the general public," and a suit "to vindicate the rights of the public" harmed by the nuisance is ordinarily brought by "the proper public officials."[93]

A plaintiff asserting a public nuisance claim based on conditions caused by the distribution of a controlled substance therefore must establish harm to the general public or an indefinite number of persons. Distribution of a controlled substance can have that effect through its impact on public health and welfare, public safety, or public property and resources.[94]

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[90] *Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6 (quoting Restatement (Second) § 821B(1)); *see also* 58 Am. Jur. 2d *Nuisances* § 25 ("Public nuisance law is concerned with the interference with a public right.").

[91] *Kermit Lumber*, 200 W.Va. at 245 n.28, 488 S.E.2d at 925 n.28 (quoting 58 Am. Jur. 2d *Nuisances* § 35 (1989)); *see also Morrisey*, 2014 WL 12814021, at *9 (same).

[92] *Duff*, 187 W.Va. at 715-16, 421 S.E.2d at 256-57 (first quoting *Hark*, 127 W.Va. at 595-96, 34 S.E.2d at 354, then quoting *Hendricks*, 181 W.Va. at 34, 380 S.E.2d at 201) (cleaned up).

[93] *Id.* at 716, 421 S.E.2d at 257 (quoting *Hark*, 127 W.Va. at 595-96, 34 S.E.2d at 354).

[94] *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 64 (holding that West Virginia "plead[ed] viable public nuisance claims based on unreasonable interference with public health, safety, peace, comfort, and/or convenience"); *MLP Pharm MTD Order* ¶ 74 (same); *see also Moats*, 245 W.Va. at 445, 859 S.E.2d at 388 (Armstead, J., concurring in part and dissenting in part) ("[T]he opioid crisis . . . has . . . had a devastating impact on . . . cities, towns, communities and counties, as neighborhoods seek to combat the impact of rampant substance abuse.").

1. Distribution can interfere with public health

Chief among the public rights addressed by public nuisance law is public health.[95] Public health was recognized historically as a "right[ ] of the general public entitled to protection."[96]

Improper or excessive distribution of a controlled substance like opioids can harm public health, as the MLP and the courts in *Morrisey* and *Brooke County* recognized.[97] An "influx of addictive, controlled substances" can lead to increased levels of addiction and an increase in overdose deaths.[98] Widespread distribution under conditions giving rise to diversion can contribute to increased rates of infectious disease and a rise in neonatal abstinence syndrome, or the number of "babies born addicted to opioids."[99] And worsened addiction-related health outcomes risk overwhelming public health resources; hospital and emergency room services, for instance, can become "consumed by persons with prescription drug abuse issues."[100]

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[95] *See*, *e.g.*, *Kermit Lumber*, 200 W.Va. at 225, 245, 488 S.E.2d at 905, 925 (arsenic contamination endangering "public health"); *Sharon Steel*, 175 W.Va. at 483, 334 S.E.2d at 620 (hazardous wastes that "endanger human health"); *Board of Comm'rs of Ohio Cnty. v. Elm Grove Mining Co.*, 122 W.Va. 442, 443-53, 9 S.E.2d 813, 814-18 (1940) (coal production fumes affecting community health).

[96] Restatement (Second) § 821B cmt. b; *see id.* (public nuisance covered "interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes"); *see also*, *e.g.*, Legal Scholars Br. at 8-9 (JA59-60) (public nuisance law is an historically established vehicle for remedying threats to public health); *Nat'l Prescription Opiate Litig.*, 452 F. Supp. 3d at 774 ("'public health' has traditionally been considered a 'public right'").

[97] *See*, *e.g.*, *Brooke Cnty.*, 2018 WL 11242293, at *7 (plaintiffs adequately alleged defendants' distribution of opioids "interfered with a public right" based in part on harm to public health); *Morrisey*, 2014 WL 12814021, at *10 (plaintiffs adequately alleged defendants' distribution of opioids interfered with "West Virginians' common right, 'to be free from unwarranted injuries, addictions, diseases and sicknesses and have caused damage, hurt or inconvenience to West Virginia residents exposed to the risk of addiction to prescription drugs'"); *see also MLP Monongalia Distributors Order* at 3 (adopting the analysis in *Brooke County*).

[98] *Morrisey*, 2014 WL 12814021, at *10.

[99] *MLP Kroger MTD Order* ¶ 59.

[100] *Morrisey*, 2014 WL 12814021, at *10.

2. Distribution can interfere with public safety

This Court has identified conditions harmful to public safety as within the scope of public nuisance.[101] The MLP and courts in *Morrisey* and *Brooke County* recognized that improper or excessive distribution of a controlled substance like opioids can affect public safety by contributing to an increase in addiction-related crime "and other dangerous activities."[102] As a federal court adjudicating San Francisco's opioid claims explained, "[w]idespread opioid use exacerbates crime and fuels the market for illegal opioids."[103] And an oversupply of addictive controlled substances in an area can give rise to the widespread abuse of controlled substances in public spaces.[104]

3. Distribution can interfere with public property and resources

A plaintiff need not establish harm to property "to state a claim for public nuisance," as the MLP "repeatedly" has held. *MLP Kroger MTD Order* ¶ 60; *see also supra* pp. 20-22. But conditions harmful to public resources and property also fall within the scope of a public nuisance. *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 59.

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[101] *See*, *e.g.*, *Kermit Lumber*, 200 W.Va. at 225, 245, 488 S.E.2d at 905, 925 (arsenic contamination endangering public safety); *Wilson v. Phoenix Powder Mfg. Co.*, 40 W.Va. 413, 21 S.E. 1035 (1895) (explosive powder endangering residential area). Like public health, public safety also was recognized historically as a "right[ ] of the general public entitled to protection." Restatement (Second) § 821B cmt. b (public nuisance covered "interference with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets").

[102] *Morrisey*, 2014 WL 12814021, at *10; *see*, *e.g.*, *Brooke Cnty.*, 2018 WL 11242293, at *7 (plaintiffs adequately alleged defendants' distribution of opioids "interfered with a public right" based in part on harm to public safety); *Morrisey*, 2014 WL 12814021, at *10 (plaintiffs adequately alleged that "the safety . . . of the people of West Virginia has been compromised due to Defendants' alleged wrongful influx of addictive, controlled substances into West Virginia"); *see also MLP Monongalia Distributors Order* at 3 (adopting the analysis in *Brooke County*).

[103] *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1009 (N.D. Cal. 2022).

[104] *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 59 (citing testimony regarding West Virginians "deliberately injecting themselves in shopping mall bathrooms, gas stations, other places"); *San Francisco*, 620 F. Supp. 3d at 1009 ("People suffering from opioid addiction use opioids on streets and in parks throughout the city.").

Improper or excessive distribution of a controlled substance like opioids can produce conditions harmful to public resources. An epidemic can burden "law enforcement, first responders, healthcare workers, the courts, employers, teachers, and families."[105] Court dockets can become "congested by prescription drug-related cases as well as by crimes committed by addicts," and "[j]ails and prisons [can] suffer from overcrowding."[106] The public resources "consumed in efforts to address" the harms can "eliminat[e] available resources which could be used to benefit the public at large."[107] The increased levels of addiction caused by the oversupply of opioids can place a unique burden on the foster care system.[108] An oversupply of controlled substances through distribution also can harm public property and public spaces.[109]

B. The Distribution Must Be Unreasonable

A plaintiff asserting a public nuisance claim must establish that a defendant's interference with the public right was unreasonable.[110] West Virginia law sets forth at least two ways to satisfy this element: First, unlawful conduct is unreasonable.[111] Second, otherwise lawful conduct can

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[105] *MLP Distributors SJ Opinion* at 7; *see also MLP Kroger MTD Order* ¶ 59 ("The greater demand for emergency services, law enforcement, addiction treatment, and other social services places an unreasonable burden on governmental resources.").

[106] *Morrisey*, 2014 WL 12814021, at *10; *see id.* at *10 & n.11 (State alleged that "prescription drug abuse fueled by Defendants' acts and omissions make up 90% of the criminal docket in some counties").

[107] *Id.* at *10.

[108] *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 59 (citing testimony that "a substantial portion" of increased need for foster care was "being driven by the substance use crisis") (cleaned up).

[109] *See*, *e.g.*, *id.* ("[T]he State may be able to demonstrate that an oversupply and the diversion of prescription opioids and an epidemic of opioid misuse and addiction have contributed to the State and public harms that include loss of the use of public space, property, and resources due to drug abuse and related criminal behavior.").

[110] *See Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6 (citing Restatement (Second) § 821B(1)) (emphasis added); *Morrisey*, 2014 WL 12814021, at *9 (citing Restatement (Second) § 821B(1)); *see also* Cert. Order, 96 F.4th at 651 n.15 (noting that this Court "has outlined a 'reasonableness' test for public nuisance claims").

[111] *See*, *e.g.*, *Morrisey*, 2014 WL 12814021, at *9 (citing Restatement (Second) § 821B(1)).

be unreasonable "in relation to the particular locality involved."[112] Distribution of a controlled substance can be unreasonable under either approach.

1. Unlawful distribution can support public nuisance liability

A plaintiff can establish civil nuisance liability against a distributor by demonstrating that its conduct in distributing the controlled substance at issue is unlawful. "Although unlawful conduct is not *required* to establish public nuisance, . . . this is one of the permissible ways to prove that an interference is unreasonable in support of public nuisance liability."[113]

A distributor acts unlawfully—and thus unreasonably for public nuisance purposes—when it violates the diversion-control duties established by the CSA and its implementing regulations.[114] Those duties include the core obligation to "provide effective controls and procedures to guard against . . . diversion of controlled substances."[115] To comply with this provision, distributors must (1) identify, (2) report, and (3) investigate, or else decline to ship, suspicious orders for controlled substances from pharmacies.[116] By failing to comply with those duties, a distributor can give rise to public nuisance liability.[117]

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[112] *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257 (quoting Syl. Pt. 5, *Sharon Steel*, 175 W.Va. 479, 334 S.E.2d 616).

[113] *MLP Pharm MTD Order* ¶ 63 (citing *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257); *see also MLP Kroger MTD Order* ¶ 55 (same); Restatement (Second) § 821B(2) ("[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation"); *San Francisco*, 620 F. Supp. 3d at 999 ("Conduct is unreasonable if it violates a statute, ordinance, or administrative regulation."); *cf. West v. Nat'l Mines Corp.*, 168 W.Va. 578, 587-88, 285 S.E.2d 670, 677 (1981) (private nuisance may arise from "unlawful" conduct).

[114] *See Morrisey*, 2014 WL 12814021, at *9 n.10 (distinguishing distribution in violation of "well-established regulations and industry standards" from "the lawful sale of firearms").

[115] 21 C.F.R. § 1301.71(a); *see id.* § 1301.74(b) (distributors must "design and operate a system" to prevent diversion).

[116] *See supra* pp. 5-6; *Masters*, 861 F.3d at 212-13 (citing *Southwood*, 72 Fed. Reg. at 36,500).

[117] *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 35 ("[C]onduct prohibited by the WVSCA may support a public nuisance claim.").

2. Distribution unreasonable in relation to a particular locality can support public nuisance liability

A plaintiff also can establish public nuisance liability by demonstrating that the distribution of controlled substances is unreasonable "in relation to the particular locality involved."[118] This Court has recognized that "a business lawful in itself [may] constitute[ ] a public nuisance."[119] "Even in as useful and important industry as the mining of coal, an incidental consequence . . . cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby."[120]

The Restatement (Second) similarly provides that a defendant's conduct can be unreasonable regardless of its lawfulness if it "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."[121] The MLP and circuit courts accordingly have identified a significant interference with a public right as an alternative ground for liability in distribution cases.[122]

Distribution of a controlled substance can be unreasonable in relation to a particular locality, and significantly interfere with a public right, if its volume far exceeds any justifiable medical need. Respondents, for instance, shipped 81.2 million dosage units of opioids into

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[118] Syl. Pt. 2, *Duff*, 187 W.Va. 712, 421 S.E.2d 253 (quoting Syl. Pt. 5, *Sharon Steel*, 175 W.Va. 479, 334 S.E.2d 616); *see also* Cert. Order, 96 F.4th at 646 n.4.

[119] *Duff*, 187 W.Va. at 716, 421 S.E.2d at 257; *see also* 58 Am. Jur. 2d *Nuisances* § 28 ("[C]onducting a lawful enterprise in an unreasonable manner may create a public nuisance.").

[120] *Elm Grove*, 122 W.Va. at 451-53, 9 S.E.2d at 817-18 (affirming abatement decree); *see also Taylor*, 214 W.Va. at 649, 591 S.E.2d at 207 ("providing a service that has societal benefits does not give a corporate entity license to freely pollute the waters of this State"); *cf. West*, 168 W.Va. at 587, 285 S.E.2d at 677 (defendant's right to the use and enjoyment of a public road "must be exercised in a reasonable manner," in context of private nuisance claim).

[121] Restatement (Second) § 821B(2)(a); *see Duff*, 187 W.Va. at 716 n.6, 421 S.E.2d at 257 n.6 (adopting this Restatement section's definition of public nuisance).

[122] *See*, *e.g.*, *MLP Kroger MTD Order* ¶ 55; *MLP Pharm MTD Order* ¶ 63; *Morrisey*, 2014 WL 12814021, at *9; *see also Lemongello*, 2003 WL 21488208, at *2 ("[A]lthough the Defendants argued the necessity of an unlawful act to sustain nuisance, this Court finds the same is not necessary to create a public nuisance.").

Cabell/Huntington over 20 years—an average of more than 40 opioid pills per person annually.[123] That level of distribution is unreasonable by any account.

A distributor also acts unreasonably by sending massive shipments of opioids to pharmacies that dispense many more opioids than average or that supply known over-prescribers of opioids. Respondents, for example, shipped vast quantities of opioids prescribed by the community's most egregious over-prescribers, Drs. Webb and Fisher—both of whom lost their medical licenses.[124] Courts have recognized that "[h]igh volume, unprincipled prescribers" like Drs. Webb and Fisher are one of the "main" ways that diversion occurs.[125] Respondents also supplied Cabell/Huntington's highest-volume pharmacies, including one that was shut down after a DEA raid.[126]

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

A plaintiff asserting a public nuisance claim against a controlled-substance distributor must establish that the unreasonable distribution caused the harmful condition. As the MDL court has held, a plaintiff can establish public nuisance causation in the opioid context by showing that an opioid distributor was responsible for "massive increases in the supply of prescription opioids" while failing "to maintain effective controls against diversion."[127]

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[123] *See supra* p. 8.

[124] *See supra* p. 8.

[125] *San Francisco*, 620 F. Supp. 3d at 992-93.

[126] *See*, *e.g.*, JA3232; JA6011 (ABDC sold hundreds of thousands of opioids to SafeScript pharmacy until DEA raided it in 2012 and arrested the owner for drug-related crimes); *see also* JA6644-6645 (Cardinal routinely shipped oxycodone at five to six times Cardinal's national per-pharmacy average to Medicine Shoppe and two to four times its national per-pharmacy average to CVS locations in Cabell/Huntington); JA6650-6651 (McKesson supplied oxycodone to Rite Aid stores in Cabell/Huntington at rates exceeding its national per-pharmacy average, often at more than double that level).

[127] *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4178617, at *4 (N.D. Ohio Sept. 3, 2019); *see also San Francisco*, 491 F. Supp. 3d at 678 ("factual causation" "satisfied" where

In West Virginia, "'[t]he rule employed with respect to limitations on liability . . . in public nuisance actions must be less restrictive than in individual tort actions,'" and, "[a]s such, 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 cases.'"[128] A distributor may be liable for causing harm to the public health and safety even if it did not solely create or maintain that harm,[129] as long as the harm was foreseeable. "Intervening actions, even multiple or criminal actions taken by third parties, do not break the chain of causation if a defendant could reasonably have expected their nature and effect."[130] In the opioid context, this means that the intervening actions of third parties, such as illicit drug dealers, do not break the chain of causation if the distributor reasonably could have foreseen such acts.[131]

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plaintiff "plausibly alleged that its injuries stemming from the oversupply of opioids would not have occurred absent Distributors' failure to halt distribution of suspicious orders").

[128] *Brooke Cnty.*, 2018 WL 11242293, at *7 (quoting *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 496-97 (E.D.N.Y. 2003)); *see also MLP Monongalia Distributors Order* at 3 (finding decisions in *Brooke County* to be "the law of the case" before the MLP). Under West Virginia law, proximate cause is "that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." *Wal-Mart Stores E., L.P. v. Ankrom*, 244 W.Va. 437, 450, 854 S.E.2d 257, 270 (2020). The "first act" can be a proximate cause if it "sets off a chain of events o[r] creates a situation ultimately resulting in injury." *Evans v. Farmer*, 148 W.Va. 142, 154, 133 S.E.2d 710, 717 (1963).

[129] *See* Restatement (Second) § 840E ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution.").

[130] *Brooke Cnty.*, 2018 WL 11242293, at *7 (quoting *NAACP*, 271 F. Supp. 2d at 494). West Virginia's nuisance causation requirement thus is consistent with—though less demanding than—its proximate-cause requirement for negligence, which "necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made." *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 653, 77 S.E.2d 180, 188 (1953); *see also Hudnall v. Mate Creek Trucking, Inc.*, 200 W.Va. 454, 459, 490 S.E.2d 56, 61 (1997) ("[A] proximate cause of injury is a cause which, in natural and continuous sequence, produces foreseeable injury and without which the injury would not have occurred.").

[131] *See Brooke Cnty.*, 2018 WL 11242293, at *6 ("the acts of third parties (even criminals) were foreseeable and did not create a new effective cause or operat[e] independently" of opioid distributors' conduct); *cf. Massachusetts v. Purdue Pharma, L.P.*, 2019 WL 6497887, at *3 (Mass.

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

Under West Virginia law, equitable relief is the means for abating a nuisance. *See Duff*, 187 W.Va. at 716, 421 S.E.2d at 257. A court may require defendants "to remedy the *conditions* giving rise to the nuisance."[132] West Virginia law long has recognized that, under the common law, public nuisances are "abatable . . . by the expenditure of labor or money, by the defendant."[133] In *Moats*, this Court declined to set aside the MLP's determinations that its "powers to fashion equitable relief are broad, and that nothing precludes it from ordering Defendants to pay the costs associated with abating the alleged public nuisance."[134]

Both the MLP (after *Moats*) and the federal MDL court have held that a court's equitable powers in the opioid context include discretion "to craft a remedy that will require Defendants, if they are found liable, to pay the prospective costs that will allow Plaintiffs to abate the opioid crisis."[135] The MLP has explained that "[s]uch costs are akin to the 'clean up' costs that were

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Super. Ct. Nov. 6, 2019) ("the illegal drug trade, decisions by prescribing doctors and the irresponsible dispensation of the drugs by pharmacies" did not break the causal chain as to opioid manufacturers); *Tennessee*, 2019 WL 2331282, at *5 (similar); *Grewal v. Purdue Pharma L.P.*, 2018 WL 4829660, at *23 (N.J. Super. Ct. Ch. Div. Oct. 2, 2018) (similar).

[132] *West*, 168 W.Va. at 591, 285 S.E.2d at 678-79 (citing *McGregor v. Camden*, 47 W.Va. 193, 34 S.E. 936 (1899)) (emphasis added); *see also* Restatement (Second) § 834 cmt. f (defendants remain liable for "the creation of a physical condition which is, of itself, harmful [even] after the activity that created it has ceased").

[133] *Kermit Lumber*, 200 W.Va. at 243 n.26, 488 S.E.2d at 923 n.26 (quoting 58 Am. Jur. 2d *Nuisances* § 29 (1989)).

[134] 245 W.Va. at 439, 859 S.E.2d at 382; *see also id.* at 441 & n.43, 859 S.E.2d at 384 & n.43 (citing precedent for injunctions "entail[ing] the payment of money by a defendant" and recognizing that injunctions that "compel expenditures of money" could be "permissible forms of equitable relief").

[135] *MLP Pharm MTD Order* ¶ 20 (quoting *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4043938, at *2 (N.D. Ohio Aug. 26, 2019)).

assumed to be recoverable to remediate the public nuisance in *Kermit Lumber*."[136] A West Virginia circuit court reached the same conclusion in *Brooke County*: "West Virginia caselaw recognizes broad remedies—including the recovery of costs—in abatement."[137]

Petitioners seek funding for services to abate the harmful conditions[138]—the crisis of addiction, overdose deaths, increased crime, and other public health and safety harms arising from widespread opioid abuse and diversion. For example, Petitioners seek funding to distribute naloxone, a drug that reverses overdoses. JA3659, JA3675. Petitioners did not present an accounting of how much the opioid epidemic has cost or seek compensation for those expenditures. Rather, they seek measures to eliminate current dangerous conditions—the multifaceted opioid crisis—that Respondents created. *See supra* pp. 3-9. Such relief is within the scope of equitable remedies for public nuisance.

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.

[136] Order Regarding Pls.' Mot. To Strike Defs.' Notices of Non-Party Fault ¶ 14, *In re Opioid Litig.*, No. 19-C-9000 (W.Va. M.L.P. July 29, 2020) (Transaction ID 65807300).

[137] 2018 WL 11242293, at *7 (citing *Witteried v. City of Charles Town*, 2018 WL 2175820, at *3 (W.Va. May 11, 2018) (holding that West Virginia law permits a city to abate a nuisance structure by demolishing it and recovering demolition costs from defendant)).

[138] *See Hark*, 127 W.Va. at 595-96, 34 S.E.2d at 354 (1945).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of April 2024, the foregoing OPENING BRIEF FOR PETITIONERS was served using the File and ServeXpress system, which will send notification of such filing to all counsel of record.

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