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

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INTRODUCTION

This proceeding arises from suits brought by two local governments ("Plaintiffs") seeking to hold three wholesale distributors of prescription opioid medications ("Distributors") liable for causing the opioid epidemic in Huntington and Cabell County, West Virginia. At trial, Distributors did not dispute the existence of an opioid epidemic in Plaintiffs' community. Instead, Distributors maintained that their conduct in shipping prescription opioids needed to fill legitimate prescriptions written by West Virginia doctors was not wrongful and did not cause the opioid epidemic. The trial court agreed.

After a 10-week trial with 70 witnesses and 368 exhibits, the Honorable David A. Faber of the United States District Court for the Southern District of West Virginia entered judgment in favor of Distributors on five independent factual and legal grounds, supported by an exhaustively detailed 184-page opinion. Only ***one*** of those five independent grounds is at issue before this Court: the trial court's legal ruling that West Virginia public nuisance law does not extend to the distribution of lawful products like prescription opioids.

Separate from that legal ruling, the trial court's four other independent grounds for its judgment, listed below, all assumed that West Virginia public nuisance law ***does*** apply to the claims at issue in this case, and each was based on the trial court's careful consideration of a voluminous trial record:

- Plaintiffs failed to prove that Distributors caused the alleged harms;
- Plaintiffs failed to prove that Distributors proximately caused the alleged harms;
- Plaintiffs failed to prove that Distributors' conduct was unreasonable; and
- Plaintiffs' sole requested form of relief was not a proper abatement remedy under West Virginia law.

Plaintiffs did not meaningfully challenge the trial court's detailed fact-findings before the Fourth Circuit, and those determinations are not at issue here. Indeed, the Fourth Circuit acknowledged that the trial court's independent holdings on reasonableness and causation are "not relevant" to the certified question, and would need to be separately addressed even if this Court determines that West Virginia public nuisance law applies to lawful products.[1] Accordingly, this Court's resolution of the certified question is not necessarily dispositive—a "negative answer . . . is outcome determinative," Joint Appendix ("JA") 29, but a positive answer is not.[2]

If this Court chooses to answer the certified question, it should confirm that West Virginia public nuisance law does not and should not apply to the distribution of lawful products like prescription opioid medications. West Virginia law adheres to traditional limitations on the public nuisance doctrine, which addresses unreasonable interferences with access to, and use of, (i) public property and (ii) shared public resources such as air and water. This Court has never recognized public nuisance liability based on the sale of a lawful product—and, this Court's controlling precedent, the Restatements of Torts, the rulings of the highest courts of other states, and strong public policy concerns all support the trial court's conclusion that public nuisance law does not apply. As the most recent Restatement states, "the common law of public nuisance is an inapt vehicle for addressing the conduct at issue," because "[m]ass harms caused by dangerous products

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[1] *See* Joint Appendix ("JA") 32 n.3 (noting that the Fourth Circuit "need address" the trial court's holdings on reasonableness and causation "only if the Supreme Court of Appeals recognizes public nuisance as a cognizable claim in this case").

[2] This Court has "repeatedly said" that it will not consider a certified question "unless the disposition of the case depends wholly or principally upon the construction of law determined by the answer, ***regardless of whether the answer is in the negative or affirmative***." *State ex rel. Advance Stores Co v. Recht,* 230 W. Va. 464, 468, 740 S.E.2d 59, 63 (2013) (citation omitted). All emphases in this brief are supplied unless otherwise noted.

are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake."[3]

COUNTERSTATEMENT OF THE CASE

Much of what appears in Plaintiffs' Statement of the Case is not relevant to the certified question and also is directly contrary to the trial court's express findings of fact. Distributors present the facts, as found by the trial court, here.[4]

Distributors are "wholesale distributors of pharmaceutical and other products." JA 7556. Distributors fill the important logistical role of providing pharmacies and hospitals with medicines and other medical supplies. JA7556. At all relevant times, Distributors have been registered by the West Virginia Board of Pharmacy. JA2487–89.

Plaintiffs sued Distributors along with 40 manufacturers, 18 pharmacies, five prescription benefit managers, and eight members of the Sackler family (the owners of Purdue Pharma), alleging all were responsible for causing the opioid epidemic in their community. JA7555–56 n.1. To secure early remand from the multidistrict proceeding pending in the Northern District of Ohio[5] for purposes of conducting a "bellwether" trial with the earliest possible trial date, Plaintiffs voluntarily severed all defendants except Distributors, waived a jury trial, and disclaimed compensatory damages.

Although Plaintiffs initially asserted several other claims, they elected to proceed to trial against Distributors on a single cause of action for public nuisance. They sought approximately

[3] Restatement (Third) of Torts: Liability for Economic Harm ("Third Restatement") § 8 cmt. g (Am. Law Inst. 2020).

[4] The trial court's Findings of Fact and Conclusions of Law in full are included in the Joint Appendix, JA7552–7736.

[5] *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio).

$2.5 billion in monetary relief, which they termed "abatement" of the alleged nuisance even though they did not request that the court order Distributors to stop or modify any conduct. JA7699-7700.

One year after trial, the trial court issued a 184-page opinion entering judgment in favor of Distributors, supported by more than 125 pages of fact-findings and more than 775 record citations. While the trial court found that "there is an opioid epidemic in the United States," JA7554, and that Cabell/Huntington "are among the West Virginia communities hardest hit by the opioid epidemic," JA7570, it held that Distributors did not engage in wrongful conduct and did not cause the opioid epidemic or its harms. The trial court based its judgment on five separate conclusions of fact and law. Each conclusion provided an independently sufficient basis for the court's judgment. Plaintiffs therefore cannot prevail on their appeal unless the Fourth Circuit reverses all five conclusions, only one of which is before this Court.

A. The Trial Court Held That West Virginia Public Nuisance Law Does Not Apply to the Distribution and Sale of Lawful Products.

As relevant to this certified question proceeding, the trial court held that West Virginia public nuisance law does not extend "to the sale, distribution and manufacture of opioids." JA7710. In reaching this conclusion, the court surveyed more than a century of West Virginia public nuisance decisions, concluding that they uniformly involved interferences "with public property or resources," JA7704, and that this Court has never "held that distribution or sale of a product could constitute a public nuisance," JA7705. The trial court's legal ruling regarding the scope of West Virginia public nuisance law was also informed by its consideration of the voluminous evidence presented at trial, which demonstrated the profound policy issues inherent in applying the law of public nuisance to the distribution of lawful products. *See* JA7709 (concluding that "[t]o apply the law of public nuisance to the sale, marketing and distribution of products would

invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product").

B. The Trial Court Held That Plaintiffs Failed To Prove Liability Even if West Virginia Public Nuisance Law Applies.

Even though it held that West Virginia public nuisance law does not extend to the distribution of lawful products, the trial court did not end its analysis there. Instead, the trial court also addressed whether Plaintiffs "establish[ed] a public nuisance" under West Virginia law, *see* JA7710, on the assumption that West Virginia public nuisance law extends to the distribution and sale of lawful products. Based on this analysis, the trial court issued four additional legal and factual rulings that independently require judgment in Distributors' favor ***regardless*** of how this Court resolves the certified question.

1. The Trial Court Found That Plaintiffs Failed To Prove Causation.

a. The trial court found that Distributors did not determine the volume of prescription opioids.

Plaintiffs assert that Distributors shipped "vast quantities of opioids" to Cabell/Huntington pharmacies, "far beyond any medically justifiable need." Pet. Br. 8. But the trial court found as a matter of fact that Plaintiffs failed to prove that assertion at trial. The court found instead that "[d]octors in Cabell/Huntington determined the volume of prescription opioids that pharmacies in the community ordered from [Distributors] and then dispensed pursuant to those prescriptions." JA7682. Distributors "shipped prescription opioids only to licensed pharmacies in response to demand created by prescriptions." JA7713–14. Thus, the court concluded, "the volume of prescription opioids was determined by the good faith prescribing decisions of doctors in accordance with established medical standards." JA7712.

While Plaintiffs assert that Distributors improperly shipped opioids to fill prescriptions written by "the community's most egregious over-prescribers," Pet. Br. 36, they presented no

evidence of the volume of allegedly illegitimate prescriptions written by these doctors, the volume of these doctors' prescriptions dispensed by pharmacies served by Distributors, or that Distributors knew that prescriptions written by these doctors were illegitimate. *See* JA7693–98. As the trial court found, "Distributors have no control over the medical judgment of doctors" and "are not tasked with deciding whether the patient ought to get pain medication." JA7723. Nor do they have the "ability to stop pills on a prescription-by-prescription basis" or any "expertise with which to determine whether prescriptions are good or bad." JA7724. The trial court found "***no evidence*** that ties any of [Distributors'] shipments to a pill mill in Cabell/Huntington," JA7693, and "***no evidence*** that [Distributors] ever distributed controlled substances to any entity that did not hold a proper registration from DEA or license from the West Virginia Board of Pharmacy," JA7694.

Plaintiffs' brief also omits any discussion of the trial court's findings about the root cause of the opioid epidemic. The court found that "[t]he opioid crisis would not have occurred if prescribing opioids had not become standard practice in managing acute and chronic pain." JA7676. This "standard practice" emerged because, "[b]eginning in the 1990s, the standard of care changed to recognize a broader range of appropriate uses for prescription opioids." JA7652. The changes in the standard of care sprang from the "notion that the medical community was not doing enough to treat pain," which "persisted into the 2000s." JA7649. Thus, doctors—who "prescribe medications based on the then-prevailing standard of care," JA7652—"began to prescribe opioids for a broader range of conditions, most notably, for the long-term treatment of chronic pain," JA7672–73. Importantly, "there was no evidence presented for the trier of fact to find that [Distributors] had anything to do with changing the standard of care." JA7677.

The trial court found that the "high volume of opioid prescriptions" resulting from the changed standard of care "became the foundation for the overall expansion in . . . opioid-related

harm." JA7683 (quoting Plaintiffs' expert epidemiologist). This point was not contested, and indeed, the majority of the evidence on these points came from ***Plaintiffs' own witnesses and documents***. For example, the West Virginia Board of Medicine concluded "that the opioid epidemic was fueled primarily by doctors liberally prescribing opioids," JA7689, and West Virginia's Opioid Response Plan likewise concluded "that '[a] critical factor fueling the national opioid epidemic is the rapid rise in opioid prescriptions for pain,'" JA7675 (alteration in original).

Plaintiffs' witnesses conceded that good-faith medical decision-making, which involved "excessive prescriptions" and "overprescribing by doctors," JA7729, resulted in diversion after pharmacies dispensed the medicines—namely, "unused prescription opioids diverted for [m]on[e]tary value, [or] bartered for no cost among family and individuals in a shared social network," JA7674 (quoting Plaintiffs' expert epidemiologist).[6] Plaintiffs' witnesses consistently described this pattern of "medicine cabinet diversion" as arising from the sharing, sale, or theft of unused prescription opioids after pharmacies dispensed them to patients.[7]

b. The trial court found that Distributors did not cause diversion.

The trial court found that "Plaintiffs offered ***no evidence*** of any diversion [of prescription opioids] from [Distributors'] pharmacy customers in Cabell/Huntington," JA7643, and that the "lack of evidence of pharmacy-level diversion on the part of [Distributors'] pharmacy customers is fatal to [P]laintiffs' claims," JA7722. The court additionally rejected "[P]laintiffs' claim that

[6] The term "diversion" refers to the transfer of controlled substances to illicit channels, including to persons for whom they were not prescribed. JA3451:15–3452:4. The only evidence of diversion in the trial record involved medicines that were diverted after being dispensed by pharmacies. JA 7674.

[7] *See, e.g.*, JA3116:2–7 ("[I]f you prescribe for a tooth pull 30 days worth of opioids at a dentist, then those—29 days of that opioid is going to sit in your closet. And your kids are going to get their hands on it or somebody else is going to get their hands on it.") (testimony of Plaintiffs' witness Rahul Gupta, M.D., former Director of the West Virginia Bureau for Public Health and current Director of the Office of National Drug Control Policy).

[Distributors'] purported violations of the [Controlled Substances Act ("CSA")] and its implementing regulations caused an opioid epidemic . . . because there is no evidence that any such violation caused opioid diversion, properly understood." JA7714.

The evidence instead established that "unused prescription opioid[s]" were diverted ***after*** being dispensed by pharmacies, JA7674, through "criminal actions of third parties over whom [Distributors] had no control, including the persons to whom the medicines were prescribed and those involved in diverting the prescription opioids," JA7644–45. Thus, the court found "there is ***no admissible evidence in this case that [Distributors] caused diversion*** that resulted in an opioid epidemic." JA7725.

2. The Trial Court Found That Plaintiffs Failed To Prove Proximate Causation.

Separate from its threshold causation findings that Distributors did not cause either an "oversupply" or diversion of prescription opioids, the trial court also found that the alleged harms (primarily, increased drug addiction and abuse) were too remote from Distributors' conduct to establish ***proximate*** causation. JA7725–29. The court found that prescribing by doctors, dispensing by pharmacists, sharing by patients, and thefts and sales by criminal actors involved in "diversion of the drugs to illegal usage" ***all*** stood between Distributors' conduct in shipping prescription opioids to their pharmacy customers and Plaintiffs' alleged harms. JA7729; *see also* JA7644–45. Thus, as a matter of fact, the court concluded that Plaintiffs "failed to meet their burden to prove that [Distributors'] conduct was the proximate cause of their injuries." JA7729.

3. The Trial Court Found That Plaintiffs Failed To Prove Unreasonable Conduct by Distributors.

The trial court also found that Plaintiffs failed to prove their public nuisance claim because they did not establish an "unreasonable interference with a right common to the general public." JA7712. The court found that "[t]he overwhelming majority of doctors were acting in good faith

when they made the decision to prescribe opioids," JA7686, and that "the distribution of medicine to support the legitimate medical needs of patients as determined by doctors exercising their medical judgment in good faith cannot be deemed . . . unreasonable," JA7712.

Contrary to Plaintiffs' assertion that Distributors violated their duties under the CSA, Pet. Br. 6, the trial court found that "[a]t all relevant times [Distributors] had in place suspicious order monitoring . . . systems as required by the CSA and its implementing regulations," JA7583, and that Distributors "[s]ubstantially [c]omplied" with their duties under the CSA, *id.* Plaintiffs' assertion that Distributors "admitted that, for years, they shipped suspicious orders without investigating them," Pet. Br. 6, is incorrect. The cited materials refer to the period before 2007, when Distributors reported suspicious orders to the DEA but did not halt the shipments, because DEA had not yet imposed any instruction to hold such shipments, as the trial court found.[8] In any event, the court concluded that even if it assumed that the CSA regulations included a no-ship duty, that fact would "not affect the outcome of this case under the evidence presented at trial." JA7630 n.2. The trial court also separately found that "[P]laintiffs failed to show that any alleged violations based upon a failure to report suspicious orders by [Distributors] contributed to the volume of opioids distributed in Cabell/Huntington." JA7645 n.5.

[8] The trial court found that "[b]y 2008, each [Distributor] had in place a [Suspicious Order Monitoring] program that blocked ***all*** suspicious orders they identified." JA7714. Before then, the court found that the DEA "understood and accepted that wholesale distribut[ors] would ship any suspicious orders that they identified and reported to the DEA." *Id.*; *see also* JA7586 ("Prior to April 2007, the DEA never told ABDC that it should not ship suspicious orders."); JA7594–98 (determining, as a factual finding, that with regard to Cardinal's pre-2007 suspicious order monitoring system, the DEA told Cardinal it "was doing the right things and heading in the right direction").

4. The Trial Court Held That Plaintiffs' Requested Relief Was Not a Proper Abatement Remedy.

Finally, the trial court held that Plaintiffs' requested relief—a monetary award for treatment of personal injuries and other harms associated with opioid abuse and addiction—was not a proper equitable remedy. JA7699–7700, 7729–34. The court found that Plaintiffs were "not seeking to 'abate' (enjoin or stop) the nuisance," JA7732, and that their "abatement plan" instead was directed "virtually in its entirety . . . at treating or otherwise addressing drug use and addiction," a remedy which had "no direct relation to any of defendants' alleged nuisance-causing conduct." *Id.* For these reasons, "and upon a full trial record," the court held that "under the facts of this case, the relief that plaintiffs seek is not properly understood as abatement." JA7734.

C. The Certification Order

Plaintiffs appealed the trial court's judgment on August 5, 2022. The parties completed briefing, and the Fourth Circuit heard oral argument on January 25, 2024. On March 18, 2024, the Fourth Circuit issued an Order conveying the following question to this Court:

> 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?

See JA26–45. That court stated that "[a] negative answer to this question is outcome determinative in the present appeal." JA29. The court also noted the trial court's separate holdings on reasonableness and causation but stated that "we need address" those issues "only if the Supreme Court of Appeals recognizes public nuisance as a cognizable claim in this case." JA32 n.3.

SUMMARY OF ARGUMENT

If this Court answers the certified question, it should hold that West Virginia public nuisance law does not apply to the distribution of lawful opioid medications. For over 100 years, this Court has limited public nuisance law to its traditional scope: interferences with "public

rights," which means the public's right to enjoy public property, such as roadways and waterways, and natural resources, such as air and water. The Third Restatement of Torts states that liability for public nuisance based on products "has been rejected by most courts, and is excluded by [the Restatement], because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue."[9] This is the majority rule among the highest courts of other states that have considered the issue. In the opioid litigation, the only state high court to address the issue, the Oklahoma Supreme Court, which follows the Restatement (as does West Virginia), held that "public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids."[10] Public policy also strongly militates against allowing public nuisance to expand into "a monster that would devour in one gulp the entire law of tort."[11]

Lower-court decisions that have allowed opioid-related public nuisance claims to proceed past the motion to dismiss stage are fundamentally different from and less persuasive than post-trial decisions that take into consideration a fully-developed trial record. The trial court's decision in this case was informed by its consideration of more than 10 weeks of trial evidence, which, among other things, demonstrated the profound policy implications of extending West Virginia public nuisance law to the distribution of lawful products. *See, e.g.*, JA7706 (noting that lower-court motion-to-dismiss rulings did not "contain[] an in-depth consideration of the question" or "consider[] the adverse economic consequences of extending the law of nuisance to the sale or distribution of opioids or the expansion of nuisance law to cover other dangerous products"). In particular, the trial record reflected the extraordinarily serious policy ramifications of imposing public nuisance liability for the distribution of medicines recognized as "essential" for the

[9] Third Restatement § 8 cmt. g.

[10] *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021).

[11] *Id.* at 726 (citation omitted).

treatment of chronic pain, JA7656–59, JA7667–68, and prescribed by doctors acting "overwhelming[ly] . . . in good faith," JA7686. These lower-court rulings on motions to dismiss had no occasion to address that record evidence and its ramifications, and are examples of what the Third Restatement explains are "unsound" decisions that have sometimes resulted from "confusion" about the proper scope of public nuisance law.[12]

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If this Court chooses to address the certified question, Distributors agree that oral argument would be helpful to the Court.

ARGUMENT

I. Standard of Decision

This Court reviews "legal issues presented by a certified question from a federal district or appellate court" *de novo*. *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 30, 506 S.E 2d 64, 67 (1998). When answering certified questions, this Court is "not sitting as an appellate court" but rather is "simply asked to answer questions of law." *Barefield v. DPIC Cos.*, 215 W. Va. 544, 550, 600 S.E.2d 256, 262 (2004). Therefore, review must be "confine[d] . . . to the question certified." *Collins v. AAA Homebuilders, Inc.*, 175 W. Va. 427, 428 n.1, 333 S.E.2d 792, 793 n.1 (1985).[13]

II. West Virginia Public Nuisance Law Does Not Apply to the Distribution of Lawful Products.

The first part of the Fourth Circuit's question asks whether "conditions caused by the distribution of a controlled substance constitute a public nuisance." JA29. If this Court chooses to address that question, it should rule that the answer is "no": only conduct, not "conditions," can

[12] Third Restatement § 8 cmt. b.

[13] *See also Motto v. CSX Transp., Inc.*, 220 W.Va. 412, 417, 647 S.E.2d 848, 853 (2007) (declining to review additional argument where plaintiffs failed to raise it in the certifying court and argument was "not arguably within the scope of the questions certified").

constitute the tort of public nuisance, and West Virginia law, in accord with traditional common law principles and the majority rule across the country, does not extend the law of public nuisance to the sale and distribution of lawful products.

A. The Tort of Public Nuisance Applies to Conduct, Not Conditions.

While the certified question asks whether "***conditions*** caused by the distribution of a controlled substance" can give rise to public nuisance liability, this Court's precedent makes clear that the tort of public nuisance requires actionable ***conduct***, not merely an unfavorable "condition" divorced from actionable conduct. *See, e.g.*, *State ex rel. Smith v. Kermit Lumber*, 200 W.Va. 221, 245 n.28, 488 S.E.2d 901, 925 n.28 (1997) (public nuisance is "the ***doing of or the failure to do something***") (citation omitted); *Pope v. Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 226, 75 S.E.2d 584, 589 (1953) ("[p]ublic nuisances always arise out of unlawful ***acts***") (citation omitted); *Duff v. Morgantown Energy Assocs.*, 187 W. Va. 712, 721, 421 S.E.2d 253, 262 (1992) (per curiam) ("the proposed trucking may constitute a public nuisance ***once it is operational***"). That precedent is consistent with the Second Restatement, which explains that "conduct"—meaning "(a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action"—is "necessary" to make someone liable for public nuisance. Restatement (Second) of Torts ("Second Restatement") § 824 (Am. Law Inst. 1979).

Although this Court has sometimes referred to a public nuisance as "an act or condition," *see Duff*, 187 W.Va. at 716, 421 S.E.2d at 257 (citation omitted), its decisions demonstrate that a nuisance is defined by the defendant's ***conduct***, or in some cases by physical conditions directly related to that conduct and located at a specific place, typically the defendant's land or a public

space.[14] For example, in *Martin v. Williams*, this Court held that operation of a used car lot in a residential neighborhood was a public nuisance. 141 W.Va. 595, 610–11, 93 S.E.2d 835, 844 (1956). The Court referred to the nuisance as a "condition," but the so-called "condition" concerned the ***conduct*** of the defendant in operating the car lot—using lights, displays, and equipment in ways that interfered with the homeowners' use and enjoyment of their own property. *Id*. Similarly, in *Kermit Lumber*, the public nuisance was defendant's conduct in depositing arsenic "on the Kermit Lumber business site in amounts above the regulatory limits." 200 W.Va. at 245, 488 S.E.2d at 925. That conduct caused an unfavorable "condition" when the arsenic later "flow[ed] into the Tug Fork River," *id*., but that condition was a direct physical manifestation of the conduct that caused it. In both cases, the "condition" was indistinguishable from and coextensive with the actionable, objectionable conduct and did not extend to personal injuries or other harms associated with the nuisance-creating conduct (e.g., illness or disease from drinking arsenic-polluted water, or depreciated property values due to an adjacent car lot).

The fact that conduct can sometimes bring about unfavorable "conditions" does not mean that the condition—standing alone—can give rise to liability for public nuisance. Consistent with basic tort law, this Court's precedent makes clear that liability for public nuisance must rest on wrongful conduct.[15] Accordingly, if the Court answers the certified question, it should confirm its longstanding precedent that public nuisance liability requires actionable conduct. *See* W. Va. Code § 51-1A-4 (the Court "may reformulate a question certified to it").

[14] This is consistent with the principle that public nuisance law "address[es] discrete, localized problems," not broad social ills. *See Hunter*, 499 P.3d at 731.

[15] *See also* Second Restatement § 821A cmt. c ("conduct" can give rise to liability for public nuisance "only if it falls into the usual categories of tort liability").

B. West Virginia Public Nuisance Law Applies to Conduct That Interferes with Public Property and Public Resources, Not the Distribution of Lawful Products.

In addition to affirming that only conduct can give rise to public-nuisance liability, this Court should hold that Distributors' conduct in distributing lawful products cannot constitute a public nuisance under West Virginia law.

West Virginia law has long followed the definition of public nuisance in the Restatement of Torts: "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 Second Restatement§ 821B). That is, West Virginia public nuisance law applies only when the conduct at issue interferes with "an interest shared equally by members of the public." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011) (citing *Int'l Shoe Co. v. Heatwole*, 126 W. Va. 888, 30 S.E.2d 537, 540 (1944)).

Reflecting these limiting principles, the trial court correctly observed that this Court "has only applied public nuisance law in the context of conduct that interferes with public property or resources." JA7704. To support that conclusion, the court relied on a survey of 17 West Virginia nuisance cases (both public and private) from 1878 to 1982 in *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483–84, 334 S.E.2d 616, 621 (1985). As the trial court noted, "[e]very case listed" in *Sharon Steel* "concerned the misuse, or interference with, public property or resources." JA7704–05. One common category of public nuisance cases involves harm to publicly shared natural resources such as clean air and water.[16] The other principal category

[16] *See, e.g.*, *Kermit Lumber*, 200 W. Va. at 225–26, 488 S.E.2d at 905–06 (hazardous waste at defendant's business site); *Sharon Steel Corp.*, 175 W. Va. at 481–82, 334 S.E.2d at 619–20 (hazardous waste facility at location of defendant's former coking plant); *Harris v. Poulton*, 99 W. Va. 20, 127 S.E. 647, 648–50 (1925) (garage on defendant's property used to store flammable materials and emitted late-night noises); *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660, 661–62 (1913) (dye works on defendant's property emitted soot and smoke).

involves physical interferences with public property, including "obstructions to highways, public grounds, harbors, and landings." *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935, 938–39 (1909).[17] "None of the cases cited" in *Sharon Steel* "held that distribution or sale of a product could constitute a public nuisance." JA7705.

This Court has never applied public nuisance law to the distribution of products. None of the cases Plaintiffs cite did so. Plaintiffs refer to a "trilogy of key precedents," Pet. Br. 1, but none of those cases imposed liability based on sale of a product. *Sharon Steel* involved the storage of hazardous waste generated by a coking plant. *See* 175 W. Va. at 481, 334 S.E.2d at 619. In *Duff*, this Court found premature a public nuisance claim based on the trucking of coal that allegedly caused "road damage, traffic congestion and delays, accidents, noise and diesel fumes." *See* 187 W. Va. at 714, 720–21, 421 S.E.2d at 255, 261–62. And while the defendant in *Kermit Lumber* sold lumber, the court did not hold that selling lumber was or created a public nuisance. 200 W. Va. at 225–26, 245, 488 S.E.2d at 905–06, 925. Rather, *Kermit Lumber* involved use of the defendant's property to pollute natural resources (air, land, and water) with hazardous waste, as Plaintiffs acknowledge. *See* Pet. Br. 31 n.95. Likewise, even though *Wilson v. Phoenix Powder* involved a product (explosives), the public nuisance was the defendant's use of its mill "dangerously near to public places," including public roads, which posed a "constant danger impending over those highways and all lawfully using them." 40 W. Va. 413, 21 S.E. 1035, 1036 (1895). Thus, it was a standard case of the defendant using its property to endanger persons enjoying public spaces nearby. By contrast, the alleged nuisance here has no connection to

[17] *See also, e.g.*, *Higginbotham v. Kearse,* 111 W. Va. 264, 161 S.E. 37, 38–41 (1931) (door swung open into public sidewalk); *City of Elkins v. Donohoe*, 74 W. Va. 335, 81 S.E. 1130, 1130 (1914) ("obstruction of a public street by an individual is a public nuisance" (citations omitted)); *Davis v. Spragg*, 72 W. Va. 672, 79 S.E. 652, 652–55 (1913) (awning erected over public street).

Distributors' physical operations and instead relates solely to opioids after they have left Distributors' control.

Plaintiffs attack a straw man in arguing that public nuisance law is not limited to "property disputes" or "claims arising out of the use of property" or "involving harm to property." Pet. Br. 19–20. The trial court did not impose any of those limitations. Rather, it recognized public nuisance law's longstanding focus on unreasonable interferences with the public's right to enjoy public property and resources. Although public nuisance law is "adaptable to a wide variety of factual situations," *Sharon Steel*, 175 W. Va. at 483, 334 S.E.2d at 621, this flexibility has bounds. In West Virginia, it has been consistently confined to these traditional categories of harm, and has ***not*** been extended to the distribution and sale of lawful products—and certainly not to cases where the alleged harm is personal injury from consumers' use of a product.

That is for good reason. As the trial court observed, "[t]o apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." JA7709. This Court should reject the dramatic re-writing of West Virginia public nuisance law that Plaintiffs urge.[18]

[18] Plaintiffs cite an amicus brief submitted in the Fourth Circuit by a group of legal scholars, but the authors' assertion that products are within the historical scope of public nuisance law is inconsistent with the law of West Virginia, the Restatement, the majority rule, and their own other writings. *See* David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L.J. 61, 99 (2022) (noting that it is "true" that "public nuisance historically did not extend to products"); *see also* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 705 (2023) (noting that public nuisance claims aimed at broad social problems have been "mostly unsuccessful"). Other scholars explain that "[t]he new-public-nuisance cases"—such as this one—"do not rest on any conventional understanding of what constitutes a public nuisance"; distribution of prescription opioid mediations "is not a public bad like the classic public nuisances of blocking a highway or contaminating the local water supply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 988, 1000 (2023).

C. Plaintiffs' Claims Do Not Implicate Any Public Right Under West Virginia Public Nuisance Law.

It is essential to understand the "public" in the term public right, and to distinguish public from private rights. It is the inherent nature of the right, not the number of persons affected, that defines a public right for purposes of public nuisance law. Plaintiffs' claims do not implicate a public right, as that term has been defined historically in the law of public nuisance. The harm that Plaintiffs seek to abate—i.e., the addiction, drug overdoses and deaths of individual drug users (and their attendant costs)—implicates only the inherently private right that each individual has not to be injured by a product.

Under the longstanding common law, "[t]he term public right is reserved . . . for those indivisible resources shared by the public at large, such as air, water, or public rights of way." *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 453 (R.I. 2008); *see also Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 726 (Okla. 2021) (same). West Virginia law has been faithful to that definition.[19] As the Restatement of Torts explains, and contrary to Plaintiffs' contention, the concept of "public right" is not so broad as to encompass "anything injurious to public health and safety." Third Restatement § 8 cmt. g.

If a party obstructs a public thoroughfare, he interferes with a public right because every member of the public has a right to travel that thoroughfare. It does not matter how many persons

[19] *See Hendricks v. Stalnaker*, 181 W. Va. 31, 33, 380 S.E.2d 198, 200 (1989) (describing public nuisance as that which "affects the general public as public" (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595–96, 34 S.E.2d 348, 354 (1945))); *Pickens v. Coal River Boom & Timber Co*., 66 W. Va. 10, 13, 65 S.E. 865, 866 (1909) (noting that "[a] nuisance is public when affecting wrongfully the public generally"); *Hale v. Town of Weston*, 40 W. Va. 313, 319, 321 S.E. 742, 744 (1895) (public rights are "one[s] which every subject of the state may exercise and enjoy, such as the use of a highway or canal, or a public landing place or a common watering place upon a stream," and a public nuisance "excludes or hinders all persons alike from the enjoyment of the common right" (citation omitted)); *Williams v. Cnty. Ct.*, 26 W. Va. 488, 506 (1885) (public nuisance "affects all inhabitants alike").

travel that route or, indeed, whether any member of the public does so while the thoroughfare is blocked. *See generally Keystone Bridge Co. v. Summers*, 13 W. Va. 476 (1878); Second Restatement § 821B cmt. b (citing as a public right "the obstruction of a public highway or a navigable stream"). The key is that any member of the public who attempts to use the thoroughfare will be prevented from doing so, and the interference with the right to traverse the road will be the same for every person. Likewise, if a party pollutes a public reservoir, he interferes with a public right because every member of the public has a right to make use of the water, whether for private recreation or because it supplies the city's drinking water. *See Sharon Steel*, 175 W. Va. at 483, 334 S.E.2d at 621.[20]

A ***private*** right, by contrast, is "***the individual right that everyone has*** not to be assaulted or defamed or defrauded ***or negligently injured***." Second Restatement § 821B cmt. g; *Hendricks v. Stalnaker*, 181 W. Va. 31, 33–34, 380 S.E.2d 198, 200 (1989); *see also Lead Indus.*, 951 A.2d at 454 ("Were we to hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals."); Second Restatement § 821B cmt. g ("Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.").

For these reasons, an adverse impact on "public health" arising from many individuals' exposure to an allegedly harmful or dangerous product does not implicate a "public right." The prevalence of obesity in the general population, for example, is termed a "public health" problem. But it is so termed because of its impact on many individuals, not because there is a "right common to the general public" to be thin or free from heart disease. *See Lead Indus.*, 951 A.2d at 448 ("[A]

[20] *See also Kermit Lumber*, 200 W. Va. at 225, 488 S.E.2d at 905 (analyzing alleged public nuisance from run-off of arsenic and chromium into Tug Fork River).

public right is more than an aggregate of private rights by a large number of injured people."); *Hunter*, 499 P.3d at 726 (same).[21] Likewise, many individuals took prescription opioids, and some misused them, resulting in addiction or overdose. *See Hunter*, 499 P.3d at 727. Cumulatively, the adverse effects of these individual decisions implicate the public health and the public "interest,"[22] but they do not involve a public right that gives rise to a public nuisance claim.[23] *See, e.g.*, *Lead Indus*., 951 A.2d at 436, 453–55 (finding that, although "lead poisoning constitutes a public health crisis," it does not involve public rights).[24]

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[21] Plaintiffs point to the reference to public health in the Second Restatement section 821B(2), Pet. Br. 35 & n.121, but that provision is not the Second Restatement's definition of public right; rather, subsection (2) lists "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable." Second Restatement § 821B(2). The existence of a public right must be established first, before considering whether the interference with that right is unreasonable. And under subsection (1) of section 821B, a public right is "a right common to the general public." Moreover, the circumstances listed in section 821B(2) are "not conclusive." *Id*. at cmt. e. The listed factors include things such as whether "the conduct is proscribed by a statute, ordinance[,] or administrative regulation," *id*. § 821B(2)(b), but not every violation of an ordinance or regulation is a public nuisance.

[22] *Lead Indus.*, 951 A.2d at 448 ("That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.' For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.") (quoting Donald Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 815 (2003))).

[23] *See* Nathan R. Hamons, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating a Public Nuisance*, 121 W. Va. L. Rev. 257, 281–84 (2018) (discussing the instant case against Distributors and noting that "[b]ecause courts have construed the element of public right to include traditional communal interests, the right to be free from addiction, morbidity, and mortality should be considered an individual right, not a communal interest held by the public").

[24] To be sure, conduct that interferes with the public health ***can*** sometimes implicate a public right, such as where the conduct spreads contagious disease and thereby interferes with the public right to travel safely in public and make use of public spaces. *See* William Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 90, at 643 nn. 3–4 (5th ed. 1984); Second Restatement § 821B cmt. b. But that does not mean that the two terms are synonymous, or that every interference with the public health involves a public right.

Plaintiffs' invocation of "public safety" fares no better. The Illinois Supreme Court's decision in *City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099 (Ill. 2004), demonstrates the point. There, the court affirmed the dismissal of public nuisance claims against the manufacturers, distributors, and retail sellers of handguns. *Id*. at 1105–09, 1148. Just as Plaintiffs do here, the City of Chicago attempted to establish a public right based on "public safety." *Id.* at 1107. The City alleged that the ready availability of firearms "create[d] an unreasonable and significant interference with public safety," causing increased suicides, accidental shootings, and illegal gun violence. *Id.* at 1106–07 (internal quotation marks omitted). But the court held these allegations did not involve interference with a public right, because there is no public right to be "free from the threat of illegal conduct by others." *Id*. at 1114. The harm alleged—"a higher level of crime, death and injuries to Chicago citizens, a higher level of fear, discomfort and inconvenience to the residents of Chicago," among others, *id.* 1115–16—was better characterized, the court said, as "merely an assertion, on behalf of the entire community, of ***the individual right*** not to be assaulted," *id*. at 1116 (citing Second Restatement § 821B cmt. g). The court recognized that to treat this individual right as "public" would make the concept of public right "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it." *Id.*

The same distinction between public right and individual right exists here. Just as Chicago alleged that handgun distributors sold a large volume of firearms into the city with the knowledge that "a significant number of the guns will ultimately find their way into an illegal secondary gun market and then into hands of persons who cannot legally possess those guns," *id.* at 1109, Plaintiffs allege that Distributors shipped too many opioids into their communities, *see* Pet. Br.

33.[25] But like the epidemic of gun violence in Chicago, the opioid epidemic consists of "harm to individual members of the public, not to the public generally." *City of Chicago*, 821 N.E.2d at 1115; *see also Hunter*, 499 P.3d at 727.

Moreover, the "public resources" that can give rise to public rights under public nuisance law are natural resources and do not include any right to social services such as police protection, emergency services, and addiction treatment, as Plaintiffs assert, Pet. Br. 22. *See* Third Restatement § 8 cmt. d.[26] That the indirect effects of opioid abuse can strain these services does not implicate a public right. Many social problems, including alcoholism and gun violence, also result in demands on these services, but courts have never deemed them public nuisances.

Finally, Plaintiffs suggest that even if public rights are limited to access to public property and resources, "this case involves such harm[s]." Pet Br. 20. But Plaintiffs do not cite any evidence that Distributors' conduct interfered with access to public property or resources. There was no such evidence,[27] and that failure was fatal to their claim. The statement of the Multidistrict Litigation Panel ("MLP") in denying a motion to dismiss in another case that the State of West Virginia "***may*** be able to demonstrate" that a pharmacy's alleged improper dispensing caused "the diversion of prescription opioids and an epidemic of opioid misuse and addiction . . . includ[ing] loss of public space, property, and resources due to drug abuse and related criminal behavior," has

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[25] Again, the trial court found as a matter of fact that Plaintiffs failed to prove that assertion at trial, concluding that "the volume of prescription opioids was determined by the good faith prescribing decisions of doctors in accordance with established medical standards." JA7712.

[26] "*Harm to public resources*. A public nuisance involving harm to a ***natural*** resource most often arises from contamination of waterways, as when a defendant spills toxic chemicals into the sea and thus causes economic injury to those who depend on it for commercial or recreational purposes."

[27] The testimony of Dr. Gupta quoted in footnotes 55 and 104 of Petitioner's Brief was not in this case; it was given in a different case, almost a year after the conclusion of the trial in this case.

no relevance here where the trial court found there was no evidence that Distributors caused any diversion and no evidence of any loss of public spaces or resources. Pet. Br. 22 & n.55 (citing Order Denying Kroger's Mot. to Dismiss ¶ 59, *State ex rel. Morrisey v. Kroger Co.*, No. 22-C-111 PNM (W.Va. M.L.P. Nov. 15, 2022) ("MLP Kroger MTD Order")).[28]

D. The Restatement of Torts Are Consistent with West Virginia Law and Support the Trial Court's Ruling.

In reaching its conclusions about the limits of West Virginia public nuisance law, the trial court properly relied on both the Second Restatement, as adopted by this Court, and the more recent Third Restatement's explication of that standard. *See* JA7704. Comment g to Section 8 of the Third Restatement explains that liability for public nuisance based on products "has been rejected by most courts, and is excluded by [the Restatement], because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." Third Restatement § 8 cmt. g. "Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake." *Id.* These principles are consistent with West Virginia law and support the trial court's ruling.

Plaintiffs point out that this Court has not yet referred to the Third Restatement, but the Court has consistently relied on the Second Restatement's definition of public nuisance, *see, e.g.*,

[28] The MLP's reliance on Dr. Gupta's testimony in a different case to deny the pharmacy's motion to dismiss was inappropriate under West Virginia Rule of Civil Procedure 12 and undermines confidence in the court's reasoning. *See* MLP Kroger MTD Order ¶ 59 (citing Tr. 447:17–21, 489:8–12, *In re Opioid Litig.: Mfr. Cases*, No. 21-C-9000-MFR (W.Va. M.L.P. Apr. 5, 2022) (testimony of Rahul Gupta, M.D.)). "This Court has long held that, in ruling on a motion made pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a court is limited to considering the facts properly alleged in the pleadings." *Riffle v. C.J. Hughes Constr. Co.*, 226 W. Va. 581, 587, 703 S.E.2d 552, 558 (2010). The MLP compounded this error in another case, again citing the same testimony to deny a motion to dismiss in a different case. *See* Order Denying Pharmacy Defs.' Mots. to Dismiss ¶ 67, *In re Opioid Litig.: Pharmacies Cases*, No. 21-C-9000-PHARM (W. Va. M.L.P. Aug. 3, 2022) ("MLP PHARM MTD Order").

Duff, 187 W. Va. at 716 n.6, 421 S.E.2d at 257 n.6, and the Third Restatement does not change that definition but rather explains and clarifies it, *see* Third Restatement § 8 cmt. a. The Restatement adopted this clarification due to "confusion about [the] scope" of the Second Restatement, including a misimpression that public nuisance law covers "anything injurious to public health and safety." *Id.* § 8 cmts. b, g.[29] That misimpression is precisely what Plaintiffs urge this Court to write into West Virginia law.

Plaintiffs argue that Section 8 addresses claims by private parties for economic harm, whereas they are local governments seeking "abatement." Pet. Br. 23. But as explained above, and the trial court found, that position ignores that what Plaintiffs are actually seeking is money, and only money. Plaintiffs also echo the Fourth Circuit's observation that "the text of [S]ection 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." JA42. Yet the most important comment cited by the trial court—comment g to Section 8—clearly encompasses governmental suits. The Reporter's Note to comment g relies on several oft-cited governmental cases in support of the comment, making clear that the comment is not limited to private suits. *See* Third Restatement § 8 cmt. g, rep.'s note g (citing *Lead Indus.*, 951 A.2d 428, and *City of Chicago*, 821 N.E.2d 1099).

The scope of comment g is also evident from its broad language, including that "***the common law of public nuisance is an inapt vehicle for addressing the conduct at issue***," which draws no distinctions based on the nature of the plaintiff or the form of relief sought. *Id.* § 8

[29] The Second Restatement had earlier warned about the "loose connotation" of the word "nuisance" that had sometimes "crept into" court opinions, and it instructed that "[i]f the term is to have any definite legal significance, these cases must be completely disregarded." Second Restatement § 821A cmt. b.

cmt. g.[30] And while Plaintiffs cite an article by one of the legal scholar amici in support of their crabbed reading of comment g, Pet. Br. 24 n.62, that article elsewhere recognizes that "comment g to Section 8 contains broad language indicating a ***categorical rejection*** of the application of public nuisance to product-based harms." David A. Dana, *Public Nuisance Law when Politics Fails*, 83 Ohio St. L.J. 61, 97 n.175 (2022).[31]

E. The Majority of State Supreme Courts To Consider the Expansion of Public Nuisance to Products Have Rejected It.

Seven state supreme courts have considered the issue of whether public nuisance extends to claims based on the distribution of products. Five of them rejected such an expansion of public nuisance law.[32]

Among those five is the only state supreme court decision to address the scope of public nuisance in the opioid litigation—the Oklahoma Supreme Court's decision in *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719. After a full bench trial against an opioid

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[30] Plaintiffs also point out that comment a to Section 8 states that public nuisance suits brought by governmental bodies often involve a "definition of 'public nuisance' [that is] widely a matter of statute, and tends to be considerably broader than the common-law definition recognized by this Section . . . ." Pet. Br. 23 n.60 (citing Third Restatement § 8 cmt. a). But this case is not based on any statute. Plaintiffs agree that the common-law definition of nuisance applies. Pet. Br. 1.

[31] Plaintiffs assert that courts in other states have rejected the Third Restatement, Pet. Br. 25 n.73, but those cases did not address the provisions on which the trial court relied here, or even the same volume of the Restatement. *See Delaney v. Deere & Co.*, 999 P.2d 930, 935–36, 946 (Kan. 2000) (declining to adopt Restatement (Third) of Torts: Product Liability § 2 cmt. *l* (Am. Law. Inst. 1997)); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014) (declining to adopt the Restatement (Third) of Torts: Products Liability § 1 *et seq.*); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331–32 (Conn. 1997) (discussing Restatement (Third) of Torts: Products Liability § 2(b)).

[32] *See Ganim v. Smith & Wesson Corp.,* 780 A.2d 98, 131–32 (Conn. 2001); *City of Chicago*, 821 N.E.2d at 1116 (IL); *In re Lead Paint Litig.*, 924 A.2d 484, 501–02 (N.J. 2007); *Lead Indus.*, 951 A.2d at 456–57 (RI); *Hunter*, 499 P.3d at 730 (OK). The only outliers are *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002), and *City of Gary ex rel. King v. Smith & Wesson Corp*., 801 N.E.2d 1222 (Ind. 2003), both of which involved cities' suits against the firearms industry.

manufacturer and a judgment for the plaintiff, the Oklahoma court vacated the judgment and ruled that "public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids." *Id*. at 721. That conclusion is not an "outlier," as Plaintiffs contend, Pet. Br. 28, but reflects the clear majority rule.

As support, the Oklahoma court cited a long list of public nuisance cases dating back to 1909, establishing that Oklahoma law (like West Virginia's) addresses the pollution of public resources and interference with public thoroughfares, not lawful products. 499 P.3d at 724 n.13. While Plaintiffs suggest that the Oklahoma court relied only on a historical interpretation of Oklahoma's nuisance statute, *see* Pet. Br. 28, that statute "codifie[d] the common law," and the court's decision relied heavily on both the Second and Third Restatement. *See* 499 P.3d at 724–26. Consistent with West Virginia law, the Oklahoma court recognized that "a public right is a right to . . . an indivisible resource . . . like air, water, or public rights-of-way," and that "[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right." *Id.* at 726–727 (alteration in original) (citations and internal quotation marks omitted).

In reasoning that applies equally here, the Oklahoma Supreme Court observed that "[t]he damages the State seeks are not for a communal injury but are instead more in line with a private tort action for individual injuries sustained from use of a lawful product." *Id.* at 727. The court also specifically rejected the argument—also advanced here—that there is a public right to public health. It wrote that "[t]his case does not involve a comparable incident to those in which we have anticipated that an injury to the public health would occur, e.g., diseased animals, pollution in drinking water, or the discharge of sewer on property." *Id.* That same conclusion applies here because the traditional scope of public nuisance law is no broader in West Virginia than in Oklahoma.

The trial court in this case also found persuasive the Oklahoma court's insight that extending public nuisance law to prescription opioids or other products "would allow courts to manage public policy matters that should be dealt with by the legislative and executive branches of government—not by courts." JA7707 (citing *Hunter*, 499 P.3d at 731). West Virginia has endorsed this principle in litigation related to climate change, arguing that public nuisance law should not apply because "[t]here are no judicially enforceable common law 'nuisance' standards to apply, or any practical limitation on the judicial policymaking role" with respect to large-scale social issues that are "more appropriately addressed by other branches of government."[33]

Plaintiffs point to a number of opioid-related public nuisance decisions, Pet. Br. 18 & n.41, but these are primarily ***unpublished*** denials of ***pretrial*** motions issued with little to no reasoning. These rulings are among the "unsound" decisions resulting from "confusion" about the proper scope of public nuisance law. *See* Third Restatement § 8 cmt. b (citing cmt. g). They should be "completely disregarded." Second Restatement § 821A cmt. b. Many other courts around the country have correctly dismissed public nuisance claims against Distributors and other opioid medication supply-chain participants, including on the basis that public nuisance law does not extend to the distribution of products.[34]

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[33] Amicus Br. of Indiana and Fourteen Others States in Support of Dismissal, *California v. BP P.L.C.*, 2018 WL 1916332, at *10 (N.D. Cal. Apr. 19, 2018) (signed by Attorney General Morrissey on behalf of West Virginia).

[34] *See North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.,* 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019) (declining to extend the law of public nuisance "to cases involving the sale of goods"); *South Dakota v. Purdue Pharma, L.P.,* 2021 WL 5873046, at *7–8 (S.D. Cir. Ct. Jan. 13, 2021) (same); *Fayetteville Ark. Hosp. Co., LLC v. Amneal Pharm.,* No. 72CV-20-156, at *4 (Ark. Cir. Ct. Dec. 16, 2022) (dismissing public nuisance claim for failure to demonstrate interference with a cognizable public right); *E. Me. Med. Ctr. v. Teva Pharms. USA, Inc.,* 2023 WL 2161256, at *6 (Me. Bus. Ct. Feb. 13, 2023) (dismissing public nuisance claim for failure to allege an "actionable public right in tort" or any non-derivative special injury); *Alaska v. Walgreen Co.,* 2024 Alas. Trial Order LEXIS 1, at *6–8 (Alaska Super. Ct. Mar. 1, 2024) (dismissing public

F. The West Virginia Lower Court Decisions on Which Plaintiffs Rely Are Not Persuasive.

Plaintiffs place substantial weight on decisions by lower courts of this State denying various pretrial motions in opioid cases. These decisions were not reviewed by this Court and do not accurately reflect West Virginia law.[35]

Most of these decisions came before the trial court's decision. The trial court considered them and found them "not persuasive" and "inconsistent with the Restatement of Torts that has been favorably commented upon by the West Virginia Supreme Court of Appeals." JA7706. Addressing the first two of these cases, *Brooke County* and *Morrisey*,[36] the trial court concluded that "neither case contained an in-depth consideration of the question" or "considered the adverse economic consequences of extending the law of nuisance to the sale or distribution of opioids or the expansion of nuisance law to cover other dangerous products." *Id.*[37] Neither case identified

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nuisance claim for failure to demonstrate interference with a cognizable public right); *Michigan ex rel. Nessel v. Cardinal Health, Inc.,* 2020 Mich. Cir. LEXIS 1796, at *13–15 (Mich. Cir. Ct. Jan. 22, 2021) (dismissing public nuisance claim for failure to allege that defendants controlled the instrumentality of the nuisance); *Delaware ex rel. Jennings v. Purdue Pharma L.P.,* 2019 WL 446382, at *13 (Del. Super. Ct. Feb. 4, 2019) (dismissing public nuisance claim for failure to allege a cognizable public right or that defendants controlled the instrumentality of the nuisance); *City of New Haven v. Purdue Pharma. L.P.*, 2019 WL 423990, at *2–6 (Conn. Super Ct. Jan. 8, 2019) (dismissing public nuisance claim for failure to allege proximate causation).

[35] Plaintiffs suggest that some of these trial court decisions should have more weight because this Court denied discretionary petitions for review or writs of prohibition. Pet. Br. 18. But those denials of discretionary review have no precedential value. *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n.3, 607 S.E.2d 485, 488 n. 3 (2004) (per curiam); *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 521 n.45, 694 S.E.2d 815, 854 n.45 (2010).

[36] *Brooke Cnty. Comm'n v. Purdue Pharma, L.P.*, 2018 WL 11242293 (W. Va. Cir. Ct. Dec. 28, 2018); *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, 2014 WL 12814021 (W. Va. Cir. Ct. Dec. 12, 2014).

[37] After the *Brooke County* decision by Judge Hummel, that case and others similar cases were transferred to the MLP by order of the Chief Justice. The MLP then entered an order deeming Judge Hummel's *Brooke County* motion-to-dismiss decision to be "law of the case" and barring Distributors from re-raising their public nuisance argument in motions to dismiss in any of the

any decision of this Court applying public nuisance law to the distribution of a lawful product, nor could they.[38] The *Morrisey* decision also predated the promulgation of the relevant portion of the Third Restatement, and both these decisions predated the Oklahoma Supreme Court decision in *Hunter*. Both cases fit the description of "unsound" decisions caused by the erroneous view that public nuisance law extends to "anything injurious to public health and safety," which the Restatement has now explained is incorrect. Third Restatement § 8 cmt. b (citing cmt. g).

Plaintiffs also cite several decisions of the MLP denying motions to dismiss and summary judgment. Pet. Br. 17–18. Those MLP orders were largely based on the *Brooke County* and *Morrisey* decisions that the trial court found "not persuasive," "inconsistent with the Restatement of Torts," and devoid of meaningful reasoning. JA7706. These MLP decisions, too, failed to recognize the proper limits of public nuisance. *See* Third Restatement § 8 cmts. b, g. The MLP's opinion denying Distributors' summary judgment motion missed the point in stating that West Virginia public nuisance law is not "limited to claims arising out of the use of property"—something Distributors have not argued. Order Denying Defs.' MSJ re "Factual Issue #2," at 3, *In re Opioid Litig.*, No. 21-C-9000 DISTRIBUTOR (W. Va. M.L.P. July 1, 2022) ("MLP Distributors MSJ"). The MLP also declined to follow *Hunter* on the ground that Oklahoma law is "not equivalent to West Virginia law," but it provided no examples of any differences. *Id.* at 6. It

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other cases. *See* Order re: Rulings Issued During the September 20, 2019 Status Conf., at 1, *In re Opioid Litig.*, No. 19-C-9000 (W. Va. M.L.P. Oct. 19, 2019).

[38] Plaintiffs also cite *Lemongello v. Will Co.*, 2003 WL 21488208 (W. Va. Cir. Ct. June 19, 2003). Pet. Br. 20, 27, 35. But that unpublished trial court order denying a motion to dismiss has even less reasoning than *Brooke County*, simply stating in a single sentence without citation to any case law "that West Virginia law does not limit claims of public nuisance to those dealing with real property." *Id*. at *2. That was not the issue addressed by the court here. The court in *Lemongello* eventually dismissed the case, holding that the plaintiffs' claims "would be a real stretch under our case law and under our definition of what a proximate causation is." *See Gunmaker Dismissed from WVA Public Nuisance Suit*, 6 No. 7 Andrews Gun Indus. Litig. Rep. 7 (Nov. 5, 2004).

found Section 8 of the Third Restatement inapplicable to government suits, *id.* at 5, but failed to recognize the broad scope of comment g's teaching that "the common law of public nuisance is an inapt vehicle for addressing the conduct at issue," without limitation as to the nature of the plaintiff, Third Restatement § 8 cmt. g.

While some of the MLP orders came after the trial court's ruling and disagreed with it,[39] those decisions identified no error in the trial court's reasoning and again largely reiterated the erroneous aspects of the earlier rulings. One of them based its disagreement, at least in part, on the conclusion that "public nuisance does not require harm to real property,"[40] but the trial court did not impose that requirement. The other two, as described above, improperly relied on testimony from a different case to deny motions to dismiss.[41] None of these orders addressed the public policy implications of their rulings. For these reasons, these decisions are not persuasive.

G. The West Virginia Legislature Has Not Approved These Claims.

Contrary to Plaintiffs' position, the West Virginia Legislature has never approved the claims involved in this case. Plaintiffs do not point to any express approval. Rather, they rely on purported legislative acquiescence: that the Legislature "took no action to stop these cases." Pet. Br. 26. While legislative acquiescence to judicial or administrative interpretations of statutes may sometimes be used as an aid to statutory construction,[42] it has no role here because this case involves common law claims, not statutory interpretation.

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[39] MLP Kroger MTD Order, ¶¶ 19, 61–63; MLP PHARM MTD Order ¶¶ 19, 69–71; Order Denying Defs.' Mots. to Dismiss, ¶¶ 12, 20–21 *City of Beckley v. Allergan PLC*, No. 20-C-34 MSH (W. Va. M.L.P. Oct. 18, 2022) ("MLP Beckley MTD Order").

[40] MLP Beckley MTD Order ¶ 20.

[41] *See* MLP Kroger MTD Order ¶ 59, MLP PHARM MTD Order ¶ 67.

[42] That was the case in *State v. Butler*, 239 W. Va. 168, 176, 799 S.E.2d 718, 726 (2017), cited at Pet. Br. 26 n.77, which addressed whether the word "sex" in a criminal civil-rights statute could be read as including sexual orientation.

Moreover, "[t]he failure of harried legislatures" to take action "is as likely the result of inattention or overwork as it is of implicit legislative approval." *Bailey v. SWCC*, 170 W. Va. 771, 777, 296 S.E.2d 901, 907 (1982). For that reason, courts have an "oft-expressed skepticism toward reading the tea leaves of [legislative] inaction." *Rapanos v. United States*, 547 U.S. 715, 749–750 (2006) (Scalia, J., plurality op.) (purported "deliberate acquiescence" could more appropriately be called "failure to express any opinion") (citation omitted). If legislators thought about these cases at all, it is equally plausible that they believed Plaintiffs' public nuisance claims are inconsistent with West Virginia law and assumed that this Court would eventually reject them.

Plaintiffs rely on the Legislature's enactment of a statute relating to firearms-industry participants, W. Va. Code § 55-18-1, but that statute does not support Plaintiffs' argument that the Legislature has approved of the claims here. When that statute was enacted in 2003, no one had ever tried to bring a public nuisance claim against distributors of prescription medications.[43] Accordingly, the Legislature's decision to block certain nuisance claims relating to firearms says nothing about its attitude towards opioid-based nuisance claims, which were not before it at the time.

Plaintiffs also point to an unenacted bill, Pet. Br. 28, but "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). The bill in question did not address the specific issue of whether distribution

[43] This distinguishes this case from *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763 (1995), cited at Pet. Br. 27–28 & n.82. That case involved a statutory provision that provided for intra-state transfers of cases but excluded the doctrine of *forum non conveniens*, which was well known to legislators at the time. *See Riffle*, 195 W.Va. at 127, 464 S.E.2d at 769. Under those circumstances, this Court understood the Legislature's action as "wholesale abandonment" of that "old legal doctrine." *Id*. at 127–28, 464 S.E.2d at 769–70. There is no comparable basis here to think that the 2003 Legislature had any notion that W. Va. Code § 55-18-1 would have any effect on the then-unknown entity of public nuisance claims against opioid distributors.

of opioid medications can give rise to public nuisance liability under the common law.[44] This is a far cry from the situation in *State v. Butler*, where this Court recognized that "unsuccessful legislative efforts can be attributed to a myriad of reasons," but could not ignore the fact that the legislature had rejected 26 attempts, over 30 years, to amend the statute in question to address the specific issue involved in the case (by adding the term "sexual orientation"). 239 W. Va. 168, 175–76, 799 S.E.2d 718, 725–26 (2017). Nor does the fact that the Legislature carried out its legal duty to appropriate the funds received in settlement of opioid-related cases, *see* Pet. Br. 26 & n.75, connote approval of the nuisance claims in those cases, which were only one of several claims asserted, just as the defendants' agreements to pay those settlements did not admit the claims' merit.

H. Public Policy Concerns Strongly Counsel Against Recognizing Public Nuisance Liability Here.

In addition to being inconsistent with current West Virginia law, the application of public nuisance doctrine to the distribution of lawful products would cause serious public policy problems. As the trial court recognized, "[t]o apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." JA7704. "The economic harm and social costs associated with these new causes of action are difficult to measure but would obviously be extensive." JA7709. Other courts have agreed. The Oklahoma Supreme Court reasoned that extending public nuisance law to the manufacture and sale of lawful products like opioid medications would render the doctrine "impermissibly vague" and inject courts into "manag[ing] public policy matters that should be dealt with by the legislative

[44] *See* SB 572, 86th Leg. 2d Sess. (W. Va. 2023) (introduced Feb. 6, 2023), https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=sb572%20intr.htm&yr=2023&sesstype=RS&i=572.

and executive branches." *Hunter*, 499 P.3d at 731. As the Oklahoma court asked rhetorically, "will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution"? *Id*. A Connecticut court concluded in dismissing an opioid-related case that allowing public nuisance claims in this context "would risk letting everyone sue almost everyone else about pretty much everything that harms us." *City of New Haven v. Purdue Pharma L.P.*, 2019 WL 423990, at *2 (Conn. Super. Ct. Jan. 8, 2019).

Commentators also have expressed these and other policy concerns. For example, Professor Thomas Merrill argues persuasively that public nuisance litigation of this kind "(1) violates the rule of law; and (2) is inconsistent with basic norms of democratic government."[45] "The legal duty asserted in these cases is so broad it can be made to describe virtually any widespread social problem" and therefore "violates the most elemental aspect of the rule of law: that legal duties must be sufficiently predictable to guide those to whom they apply."[46] Thus, this new "super tort" is "illegitimate."[47] Public nuisance law becomes the "bull in the China [*sic*] shop"; "[n]ow anything can become a public nuisance by fiat . . . resulting in massive verdicts in favor of government entities that are wholly against principle."[48]

If accepted here, the metastasis of public nuisance litigation will continue and likely accelerate. In addition to targeting the tobacco, firearm, and paint industries, governments have already tried to use the doctrine to sue energy companies over climate change, banks over subprime

[45] Merrill, *supra* note 18, at 987.

[46] *Id.* at 987, 1008.

[47] *Id.* at 1008–09.

[48] Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J.L. Econ. & Pol'y 282, 313 (2022).

lending, carmakers for failing to include anti-theft devices in their cars, and soft drink companies over plastic waste discarded by consumers, among others. There will be no end to it.

An unlimited definition of public nuisance also means that once someone advances a new use for public nuisance law, many, many others will pile on. As the trial court noted, although "the phrase 'opening the floodgates of litigation' is a canard often ridiculed with good cause," in this context "it is applicable." JA7709. Distributors have been sued in literally thousands of cases across the country, alleging the same public nuisance. In West Virginia alone, Distributors have defended claims brought not only by Cabell County and the City of Huntington, but also the State Attorney General and more than 80 other political subdivisions. This includes another municipality within Cabell County itself, all of the counties immediately surrounding Cabell County, and a host of cities located therein. They also have faced suits by 30 West Virginia hospital groups that seek recovery for rising costs incurred allegedly as a result of the opioid crisis; roughly 25 individuals suing as next friends of children allegedly suffering from neonatal abstinence syndrome as a result of their mothers' ingestion of opioids during pregnancy, three of which are overlapping class actions; and a class of West Virginia residents, with whom Distributors have no relationship, who claim their health insurance premiums have risen because of the opioid epidemic—all seeking enormous sums for the same alleged conduct and the same alleged nuisance.

If this Court chooses to answer the certified question, it should impose rational limits on public nuisance litigation by enforcing its longstanding limits on public nuisance liability.

III. The Elements of a Public Nuisance Claim Are Clear and Settled.

If this Court determines that West Virginia public nuisance law does not extend to the distribution of lawful products, it need not reach the second portion of the certified question, which asks for clarity regarding "the elements of such a public nuisance claim." But even if this Court

does reach that aspect of the certified question, it need only reaffirm the well-established elements of a public nuisance claim under West Virginia law: (i) actionable conduct; (ii) unreasonable interference with a public right; and (iii) causation. Plaintiffs concede that those elements apply, *see* Pet. Br. 29, and there is no reason for this Court to revisit these well-established elements of the tort of public nuisance.

In particular, the Court should reject Plaintiffs' invitation to issue "syllabus points" and other purported "clarifications" that go far beyond the certified question. *See* Pet. Br. 2–3, 29–39. In certified-question proceedings, this Court "confine[s] [its] analysis to the question certified," *Collins v. AAA Homebuilders, Inc.*, 175 W. Va. 427, 428 n.1, 333 S.E.2d 792, 793 n.1 (1985), and "assiduously avoid[s] the temptation to comment by way of dictum" on other issues, *Brumfield v. Wofford*, 143 W. Va. 332, 336, 102 S.E.2d 103, 105 (1958); *see also* W. Va. Code § 51-1A-3 (the Court "may answer a question of law certified to it"). Here, the Fourth Circuit limited this Court's analysis to two narrow questions: (i) whether the law of public nuisance applies; and (ii) the elements of the claim. *See* JA29. It explicitly reserved for itself consideration of the trial court's ***application*** of those elements to the facts of this case, stating that it would resolve those disputes "if the Supreme Court of Appeals recognizes public nuisance as a cognizable claim in this case." JA32 n.3. It would thus be inappropriate for this Court to issue advisory opinions on factual, legal, or mixed questions—including standards of proof and remedies—that go beyond the certified question.

But since Plaintiffs have addressed issues beyond the certified question in their brief, Distributors respond to them below—while recognizing that these points should not be reached by the Court because it will "confine [its] analysis to the question certified," *Collins*, 175 W. Va. at 428 n.1, 333 S.E.2d at 793 n.1.

A. Unlawful Conduct Is Not *Per Se* Unreasonable Under West Virginia Law.

Although the trial court held that Distributors did not act unlawfully, Plaintiffs ask this Court to state that unlawful conduct is *per se* unreasonable. Pet. Br. 33–34. That is incorrect. Although conduct proscribed by statute or regulation ***may*** be a basis for concluding that an interference with a public right is "unreasonable," it is not "conclusive." *See* Second Restatement § 821B(2)(b) (listing "whether the conduct is proscribed by a statute, ordinance or administrative regulation" as one of several factors that "may sustain a holding that an interference with a public right is unreasonable"); *see also id.* cmt. e (noting that the factors listed in subsection 2 **"**are ***not conclusive tests*** controlling the determination of whether an interference with a public right is unreasonable").

B. The Causation Standard for Public Nuisance Claims Is Not Relaxed From General Tort Law.

Plaintiffs argue that West Virginia law permits public nuisance liability based on a relaxed causation standard that is lower than the standard for negligence. Pet. Br. 37. In their brief to the Fourth Circuit, they said the opposite: "West Virginia's nuisance-causation requirement is consistent with its proximate-cause requirement for negligence." JA 241. When considering certified questions, this Court does not reach issues that were not raised in the certifying court. *See, e.g.*, *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 417, 647 S.E.2d 848, 853 (W. Va. 2007). Because Plaintiffs waived this argument in the Fourth Circuit,[49] any statement this Court could make now would have no effect on the result and would be merely advisory.

[49] Under Fourth Circuit law, "[f]ailure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues." *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003). Plaintiffs not only failed to present their current argument, they presented the opposite argument.

In any event, Plaintiffs' new argument is wrong. Public nuisance "is a species of tort liability . . . which is governed by the rules relating to torts generally," including the requirement of cause-in-fact and proximate cause. *Carter v. Monsanto Co.*, 212 W.Va. 732, 737, 575 S.E.2d 342, 347 (2002) (citation and internal quotation marks omitted). *See also, e.g., McCormick v. Walmart Stores, Inc.*, 215 W. Va. 679, 682, 600 S.E.2d 576, 579 (2004) (nuisance requires that "wrongful conduct was a proximate cause of the injuries"); *Valentine v. Wheeling Elec. Co.*, 180 W. Va. 382, 385 n.4, 376 S.E.2d 588, 591 n.4 (1988) (public nuisance plaintiff "must show . . . proximate cause"); *Webb v. Sessler*, 135 W. Va. 341, 346–48, 63 S.E.2d 65, 68–69 (1950) (affirming dismissal of nuisance claim due to lack of proximate cause); *Daniels v. Cranberry Fuel Co.*, 111 W. Va. 484, 163 S.E. 24, 25–27 (1932) (affirming trial court setting aside public nuisance verdict for lack of proximate cause). This Court has never approved of any form of relaxed causation requirement in public nuisance cases, and there is no basis for it to do so now.

The only support Plaintiffs offer for their proposed standard is the *Brooke County* decision, which in turn relied solely on a federal decision applying New York, not West Virginia, law.[50] The Restatements do not call for any relaxed standard. *See* Second Restatement § 822 & cmt. e (requiring "legal cause" for nuisance claims and referring to sections of Restatement that address negligence and intentional conduct). The highest courts of other states have rejected such efforts to "dilute" the normal standard. *See District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633,

[50] *See* Pet. Br. 37 n.128 (citing *Brooke Cnty. Comm'n*, 2018 WL 11242293, at *7). That federal decision, *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003), is inconsistent even with New York law. The *AcuSport* court posited a relaxed causation standard in approving of an association's public nuisance claim against gun industry participants. *Id.* at 496–97. But in a case brought by the State of New York and asserting the same type of claim, a New York appellate court rejected any relaxed standard of causation and held that the State's claim failed for lack of proximate cause. *New York ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 103 (N.Y. App. Div. 2003) (finding proximate cause lacking where defendants' conduct was remote from alleged harms and criminal acts of third parties intervened).

650 (D.C. 2005) (en banc) ("[W]e decline to relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance."); *City of St. Louis v. Benjamin Moore Co.*, 226 S.W.3d 110, 116 (Mo. 2007) (en banc) (per curiam) ("declin[ing] to approve such a departure" from causation requirement for public nuisance). Plaintiffs give no clear definition of their proposed standard, nor any guidance as to how it could be applied. Their vague and unsupported argument should be rejected; the proximate cause requirement applies to public nuisance just as it does to other torts.[51]

C. Plaintiffs' Request For a Large Sum of Money To Address Downstream Effects of Opioid Abuse Is Not A Proper Abatement Remedy.

Although abatement is not within the certified question, and the trial court's ruling on abatement was not a pure legal ruling but was based on the specific facts of Plaintiffs' abatement plan and its relationship to Distributors' alleged conduct, JA7729–34, Plaintiffs invite this Court to issue dicta concerning this topic. Abatement is the typical remedy when governmental bodies sue for public nuisance. *See* W. Va. Code § 7-1-3kk (granting county commissions limited authority to "abate" the alleged public nuisance); W. Va. Code § 8-12-5(22) (same for municipalities). As the trial court correctly recognized, "[u]nder the traditional definition of abatement, nuisance claims seek court intervention to require one party to stop doing something that affects another . . . ." JA7731 (citing *State ex rel. AmerisourceBergen Drug Corp. v. Moats*,

[51] Plaintiffs (Pet. Br. 36 & n.127) also cite a pretrial MDL ruling finding that causation ***could be*** established by proof that opioid distributors were responsible for "massive increases in the supply of prescription opioids." *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4178617, at *4 (N.D. Ohio Sept. 3, 2019). But here the court found, on a full trial record, that Distributors were ***not*** "responsible" for the volume of prescription opioids in Cabell/Huntington. The same deficiency applies to Plaintiffs' citation of *City and County of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610 (N.D. Cal. 2020). *See* Pet. Br. 36 n. 127.

245 W. Va. 431, 446–47, 859 S.E.2d 374, 389–90 (2021) (Armstead, J., concurring in part)).[52] As a result, "[e]quitable abatement has historically been limited to an injunction designed to eliminate allegedly tortious conduct or, in certain environmental nuisance cases, an injunction to remove the contaminant from the environment." JA7731–32 (citing *Duff*, 187 W. Va. at 716, 421 S.E.2d at 257).

An order to pay a large sum of money in "remuneration for the costs of treating the horrendous downstream harms of opioid use and abuse," with "no direct relation to any of defendants' alleged misconduct," is not abatement. JA7732. This Court has never approved such a remedy. Even where parties have been ordered to clean up environmental nuisances, the remedy has never included paying for the treatment of downstream personal injuries or social programs with remote connections to the defendants' conduct, as Plaintiffs seek here. For example, as the trial court correctly observed, the abatement order in *Kermit Lumber* "consisted of removing the excessive or above-limits arsenic from the environment," but "[t]ellingly, *Kermit Lumber* did not hold that the plaintiff could recover, as abatement, for downstream harms to the community resulting from the contamination in the Tug River, such as treatment for injuries from those who consumed or otherwise came in contact with contaminated water." JA7734 (citing *Kermit Lumber*, 200 W. Va. at 245, 488 S.E.2d at 925).

CONCLUSION

For the reasons stated above, if this Court answers the certified question, it should hold that West Virginia public nuisance law does not apply to the distribution of lawful products.

Dated: May 20, 2024 Respectfully submitted,

[52] *See also* Merrill, *supra* note 18, at 1002–03 (noting that abatement orders the defendants "to stop whatever they were doing").

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of May 2024, the foregoing RESPONDENTS' BRIEF was served using the File and ServeXpress system, which will send notification of such filing to all counsel of record.

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