IN THE SUPREME COURT OF OHIO

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	:	
TRUMBULL COUNTY, OH; LAKE COUNTY, OH; PLAINTIFFS' EXECUTIVE COMMITTEE	:	Case No. 2023-1155
Respondents,	:	On Review of Certified Question from the U.S. Court
v.	:	of Appeals for the Sixth Circuit, Case No. 22-3750 et al.
PURDUE PHARMA L.P., ET AL.,	:	
WALGREENS BOOTS ALLIANCE, INC., WALGREEN CO., WALGREEN EASTERN CO., INC; CVS PHARMACY, INC., OHIO CVS STORES, LLC, CVS TENNESSEE DISTRIBUTION, LLC, CVS RX SERVICES INC., CVS INDIANA, LLC; WALMART INC.,	:	
Petitioners.	:	

AMICUS CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and the reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries of various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

INTRODUCTION AND SUMMARY OF ARGUMENT

From time to time, governments in Ohio and other states have filed lawsuits against manufacturers or sellers of products—from lead paint to oil and gas to household chemicals to even home mortgages, and here, prescription drugs—that

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

have risks even though the products are neither illegal nor defective. These lawsuits are not about applying traditional liability law to these products or defendants. They are about second-guessing federal or state regulatory regimes governing product risks and trying to use litigation to make companies fund local efforts to deal with risk-related injuries, even when the products are lawful and the companies did not cause those injuries. Liability law does not impose blame or obligations in these situations on companies for putting such products into the stream of commerce—particularly, as here, when the products remain highly beneficial to many people and are approved by the governing agencies. Most state high courts, when given the opportunity, have rejected these claims, ruling that fundamental liability principles cannot be cast aside. The Court should do the same under longstanding Ohio law.

In this case, local Ohio governments are suing companies involved in selling prescription opioid medications approved by the U.S. Food and Drug Administration (FDA), seeking to impose industry-wide liability for costs associated with treating opioid abusers. They assert that the social, economic, and health effects of illegal use of opioids by individuals in their jurisdictions qualify as a "public nuisance" under Ohio law and that companies that sold these medications should be held liable for paying the costs associated with this nuisance.

However, the Ohio General Assembly, in response to previous attempts to expand the state's public nuisance doctrine to impose comparable liability against

product sellers, made clear and then reaffirmed that Ohio law does not support such unprincipled, open-ended liability. *See* R.C. 2307.71(B) and 2307.71(A)(13). Under these statutes, the product-based risks for which manufacturers and sellers of products can be liable are governed solely by the Ohio Product Liability Act (OPLA); they cannot be subject to separate public nuisance liability for risks that, as here, occur downstream and that are outside of their control. *See* R.C. 2307.71(B) (stating the OPLA "abrogate[s] all common law product liability claims or causes of action"); R.C. 2307.71(A)(13) (specifying "public nuisance" as an OPLA-subsumed claim against product manufacturers and sellers).

The Federal District Court, in ruling otherwise, misapplied Ohio law in two ways. First, it misconstrued the OPLA, both as written and as clearly intended by the General Assembly in its 2005 and 2007 clarifying amendments. The court wrongly held that the OPLA is ambiguous and that the amendments were not aimed at stopping these types of claims. As discussed in detail below, nothing can be further from the truth. Second, the court authorized a radical departure from traditional public nuisance law. Public nuisance law has always been about giving governments the ability to stop someone from unlawfully interfering with the public's rights to use public land, water, or other communal spaces—not turning product sellers into insurers of last resort for downstream product risks. *See generally* Donald Gifford, *Public Nuisance as a Mass Product Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

Neither the personal injuries alleged, nor the related costs of treatment were incurred in the exercise of any such public right. Thus, there is a huge dissonance between the allegations against Petitioners and allowable public nuisance claims, under both the OPLA and the common law. Respondents' legal theories are simply not viable.

None of this denies that opioid abuse is a serious problem that demands serious, policy-based solutions. But opioid abuse being a critical public health issue in Ohio and other states does not make it a tort. This situation calls for a legislative response. *Amicus* urges the Court to apply the OPLA as written and intended, to adhere to traditional public nuisance law, and to stop federal courts from engaging in deep pocket jurisprudence. It should answer the certified question—whether the OPLA abrogates Respondents' common law claims of public nuisance from the sale of a product in commerce—in the affirmative. Petitioners are in the business of selling beneficial, regulated products; they have not caused a public nuisance.

STATEMENT OF CASE AND FACTS

The certified question is one of law, namely the application of the Ohio Product Liability Act to the public nuisance claims asserted in this case. *Amicus* relies on the statement of the case and facts in Petitioners' brief.

ARGUMENT

I. RESPONDENTS' CLAIMS CONTINUE A 50-YEAR EFFORT TO EXPAND PUBLIC NUISANCE TO CLAIMS AGAINST PRODUCT SELLERS IN ORDER TO EVADE PRODUCT LIABILITY LAW.

Respondents' attempt to recast the tort of public nuisance in this case represents a radical departure from traditional public nuisance law. Going back to English common law—and more than 250 years of American jurisprudence—public nuisance law has provided governments with the ability to force people to stop quasi-criminal behavior that is interfering with the community's right to use communal spaces, namely government-owned land, waterways, and town squares. *See* Gifford, 71 U. Cin. L. Rev. at 791-806 (detailing the tort's historical core as interferences with "the king's real property rights" and low-grade criminal offenses against the community as a whole). Although public nuisance lawsuits have taken a variety of forms, the archetypal nature of them has largely been consistent for hundreds of years in both English and American common law. *See* Victor E. Schwartz & Philip S. Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570-72 (2006).

Public nuisances have no redeeming qualities. The quintessential cases involve the blocking of public roads for illicit purposes, illegally dumping into rivers, emitting toxic fumes in a community, and vagrancy in parks. If a person causes a public nuisance, for example, by dumping nails and tacks onto a public

road, that person—not the manufacturer or seller of the nails or tacks—is responsible for the nuisance. A government can sue the individual for (1) injunctive relief, to stop the nuisance-causing conduct, and (2) abatement of the public nuisance, so the interference with a public right is eliminated. Traditional public nuisance law does not entitle a government to monetary damages, including to treat people harmed by the nuisance. *See id*. Municipalities have never been able to sue derivatively for the cost of their public services; financing government services is a legislative function.

Ohio courts have largely followed these historic, and fundamental, principles. "What the law sanctions cannot be held to be a public nuisance." *Mingo Junction v. Sheline*, 130 Ohio St. 34, 196 N.E. 897 (1935), paragraph three of the syllabus; *see also Williamson v. Pavlovich*, 45 Ohio St.3d 179, 181, 543 N.E.2d 1242 (1989) (noting the early public nuisance cases involved "encroachments . . . of public highways"); *State ex rel. Brown v. Rockside Reclamation, Inc.*, 47 Ohio St.2d 76, 83, 351 N.E.2d 448 (1976) ("It is a general rule that an act which has been authorized by law cannot be a public nuisance"); *Franks v. Lopez*, 69 Ohio St.3d 345, 351, 632 N.E.2d 502 (1994) (refusing to expand public nuisance to design and construction defects in road signs); *see Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (4th Dist. 1993) (noting the tort originated in criminal law); *cf. Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908, 914 (3d Cir.

1948) (under Ohio law, "people who supplied the material and built the storage tank which gave way . . . are not in the situation of one who creates a nuisance").

A concerted effort began in the 1970s to detach public nuisance law from its traditional moorings. The proponents of these changes sought to transform public nuisance law into a tool for requiring large businesses, rather than individual wrongdoers or society as a whole, to remediate environmental damage or pay costs of social harms associated with categories of lawful products. *See* Schwartz & Goldberg, 45 Washburn L.J. at 548-51. Those behind these efforts believed that suing individual wrongdoers was inefficient and would not achieve their political agendas, whereas imposing liability on presumed deep-pocketed companies could allow them to achieve both of these goals on a macro scale. *See id*. To do so, they had to avoid well-settled principles of public nuisance law and circumvent product liability law. Public nuisance theory was rarely used in those years, as many situations where the tort had historically been invoked were governed by post-industrial statutory and regulatory law, including land-use regulations. *See Gifford*, 71 U. Cin. L. Rev. at 805-06. As a result, many judges were unfamiliar with its traditional boundaries. *Accord* W. Page Keeton *et al*., *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people").

The first real effort to transform public nuisance law involved an attempt to introduce changes to the public nuisance chapters of the Restatement (Second) of Torts. Proponents of the changes hoped to break "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other things, these advocates sought to expand "public right" to include anything in the public interest and remove the unlawful conduct requirement altogether. This would have been as radical as removing duty and breach from a negligence claim. The goal was to sue companies for widespread social and environmental harms even when the companies were engaged in lawful commerce and traditional public rights were not involved. *See id.* Those transformational changes did not enter the Restatement's black letter.

The proponents' first test case also failed. In *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (1971), advocates of expanding public nuisance law targeted businesses that had sold products or engaged in activities that allegedly contributed to smog in Los Angeles. An intermediate appellate court affirmed dismissal of the claims because the attempted use of public nuisance liability lacked appreciable standards and was inconsistent with traditional public nuisance principles. *See id.* at 645. *Diamond* called out the plaintiffs for "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt

power of court." *Id.* The group behind these cases expressed frustration that courts adhered to the tenets of public nuisance law and served as a "gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy of using government public nuisance actions to circumvent product liability law, marketing laws, and product regulations intensified in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (observing the changes sought "invite[d] mischief in other areas—such as products liability"). In those decades, cases targeted manufacturers of products that had inherent risks or that could be used to create harm, including widespread harm. *See, e.g.*, *Johnson Cty., by and through Bd. of Edn. of Tenn. v. U.S. Gypsum Co.*, 580 F.Supp. 284 (E.D.Tenn. 1984), *set aside on other grounds*, 664 F.Supp. 1127 (E.D.Tenn. 1985) (asbestos); *Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1990) (PCBs); *Texas v. American Tobacco Co.*, 14 F.Supp.2d 956 (E.D.Tex. 1997) (tobacco).

Again, judges dismissed the cases under traditional public nuisance principles. The courts recognized the dissonance between the manufacture and sale of goods and public nuisance liability, regardless of the product or other allegations raised. Manufacturers and sellers "may not be held liable on a nuisance theory for injuries" caused by a product. *Detroit Bd. of Edn. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. App. 1992); *see also Am. Tobacco Co*., 14 F.Supp.2d at 973 ("The overly broad definition of the elements of public nuisance urged by the State is simply not

found in Texas case law"). If the courts were to hold otherwise, the courts explained, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson Cty.*, 580 F.Supp. at 294. Product sellers would be liable whenever someone uses a product to cause harm regardless of their "culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

In *Westinghouse*, the U.S. Court of Appeals for the Seventh Circuit stressed this point. Westinghouse was charged with illegally releasing PCB waste into municipal sewers and landfills, thereby unlawfully interfering with public land and water rights. In addition to suing Westinghouse, the city also sued the company that sold Westinghouse the PCBs in a public nuisance action. The court dismissed the seller, explaining that once the seller sold PCBs to Westinghouse, "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product." 891 F.2d at 614.

In these numerous seminal cases through the 1990s, the nation's courts spoke with clarity and uniformity: the boundaries of public nuisance law did not extend to manufacturing, selling, and promoting products. Public nuisance remained largely a local land and water use tort.

II. THE GENERAL ASSEMBLY'S OPLA ENACTMENTS DIRECTLY RESPONDED TO PRODUCT-BASED PUBLIC NUISANCE CASES, MAKING CLEAR THESE CLAIMS ARE NOT VIABLE IN OHIO.

Product-based public nuisance claims arose in Ohio in the late 1990s. Lawyers seeking to impose gun regulations sued the firearms industry for public nuisance, demanding payment of local government costs associated with gun violence, even while acknowledging this strategy had "legal problems" and "never [won] in court." David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1172 (2000). They believed the threat of public nuisance liability could create a "vehicle for settlement," so they alleged that certain industry marketing practices facilitated the illegal secondary firearms market, thereby interfering with public health and safety. *Id.* Around the same time, other private lawyers were teaming with local and state governments to sue former manufacturers of lead pigment and paint under a public nuisance theory after their product liability claims repeatedly failed. *See* Scott A. Smith, *Turning Lead into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 Def. Couns. J. 119 (2004).

The firearms cases pursued outside of Ohio largely failed. *See, e.g.*, *Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So.2d 1042, 1045 (Fla. Ct. App. 2001); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003). The Illinois Supreme Court explained

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

This Court, however, reached a different result in a case brought by the city of Cincinnati. In *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, the city alleged that entities in the stream of commerce could be subject to public nuisance liability for "manufacturing, marketing, distributing, and selling [products] in ways that unreasonably interfere with the public health, welfare and safety in Cincinnati and that the residents of Cincinnati have a common right to be free from such conduct." *Id.* at ¶ 7. The defendants responded that "Ohio's public nuisance law does not encompass injuries caused by product[s]," or the marketing and sales of products. *Id.* at 1142. Although this Court acknowledged that the claims diverged from traditional principles of liability law, it held the city had stated a viable claim under Ohio law. The Court stated that it had "never held that public nuisance law is strictly limited" to only its traditional applications. *Id.* at ¶ 9.

The General Assembly responded by enacting legislation that reversed this Court's holding. The legislature clarified that R.C. 2307.71 to 2307.80 "are intended to abrogate all common law product liability claims or causes of action"—thus reiterating that the OPLA is the only law for imposing liability on manufacturers and sellers for product-based harms. *See* Am.Sub.S.B. No. 80 (amending R.C. 2307.71(B)). This language was common among states with product liability statutes. Ohio and other states enacting product liability statutes in the 1980s and 1990s generally based their laws on the Model Uniform Product Liability Act (UPLA). *See* 44 Fed. Reg. 62714 (daily ed. Oct. 31, 1979). The purpose of UPLA was to provide a single body of law for injuries stemming from products so that manufacturers, sellers, and consumers would have clarity and predictability as to their rights and responsibilities. *See id.* at 103(a), 44 Fed. Reg. at 62720 ("The Act consolidates all product liability recovery theories into one").

The public policy rationale for a single, uniform approach to product liability was that "a 'product liability action' is defined not by the substantive legal theory under which the plaintiff proceeds, but rather by the factual scenario that gives rise to the plaintiff's claim and injury that results from the conduct of the defendant." *Fields v. Wyeth, Inc.*, 613 F.Supp.2d 1056, 1059 (W.D.Ark. 2009). Thus, an individual alleging injury from a product could sue an entity operating in the stream of commerce only when he or she could establish the elements of a product liability

action against that entity. In enacting S.B. 80 in 2005, the General Assembly made clear that the OPLA was the only source for imposing product liability.

Nevertheless, local Ohio governments continued to pursue public nuisance claims against product sellers. In *Toledo v. Sherwin-Williams Co.*, Lucas C.P. No. CI 200606040, 2007 WL 4965044 (Dec. 12, 2007), the city of Toledo filed a lawsuit against former manufacturers of lead pigment and paint, alleging that companies in the stream of commerce can still be subject to public nuisance liability for "manufactur[ing], processing, marketing, supplying, distributing, and/or [selling]" a product and be forced to pay for "the provision of medical care and programs relative to lead products" if that product is used or misused by consumers in ways that interfere with "the health, safety, and welfare" of local residents. *Id.* at *2.

For a second time, the General Assembly enacted legislation specifying that the OPLA as the exclusive source of liability for the manufacture and sale of products. *See* Am.Sub.S.B. 117 (amending R.C. 2307.71(A)(13)). With the passage of S.B. 117, R.C. 2307.71(A)(13) now states: "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling or sale of a product unreasonably interferes with a right common to the public."

The General Assembly stated that the purpose of S.B. 117 was to clarify that its original intent in enacting the OPLA was "to abrogate all common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacture's or supplier's product." S.B. 117, Section 3. Further, the legislature expressed that the change was not substantive so it would apply to existing claims without resulting in an inappropriate retroactive application of the law. Accordingly, the court dismissed the City's public nuisance claim against the manufacturers and sellers of lead paint. *See Toledo*, 2007 WL 4965044, at *5.

The Federal District Court's ruling here directly contradicts the OPLA's terms, along with its unequivocal history and the stated purpose of the 2005 and 2007 amendments. Contrary to what the court stated, the OPLA's terms are not "ambiguous." Also, there is no support for the court's suggestion that the amendments prohibit only public nuisance cases seeking non-economic damages. The legislature was clear that the statute does not allow claims seeking recovery for governmental economic losses because those were the very claims in the gun and lead-paint cases that the legislature was expressly rejecting. And, it is incorrect to suggest that the reason the legislature stated the reforms were not substantive was that it did not want them to have a substantive effect. To the contrary, the legislature

used this common drafting technique to ensure the amendments would be applied to pending cases because the 2007 reforms reaffirmed existing substantive law.

Here, the Court should ensure that federal and state courts apply the OPLA as the General Assembly wrote and intended. It governs all product-based claims against those who make, sell, and market products. There is no public nuisance exception, regardless of how creatively lawsuits are packaged.

III. THE GENERAL ASSEMBLY'S OPLA ENACTMENTS HAD THEIR DESIRED EFFECT OF KEEPING OHIO PUBLIC NUISANCE LAW WITHIN MAINSTREAM AMERICAN JURISPRUDENCE.

Over the next decade, in response to the firearm and lead paint cases, a body of case law developed across the country affirming that public nuisance law cannot circumvent product liability law and create a separate body of liability for manufacturers and sellers of products over downstream product injuries and associated costs. These rulings validate the General Assembly's clarifications in 2005 and 2007 that this Court misapplied public nuisance law in *Cincinnati v. Berretta*. Key rulings came in the Supreme Courts of Illinois, Rhode Island, New Jersey, and Missouri, as well as mid-level appellate and federal district courts nationally. *See Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1112 (Ill. 2004); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (dismissing public nuisance claim by private plaintiffs); *State v. Lead Indus. Assn.*, 951 A.2d 428, 434–35 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007); *St. Louis v. Benjamin*

Moore & Co., 226 S.W.3d 110, 112–13 (Mo. 2007). The courts explained that public nuisance law has distinct elements and purposes, which do not include authorizing governments to seek money damages from private entities for treating injuries associated with third-party use (or misuse) of products.

These courts first affirmed that the term "public right" refers to something specific, *i.e.*, the right of the public to use a shared government resource, namely a public road, communal space, or waterway. A public nuisance is a dangerous condition interfering with the public's ability to use that resource. This concept of "public right," therefore, does not include general notions of public health or safety, including the right to be free from gun violence, lead poisoning, or opioid abuse. As the Illinois Supreme Court held, this element necessarily limits when the tort can be used: there is no "public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm." *Chicago*, 821 N.E.2d at 1114-16. These risks may invoke private rights or be of public interest, but they are not public rights for purposes of applying public nuisance law.[2]

[2] By contrast, the tort of *private nuisance* involves the wrongful invasion of *personal* legal rights, including unreasonable interference with the use and enjoyment of the property of another. *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966) (noting that private nuisance and public nuisance "are quite unrelated"). For this reason, private nuisance is not alleged here, and private nuisance cases, including *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944), are inapplicable here.

Second, public nuisance liability requires a specific type of misconduct: the person must have engaged in unlawful activity when interfering with the public right. Historically, this misconduct has been quasi-criminal in nature, such as illegally dumping pollutants in a river. These activities have no redeeming qualities, are highly localized, and interfere with an identifiable public resource. For these reasons, selling a government-approved product does not create public nuisance liability—even if the product, here prescription medicines, comes with risks of harm. The New Jersey Supreme Court explained: "In public nuisance terms . . . the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it." *In re Lead Paint Litig.*, 924 A.2d at 501. Another court said: "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien." *Detroit Bd. of Edn.*, 493 N.W.2d at 521.

Third, the offending conduct must be the proximate cause of the public nuisance. The Rhode Island Supreme Court made clear that the causation requirement for public nuisance is the same as in any other tort case: "Causation is a basic requirement in any public nuisance action. . . . In addition to proving that defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause." *Lead Indus. Assn*, 951 A.2d at 450. In product cases, the alleged health, safety, or environmental issue is often caused by acts of third parties—sometimes

criminal acts. Landlords who allow lead paint to decay are the cause of lead poisoning, criminals who use guns for illegal purposes are the cause of gun violence, and those who steal or get illicit prescriptions for opioids are the proximate cause of prescription-drug abuse—not manufacturers and pharmacies.

Some governments have argued for lower causation standards that would subject companies to liability for merely contributing to a claimed risk of harm, or would substitute the chain of commerce for the chain of causation. Courts have rejected these efforts. As the Missouri Supreme Court held, "To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect." *St. Louis*, 226 S.W.3d at 114. Otherwise, governments would frame a case "as a public nuisance action rather than a product liability suit" in order to lower liability standards. *Chicago v. Am. Cyanamid Co.*, Ill. Cir. Ct. No. 02 CH 16212, 2003 WL 23315567, at *4 (Oct. 7, 2003).

Finally, a defendant must *control* the instrumentality causing the public nuisance when the nuisance is created. Control is a "basic element of the tort." *Lead Indus. Assn.*, 951 A.2d at 449. As the New Jersey Supreme Court stated, "a public nuisance, by definition, is related to conduct, performed in a location with the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499. In product cases, courts have held that "the manufacturer or distributor who has relinquished possession by selling or

otherwise distributing the product" does not control the product when the nuisance is created. Gifford, 71 U. Cin. L. Rev. at 820.

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

Thus, public nuisance liability does not hinge on whether the risks were known or knowable, or whether the effects of the use, misuse, or improper disposal of the product created local, national or even international matters of public interest. The New Jersey Supreme Court got it right: "were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint Litig.*, 924 A.2d at 494. An Illinois Court of Appeals agreed: "Plaintiff is attempting to do

what [the law] forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all" of the products produced and sold. *Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. Ct. App. 2005). So did a New York appellate court: "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *People ex rel. Spitzer*, 761 N.Y.S.2d at 196.

IV. COURTS HAVE LARGELY REJECTED EXPANDING PUBLIC NUISANCE LAW TO IMPOSE LIABILITY ON SELLERS OF OPIOIDS.

Nevertheless, product-based public nuisance cases have continued to be filed and, on a few occasions, trial courts in other states or at the federal level, as here, have allowed deviations from traditional public nuisance law. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022). Some judges have been candid about using public nuisance to address social problems—despite the fact that liability would not be based on existing law. *See*, *e.g.*, *People v. Atlantic Richfield Co.*, Cal. Super. Ct. No. 100CV788657, 2014 WL 1385823, at *53 (Mar. 26, 2014) (not wanting to "turn a blind eye" to lead poisoning). In the opioid MDL giving rise to this appeal, the trial judge stated that

his focus was not "figuring out the answer to interesting legal questions," but to "do something" about prescription drug abuse. Transcript, *In re Natl. Prescriptions Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018).

Politically, there may be an allure for local elected officials and others to create a catch-all cause of action for taxing product sellers to pay for social problems, including prescription drug abuse. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).[3] But when appellate courts have been called upon to review these rulings, they have largely overturned them.

The Oklahoma Supreme Court is the only high court to address public nuisance in an opioid case, ruling that the state's public nuisance law could *not* apply to manufacturing, marketing, and selling products. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). Reversing the trial court's failure to dismiss the claims, the Supreme Court of Oklahoma echoed what other courts have said about the origins and history of the tort and concluding that public nuisance law applies only to "conduct, performed in a location within the actor's control,

[3] *See also* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1998) ("As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so").

which harmed those common rights of the general public." *Id*. at 724, citing Restatement (Second) of Torts, Section 821B, cmt. b (1979).

The Court reiterated that public nuisance "has historically been linked to the use of land by the one creating the nuisance" and that "[c]ourts have limited public nuisance claims to these traditional bounds." *Id*. "Such property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use of treating pain." *Id.* Also, any public nuisance caused by opioid abuse occurs after the product has been sold, and damages for treating addiction is not a remedy governments can seek. The sole purpose of public nuisance litigation is to force someone to stop causing, and to remediate, a public nuisance so the nuisance no longer exists. *Id.* at 729. By contrast, "opioid use and addiction[] would not cease to exist even if the defendant pays for the abatement plan." *Id.* Thus, the remedy sought here—funds to deal with effects of opioid abuse—are money damages, not abatement of a nuisance.

The court then reinforced that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id*. at 725. The responsibility of product sellers "is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id*. at 728. Nor should a manufacturer or seller be held liable for its products years after its products enter the

stream of commerce. *See id*. at 729. Finally, the court cautioned that applying public nuisance liability to lawful products "would create unlimited and unprincipled liability for product manufacturers." *Id*. at 725.

Many other courts in opioid cases have reached the same conclusions. They have held that public nuisance law applies only to the "misuse, or interference with, public property or resources," not to "the marketing and sale" of a product. *Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp.3d 408, 472 (S.D.W.Va. 2022). The theory does not hinge on whether the product is associated with known or knowable risks or whether the company failed to prevent them. Otherwise the theory could be used "against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *Id*. at 474.

Further, governments cannot recover monetary damages in public nuisance actions. In these cases, governments are not seeking abatement of any public nuisance—just money to pay for public programs dealing with the *effects* of a social, political, or environmental problem. "[T]he distinction between abatement of nuisances and recovery of damages for injuries . . . is both apparent and vast." *Id.* (cleaned up). Finally, courts have joined the chorus against creating a "super tort":

> The phrase "opening the floodgates of litigation" is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that

> involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled.

Id.

As these courts have acknowledged, "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it's bad law." *New Haven v. Purdue Pharma, L.P.*, Conn. Super. Ct. No. X07 HHD CV 17 6086134 S, 2019 WL 423990, at *8; *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019). The Supreme Court of Iowa made this point in a different prescription drug context, stating "[d]eep pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted). Put simply, public nuisance law does not create liability for harms caused by lawful products or shift costs associated with their risks to the manufacturers and sellers.

V. TRADITIONAL BODIES OF LAW, INCLUDING PRODUCT LIABILITY LAW, AND THE REGULATORY PROCESS, SHOULD NOT BE SUPPLANTED BY PUBLIC NUISANCE LITIGATION.

Finally, the Court should make clear that Ohio's product liability law, as set forth in the OPLA, remains the body of law governing risks associated with products. Product defect causes of action have their own purposes, elements, and remedies. They manage the risks that product manufacturers and sellers can control, namely putting lawful, non-defective products into the market. These laws balance the interests of consumers, sellers, and the public by facilitating a plaintiff's recovery

and providing companies with incentives to exercise due care. The OPLA, not public nuisance, should continue to be the sole basis of liability for product claims. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

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

Allowing courts to impose liability for risks alone through public nuisance law is particularly inappropriate for prescription drugs given that the FDA is directly engaged in the risk assessments and balancing Respondents are asking the courts to do here. All aspects of prescription drugs are highly regulated, from their risks and benefits to human health to their design and labeling. *See* 21 U.S.C. 821 *et seq*. The inherent risks of prescription drugs are why the FDA requires a physician's prescription in the first place.

Even the distribution chain of such drugs is highly regulated. Petitioners are registered with state and federal authorities to sell prescription drugs, the medicines must be dispensed at licensed pharmacies, and each person must obtain a prescription from a physician to purchase them. Further, the FDA has been working on risk management plans based on improved surveillance, education, and warnings calling attention to unlawful diversion of the medicines. *See* Opioid Medications, U.S. Food & Drug Admin. ("One of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs").[4]

Using the blunt weapon of public nuisance law to supplant or second-guess these policy decisions will undermine this regulatory regime. Ensuring that liability law properly aligns with these regulations is a significant concern for *amicus* and its members because manufacturers and sellers of all products with inherent risks—

[4] https://www.fda.gov/drugs/information-drug-class/opioid-medications

from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer risks. Weighing the costs, benefits, and social value of producing and using these products and factoring in any adverse effects is part of the delicate balancing for which only legislatures and administrative agencies are suited. If a company violates any of these regulations, there are enforcement remedies tailored to the violations available to the government agencies.

CONCLUSION

The Court should answer the certified question in the affirmative. Creating liability over categories of non-defective products that have inherent risks and shifting costs to companies for downstream risks associated with those products does not resemble any claim the Ohio General Assembly had in mind when enacting the OPLA. The 2005 and 2007 amendments affirm that Respondents' claims are barred. This case has no foundation in public nuisance law and is prohibited by the OPLA.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of January, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing system. I further certify that a copy of the foregoing was served by e-mail upon the following counsel for the parties:

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