IN THE SUPREME COURT OF OHIO

In Re: National Prescription Opiate Litigation.	:	Case No. 2023-1155
Trumbull County, Ohio; Lake County, Ohio; Plaintiffs' Executive Committee	:	
Plaintiffs-Respondents	:	
v.	:	
Purdue Pharma L.P, et al., Walgreens Boot Alliance, Inc., Walgreen Company, Walgreen Eastern Co., Inc. (22-3750/3841); CVS Pharmacy, Inc. Ohio CVS Stores, LLC, CVS Tennessee Distribution, LLC CVS Rx Services, Inc., CVS Indiana, LLC (22-3751/3843); Walmart, Inc. (22-3753/3844)	:	On Certified Question From the U.S. Court of Appeals for the Sixth Circuit Case Nos. 22-3750/3841; 22-3751/3843; 22-3753/3844
Defendants-Petitioners	:	

BRIEF OF AMICUS CURIAE
THE BUCKEYE INSTITUTE
IN SUPPORT OF DEFENDANTS-PETITIONERS

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QUESTION PRESENTED

"Whether the Ohio Product Liability Act, Ohio Revised Code § 2307.71 et seq., as amended in 2005 and 2007, abrogates a common-law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?"

INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal levels. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions, protecting the rule of law, and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. In this case, the federal district court's decision to award monetary damages to government entities as a form of nuisance abatement departs from the equitable relief available to public nuisance plaintiffs under Ohio law and thus undermines the rule of law.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented by the Defendants-Petitioners.

SUMMARY OF THE ARGUMENT

Amicus first notes that it agrees with Defendants-Petitioners (Defendants) that OPLA abrogates all common-law product-liability claims, including any public nuisance claim arising out of the sale of a product, regardless of whether they seek compensatory damages or equitable abatement, but Amicus focuses on only an assumption embedded in the Question Presented.

The Question Presented assumes that "equitable abatement, include[es] monetary" remedies. This is fundamentally wrong. The remedies for a government plaintiff challenging a public nuisance are injunctions and abatement, not monetary relief. Very simply, injunction remedies require the offending party to stop doing something. Abatement remedies order that the offending nuisance be terminated. By contrast, a monetary award orders the offender to pay the plaintiff money, i.e. damages. Plaintiffs-Respondents (Plaintiffs) admit that the Ohio Products Liability Act ("OPLA") abrogates common law public nuisance claims for damages. Accordingly, Plaintiffs claims are subsumed within OPLA. The federal district

court's monetary damages award to the government plaintiffs is inconsistent with both the common law and OPLA.

The history of public nuisance law and OPLA supports this conclusion. The legal doctrine allowing a court to abate a public nuisance predates the arrival of the first English colonists on American shores. From the doctrine's beginnings though, nuisance abatement has resided solidly within a court's equity jurisdiction. While our modern unified court system makes the historical distinction between equitable and legal jurisdiction less conspicuous, they remain separate spheres, each with its own requirements, protections, and remedies. Over the centuries, courts have exercised that equity jurisdiction to issue injunctions to prevent or abate nuisances.

And although injunctive or abatement relief may carry some financial cost, the costs are incidental to the equitable relief sought and distinct from monetary damages. Ohio law has long recognized that distinction, and it is a distinction worth preserving. The federal district court's decision, however, ignores the line between equitable relief in the form of an abatement order and the legal remedy of monetary damages. The judicial power to abate public nuisances arose out of courts' equitable jurisdiction and judicial action in a public nuisance case should be confined to actual abatement rather than compensating government entities with a monetary remedy.

Besides departing from the solid judicial reasoning of the past five centuries and the Ohio jurisprudence incorporating it, awarding monetary damages to

government entities creates the unhealthy incentive for government entities to address public policy problems by tapping, via litigation, the deep pockets—or perceived deep pockets—of politically unpopular industries. Other public nuisance lawsuits resolved through mass settlements have demonstrated that even with explicit usage instructions and the governments' intentions to use funds for a designated purpose related to the gravamen of the suit, these instructions and intentions give way when other funding priorities appear.

Regardless of whether the payments are couched in terms of equitable remediation, government actors treat the payments as monetary damages to be spent however they see fit. And regardless of the gravity of the public policy problem at issue, this amounts to a government shakedown. Equity requires those who caused public nuisances to abate them. But as the very existence of the federal litigation shows, the concept of using monetary awards to compensate a government entity for funds spent or expected to be spent tempts those governments to seek recovery from not only those who actually caused the harm, but to supposed deep-pocketed actors whose role was minimal.

For these reasons, the Court should clarify that Ohio law recognizes and preserves the distinction between equitable nuisance abatement and compensatory monetary damages, and that the public nuisance claim asserted in this case is subsumed into OPLA.

ARGUMENT

In the past decade, opioid misuse has destroyed or damaged millions of American lives. To address this drug abuse epidemic, Plaintiffs invoked the federal district court's equitable power to abate a public nuisance but sought damages under the guise of an "abatement award." But equity does not allow the transmutation of abatement into damages, and OPLA does not permit such a remedy.

A. The Question Presented incorrectly assumes that equitable abatement permits monetary damages.

The question presented assumes things which are not so. It asks if OPLA abrogates public nuisance claims "in which plaintiffs seek equitable abatement, including both monetary and injunctive remedies." But that incorrectly assumes that equitable abatement claims by the public entities here can seek "monetary" remedies in a public nuisance case.

Plaintiffs seek to evade OPLA, claiming that OPLA does not include claims for equitable relief. The governments argue:

> If the legislature had intended OPLA to establish a required showing for, or to bar, claims for equitable relief, the legislature would have included such a provision. Its failure to do so is presumptively intentional.

Prelim. Memo. of Pl.-Appellees/Resp. Trumbull Co. and Lake Co. at 8 (Oct. 2, 2023). First, Amicus agrees with Defendants that OPLA abrogates all common-law product-liability claims, including any public nuisance claim arising out of the sale

of a product, regardless of whether they seek compensatory damages or equitable abatement. But even assuming *arguendo* that Plaintiffs argument is valid, that does not address the issue regarding what constitutes equitable relief. Plaintiffs concede that the 2007 amendment to OPLA "clarify[ied] that a public-nuisance theory otherwise meeting the statutory definition of a 'products liability claim'—that is one seeking compensatory damages—is embraced by OPLA." *Id.* at 12. But embedded in Plaintiffs' argument—as it is in the question presented—is the assumption that the relief granted here is an abatement. To the contrary, the federal district court awarded 650 million dollars in compensatory damages but simply re-labeled the monetary award as an "equitable abatement award." *In re Nat'l Prescription Opiate Litig.*, 622 F.Supp.3d 584, 606 (N.D.Ohio 2022), *judgment entered*, N.D.Ohio No. 1:17-MD-2804, 2022 WL 4099669 (Aug. 22, 2022).

The district court asserted that it had "repeatedly, but with limited success, attempted to help Defendants understand the difference between an abatement remedy, such as this, and a damages award." *Id*. In an effort to justify its "equitable abatement award" as a form of abatement, the court repeatedly referred to out-of-state jurisdictions. Ohio law, however, does not support the court's understanding.

Specific remedies are designed to address specific wrongs. And equitable remedies are different than legal remedies. Equitable remedies permissible for remedying public nuisances are injunctions and abatement. Injunctions tell the

offender to not do something. *State ex rel. Great Lakes Coll., Inc. v. Med. Bd.*, 29 Ohio St.2d 198, 201, 280 N.E.2d 900 (1972) ("An injunction ordinarily is employed to prevent future injury * * * ."). To abate something is to stop it, or to "eliminat[e] or nullify[]" it. ABATEMENT, Black's Law Dictionary (11th ed. 2019). See also *City of Toledo v. Jackson Indus. Corp*., 6th Dist. Lucas, Nos. L-17-1135, L-17-1136, L-17-1137, 2018-Ohio-2592, ¶ 32 ("The dictionary definitions of 'abate' include 'to decrease in force or intensity * * * to decrease in amount of value * * * to put an end to.' Merriam-Webster, https://www.merriam-webster.com/dictionary/abate (accessed May 29, 2018)."). *See, e.g., State, ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992) (closure of bookstore found to be a public nuisance was "abatement" of the nuisance). None of these suggests an award of monetary damages. Monetary damages are a remedy at law, not in equity. *See Cirino v. Ohio Bur. of Workers' Comp.*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, ¶ 47–53 (distinguishing between "money damages to compensate [one] for losses they suffered or would suffer," and specific equitable relief).

Never before has any Ohio court suggested that any damages—let alone an enormous—over half-a-billion-dollar award—be construed as an abatement. Assuming that Plaintiffs' theory is correct that a common law cause of action for public nuisance abatements still exists or applies here, the legislature surely did not

anticipate that a court would bypass OPLA's abrogation of public nuisance claims seeking compensatory damages by re-labeling monetary awards as "abatement funds."[1] Neither the district court nor Plaintiffs presented any Ohio law to support such a novel legal claim.

The history of the remedies available to address public nuisances demonstrates that the district court's analysis of OPLA is misguided.

[1] Early in the case the presiding judge below explained his intentions as follows: "So my objective is to do something meaningful to abate this crisis and to do it in 2018. And we have here — we've got all the lawyers. I can get the parties, and I can involve the states. So we'll have everyone who is in a position to do it. And with all of these smart people here and their clients, I'm confident we can do something to dramatically reduce the number of opioids that are being disseminated, manufactured, and distributed. Just dramatically reduce the quantity, and make sure that the pills that are manufactured and distributed go to the right people and no one else, and that there be an effective system in place to monitor the delivery and distribution, and if there's a problem, to immediately address it and to make sure that those pills are prescribed only when there's an appropriate diagnosis, and that we get some amount of money to the government agencies for treatment. Because sadly, every day more and more people are being addicted, and they need treatment. * * *.

But that's what — I think we have an opportunity to do it, and it would be an abject abdication of our responsibility not to try it. And if we can't, then we've got to do the other way. And if we can get some general agreement that we should try it, then we'll figure out today, how do we organize that effort, who is not here that we need to get involved, and we'll get about doing it and what help I'll need." Jack Fowler, *Is Settling the Opioid Crisis the Job of a Maverick Judge?*, Jack Fowler, National Review (June 24, 2021), https://tinyurl.com/562nd6mf (accessed Jan. 3, 2024).

B. The history and development of public nuisance law and court's equitable jurisdiction.

Public nuisance is an ancient legal doctrine dating back to before our nation's founding. Over a century ago, the United States Supreme Court in *Mugler v. Kansas* recognized this long pedigree:

> "In regard to public nuisances, * * * the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction."

Mugler v. Kansas, 123 U.S. 623, 672–73, 8 S.Ct. 273, 31 L.Ed. 205 (1887), quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 921, 922 (1839).

The *Mugler* Court noted the advantages in a court's exercise of its equity jurisdiction to address public nuisances, particularly the ability of courts sitting in equity "to give a more speedy, effectual, and permanent remedy than can be had at law." *Id.* at 673. The virtues of using equitable remedies to address public nuisances also included the ability to "prevent nuisances that threatened, and before irreparable

mischief ensures" but also to "arrest and abate those in progress, and by perpetual injunction, protect the public against them in the future." *Id.*

To be sure, the equitable abatement of public nuisances often results in the responsible party expending funds to comply with the court order. An order requiring a company to take additional steps in disposing of waste into public waters or onto public lands, for example, or preventing the escape of pollutants into the atmosphere will likely incur compliance costs. Likewise, a company ordered to correct its encroachment on public properties or spaces will incur costs in so doing. But in those cases, the offending party does not pay the government—it simply has to take steps to abate the nuisance—even if it costs money to do so. "There is no historical evidence [] that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance." Donald G. Gifford, *Pub. Nuisance as a Mass Products Liab. Tort*, 71 U.Cin.L.Rev. 741, 782 (2003). Instead, the government remedies were "restricted to prosecution or abatement, or both." *Id.*

The drafters of the Restatement (Second) of Torts took up the question of who can recover monetary damages for a public nuisance. The Restatement recognizes that only individuals injured by a public nuisance may recover monetary damages because they have suffered a harm different in kind from the "harm suffered by other members of the public exercising the right common to the general public that was

the subject of the interference." 4 Restatement of the Law, 2d, Torts, Section 821C (1979). In contrast, a suit to enjoin or abate a public nuisance is available to either a member of the public who has suffered special injury or a public official or public agency representing the state or a political subdivision. *Id*.

This distinction is consistent with the history of public nuisance law. The public nuisance doctrine arose in twelfth-century England as a quasi-criminal action by the Crown. Adam Coretz, Note, *Reparations for A Pub. Nuisance? The Effort to Compensate Survivors, Victims, & Descendants of the Tulsa Race Massacre One Hundred Years Later,* 43 Cardozo L. Rev. 1641, 1649–50 (2022). At that time, the King invoked public nuisance to bring suit against anyone who infringed on the rights of the Crown in order to stop the infringement, and he required the offending party to repair the damage. *Id.* at 1649. Notably, the remedy was the King's alone and tied to the damage done.

But in the fourteenth century, the common law public nuisance claim developed to provide an individual right to obtain particular monetary damages for infringements on "rights common to the public."

> In 1535, an English court, for the first time, allowed individuals to sue and recover damages under the doctrine. The case involved the blocking of a highway and set the precedent that an individual who had

> suffered "particular damages" could file a public nuisance suit to recover those damages.

(Citations omitted.) Victor E. Schwartz & Phil Goldberg, *The Law of Pub. Nuisance: Maintaining Rational Boundaries on A Rational Tort*, 45 Washburn L.J. 541, 544 (2006). But "the individual could not sue for injunction and abatement because those actions were reserved solely for the Crown." *Id.* In other words, as the present-day Restatement continues to recognize, public nuisance law envisions two distinct types of plaintiffs and provides distinct and exclusive remedies for each. Suing to abate a public nuisance has always been quasi-criminal in nature and the prerogative of the government.

American law adopted public nuisance as a "species of catch-all low grade criminal offense." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966). The rule remained, however, that while citizens suffering an individualized injury could sue for their damages, governments were limited to criminal or equitable remedies. This distinction makes sense considering that the government's purpose in prosecuting and abating the nuisance was to serve the citizenry at large rather than compensate specific citizens for specific harms done to them.

Ohio courts have followed the Restatement, citing Professors Prosser and Keeton, to hold that "[h]istorically, public nuisance was criminal in nature and

recovery in damages is limited to those who can show particular harm of a kind different from that suffered by the general public." *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (4th Dist.1993).

The Eighth District Court of Appeals held that in the context of a specific insurance policy, an abatement fund awarded by a California Court[2] under a California code provision[3] *constituted damages* and so those "damages" were covered by the insurance policy. *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 8th Dist. Cuyahoga No. 110187, 2022-Ohio-3031, ¶ 67, *appeal allowed,* 170 Ohio St.3d 1418, 2023-Ohio-1507, 208 N.E.3d 859. The California-mandated abatement fund was to "reimburse the government's costs." *Id*. The *Sherwin-Williams* court also cited with approval the following language from the California case:

> An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued

[2] *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 227 Cal.Rptr.3d 499 (2017), *pet. for cert. denied ConAgra Grocery Prod. Co. v. California*, 139 S.Ct. 377, 202 L.Ed.2d 288 (2018).
[3] Notably, California law does not have a law comparable to OPLA and its case law regarding equitable relief is guided by a California law. OPLA precludes damages awards—by any name—to governmental entities.

> harm that has resulted from the defendant's wrongful conduct. The distinction between these two types of remedies frequently arises in nuisance actions.

Id. at ¶ 13, quoting *ConAgra Grocery Prod. Co.*, 17 Cal.App.5th at 131, 227 Cal.Rptr.3d 499, *pet. for cert. denied ConAgra Grocery Prod. Co. v. California*, 139 S.Ct. 377, 202 L.Ed.2d 288.

Discussing the different remedies available to government versus private plaintiffs, Professors Schwartz and Golding have echoed the Restatement, noting that "[w]hen government serves as the plaintiff and is suing in its role as the sovereign, only injunction or abatement remedies are appropriate." Schwartz et al., 45 Washburn L.J. at 570. According to Schwartz and Golding, the rationale for this rule—beyond the distinction's long history—is twofold. First, allowing governments to collect monetary damages for a public nuisance is inappropriate because "[e]ven when it acts in the name of public health, the state is not the party who has suffered the special damages being sought." *Id*., quoting Gifford, 71 U.Cin.L.Rev. at 784–785. Second, "the free public services doctrine," which prohibits a government entity from assessing the costs associated with the performance of governmental functions to a few disfavored tortfeasors, rather than the public at large, bars the remedy that the trial court seeks to impose. *Id.* In other words, costs that the government would ordinarily incur to abate some social ill—in

this case, funding drug courts, addiction recovery services, etc.—must "be borne by the public as a whole and cannot be assessed against an individual tortfeasor." *Id.*

The federal district court justified its expansion of public nuisance remedies to effectively impose compensatory damages on this thin reed: "In Ohio '[w]hen a nuisance is established, the form and extent of the relief designed to abate the nuisance is within the discretion of the court.' 72 Ohio Jur. 3d Nuisances § 49." Abatement Order at 8, *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804-DAP, (Aug. 17, 2022). But contrary to the district court's suggestion, that discretion is not unlimited—and it certainly does not allow the court to award prospective damages. Indeed, the federal district court ignored the remainder of the Ohio Jurisprudence entry that explained the different types of abatement Ohio Courts have authorized—"narrowly tailored" orders "adequate to eliminate the nuisance," or "perpetually enjoin[ing] the defendant[s] * * * from maintaining the nuisance." 72 Ohio Jur. 3d Nuisances § 49. Instead, the federal district court used the first sentence as a license to create new law in Ohio. According to the court, in "exercising its equitable powers," the court has the discretion to craft a remedy that will require Defendants * * * to pay the prospective costs that will allow Plaintiffs to abate the Opioid crisis." *See* Abatement Order at 8, *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804-DAP, (Aug. 17, 2022).

The court cited no Ohio authority supporting its newly minted version of abatement that looks more like compensatory damages than an injunction or abatement. That is because there is no such authority—Ohio courts have long hewed to the distinction between legal and equitable remedies and recognized that a court acting in equity lacks the authority to order monetary damages. The few Ohio cases the federal district court did cite did not award a monetary remedy such as the district court ordered.

In *State ex rel. Miller v. Anthony*, 72 Ohio St.3d 132, 647 N.E.2d 1368 (1995), this Court explained the interaction between law, equity, and the right to jury trials under the Ohio Constitution. The question in *Miller* was whether a right to a jury trial attaches in a public nuisance abatement action. In that case, Miller, the Franklin County Prosecuting Attorney, brought a public nuisance abatement action against Anthony, a drug dealer, pursuant to R.C. 3719.10, which declares properties on which felony drug offenses occur to be public nuisances. As part of the abatement, the county sought and the court authorized a permanent injunction enjoining Anthony from maintaining the nuisance on his current, or any other property. *Id.* at 138. Anthony objected that he had been denied a jury trial in violation of Section 5, Article I of the Ohio Constitution. *Miller* held that because the abatement order was designed to prevent the continued nuisance (i.e. drug dealing) it was a purely equitable action and Anthony was therefore not entitled to a jury.

The *Miller* Court began by noting the distinction between an equitable abatement action and a common law suit, noting that "[a]s early as 1893, the United States Supreme Court defined an abatement action as 'not a common law action, but a summary proceeding more in the nature of a suit in equity * * *.'" *Id.* at 136, citing *Cameron v. United States*, 148 U.S. 301, 304, 13 S.Ct. 595, 37 L.Ed. 459 (1893). This Court was clear that the nature of the relief sought—injunctive versus legal—determines in part the process afforded. Because "[n]uisance abatement actions seek injunctive relief and, as such, are governed by the same equitable principles that apply to injunctive actions generally," a "[jury] trial is not required." *Id.*, quoting *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. 545, 551, 17 L.Ed. 333 (1863), and *Mugler*, 123 U.S. at 673, 8 S.Ct. 273, 31 L.Ed. 205. The court explained that the state has the authority to move quickly to abate a public nuisance without the process required by a jury trial. But that ability to act quickly and fashion a flexible equitable remedy comes with a price: The remedy must be "designed to prevent the continuation of unlawful acts rather than [as] a punishment for unlawful activity." *Id.* at 138.

Likewise, Ohio law is clear that "[a] public nuisance provides a basis for recovery of damages by individual plaintiffs only where the injury suffered is a 'particular harm * * * that is of a different kind than that suffered by the public in general.'" *Kramer v. Angel's Path, L.L.C.*, 174 Ohio App.3d 359, 2007-Ohio-7099,

882 N.E.2d 46, ¶ 16 (6th Dist.), quoting *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 714, 622 N.E.2d 1153 (4th Dist.1993). In this case, however, the court-ordered payments appear aimed at compensation, not at enjoining or otherwise preventing future wrongs. Moreover, it is unclear how the damages suffered by the plaintiffs—local government entities—are any different than those suffered by the public in general. Indeed, local governments represent the "public in general." To the extent that those governments claim to have suffered economic losses by the costs they have incurred and will incur in dealing with the opioid epidemic, those economic losses are economic losses to the public at large.

To be sure, the federal district court's decision describes the over $650 million payments over 15 years as "abatement" of the nuisance rather than monetary damages and goes to great lengths to put an equitable gloss on its award. But what matters is not the label the court applies to the payments, but the reality of what the payments are—money—and how they can be used. To local governments, revenue by any other name would smell as sweet. Further, the 1998 multi-state tobacco settlement provides a prominent example of how governments sometimes re-purpose funds designated to address a particular issue.

C. The 1998 tobacco settlement shows how governments redirect funds designated for curing a particular social ill.

Not only are courts guided by precedents and legal theory, but they are also guided by experience in the application of the law and equity. Indeed, if we do not learn from our mistakes of the past, we are likely to repeat them.[4]

Defendants' appellate brief properly addressed the inherent problems with the federal district court's methodology in computing the abatement costs. See Appellants' Consolidated Brief ECF #28, December 1, 2022, at 87-90. But even if the district court's predictions were spot-on accurate, it is merely a speculative assumption that the funds awarded today will actually reach the promised abatement programs or that they will be effective in the supposed abatement. This is another reason why it is wrong to apply a pseudo-damages remedy to a public nuisance claim.

Ohio's experience with the 1998 settlement between major tobacco companies and 46 states provides a cautionary tale in awarding monetary damages in the hope of remediating a social ill. In that 1998 tobacco settlement, state governments received $246 billion to restrict cigarette sales and marketing by forbidding manufacturers from targeting youth and banning specific types of media

[4] "Those who cannot remember history are condemned to repeat it." George Santayana, Vol. I, The Life of Reason. This aphorism holds special meaning for the practice of law * * * ." *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 747–48 (D.Colo.1987).

(e.g., cartoons). The settlement funds were also to be used for prevention and cessation programs. Michele Gilbert, *What History's Big Tobacco Settlement Means for Today's 'Opiod Remediation*', https://bipartisanpolicy.org/blog/big-tobacco-opioids/ (accessed Jan. 3, 2024).[5] A retrospective assessment conducted 20 years after the settlement by an anti-tobacco advocacy coalition, however, showed that "less than 3% of the settlement funds were used for programs to prevent kids from smoking and to help smokers quit." Campaign for Tobacco Free Kids, *Broken Promises to Our Children*, https://www.tobaccofreekids.org/what-we-do/us/statereport (accessed Jan. 3, 2024). Because money is always fungible, there is no guarantee that payments earmarked for addressing particular problems will arrive at their intended destination. Politicians can display an almost child-like

[5] Notably, the claims against the tobacco manufacturers which resulted in the Tobacco Master Settlement Agreement were not premised on public nuisance claims but rather other claims that were not the basis for any decision in this case. Moreover, the tobacco companies undoubtedly signed the Tobacco Master Settlement Agreement, at least in part, because they knew they could recover any settlement funds paid out with price increases with their addictive product—and they did. "Cigarette prices surged 45 cents per pack on November 16, 1998, the day the Master Settlement Agreement (MSA) was signed. Cigarette manufacturers raised prices to cover the cost of the settlement." Thomas C. Capehart, *Trends in the Cigarette Industry After the Master Settlement Agreement*, U.S Dept. of Agriculture (October 2001), www.ers.usda.gov/webdocs/outlooks/39455/31534_tbs250-01_002.pdf?v=7312.4 (accessed Jan. 3, 2024). If the judgment here stands, the pharmacy defendants will likely just increase their prices to pay the damages award. That ultimately punishes consumers—who had nothing to do with the illicit drug abuse—rather than stopping, i.e. abating, the opioid abuse epidemic.

imagination in re-purposing, re-classifying, and re-labeling programs in order to qualify them for otherwise earmarked money.

Ohio's own use of tobacco settlement proceeds stands as an example of the insecurity of special set-asides. Following the settlement, the State began by taking prudent steps to evaluate how it would spend the State's initial $330 million payment. In 1999, Governor Bob Taft and the General Assembly created the Tobacco Settlement Task Force in Ohio to develop spending recommendations. The task force conducted a series of public meetings and deliberations and reviewed research and analysis before presenting its recommendations. *See* Ken Slenkovich, *Ohio's Tobacco Master Settlement Agreement: History, Lessons Learned and Considerations for Ohio*, The Center for Community Solutions, https://tinyurl.com/3bzm6jea (accessed Jan. 3, 2024.) The Task Force based its recommendations on the U.S. Centers for Disease Control and Prevention's *Best Practices for Comprehensive Tobacco Control Programs*, "a guide for states that summarized the best available information at the time regarding programs shown to be effective in reducing tobacco use." *Id.*

In 2000, largely following the Task Force's recommendations, the legislature enacted S.B. 192, which stipulated how funds from the settlement would be distributed and used in the state. The legislation "specified that all MSA funds would be deposited into the state treasury to the Master Settlement Agreement Fund (MSA

Fund). It also created eight funds in the treasury into which money would be transferred from the MSA Fund." *Id.* The bill included language requiring at least some of the money from three of the funds to be used for activities tied to tobacco-related concerns and specifically created an endowment to fund programs to reduce Ohioans tobacco use, focusing on "youth, minority and regional populations, pregnant women, and others disproportionately affected by tobacco use." *Id.*

This seemed like a solid and responsible plan to ensure that the settlement funds were spent for their intended purpose—preventing tobacco use. But as onetime Ohio resident Mike Tyson observed, "[e]veryone has a plan until they get punched in the mouth." Mike Berardino, *Mike Tyson explains one of his most famous quotes*, South Florida Sun-Sentinel, https://tinyurl.com/hmtzn2f8 (accessed Jan. 3, 2024). The punch in the mouth came in the form of the 2008-2009 Great Recession. Ohio's employment rate rose to 10.3% and the state found more pressing needs for the tobacco settlement funds. Slenkovich, *supra*. The legislature diverted *all* of the existing funds from Tobacco Use Prevention and Cessation Trust Fund ("TUPCF") to "a job-creation fund." *Id.* When the TUPCF'S board "took action to prevent the diversion, the state abolished the foundation" and absorbed all of the TUPCF's funds into the state's general revenue fund. The General Assembly later authorized the State Treasurer to securitize the right to future payments and sell capital appreciation bonds backed by future settlement payments. In essence, "the state sold its rights to

future [settlement] payments in exchange for a lump sum." *Id*. Thus, the funds placed in trust for the specific purpose of funding smoking cessation and prevention were converted into monetary damages. As a result, "virtually overnight, Ohio went from having one of the best-funded tobacco control programs to one of the worst-funded." Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. Kan. L. Rev. 1029, 1042 (2019).

Ohio "is emblematic of what happened in a number of other states. * * * Ultimately, in nearly every state, the plan to make long-term, sustained investments in tobacco control was not realized and successful tobacco control programs were dismantled--often as the result of budgetary pressures." *Id*.

Although the federal district court believes that systems could be put in place to ensure that the monetary award is used to abate the opioid crisis, it is unclear how such an enforcement mechanism would operate. On the one hand, allowing the various local governments free rein to use the funds would seem to invite the sort of mischief manifest in the use of the tobacco funds. But what appears to one taxpayer as "mischief" may seem to another to be wise use of resources during a crisis. Not to mention robust court enforcement over sizeable government expenditures raises its own problems. It is a thin line between court monitoring of expenditures and court micromanagement of local government's drug policies. Neither option is appealing from the perspective of government accountability. Policymakers relying on

litigation winnings become insulated from voters regarding how that monetary award is spent. New approaches to public policy problems are stymied by the need for court approval. Ineffective policy solutions become immune to review once they are blessed by the court. Reliance on money won in litigation to fund ongoing government services thus raises a significant separation of powers issue.

Ohio's Tobacco Master Settlement misadventure is instructive as to why misapplying public nuisance abatement to compensatory damages is an illegitimate legal theory. The longstanding distinction between equitable relief and monetary damages reflects our constitutional separation of powers. Legislatures have the authority to raise taxes and direct the expenditure of those funds. Courts—which are by design less responsive to the political winds—properly lack the power to raise money for the public fisc.

CONCLUSION

The old rule limiting government plaintiffs to equitable relief in public nuisance actions has stood for nearly half a millennium. Ohio has never recognized the type of abatement through payment of money that the federal district court has proposed, and it should not do so now. Money is fungible, and history has shown that fact to be particularly true when the money is in the government's hands. Allowing governments to fund themselves through litigation rather than legislation and appropriations creates its own risk of addiction. For all the foregoing reasons,

the Court should hold that Ohio law does not permit the remedy that the district court seeks to impose and consequently the remedy sought by the governmental Plaintiffs is subsumed into OPLA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 8th day of January, 2024.

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