No. 19-1692

United States Court of Appeals for the Third Circuit

ROBIN BAPTISTE AND DEXTER BAPTISTE,
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

BETHLEHEM LANDFILL COMPANY,
A DELAWARE CORPORATION DOING BUSINESS AS
IESI PA BETHLEHEM LANDFILL,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
Case No. 18-2691

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, AND THE PENNSYLVANIA FARM BUREAU

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United States Court of Appeals for the Third Circuit

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

No. 19-1692

ROBIN BAPTISTE AND DEXTER BAPTISTE,
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

v.

BETHLEHEM LANDFILL COMPANY

Under Rule 26.1 and Third Circuit LAR 26.1, the amici, Chamber of Commerce of the United States, the Pennsylvania Chamber of Business and Industry, and the Pennsylvania Farm Bureau, making the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For all non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant.

Not applicable.

/s/ Robert L. Byer
Counsel for Amici

August 12, 2019

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INTRODUCTION[1]

Public and private nuisance law is common law land use law developed before the adoption of regulatory programs designed to regulate land use and protect the public good. Nuisance law is notoriously difficult in application and courts have, for good reason, retained strict doctrinal boundaries. Pennsylvania's common law developed two distinct categories of nuisance. It recognizes a private cause of action, for one or relatively few plaintiffs injured by a neighbor's activities, as a "private nuisance." (Private nuisances are sometimes referred to as "small numbers cases.") And it recognizes an exclusive cause of action for the state, acting through its police power, to address activities injuring large numbers of citizens or the public at large as a "public nuisance." (Public nuisances are sometimes referred to as "large numbers cases.") Although public nuisance claims are the state government's prerogative, the common law recognizes one narrow exception, allowing a private action only where a public nuisance causes

[1] Amici curiae secured consent for the filing of this brief from all parties.

"special damage" to one or few individuals over and above that suffered by the public.

Plaintiffs assert that claims by 8,000 households (with 20,000 people) across more than 19 square miles can satisfy the special injury requirement. But that is not Pennsylvania law. The district court correctly recognized that claims by 8,000 households sound, if at all, in public nuisance, not private nuisance, and thus Plaintiffs could not rely on their so-called private nuisance claims to establish a private cause of action against the alleged public nuisance.

Nor should it be the law. The logic behind confining private nuisance to small numbers cases and allowing only a narrow special injury exception for large numbers cases is that diffuse (alleged) harms present problems uniquely suited to legislative solutions and administrative regulation. Nuisance law is judicial land use law. It abuts legislative and administrative land use law. Thus, preserving the bounds of nuisance not only furthers the rule of law through doctrinal consistency, but also protects the separation of powers. Those concerns are not simply theoretical: the Pennsylvania General Assembly has

allocated comprehensive regulatory oversight to agencies and administrative hearing boards for addressing diffuse harms, including those related to solid waste management.

Reversing the district court would shift policymaking responsibility away from Pennsylvania's chosen agencies and toward ad hoc and potentially inconsistent judge-made law. Such a shift would create disincentives for compliance and remediation, the better to save for inevitable and expensive litigation. Thus, in addition to disrupting the doctrinal boundaries of Pennsylvania nuisance law and the General Assembly's chosen allocation of policymaking power, a reversal would entail negative and unnecessary consequences for Pennsylvania's culture of regulatory compliance. This Court should affirm.

STATEMENT OF INTEREST

The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. More than 96% of the U.S. Chamber's members are small businesses with 100 or fewer employees. An important function of the U.S. Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

The Pennsylvania Chamber is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ more than 50% of Pennsylvania's private workforce. The Pennsylvania Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

The Pennsylvania Farm Bureau is the largest farmers' association in Pennsylvania, with a statewide membership of more than 53,780 farm and rural families in the Commonwealth. The Pennsylvania Farm Bureau advocates for small and large farms. And those farms currently managed by Pennsylvania Farm Bureau members – whether small or large – are predominantly family owned and operated. Its mission is to provide Pennsylvania's farmers with legislative support, information, and services to ensure that Pennsylvania maintains a hospitable environment for farmers to conduct their crucial work on the land, and the challenging and volatile economic and natural forces they often face in viably sustaining their farming operations.

The district court's decision preserved the ability of members of the U.S. and Pennsylvania Chambers and the Pennsylvania Farm Bureau to coordinate with stable, identifiable decision makers in regulatory agencies. In order to provide crucial services, businesses and farms require stable compliance and remediation expectations. Ad hoc nuisance litigation would destroy the ability to predict costs, and thereby reduce investment and quality of goods and services. It would also

circumvent the policy decisions and compromises of the Pennsylvania General Assembly.

The amici have secured the consent of all parties for the filing of this brief. Amici state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no other person contributed money that was intended to fund preparing or submitting this brief other than the amici and their counsel. *See* Fed. R. App. P. 29(a)(4)(E).

ARGUMENT

Nuisance law is judicial land use law. Judicial land use law is notoriously difficult for courts to apply. For the sake of the rule of law and the proper balance of policymaking power, courts must maintain strict doctrinal boundaries for nuisance.

Allowing 8,000 households across more than 19 square miles to state a claim for private nuisance and special injury for public nuisance runs contrary to nuisance law's historical boundaries. Pennsylvania law tracks those historical boundaries, and the General Assembly has chosen to allocate comprehensive regulatory responsibility to the Department of Environmental Protection, with further regulatory powers lodged in the Environmental Hearing Board and the Environmental Quality Board. The district court's decision honors Pennsylvania's doctrinal boundaries and its legislature's choice for allocating policymaking decisions. A contrary decision would expose businesses that provide crucial services to crushing verdicts untethered to cost-benefit analysis. That would encourage investment in litigation as opposed to cooperative remediation measures, making everyone worse off.

A. The Historic Boundaries of Nuisance Law

The common law makes sense of nuisance doctrine by "divid[ing] land-related environmental controversies into small and large numbers cases." Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J. L. & PUB. POL'Y 517, 526 (1992). Private nuisance arose in order to settle disputes between adjoining landowners. *See* William McRae*, The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 37 (1948) (describing early cases of private nuisances). In contrast, public nuisance "affected the whole community" and "was exclusively a matter for the local criminal courts, and the common law courts had no jurisdiction over it." J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L.J. 55, 59 (1989).

In 1536, the common law introduced a narrow exception, giving a "private right of action … only to those people who suffer 'special' damages, which are those above and beyond the general damages suffered by the population at large." Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L.J. ONLINE 317, 323 (2011).

Aside from "the special damages inflicted on one or two persons," the state retained its exclusive power to address large numbers cases. *Id.*

Instead of opening the floodgates to litigation, early Anglo law placed large numbers cases under "the jurisdiction of an administrative body known as the Court Leet that could impose an appropriate fine." *Id.* at 324. Instead of subjecting crucial activities to extensive litigation for damages "large enough to capture the entire social loss," the administrative body could impose fines that would "only exceed the costs of the wrongdoer's precautions that – if taken – would have avoided" the harm, as well as ordering removal, abatement, or remediation measures. *Id.* Thus, private actors could continue to provide important services to the public, and administrative bodies, not private litigants, would address any alleged widespread harms through efficient penalties.

The rise of social legislation and regulatory agencies in the past century bolsters the case for reserving large numbers cases for the state. Public nuisance generally, and the special injury exception in particular, arose as a gap-filling measure long before social legislation and today's

comprehensive regulatory agencies. *See* McRae, *The Development of Nuisance*, 1 U. FLA. L. REV. at 28, 35 (discussing the development of nuisance law in the 13th and 14th centuries). Thus, "blossoming national and state regulation of activities and industries … further displaced and precluded the tort's applicability, relegat[ing] it to such a minor role that it was not even included in the First Restatement of Torts published in 1939." U.S. CHAMBER INST. FOR LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE 3 (Mar. 2019), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf.

"The onset of the Progressive Era and the New Deal saw a substantial reduction in both governmental actions for public nuisance … and actions brought by individuals seeking special damages or extraordinary damages." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CINN. L. REV. 741, 805 (2003). Although nuisance reemerged in the next edition of the Restatement, the concerns for separation of powers and public policymaking remained. *See*

Restatement (Second) of Torts § 821C, cmt. b (1979) (noting the "difficulty or impossibility of drawing any satisfactory line for each public nuisance" and that "invasions of rights common to all of the public should be left to be remedied by action by public officials"). Thus, "[i]t is possible … to trace the heritage of private law concepts into problems which, solely because of their bulk and unwieldiness, have become the proper subject of the public law." Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 102 (1979).

B. The Problems with Judicial Land Use Control

The Supreme Court has lamented the "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987). "'There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Kennedy, J., concurring) (quoting W. PAGE

KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

In every nuisance inquiry, courts must determine the "utility" of the alleged nuisance, including its "social value," the "suitability of the conduct to the character of the locality," and the "impracticability of preventing or avoiding the invasion." RESTATEMENT (SECOND) OF TORTS § 828. Courts must also weigh, among other things, "the burden on the person harmed of avoiding the harm" and the "social value" of the aggrieved party's activities. *Id.* at § 827. Those are not rules of law as typically understood. Those are value judgments. Thus, nuisance cases of even one plaintiff and one defendant stretch the institutional competencies of courts in order to determine liability. *See Lucas*, 505 U.S. at 1030 (describing private nuisance law as applying to "adjacent private property"). Yet when it comes to widespread and diffuse harms, forcing courts to make those value judgments on behalf of the public becomes even more unworkable and inappropriate. Determining "social value" writ large is a quintessentially legislative function.

Even if the courts were competent to determine liability in some cases of diffuse harms, attempting to craft a proper remedy would take courts even further beyond their proficiencies. Many "nuisances" are in fact crucial services, like solid waste storage or farming. A simple judicial order to halt operations would be improper. Instead, the goal in such cases must be to reduce emissions "to low levels, not total elimination." Epstein, *Nuisance Law*, 8 J. LEGAL STUD. at 102. Thus, a proper remedy must involve regulation and oversight, including "direct emissions controls, taxes, quotas, impact statements, and any other device that legal and technical minds might devise." *Id.* Compared with legislatures and agencies, courts lack the ability and resources to conduct continued regulation and oversight.

The legislature sets policy through balancing various interests and forging compromises. *See generally* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012). After determining the utility of various activities and the proper weighing of competing social values, the legislature then delegates oversight to regulatory agencies. Unlike courts, those agencies can

commission scientific studies, implement technological controls, and perform routine inspections. On behalf of legislatures, agencies also set uniform policies for compliance and remediation, unlike the non-precedential and potentially inconsistent (or at least non-uniform) judgments of trial courts. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (contrasting institutional competence of agencies with courts regarding pollution issues). Thus, the ability of courts to craft a proper remedy falls far short of agencies. The choice of state legislatures to balance interests and task agencies with regulation strongly counts against a broad reading of public nuisance's special injury exception.

Lawyers have made various efforts at expanding nuisance to encompass pollution policy, lead paint remediation, climate change policy, gun manufacturing, and even product liability law. In response, "courts across the nation have begun to refine the types of cases amenable to a nuisance theory." *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). "Otherwise … nuisance law would become a monster that would devour in one gulp the entire law of tort," *id.* (quotations omitted), as well as whole areas of

public policy. *Am. Elec. Power Co.*, 564 U.S. at 428. "Every automobile, for example, creates a nuisance by the emission of smoke and other pollutants; yet it is inconceivable for practical reasons to entertain the prospect of systematic redress for each violation of individual rights." Epstein, *Nuisance Law*, 8 J. LEGAL STUD. at 101. Thus, it is "entirely fitting" for a legislature to designate an expert agency to address diffuse harms. *Am. Elec. Power Co.*, 564 U.S. at 428.

C. Pennsylvania's Solution to the "Impenetrable Jungle" of Nuisance

Pennsylvania courts recognize the fault lines within nuisance law and have worked to form manageable doctrinal boundaries. *See Golen v. Union Corp.*, 718 A.2d 298, 300 (Pa. Super. 1998) (explaining that "courts must determine sensible limits to liability under this potentially sweeping concept" of nuisance); *see also id.* ("Admittedly, a broad reading of the Restatement definition … is broad enough to encompass virtually all harms."). Consistent with the history of the common law, Pennsylvania permits three forms of nuisance causes of action: (1) private nuisance suits by one or a few private citizens, (2) public nuisance suits by the

state, and (3) public nuisance suits by select private citizens who suffer special harm, to redress only their own special harm.

Pleading 8,000 to 20,000 interferences with property across more than 19 square miles as a "private nuisance" does not make it so. It is a quintessential diffuse (alleged) harm of public reach and concern. *See Groff v. Borough of Sellersville*, 314 A.2d 328 (Pa. Cmwlth. 1974) ("The difference between a public and a private nuisance does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals."). Thus, the substance of Plaintiffs' allegations is public nuisance, and they must plead something other than the public nuisance itself to establish special injury.

Ratifying Plaintiffs' theory would eviscerate the boundaries of private nuisance and the special injury requirement. Addressing large numbers cases necessarily concerns matters of public policy. The narrow exception for special injury must remain the exception and not the rule.

1. Private nuisance

A private nuisance affects only one or a few properties in close proximity to the source of the alleged nuisance. *See Phillips v. Donaldson*, 112 A. 236, 238 (Pa. 1920) ("[A] private nuisance … affects … merely some private individual or individuals."); *Golen*, 718 A.2d at 301 (rejecting a private nuisance claim, reasoning that allowing the claim would "impose limitless liability … regardless of proximity"). The outer bounds of private nuisance come nowhere close to 8,000 households, 20,000 individuals, and over 19 square miles. *See, e.g., Anderson v. Guerrein Sky-Way Amusement Co.*, 29 A.2d 682 (Pa. 1943) (finding a private nuisance for fifty-four residential landowners who lived within the three-fourths of a mile between outdoor movie theater and a lake); *Bruni v. Exxon Corp.*, 52 Pa. D. & C.4th 484 (C.P. Allegheny 2001) (allowing three-hundred dwelling units to state a private nuisance claim). The most expansive Pennsylvania cases illustrate that Plaintiffs' class falls far outside the boundaries of a private nuisance and, therefore, special injury for public nuisance.

The federal cases construing Pennsylvania law do not help Plaintiffs. *McQuilken v. A & R Dev. Corp.*, 576 F. Supp. 1023 (E.D. Pa. 1983), involved a private nuisance suit for one-hundred-fifty households on one square city block, not 8,000 households across more than 19 square miles. *Diehl v. CSX Transp., Inc.* 349 F. Supp. 3d 487 (W.D. Pa. 2018), addressed a class containing only 12.5% the number of households of Plaintiffs' proposed class, and the defendant mistakenly only pressed a preemption defense to the private nuisance claims. *Bell v. Cheswick*, 2015 WL 401443 (E.D. Pa., Jan. 28, 2015), involved an estimated 1,500 individuals, while Plaintiffs' class here comprises about 20,000 individuals, and the court in *Bell* dismissed the complaint for alleging a "fail-safe" class.

2. Public nuisance

In contrast, a public nuisance in Pennsylvania must affect the public at large, either "directly or consequential[ly]." *Pennsylvania & Ohio Canal Co. v. Graham*, 63 Pa. 290 (1869). Thus, in Pennsylvania, a public nuisance "annoys the whole community in general, and not merely some particular person." *Feeley v. Borough of Ridley Park*, 551 A.2d 373, 375 (Pa.

Cmwlth. 1988); *see also Whitemarsh Twp. v. Cummings*, 7 Pa. D. & C.2d 557, 559 (C.P. Montgomery 1957) (reasoning that, because only seven of one-hundred-five neighborhood households complained of about one neighbor's beekeeping, "[t]he nuisance, if a nuisance at all, is a private nuisance and not a public nuisance"). Consistent with the historic common law, the cause of action against it resides only with the state. *Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enter., Inc.*, 237 A.2d 342, 349 (Pa. 1968); *see also* F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 NAT. RESOURCES & ENV'T 34 (Spring 2010); *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) ("To regulate and abate nuisances is one of [the] ordinary functions" of a state's "police power").

3. Private cause of action for public nuisance

Pennsylvania recognizes the third type of nuisance suit: A private cause of action for damages against a public nuisance where the public nuisance causes a plaintiff special injury different from the public at large. *See City of Philadelphia v. Collins*, 68 Pa. 106 (1871) (defendant obstructed public waterway, causing special damage to a single plaintiff

who, unlike anyone else, was stranded with his cargo for weeks). "The law requires greater and different injury because (1) it is difficult to 'draw any satisfactory line for any public nuisance' and (2) 'to avoid multiplicity of actions, invasions of rights common to all of the public should be left to be remedied by public action by officials.'" *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 446 (3d Cir. 2000) (quoting RESTATEMENT (SECOND) OF TORTS § 821C, cmt. b (1979)) (alterations omitted).

A private nuisance can supply the special injury required. But the private nuisance must be a *genuine* private nuisance—an interference with the use of property that affects a small number of people over and above that suffered by others in the community. *See Pottstown Gas Co. v. Murphy*, 39 Pa. 257 (1861) (recognizing private cause of action where the defendant was "[w]antonly, unnecessarily, or oppressively causing such smells as to annoy the [sole] plaintiff below in a special and peculiar degree beyond others in the immediate vicinity"); *Umphred v. VP Auto Sales & Salvage, Inc.*, 2015 WL 6965725 (Pa. Super. June 24, 2015) (non-precedential) (two plaintiffs successfully brought a private action against

a scrap metal dump for public nuisance based on the special damages the dump caused to their private property, which was located only 200 feet away).

4. Pennsylvania's nuisance law framework compared with other common law jurisdictions

Overruling the district court would place Pennsylvania law outside of the common law norm. "To be a private nuisance, it has variously been said that the interference with or invasion of rights in the use and enjoyment of another's rights in land or property must affect one or a few or a relatively few persons. According to some courts, to be a private nuisance, the interference or invasion must affect or threaten a determinate number of persons." AM. JUR. 2d NUISANCES § 37 (Number of persons affected); *see also* Yandle, *Escaping Environmental Feudalism*, 15 HARV. J. L. & PUB. POL'Y at 525-26 ("Common-law treatment of nuisance … divided land-related environmental controversies into small and large numbers cases.").

Like Pennsylvania, New York also applies nuisance concepts as historically understood. In *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1103 (N.Y. 2001), New York's

highest court addressed a consolidated appeal from cases addressing construction collapses that required businesses to close and "a subclass of area residents [to be] evacuated from their homes." As in Pennsylvania, New York public nuisance is limited to substantial interference with "a common right of the public … or injuring the property, health, safety or comfort of a considerable number of persons." *Id.* at 1104; *see also Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 362 N.E. 2d 968 (N.Y. 1977) ("A private nuisance threatens one person or a relatively few."). The plaintiffs filed several lawsuits, and the trial courts entered divergent orders. *Id.* at 1100. New York's highest court affirmed the trial court rulings ordering dismissal because the plaintiffs "could not show that the harm threatened only one person or relatively few" as required for private nuisance, nor could they "show special damages" to state a private cause of action for public nuisance. *Id.* at 1100, 1104.

Pennsylvania and New York's doctrinal limitations on nuisance prevail throughout the country. Private nuisances are restricted to single or small numbers of properties in close proximity to the alleged harm.

See, e.g., Southwestern Constr. Co. v. Liberto, 385 So.2d 633, 636 (Ala. 1980) ("A private nuisance is one limited in its injurious effects to one or a few individuals.") (quotations omitted); *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n*, 337 N.W. 2d 427, 428 (N.D. 1983); *Rosenblatt v. Exxon Co. U.S.A.*, 642 A.2d 180, 190 (Md. 1994); *Acosta Orellana v. CropLife Internat'l*, 711 F. Supp. 2d 81, 102 (D.D.C. 2010). Whereas public nuisances directly affect a common right or create diffuse harms affecting large numbers of people. *See, e.g., State ex rel. Smith v. Riley*, 942 P.2d 721, 722 (N.M. 1997) ("A public nuisance affects a considerable number of people or an entire community or neighborhood."); *Southwestern Constr. Co.*, 385 So.2d at 635; *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1004 (D. Kan. 1984) ("[A] public nuisance is one which annoys a substantial portion of the community.") (quotations omitted).

In accord with the classical boundaries of nuisance law, only the policymaking and administrative bodies of Pennsylvania possess the power in the first instance to address diffuse harms and craft an appropriate remedy.

D. Pennsylvania's Chosen Balance of Power for Public Policy, Regulation, and Nuisance Law

Granting a private right of action to 8,000 households and 20,000 people for their so-called claims of "private nuisance" would undermine the Pennsylvania General Assembly's chosen method of regulation and the balance of institutional roles. Pennsylvania law, coupled with respect for this country's federal system, prohibits such an outcome. *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (stating that a federal court sitting in diversity "is not free to engraft onto … state rules exceptions or modifications").

In Pennsylvania, "[i]t is a legislative function to establish policy." *See Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1084 (Pa. 2018) (Wecht, J., concurring) (citing *Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth.*, 928 A.2d 1013, 1017-18 (Pa. 2007) and *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009)). No Pennsylvania court has ever ratified a private cause of action for public nuisance based on an alleged "private nuisance" by over 8,000 households. As discussed above, no Pennsylvania court has even come close.

Large numbers cases of diffuse harms call for public policy-making. Thus, "large-scale societal challenges are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play." U.S. CHAMBER INST. FOR LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE 32. That is precisely the balance that Pennsylvania has chosen. It is "entirely fitting" for it to have done so. *Am. Elec. Power Co.*, 564 U.S. at 428.

The General Assembly established the Department of Environmental Resources in 1970.[2] Act of Dec. 3, 1970, P.L. 834, No. 275. On July 7, 1980, the General Assembly assigned that Department with the task of comprehensive solid waste management. Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. § 6018.101 *et seq*. The Solid Waste Management Act "reposes in the legislative branch ([Department of Environmental Protection], county health departments and

[2] The Department of Environmental Resources was renamed as the Department of Environmental Protection on July 1, 1995. *See* 35 P.S. § 6018.103 n.1.

municipalities) broad powers and responsibilities for enforcement and has given the prosecutors a vast array of legal mechanisms," including enforcement tools "meant for the exclusive use of the executive branch." *Fleck v. Timmons*, 543 A.2d 148, 152 (Pa. Super. 1988) (quotations and some alterations omitted).

Through the Solid Waste Management Act, the legislature chose to have the Department of Environmental Protection to "establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management." 35 P.S. § 6018.102(1). This comprehensive program aims to "provide a flexible and effective means to implement and enforce the provisions of [the Solid Waste Management Act]." 35 P.S. § 6018.102(5). The Department regulates the permit process and performs "short and long term" planning to "protect the public health, safety and welfare." 35 P.S. § 6018.102(3)-(4). It must "utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program." 35 P.S. § 6018.102(11). In order to enforce the Act, the Department may seek

assessment of civil penalties through the Environmental Hearing Board. *See* Act of Jan. 8, 1960, P.L. 2119, as amended, 35 P.S. § 4009.2.

The General Assembly also empowered an Environmental Quality Board to "exercis[e] its powers and duties under … The Administrative Code of 1929." 35 P.S. § 6018.105(f). It tasked the Board with establishing "rules and regulations" and "the coordination of administration and enforcement of this [A]ct between the Department of Environmental [Protection] and county health departments." 35 P.S. § 6018.105(b)-(c). Thus, the General Assembly has already charged the Department of Environmental Protection with comprehensively "regulat[ing] the storage, collection, transportation, processing, treatment and disposal of solid waste." 35 P.S. § 6018.104(6). As such, there is no explicit or implied private right of action under the Solid Waste Management Act. *See Centolanza v. Lehigh Valley Dairies, Inc.*, 635 A.2d 143, 149 (Pa. Super. 1993) ("[P]rivate persons may only intervene under the SWMA in actions brought by the DER."). Ratifying Plaintiffs' claims would undermine Pennsylvania's chosen, comprehensive regulatory system.

It is also wise policy. "[A]n overlapping public nuisance regime in the administrative state creates potential for conflict and confusion." Brownell, *Public Nuisance in the Modern Administrative State*, 24 NAT. RESOURCES & ENV'T at 36. "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Countenancing common law claims to make public policy for (alleged) diffuse harms alongside comprehensive administrative regulation would create "administrative costs … sufficiently large … that *all* persons may be worse off in differing degrees." Epstein, *Nuisance Law*, 8 J. LEGAL STUD. at 79.

Pennsylvania's choice of comprehensive regulation over litigation reflects awareness that the latter is "so expensive as to be self-defeating" when it comes to addressing diffuse harms. *Id.* at 79. The costs of large

numbers nuisance cases do not present average litigation costs (which are, of course, enormous in their own right). Large numbers cases are especially difficult to settle. Thus, overlaying private litigation would subject businesses to inevitable, unpredictably timed but assuredly exorbitant costs that require, sometimes literally, betting the whole farm. That can only detract from the ability to devote resources to regulatory compliance and remediation. Yet without strong incentives for regulatory compliance coupled with penalties calibrated to produce efficient precautions as opposed to cessation, the entire public will "be worse off." *Id.*

Other jurisdictions reject nuisance law as the means to make public policy for the same reasons concerning separation of powers and a culture of compliance versus litigation. Air pollution cases provide prime examples of courts rejecting nuisance claims out of respect for the expansive nature of the problems and interests involved. *See, e.g., City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (rejecting a public nuisance claim and explaining that policy questions requiring balancing of multiple public interests are best left to the political

branches), *appeal docketed* No. 18-16663 (9th Cir. Sept. 4, 2018); *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374 (Cal. App. Div. 4, 1971) (rejecting public nuisance pollution claim because "[t]hese issues are debated in the political arena and are being resolved by the action of those elected to serve in the legislative and executive branches of government.").

Nor are these concerns limited to air pollution. In rejecting a public nuisance claim against a power plant for pollution, the Supreme Court of New Mexico reasoned, "nothing before us is made to appear that the trial court could solve the mercury problem either more quickly or better than the Agency." *State ex rel. Norvell v. Arizona Public Service Co.*, 510 P.2d 98, 105 (N.M. 1973). And in rejecting a nuisance action for remediation of lead paint, the New Jersey Supreme Court reasoned that "were we to agree … that there is a basis sounding in public nuisance for plaintiffs' assertions, we would be creating a remedy entirely at odds with the pronouncements of our Legislature." *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

The decision below fits neatly into the limited role judicial land use law plays in relation to legislative and administrative land use policymaking, in both past and present. In correctly attending to the doctrinal bounds of nuisance law, the district court honored the General Assembly's chosen division of power for regulating diffuse harms. It also preserved the ability of Pennsylvania to cultivate a culture of regulatory compliance as opposed to winner takes all litigation, thereby protecting the provision of crucial services of public import at reasonably predictable costs.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal of Plaintiffs' claims.

Respectfully submitted,

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August 12, 2019

COMBINED CERTIFICATIONS

L.A.R. 28.3(D) CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AND RULE 29(A)(5)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(a)(5) because it contains 5,302 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14 pt. Garamond, a proportionally spaced typeface, using Microsoft Office Word 2016.

L.A.R. 21.1(C) CERTIFICATE REGARDING ELECTRONIC FILING

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CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on counsel of record for all parties through the Court's Electronic Case Filing system on August 12, 2019.

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