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THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. ALBERTSONS COMPANIES, INC.; ALBERTSONS COMPANIES LLC; SAFEWAY, INC.; CARR-GOTTSTEIN FOODS CO.; THE KROGER CO.; and FRED MEYER, INC., Appellees.	Supreme Court No. S-19048 Superior Court No. 3AN-22-06675 CI O P I N I O N No 7836 – November 6, 2026

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Una S. Gandbhir, Judge.

Appearances: Laura Fox, Senior Assistant Attorney General, Anchorage, and Treg Taylor, Attorney General, Juneau, for Appellant. Chester D. Gilmore, Cashion Gilmore & Lindemuth, Anchorage, and Francis A. Citera, Greenberg Traurig, Chicago, Illinois, for Appellees Albertsons Companies, Inc.; Albertsons Companies LLC; Safeway, Inc.; and Carr-Gottstein Foods Co. Rebecca J. Hozubin, Hozubin, Moberly & Associates, Anchorage, Ronda L. Harvey, Steptoe & Johnson, Charleston, West Virginia, and Ashley Hardesty Odell, Steptoe & Johnson, Morgantown, West Virginia, for Appellees The Kroger Co. and Fred Meyer, Inc. Geoffrey D. Strommer, Hobbs, Straus, Dean & Walker, LLP, Portland, Oregon, for Amici Curiae

Aleutian Pribilof Islands Association, Bristol Bay Area Health Corporation, Norton Sound Health Corporation, Alaska Native Tribal Health Consortium, and Native Village of Eyak. Sarah L. Schirack, Perkins Coie LLP, Anchorage, and Eric Wolff, Perkins Coie LLP, Seattle, Washington, for Amici Curiae Products Liability Advisory Council, Inc. and The Chamber of Commerce of the United States of America.

Before: Carney, Chief Justice, and Borghesan, Henderson, Pate, and Oravec, Justices.

PATE, Justice.

I. INTRODUCTION

The State of Alaska brought suit against several of the largest retail pharmacies operating in Alaska for their alleged role in fueling the opioid[1] epidemic. The case now comes to us on appeal from the superior court's grant of the defendant pharmacies' motion to dismiss on the pleadings. At this stage of the litigation we are required to treat every factual allegation in the complaint as true.

According to the complaint, the effects of the opioid epidemic have touched nearly every facet of Alaskan society over the past two decades. Opioid addiction, as well as both fatal and non-fatal overdoses, have skyrocketed over the years, leading to overwhelming burdens on our policing and healthcare systems. The State alleges that the effects do not stop there. The human cost of the opioid epidemic is also borne by the many children with a parent addicted to prescription opioids, which

[1] Although the terms "opiate" and "opioid" are often used interchangeably, we use the term "opioid" to refer to narcotics made from synthetic or partially synthetic chemical compounds produced by the pharmaceutical industry — such as hydrocodone and oxycodone — whereas we interpret "opiate" to refer to narcotics consisting of "chemical compounds that are extracted or refined from natural plant matter," such as morphine and heroin. Alcohol & Drug Pol'y Comm'n, *Opiates or Opioids — What's the Difference?*, OREGON.GOV, https://www.oregon.gov/adpc/pages/opiate-opioid.aspx (last visited Mar. 6, 2026).

can result in unstable home lives, entry into the foster care system, and even opioid addiction due to prenatal exposure.

The State alleges that the pharmacies ignored their oversight, monitoring, and reporting duties required by state and federal controlled substances laws and, as a result, facilitated opioid diversion,[2] increased the availability of prescription opioids, and ultimately caused a dramatic rise in opioid addiction. The State argues that the pharmacies' actions constituted a public nuisance and a violation of the Alaska Unfair Trade Practices and Consumer Protection Act (UTPA).

With one exception, we affirm the order of the superior court dismissing the State's claims under the UTPA. With regard to the claim of public nuisance, we reverse the decision to dismiss the State's complaint. Taking the State's allegations as true, we hold that the pharmacies' failure to fulfill their legal obligations when dispensing opioids unreasonably interfered with public rights protected by the common law. We also decline to impose a categorical bar on public nuisance claims involving the sale of products. Although the State has not yet proven the allegations in its complaint, it has sufficiently articulated several claims so as to survive a motion to dismiss on the pleadings.

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[2] "Prescription drug diversion is defined as the unlawful channeling of regulated pharmaceuticals from legal sources to the illicit marketplace." Danielle Wood, *Drug Diversion*, 38 AUSTL. PRESCRIBER 164, 164 (2015). Federal law appears to align with this definition because it seeks to prevent the diversion of controlled substances outside of "legitimate medical, scientific, research, or industrial channels." 21 U.S.C. § 823(b)(1). In the context of this case specifically, the alleged diversion involves pharmacies — a legal source of prescription opioids — distributing opioids in a manner that allows individuals without a proper prescription to access those opioids for personal use and redistribution.

II. FACTS AND PROCEEDINGS

A. Facts Alleged In The Complaint

The following facts alleged in the State's complaint are taken as true for the purpose of resolving the motion to dismiss on the pleadings.[3]

The opioid epidemic has had a profound impact in Alaska. The number of drug overdose deaths has steadily increased over the past decade, including a 68% increase between 2020 and 2021. Most of the overdose deaths from non-prescription opioids are directly related to prescription opioids. "Once addicted to, but no longer able to obtain, prescription opioids . . . users have turned to heroin, fentanyl, and other illicit drugs." Approximately 11.5% of the State's population needs treatment for substance use disorder.

Alaska's healthcare system has struggled to keep up with opioid-related impacts, with doctors reporting that their "new normal" includes regularly treating patients experiencing complications from, withdrawing from, or seeking opioids — some of whom "threaten violence or suicide if they are not given prescription opioids." Incidences of diseases connected to injecting drugs, such as hepatitis C, have increased, imposing further strains on the healthcare system and the State's Medicaid program. Hospital visits due to opioid overdoses in Alaska cost more than $23 million between 2016 and 2017.

Children and infants have also suffered as a result of the opioid epidemic. Prescription drug abuse by adolescents and young adults has risen. There has been a significant increase in abuse and neglect of children by opioid-addicted parents, as well as a significant increase in children being separated from their families. From 2012 to 2016, the increase in the number of children placed in foster care in Alaska was five

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[3] "In reviewing a Rule 12(b)(6) dismissal, we liberally construe the complaint and treat all factual allegations in the complaint as true." *Torrence v. Blue*, 552 P.3d 489, 492 (Alaska 2024) (quoting *Patterson v. Walker*, 429 P.3d 829, 831 (Alaska 2018)).

times the national rate. Parental substance abuse was a factor in 48% of Alaska's foster care placements. Between 2004 and 2015, there was also a 566% increase in the state of infants born addicted to opioids due to prenatal exposure.

Additionally, the opioid epidemic has strained Alaska's law enforcement resources. Between 2015 and 2016, the amount of opioid-based prescription drugs seized by the Alaska Statewide Drug Enforcement Unit increased by 96%; the amount of oxycodone seized increased by 1,685%. Between 2012 and 2017, the number of Naloxone[4] administrations by emergency medical services more than doubled.

Defendants Albertsons Companies, Inc.; Albertsons Companies LLC; Safeway, Inc.; and Carr-Gottstein Foods Co. (together, "Safeway") and The Kroger Co. and Fred Meyer, Inc. (together, "Kroger") (collectively, "the pharmacies") operate retail pharmacies in Alaska that dispense prescription opioids, including brand names such as OxyContin and Vicodin as well as generic opioids such as oxycodone and hydrocodone.[5]

According to the State's allegations, the pharmacies substantially contributed to the opioid epidemic in several ways. They failed to monitor, investigate, and report illegitimate opioid prescriptions as required by the common law, the federal Controlled Substances Act (CSA),[6] and the Alaska Controlled Substances Act (ACSA).[7] The pharmacies are obligated by the CSA and ACSA to adhere to "specific

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[4] Naloxone is a medicine administered to quickly reverse opioid overdoses, which it does as an "opioid antagonist" that "attaches to opioid receptors and reverses and blocks the effects of other opioids," such as oxycodone, heroin, and fentanyl. *Naloxone DrugFacts*, NAT'L INST. ON DRUG ABUSE, https://nida.nih.gov/publications/drugfacts/naloxone (last visited Feb. 23, 2026).

[5] Walgreen Co., Walgreens Boots Alliance, Inc., and Walmart Inc. were originally defendants in this action but have since settled with the State and are not parties to this appeal.

[6] 21 U.S.C. §§ 801-971.

[7] AS 17.30.020-.900.

security, recordkeeping, monitoring[,] and reporting requirements that are designed to identify or prevent diversion," but they failed to do so. Instead, they systemically ignored red flags when dispensing opioids, including those that the Drug Enforcement Administration (DEA) identified as "unresolvable" — a status which should have automatically prevented the pharmacists from filling the presented prescriptions.

The pharmacies knew or should have known that their failure to comply with federal and state law would lead to opioid diversion, which in turn could lead to far-reaching harm to the public. The DEA sent the pharmacies letters reminding them of their obligations to prevent opioid diversion and providing guidance on how to identify suspicious orders. The DEA additionally specified in its communications to the pharmacies that failure to prevent opioid diversion would lead to "the illegal distribution of controlled substances" resulting in "a substantial and detrimental effect on the health and general welfare of the American people." Further, the "overwhelming increase" in opioids dispensed in Alaska between 2010 and 2017 put the pharmacies "on notice that they were meeting more than an appropriate and legitimate market demand."

As to Safeway specifically, the U.S. Department of Justice investigated its Wasilla pharmacy location over Safeway's widespread practice of failing to timely report missing or stolen controlled substances. Safeway did not notify the DEA until months after it discovered that employees stole tens of thousands of hydrocodone tablets. The investigation led to a $3 million settlement with the federal government. Additionally, other Safeway pharmacies in Alaska received and distributed disproportionate amounts of opioids relative to the local population size that should have alerted Safeway to opioid diversion.

As to Kroger, it implemented policies whereby pharmacists received bonuses based on the number and speed of prescriptions filled, including controlled substances. Kroger did not take meaningful action to perform due diligence on suspicious orders despite using "computer-assisted ordering systems" that

automatically flagged " '[e]xcessive purchase' information" to a designated pharmacy coordinator; rather, it allowed fulfillment of flagged opioid orders if the pharmacy coordinator provided a simple reason, such as "new customers."

The State also asserts that the pharmacies deceived the public by "publicly promoting their compliance efforts and their efforts to prevent diversion, . . . creating the false impression that they were carrying out their legal obligations and actively working to combat the opioid epidemic." In summary, the State alleges that "[w]ithout [the pharmacies'] actions, opioid use, misuse, abuse, and addiction would not have become so widespread, and the opioid epidemic that now exists and the injury to the State would have been averted or be much less severe."

B. Procedural Posture

The State brought suit against the pharmacies, alleging two causes of action for their role in fueling the opioid epidemic in Alaska. First, the State alleged that the pharmacies engaged in unfair and deceptive sales practices in violation of the UTPA. Second, the State alleged that the pharmacies' conduct constituted a common law public nuisance. The State argued that the pharmacies significantly interfered with the public health, safety, peace, comfort, and convenience "by creating a public health epidemic in Alaska."

For relief on the UTPA claim, the State sought an injunction, civil penalties,[8] and restoration of money obtained from consumers.[9] For relief on the public nuisance claim, the State sought an injunction prohibiting the pharmacies from continuing the acts and practices that caused the public nuisance. The State also sought an order directing the pharmacies to abate the public nuisance, which could be

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[8] *See* AS 45.50.551(b) (providing for civil penalties not to exceed $25,000 for each violation of AS 45.50.501).

[9] *See* AS 45.50.501(b) (allowing court to issue order "necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful by AS 45.50.471").

accomplished by "taking measures such as providing addiction treatment to patients who are already addicted to opioids" or "making naloxone widely available so that overdoses are less frequently fatal."

The pharmacies jointly moved to dismiss the complaint under Alaska Civil Rule 12(b)(6), arguing that the State's UTPA claim was deficient because the pharmacies' conduct was exempt under the law and, even if it was not exempt, that the State failed to allege unfair or deceptive conduct. The pharmacies also argued that the State failed to allege a claim for public nuisance because (1) the sale of lawful products cannot give rise to a public nuisance claim and (2) their alleged conduct was not the proximate cause of the alleged harm. The superior court granted the pharmacies' motion to dismiss.

As to the public nuisance claim, the superior court concluded that the State failed to allege an unreasonable interference with a public right. Looking to the Illinois Supreme Court's decision in *City of Chicago v. Beretta U.S.A. Corp.*,[10] the court reasoned that "the threat of misuse of an otherwise legal product is not a violation of a public right even if there has been damage to the public." It ruled that there was not a "sufficient nexus" between the pharmacies' alleged actions — improperly filling prescriptions — and the alleged resulting consequences.[11] It also ruled that prescription opioid use is a "private individual matter and furthers a legitimate purpose." In the superior court's view, harm caused by dangerous products is better addressed through products liability law; otherwise, "any claim that has negative impacts on public health could be defined as a public nuisance."

As to the UTPA claim, the superior court found that the alleged unfair and deceptive conduct was exempt from the UTPA. The UTPA exempts acts that are

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[10] 821 N.E.2d 1099, 1116, 1126 (Ill. 2004).

[11] We do not interpret the superior court's statement as a holding that causation was lacking. *See infra*, note 60.

"regulated by a statute or regulation administered by the state, including a state regulatory board or commission, unless the statute or regulation does not prohibit the practices declared unlawful."[12] Because the State asserted that the pharmacies' alleged actions were violations of the ACSA and CSA, the court ruled that their conduct fell within the exemption.

The State appeals.

III. STANDARD OF REVIEW

We review de novo a superior court's grant of a motion to dismiss for failure to state a claim under Alaska Civil Rule 12(b)(6).[13] "Under de novo review, we adopt 'the rule of law that is most persuasive in light of precedent, reason, and policy.' "[14] "In reviewing a Rule 12(b)(6) dismissal, we liberally construe the complaint and treat all factual allegations in the complaint as true."[15] We have consistently held that "Rule 12(b)(6) dismissals should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief.' "[16]

IV. DISCUSSION

The superior court dismissed both the State's UTPA and public nuisance claims, finding that the State failed to allege a non-exempt violation of the UTPA and failed to allege an unreasonable interference with a public right. With respect to the

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[12] AS 45.50.481(a)(1).

[13] *Robinson v. Alaska Hous. Fin. Corp.*, 442 P.3d 763, 768 (Alaska 2019).

[14] *Armstrong v. Chance*, 541 P.3d 1128, 1130 (Alaska 2024) (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[15] *Torrence v. Blue*, 552 P.3d 489, 492 (Alaska 2024) (quoting *Patterson v. Walker*, 429 P.3d 829, 831 (Alaska 2018)) (internal quotation marks omitted).

[16] *Robinson*, 442 P.3d at 768 (quoting *Clemensen v. Providence Alaska Med. Ctr.*, 203 P.3d 1148, 1151 (Alaska 2009)); *Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020).

UTPA claim, we hold that defendants do not need to muster enforcement examples in order to meet their burden of establishing that they are subject to "ongoing, careful regulation." The superior court's analysis of the UTPA was nevertheless largely correct; with one exception, we affirm its ruling on this issue.

With respect to the public nuisance claim, the State has alleged that the pharmacies' failure to fulfill their legal obligations under the CSA and ACSA constitutes a substantial and unreasonable interference with collective common law rights, particularly public health and public safety. We hold that the State's allegations are sufficient to withstand a motion to dismiss on the pleadings. We also hold that public nuisance claims involving a defendant's sale of products are not categorically barred by a products liability exception. Accordingly, we reverse the dismissal of the State's public nuisance claim.

A. With One Exception, The State's Claims Are Exempt From The UTPA.

The UTPA provides that "unfair or deceptive acts or practices in the conduct of trade or commerce" are unlawful.[17] "As a general matter, a prima facie case of unfair or deceptive acts or practices under the UTPA requires proof of two elements: '(1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred.' "[18] "[B]ecause the UTPA is a remedial statute, its language should be liberally construed."[19] "A 'liberal' interpretation in this context means generally that where a statute's language is ambiguous, courts 'bring within the scope of the law every case which comes clearly

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[17] AS 45.50.471(a).

[18] *Merdes & Merdes, P.C. v. Leisnoi, Inc.*, 410 P.3d 398, 410 (Alaska 2017) (quoting *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007)).

[19] *Id.* at 410-11 (quoting *Alaska Tr., LLC v. Bachmeier*, 332 P.3d 1, 10 (Alaska 2014)).

within its spirit and policy.' "[20] And any ambiguous exceptions contained in a remedial statute are to be strictly construed.[21]

A practice must be either unfair or deceptive to fall within the purview of the UTPA.[22] We have adopted the Federal Trade Commission's assessment for determining whether an act is "unfair," which weighs several factors, including:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers . . . .[23]

We consider an act to be "deceptive" if it "has the capacity or tendency to deceive."[24] But not all unfair or deceptive conduct is subject to liability under the UTPA. Alaska Statute 45.50.481(a)(1) exempts "an act or transaction regulated by a statute or

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[20] 3 SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 60:1 (8th ed. 2024); *see also State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 & n.20 (Alaska 1980).

[21] 3 SINGER, *supra* note 20, § 60:1; *see also Andrews & Lawrence Pro. Servs., LLC v. Mills*, 223 A.3d 947, 968 (Md. 2020) (noting that "exemptions from remedial legislation must be narrowly construed" (quoting *Lockett v. Blue Ocean Bristol, LLC*, 132 A.3d 257, 272 (Md. 2016))).

[22] *Merdes & Merdes, P.C.*, 410 P.3d at 412.

[23] *Id.* (quoting *Borgen v. A &M Motors, Inc.*, 273 P.3d 575, 590 (Alaska 2012)). The quoted language originally appears in the Federal Trade Commission's regulations relating to the deceptive and unfair marketing of cigarettes. *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (July 2, 1964)).

[24] *Merdes & Merdes, P.C.*, 410 P.3d at 412 (quoting *Borgen*, 273 P.3d at 591).

regulation administered by the state, including a state regulatory board or commission, unless the statute or regulation does not prohibit the practices declared unlawful in AS 45.50.471."[25] We apply a two-part test to determine whether conduct is exempt. The defendant must first show that "its conduct is subject to ongoing, careful regulation" under a statutory or regulatory scheme.[26] Then, the defendant must show that such statute or regulation prohibits the specific conduct alleged to violate the UTPA.[27]

The superior court dismissed the State's UTPA claim, ruling that the claim was exempt under AS 45.50.481(a)(1) because the alleged unfair and deceptive conduct was specifically prohibited by the ongoing, careful regulatory scheme governing the pharmacies. On appeal, the State argues both that the pharmacies are not subject to ongoing, careful regulation and that the statutes and regulations at issue do not prohibit the specific conduct alleged in the complaint.

We agree with the superior court that the pharmacies met their burden to demonstrate that they are subject to ongoing, careful regulation under the first step of our exemption analysis under AS 45.50.481(a)(1). The regulatory scheme governing the pharmacies is sufficiently "separate and distinct"[28] as to constitute the type of ongoing, careful regulation that exempts conduct from the UTPA. The ACSA requires pharmacies to comply with federal registration requirements, keep federally required

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[25] AS 45.50.481(a)(1).

[26] *Adkins v. Collens*, 444 P.3d 187, 195 (Alaska 2019); *see also Matanuska Maid, Inc. v. State*, 620 P.2d 182, 186 (Alaska 1980) ("We agree with the superior court that a more reasonable construction is that section 481(1) exempts only those acts or transactions which are the subject of 'ongoing, careful regulation.' ").

[27] *Adkins*, 444 P.3d at 195; *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1024-25 (Alaska 2009).

[28] *See State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980) (holding that "regulation under a separate and distinct statutory scheme" satisfies the first prong of exemption analysis under AS 45.50.481(a)(1)).

records, and dispense and distribute controlled substances — such as opioids — in accordance with federal law.[29] The Board of Pharmacy (Board) is "responsible for the control and regulation of the practice of pharmacy," including compliance with the ACSA and CSA.[30] It has authority to oversee pharmacist licensing, adopt regulations, establish procedures for dispensing drugs (including controlled substances), and pursue inspections and investigations into violations of federal or state laws relating to the practice of pharmacy.[31] If the Board finds that a pharmacist or pharmacy failed to comply with a federal or state law or regulation relating to the practice of pharmacy, the Board may, among other things, revoke or suspend the pharmacist's or pharmacy's license or impose limitations on the pharmacist's professional practice.[32] The Board may also impose civil fines of up to $5,000.[33]

The Department of Public Safety (DPS) also has authority to supervise and enforce regulations relating to the practice of pharmacy. DPS has a variety of tools to enforce the ACSA, including exchanging information with federal and local law enforcement and coordinating training programs.[34] It is also authorized to bring actions for injunctions in superior court to prohibit the continued distribution or dispensation of a controlled substance in violation of state and federal law.[35]

As the pharmacies argue, this regulatory scheme is sufficiently ongoing and careful to satisfy the first prong of the exemption analysis. The State attempts to

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[29] AS 17.30.020; AS 17.30.060; AS 17.30.070-.080.

[30] AS 08.80.030.

[31] *Id.*; AS 08.80.261.

[32] AS 08.80.030; AS 08.01.075; *see also* AS 08.01.010(34) (establishing that provisions of AS 08.01 apply to Board of Pharmacy).

[33] AS 08.01.075(a)(8).

[34] AS 17.30.100(a).

[35] *Id.*

instead compare the ACSA to the Rules of Professional Conduct and Rules of Civil Procedure, which we have previously held are insufficient to trigger exemption.[36] In making that determination, we reasoned that the Bar's supervision of attorney conduct is not the type of ongoing, careful regulation that would place prohibited attorney conduct within the UTPA's exemption.[37] By contrast, we observe that the authority of DPS and the Board under the ACSA to regulate the dispensation of controlled substances is more far-reaching and comprehensive than the Bar's supervision of attorneys.

The State also contends that the pharmacies failed to establish that they are subject to ongoing, careful regulation because they did not provide examples of enforcement actions taken by State authorities. Our precedent suggests that the State's enforcement actions can be relevant to the second step of our exemption analysis under AS 45.50.481(a)(1) — specifically our determination of whether the State has interpreted or enforced the regulatory scheme as prohibiting the particular conduct at issue.[38] But we have never *required* that defendants muster enforcement examples to

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[36] *See Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1023-24 (Alaska 2009).

[37] *Id.* at 1024-25 (citing *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 186 (Alaska 1980)); *see also Matanuska Maid, Inc.*, 620 P.2d at 186 ("Regulation is, therefore, clearly distinct from and involves something more than mere prohibition."); *Jones v. Westbrook*, 379 P.3d 963, 969 (Alaska 2016) ("Attorneys are not exempt from liability under the UTPA; its regulatory system coexists with the mandates of the Alaska Rules of Civil Procedure and Rules of Professional Conduct."); *Merdes & Merdes, P.C. v. Leisnoi, Inc.*, 410 P.3d 398, 413 (Alaska 2017).

[38] *See Adkins v. Collens*, 444 P.3d 187, 195-96 (Alaska 2019) (holding that defendant failed to meet burden to show that specific conduct was prohibited in part because defendant did not show that State interpreted or enforced regulations as prohibiting specific conduct at issue).

meet their burden to show that they are subject to ongoing, careful regulation.[39] Such a requirement is unnecessary and would prevent any newly created regulatory scheme from satisfying the first step of the exemption analysis.

Accordingly, we now explicitly hold that enforcement examples are not necessary to establish that a defendant is subject to ongoing, careful regulation within the meaning of the exemption analysis. We agree instead with the pharmacies that the establishment of "enforcement authority," standing alone, is adequate evidence that a regulatory scheme is ongoing and careful for the purposes of establishing exemption from the UTPA. Therefore, the complex statutory and regulatory framework identified by the pharmacies is sufficient to meet the burden under step one of the two-part test under AS 45.50.481(a)(1).

The State additionally argues that the superior court erred by relying on statutes and regulations administered by federal officials under the CSA in holding that the pharmacies are subject to ongoing, careful regulation. According to the State, that holding is erroneous because AS 45.50.481(a)(1) exempts only conduct "regulated by a statute or regulation administered *by the state*."[40] The State misinterprets the superior court's analysis. The court found in its order that the ACSA regulates and prohibits the actions alleged in the complaint. These Alaska statutes governing controlled substances require registered pharmacies operating in Alaska to comply with the federal CSA and

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[39] Indeed, in *State v. Janssen Ortho LLC*, the U.S. District Court for the District of Alaska previously certified a question to us as to whether enforcement examples are necessary to establish careful, ongoing regulation. No. 3:11-cv-0002-RRB, 2012 WL 13034376, at *2-3 (D. Alaska Mar. 30, 2012). However, we did not resolve the question because the parties settled the matter. *See White v. NYLIFE Sec., LLC*, 551 F. Supp. 3d 974, 985-86 (D. Alaska 2021) (citing *Alaska v. Janssen Ortho LLC*, No. 3:11-cv-0002-RRB, Order Regarding Notice of Settlement and Withdrawing Certification Order (Docket 130) (Sept. 13, 2013)).

[40] AS 45.50.481(a)(1) (emphasis added).

accompanying federal regulations.[41] But even though the ACSA incorporates federal law by reference, it authorizes *state* officials to administer federal requirements with respect to Alaskan pharmacies.[42] Thus, the court's order did not rely on federal officials' administration of the relevant statutes and regulations and properly found that the requirements for step one of the exemption analysis under AS 45.50.481(a)(1) had been met.

Thus, we proceed to step two of the exemption analysis. To qualify for the exemption, the pharmacies must also show that the state statutes or regulations prohibit the specific conduct alleged by the State to violate the UTPA.[43] We affirm most of the superior court's holdings that the pharmacies' alleged actions are specifically prohibited under state statutes and regulations. The pharmacies' alleged "fail[ure] to create, maintain, and use an adequate compliance program; fail[ure] to investigate, report, and halt suspicious orders; filling [of] suspicious orders; and fail[ure] to exercise due diligence to ensure the prescriptions they dispensed were for legitimate medical purposes" are all specifically prohibited under Alaska law.[44] We therefore affirm the superior court's holding that this alleged conduct is exempt from the UTPA under AS 45.50.481(a)(1).

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[41] AS 17.30.020(a); AS 17.30.060; AS 17.30.070.

[42] *See* AS 17.30.100.

[43] *Adkins,* 444 P.3d at 195.

[44] *See* AS 17.30.020 (requiring registered pharmacies to comply with CSA and corresponding federal regulations governing controlled substances); AS 17.30.060 (requiring registered pharmacies to keep records as required by federal law); AS 17.30.070 (prohibiting registered pharmacies from dispensing controlled substances except as provided under federal law); AS 17.30.200 (requiring registered pharmacies to submit certain information to Board's controlled substances prescription database); 12 Alaska Administrative Code (AAC) 52.200(a)(7) (requiring pharmacist-in-charge to ensure effective controls against diversion of prescription drugs).

But the State alleged one unfair or deceptive act that is *not* specifically prohibited by state pharmacy regulations. The State alleged that "[b]y publicly promoting their compliance efforts and their efforts to prevent diversion, [the pharmacies] deceived the public by creating the false impression that they were carrying out their legal obligations and actively working to combat the opioid epidemic." The pharmacies do not argue that this conduct is specifically prohibited by the statutes and regulations governing the pharmacies. Rather, the pharmacies claim that this allegation only applied to Walgreens and Walmart,[45] not the remaining defendants in the litigation (Safeway and Kroger). However, the pharmacies' interpretation is at odds with the complaint. In the complaint, the State alleged that the "Defendants" engaged in the aforementioned conduct, with "Defendants" being defined collectively as all the pharmacies named in the action, including Safeway and Kroger. Liberally construing the allegations in the complaint,[46] we hold that the pharmacies failed to meet their burden to establish that the alleged deceptive promotion of their compliance efforts was exempt from the UTPA under AS 45.50.481(a)(1). We therefore reverse the superior court's decision with respect to this alleged conduct.

B. It Was Error To Dismiss The State's Claim Of Public Nuisance.

Public nuisance is a centuries-old cause of action rooted in English common law. At common law, a public nuisance involved encroachments on the royal domain or public highways and was redressed by a suit brought by the King.[47] In the late 1600s, legal scholar William Sheppard identified several types of public nuisances, including the following:

> affecting public highways and waterways; polluting the air "with houses of office, laying of garbage, carrion or the like,

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[45] As noted above, Walgreen and Walmart were previously defendants in this action, but have since reached settlement agreements with the State.

[46] *Patterson v. Walker*, 429 P.3d 829, 831 (Alaska 2018).

[47] RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (A.L.I. 1979).

> if it be near the common high way"; victuallers, butchers, bakers, cooks, brewers, maltsters and apothecaries who sell products unfit for human consumption; running "lewd ale-houses" . . . .[48]

Writing in the eighteenth century, Blackstone continued to refine the concept by describing public nuisances as "a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."[49]

Public nuisance law developed in the United States along with the rest of the common law,[50] evolving to redress a wide array of conduct, including railway strikes,[51] gambling houses,[52] and the incompetent and unlicensed practice of medicine.[53] The modern test articulated by the Restatement (Second) of Torts provides that "[a] public nuisance is an unreasonable interference with a right common to the

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[48] J. R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 60 (1989) (quoting WILLIAM SHEPPARD, THE COURT-KEEPER'S GUIDE (London, W.G. 5th ed. 1662)); *see also* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 716 (2023).

[49] 4 WILLIAM BLACKSTONE, COMMENTARIES *167 (spelling modernized).

[50] Kendrick, *supra* note 48, at 718.

[51] *See In re Debs*, 158 U.S. 564, 566-67, 587-92 (1895).

[52] *See Hill v. Pierson*, 63 N.W. 835, 836 (Neb. 1895).

[53] *See State ex rel. Marron v. Compere*, 103 P.2d 273, 274-78 (N.M. 1940).

general public."[54] Although the tort of private nuisance requires a harm to the plaintiff's use or enjoyment of land, the tort of public nuisance is not so limited.[55]

Instead, public nuisance requires that the defendant's interference with public rights be unreasonable.[56] The Restatement provides that an interference with public rights may be unreasonable depending on several non-exclusive factors:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor

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[54] RESTATEMENT (SECOND) OF TORTS § 821B(1) (A.L.I. 1979); *see also Friends of Willow Lake, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Aviation & Airports*, 280 P.3d 542, 548 (Alaska 2012) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)).

[55] RESTATEMENT (SECOND) OF TORTS § 821B cmt. h. Alaska recognizes public nuisance both under common law and under various statutes; neither framework limits public nuisance to property-related harms. *See, e.g.*, *Maier v. City of Ketchikan*, 403 P.2d 34, 38 (Alaska 1965), *overruled on other grounds by Johnson v. City of Fairbanks*, 583 P.2d 181, 187 (Alaska 1978) (recognizing common law public nuisance); Alaska Pattern Jury Instructions – Civ. 13.09 & cmt. (identifying elements of cognizable individual harm caused by common law public nuisance and providing commentary on origins of public nuisance generally); AS 03.05.050 (defining public nuisance relating to agricultural or fishing products); AS 03.30.030 (defining public nuisance relating to wire fences); AS 09.50.170-.240 (defining public nuisance relating to structures used for illicit activity); AS 16.05.800 (defining public nuisance relating to fishing equipment); AS 16.05.881 (defining public nuisance relating to construction without approval to ensure fish and game protections); AS 19.25.150 (defining public nuisance relating to advertising signs); AS 19.27.060-.080 (defining public nuisance relating to junk yards).

[56] *Id.* § 821B cmt. e; *see also Friends of Willow Lake, Inc.*, 280 P.3d at 548 (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)).

> knows or has reason to know, has a significant effect upon the public right.[57]

Additionally, to state a claim for public nuisance, the plaintiff must allege that the defendant *caused* the unreasonable interference with public rights.[58] Causation requires the plaintiff to show (1) "that the [injury] would not have happened 'but for' the defendant's [act]" and (2) "that the . . . act was so important in bringing about the injury that reasonable individuals would regard it as a cause and attach responsibility to it."[59]

The superior court concluded that the pharmacies' alleged excessive distribution of opioids did not amount to interference with a public right.[60] The court also determined that any harm caused by the use of prescription opioids was better addressed through the law of products liability based in part on a provision of the Restatement (Third) of Torts. "[L]iberally construe[ing] the complaint and treat[ing] all

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[57] RESTATEMENT (SECOND) OF TORTS § 821B(2).

[58] *See Goodwin v. Mat-Su Midwifery, Inc.*, 562 P.3d 26, 35 (Alaska 2024) ("An essential element of any tort claim is causation. The plaintiff must show that the defendant caused the harm that the plaintiff has suffered."); *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 543 (Cal. App. 2017) (applying negligence causation standard to public nuisance claim); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 676-78 (N.D. Cal. 2020).

[59] *Winschel v. Brown*, 171 P.3d 142, 148 (Alaska 2007); *Vincent by Staton v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851-52 (Alaska 1993) ("The Restatement's 'substantial factor test' encompasses *both* the actual and legal prongs of legal causation." (emphasis in original)); RESTATEMENT (SECOND) OF TORTS § 431.

[60] The superior court used the term "sufficient nexus," which conjures the issue of proximate cause. But it is clear from the court's reasoning that it was analyzing whether the State had alleged interference with a public right. Specifically, the court stated that a nexus was lacking because "[t]he sheer number of violations does not transform the harm from individual injury to communal injury." Thus, we do not interpret the superior court's order to include a ruling on causation.

factual allegations in the complaint as true,"[61] we hold that the State adequately alleged that the pharmacies unreasonably interfered with public rights. Further, we decline to adopt a categorical bar on public nuisance suits involving the sale of products.

1. The State alleged an unreasonable interference with public rights.

To state a claim for public nuisance, the plaintiff must allege an interference with a "right common to the general public."[62] "A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted . . . ."[63] The Restatement (Second) lists several examples of interference with public rights, including interference

> with the *public health*, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the *public safety*, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the *public morals*, as in the case of houses of prostitution or indecent exhibitions; with the *public peace*, as by loud and disturbing noises; with the *public comfort*, as in the case of widely disseminated bad odors, dust and smoke; with the *public convenience*, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.[64]

It is not necessary that everyone in the community be affected by the nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right.[65] The interests of the entire community may be affected by danger to

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[61] *Torrence v. Blue*, 552 P.3d 489, 492 (Alaska 2024) (quoting *Patterson v. Walker*, 429 P.3d 829, 831 (Alaska 2018)).

[62] *Friends of Willow Lake, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Aviation & Airports*, 280 P.3d 542, 548 (Alaska 2012).

[63] RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.

[64] *Id.* cmt. b (emphasis added).

[65] *Id.* cmt. g.

even one individual; for example, the threat of smallpox spreading to even one person "may be enough to constitute a public nuisance" because of the risk of causing an epidemic.[66]

The pharmacies suggest several reasons why the State failed to allege an interference with a public right. First, the pharmacies argue that the State alleged an aggregation of individual harms to opioid users, not collective harm to a public right. Second, the pharmacies rely on decisions from other jurisdictions to support their assertion that conduct related to the manufacture and distribution of products falls outside the scope of public nuisance law. Finally, the pharmacies make several policy-based arguments against recognition of a public right under the circumstances here. Each of these arguments is unpersuasive for the following reasons.

a. The State plausibly alleged unreasonable interferences with the collective exercise of public rights.

First, the State has plausibly alleged interferences with the collective right to public health and public safety, not merely the aggregation of individual harms. The Restatement recognizes that some problems "affect the health of so many persons as to involve the interests of the public at large."[67] For example, the Restatement notes that the maintenance of a malarial pond interferes with the right to public health even though the direct harm caused by a malaria infection is to the infected individuals only.[68] This example, as well as others in the Restatement, "serve to highlight that a [public] nuisance occurs when private conduct interferes with the 'interests of the community at large.' "[69]

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[66] *Id.*

[67] *Id.*

[68] *Id.* cmt. b.

[69] *Alaska v. Express Scripts, Inc.*, No. 3:23-cv-00233, 2024 WL 2321210, at *4 (D. Alaska May 22, 2024) (quoting RESTATEMENT (SECOND) OF TORTS § 821B cmt. b).

The Restatement's characterization directly contradicts the pharmacies' claim that public rights are only "rights to a public good" or natural resource, such as air, water, and public rights of way. The pharmacies attempt to support this claim by citing comment d to section 8 of the Restatement (Third) of Torts. But that comment addresses only a subset of public nuisance cases that involve harm to natural resources; it does not state that all public nuisance claims must involve natural resources.[70]

We therefore reject the pharmacies' limited view and agree instead with the State's interpretation of public nuisance, which in line with the Restatement, encompasses activity that interferes with the health interests of the "public at large."[71] The State alleged that by failing to fulfill their duties under the ACSA, CSA, and associated regulations, the pharmacies fueled an increase in harms including prescription drug overdose deaths, sales of illicit opioids, diseases spread by injecting drugs, strains on healthcare and law enforcement systems, and child foster placements.[72] These harms are collective in nature. They impact the public's "ability

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[70] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. d (A.L.I. 2020).

[71] RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.

[72] The superior court does not discuss the element of "unreasonable interference" at length in its order; rather, it focuses on the existence of a public right. In this case, we believe that the allegations in the complaint would support a determination that the pharmacies' interference was unreasonable, to the extent that the conduct violates their obligations under the CSA, ACSA, and relevant regulations. *See id.* § 821B(2)(b) ("Circumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance, or administrative regulation."); *City of Huntington v. AmerisourceBergen Drug Corp.*, 157 F.4th 547, 567 (4th Cir. 2025) ("One means of demonstrating an unreasonable interference with a public right is to show that a defendant's act or causal contributions to that act were 'unlawful.' ").

to enjoy public spaces, the quality and availability of government services, [and] the risk of communicable disease."[73]

Although addicted prescription opioid users may be those individuals most directly harmed by opioid diversion, the massive and widespread potential for harm from opioid diversion alleged in the complaint touches the entire community at least as much as the potential for harm from the spread of malaria,[74] the sale of food products unfit for human consumption,[75] or the maintenance of a house of prostitution.[76] Courts have recognized that similar allegations against opioid manufacturers and distributors are sufficient to constitute an interference with the rights to public health and public safety.[77] Liberally construing the complaint,[78] we cannot say it is "beyond doubt that the plaintiff can prove no set of facts"[79] that establish an interference with public rights.

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[73] *Express Scripts, Inc.*, 2024 WL 2321210, at *5.

[74] RESTATEMENT (SECOND) OF TORTS § 821B cmt. b.

[75] Spencer, *supra* note 48, at 60.

[76] RESTATEMENT (SECOND) OF TORTS § 821B cmt. b.

[77] *See, e.g.*, *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 627-28, 669-84 (N.D. Cal. 2020) (denying motion to dismiss public nuisance claim against opioid manufacturers and distributors); *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 674 (N.D. Ohio 2019) (finding that reasonable jury could conclude that defendant opioid manufacturer interfered with public health and public safety); *Rhode Island ex rel. Neronha v. Purdue Pharma L.P.*, No. PC-2018-4555, 2022 WL 577874, at *28 (R.I. Super. Ct. Feb 18, 2022) (denying motion to dismiss public nuisance claim and finding that State alleged harm to public rights, not merely individualized harms).

[78] *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 4 (Alaska 2012).

[79] *Sagoonick v. State*, 503 P.3d 777, 792 (Alaska 2022) (quoting *Catholic Bishop of N. Alaska v. Does 1-6*, 141 P.3d 719, 722 (Alaska 2006)) (internal quotation marks omitted).

b. The State plausibly alleged harms that fall within the scope of Alaska's standards for public nuisance.

Second, the pharmacies cite cases like *State ex rel. Hunter v. Johnson & Johnson* for the proposition that the State's claims fall outside the scope of public nuisance law.[80] In that case, the State of Oklahoma brought suit against several prescription opioid manufacturers alleging that their conduct in marketing and selling the opioids was a public nuisance.[81] Oklahoma reached settlements with some of the parties, but proceeded to a bench trial on the public nuisance claim against one of the manufacturers and its related entities, which the court found to be liable.[82] On appeal, the Oklahoma Supreme Court reversed, rejecting the State of Oklahoma's claim that the defendant manufacturer's marketing and sales practices were a public nuisance.[83] It held that Oklahoma public nuisance liability was limited to "(1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable."[84]

The *Hunter* court's reasoning is readily distinguished because Alaska's public nuisance law is not as limited as Oklahoma's.[85] As the pharmacies correctly

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[80] *E.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *Kennedy v. Prime Hydration, LLC*, No. 3:23-cv-00476-GNS, 2024 WL 3826529, at *3-4 (W.D. Ky. Aug. 14, 2024) (dismissing public nuisance claim against energy drink company because, unlike Alaska public nuisance law, Kentucky public nuisance law is limited to claims based on real property).

[81] *Hunter*, 499 P.3d at 721-22.

[82] *Id.* at 722.

[83] *Id*. at 731.

[84] *Id.* at 724.

[85] The pharmacies also attempt to rely on a recent opinion from the Supreme Court of Maryland to support their interpretation of public nuisance. *Express Scripts, Inc. v. Anne Arundel Cnty.*, 353 A.3d 1084 (Md. 2026). However, Maryland's approach

note, in *Maier v. City of Ketchikan* we stated that the defendant's "creation or maintenance of some physical condition which would cause injury to a person coming into contact with it . . . in the exercise of a public or common right" was a public nuisance.[86] But, unlike the Oklahoma Supreme Court, we have never taken so narrow a view that public nuisance always *requires* "criminal or property-based conduct."[87] Rather, we have framed the inquiry as whether the defendant's acts create "an unreasonable interference with a right common to the general public."[88] Moreover, we adopted our public nuisance test from the Restatement (Second) of Torts, which also does not limit public nuisance to criminal activity or activities that interfere with the use of property.[89] And other courts have declined to apply *Hunter* on the same basis.[90]

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to public nuisance law is similar to Oklahoma's and is distinguishable from our own. Thus, it is unpersuasive.

[86] 403 P.2d 34, 38 (Alaska 1965), *overruled on other grounds by Johnson v. City of Fairbanks*, 583 P.2d 181, 187 (Alaska 1978).

[87] *Hunter*, 499 P.3d at 725.

[88] *Friends of Willow Lake, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Aviation & Airports*, 280 P.3d 542, 548 (Alaska 2012) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)). Other jurisdictions have taken a similar stance. *See, e.g.*, *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 670 (Wis. 2005) ("[T]he interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' " (quoting RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (A.L.I. 1979))).

[89] RESTATEMENT (SECOND) OF TORTS § 821B cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land.").

[90] *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 815 (N.D. Ohio 2022) (finding that *Hunter*'s narrow interpretation of Oklahoma public nuisance law is inapplicable to Ohio common law); *City of Huntington v. AmerisourceBergen Drug Corp.*, 157 F.4th 547, 566 (4th Cir. 2025) (holding that public nuisance under West Virginia common law is not as limited as public nuisance under Oklahoma statutes).

Applying Alaska's public nuisance law, we believe that the State has plausibly alleged "an unreasonable interference with a right common to the general public" to the extent necessary to survive a motion to dismiss.

c. Acceptance of the State's characterization of public nuisance law is not likely to engender excessive litigation.

Lastly, the pharmacies contend that recognizing a cause of action for public nuisance for the distribution of prescription opioids would be an expansion of the public nuisance doctrine that threatens to "open the floodgates of litigation." The pharmacies additionally allege that if we recognize such claims we would be engaging in policy-making that supersedes "perceived failed regulation."

We are not convinced. The core requirements of a public nuisance claim — that the defendant caused an unreasonable interference with a public right[91] — provide "at least some protection against the metastasis of public nuisance into an all-encompassing super tort." And we believe that the circumstances alleged by the State fall within these bounds in a manner that both is distinct from the cases the pharmacies cite and complements the existing regulatory framework rather than supplants it.

The Illinois Supreme Court's decision in *City of Chicago v. Beretta*, cited repeatedly by the pharmacies, provides an illustrative comparison. There, the City of Chicago argued that gun manufacturers, distributors, and dealers committed a public nuisance when they sold firearms under circumstances in which they knew or should have known that the buyers intended to use or possess the firearms illegally in

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[91] RESTATEMENT (SECOND) OF TORTS § 821B & cmt. a; *see also People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 525, 543 (Cal. App. 2017) (defining public nuisance as defendant's actions "knowingly creat[ing] or assist[ing] in the creation of a substantial and unreasonable interference with a public right" and explicitly recognizing causation as an element of public nuisance).

Chicago.[92] The city claimed that the defendants knowingly oversupplied the market in areas where gun-control laws were less restrictive and thereby unreasonably facilitated the gun purchasers' violations of Chicago ordinances when the purchasers subsequently brought the guns to Chicago.[93]

The Illinois Supreme Court concluded that the city failed to state a claim for public nuisance because the lawful sale of firearms was not an "unreasonable interference" with a public right.[94] It held that the defendants' conduct was not unreasonable because the city had not alleged that the defendants themselves violated any statute or regulation governing firearm sales, nor had the city shown that the defendants were negligently selling or distributing the firearms.[95] The Illinois high court also questioned (without deciding) whether the city's allegations of higher levels of crime, deaths and injuries to residents, and higher levels of fear, discomfort, and inconvenience were "merely an assertion, on behalf of the entire community, of the individual right not to be assaulted."[96]

The pharmacies argue that the State's claim here raises an identical concern: that relief is sought "for downstream harms stemming from the oversaturation of potentially dangerous, but legal, products" to individual members of the public, not the public generally. And like the Illinois Supreme Court, the pharmacies express concern that holding otherwise would inappropriately expand the understanding of

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[92] *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1107-08 (Ill. 2004).

[93] *Id.* at 1108.

[94] *Id.* at 1117-27.

[95] *Id.* The Illinois Supreme Court's decision was also based, in part, on its observation that Illinois law recognizes a public nuisance only when (1) the conduct involved the use of land or (2) the conduct was a violation of a statute or ordinance. *Id.* at 1117.

[96] *Id.* at 1115-16.

public nuisance so "that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten [public rights]."[97]

The pharmacies' reliance on *Beretta* is misplaced. The concerns animating the *Beretta* decision are not applicable in this case because the State adequately alleged that the pharmacies violated separate, preexisting legal duties. Here, the State identified the pharmacies as "gatekeepers with legal duties to control access to dangerous substances."[98] By contrast, the gun distributors in *Beretta* did not violate any preexisting legal duties — the illegal conduct forming the basis of the public nuisance claim was entirely dependent on the subsequent illegal acts of gun purchasers.[99] The existence of separate, preexisting legal duties clearly defines the scope of liability and put the pharmacies on notice that they might be subject to liability. Therefore, the pharmacies' alleged violations of these duties amount to "unreasonable" conduct, satisfying the concerns raised in *Beretta*. And the State has adequately alleged that the systemic nature of the pharmacies' failure to perform their duties as the state's

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[97] *Id.* at 1116.

[98] *See, e.g.*, 21 U.S.C. § 823(a), (b) (requiring Attorney General to consider "maintenance of effective control against diversion of particular controlled substances" when determining whether registering applicant to manufacture or distribute controlled substances would be against public interest); 21 U.S.C. § 827(a) (imposing recordkeeping requirements); 21 U.S.C. § 832 (requiring registrants to design and operate suspicious order monitoring systems); 21 C.F.R. § 1306.06 (2026) ("A prescription for a controlled substance may only be filled by a pharmacist, acting in the usual course of his professional practice . . . ."); 21 C.F.R. § 1301.74(b) (2026) ("The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances . . . [including] orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency."); AS 17.30.080(b) ("A person who . . . manufactures, distributes, dispenses, or conducts research with a controlled substance in the state without fully complying with 21 U.S.C. 811 - 830 (Controlled Substances Act), and regulations adopted under those sections, is guilty of misconduct involving a controlled substance under AS 11.71.010 - 11.71.060 . . . .").

[99] *Beretta*, 821 N.E.2d at 1115-16.

"gatekeepers" has fueled illicit substance abuse so as to harm the rights to health and safety in a direct, collective way rather than a "downstream," individual one.

Similarly, the existence of separate and distinct duties imposed by law readily distinguishes this case from the pharmacies' hypothetical examples. For example, a fast-food chain does not have a legal responsibility to limit access to its food products or to ensure that the products are used only for lawful purposes. Here, though, the State has alleged violations of preexisting legal duties that are so widespread and severe that they interfere with the collective interests of the public and therefore potentially establish public nuisance liability.

We therefore reject the pharmacies' assertion that our interpretation expands Alaska public nuisance law, threatens to greatly increase the amount of public nuisance litigation, and constitutes policy-making by the court. Our interpretation is sufficiently limited within the existing bounds of public nuisance law to prevent excessive litigation. Our interpretation also supports rather than subverts state and federal efforts to regulate opioid distribution.

2. We decline to adopt a categorical bar on public nuisance suits involving the sale of a product.

On appeal, the pharmacies contend that public nuisance claims cannot be maintained if the claim involves the sale of a product. We disagree. Not only is this argument historically inaccurate,[100] but also none of the authorities cited by the

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[100] As early as the seventeenth century, English courts recognized public nuisance liability for selling products unfit for human consumption. *See* Spencer, *supra* note 48, at 60. More recently, courts have found public nuisances when the nuisance involved the sale of a product. *See* David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 71 (2022) (recounting history of product-based public nuisance suits); *see also City of Cincinnati v. Beretta U.S.A. Corp*., 768 N.E.2d 1136, 1142-44 (Ohio 2002) (holding that handgun defendants' conduct in manufacturing, marketing, distributing, and selling firearms stated a cause of action for public nuisance).

pharmacies to support that argument are persuasive. Neither the Restatement (Third) of Torts nor the non-binding cases from other jurisdictions relied upon by the pharmacies persuade us that a public nuisance claim cannot be maintained when the conduct at issue involves the sale of products.

As a preliminary matter, the pharmacies argue that the State's allegations involve nothing more than the sale of lawful products. Not so. We have noted above that the State made clear allegations that the pharmacies sold opioids without the legally required controls — not, as the pharmacies argue, that they merely sold lawful products. The complaint alleged that the pharmacies sold opioids in an "unreasonable and unlawful manner" by knowingly "allow[ing] widespread diversion to occur," "systemically ignor[ing] red flags," "fail[ing] to maintain effective controls against diversion," and "refus[ing] to identify, investigate, and report suspicious orders despite . . . actual knowledge of drug diversion." In other words, the alleged harm "[did] not stem from the products themselves, but from the manner in which [the pharmacies] *dispensed* the products."[101]

Neither the Restatement (Third) of Torts nor other courts' decisions persuade us to adopt a complete bar to public nuisance suits that involve the sale of products. Section 8 of the Restatement provides that "the common law of public nuisance is an inapt vehicle for . . . [m]ass harms caused by dangerous products" such

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[101] *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 813 (N.D. Ohio 2022) (emphasis added). This aspect of the decision was later undercut when the Ohio Supreme Court determined in response to a certified question that Ohio's product liability statute expressly barred the claim. *In re Nat'l Prescription Opiate Litig.*, 265 N.E.3d 1, 3 (Ohio 2024); *see also In re Nat'l Prescription Opiate Litig.*, Nos. 22-3750, 22-3751, 22-3753, 22-3841, 22-3843, 22-3844, 2025 WL 354758 (6th Cir. Jan. 31, 2025) (vacating judgment in opioid litigation due to Ohio Supreme Court decision). But the Ohio product liability statute is inapplicable to Alaska because the Alaska legislature has not adopted a statute similar to Ohio's. Thus, the logic of the federal district court's opinion, which is based on public nuisance common law, remains persuasive.

as tobacco, firearms, and lead paint.[102] The Restatement also cautions against an overly broad reading of public nuisance law encompassing "anything injurious to the public health and safety" because public nuisance law has traditionally had a narrower scope.[103] This, the pharmacies argue, precludes public nuisance liability for the pharmacies' distribution of prescription opioids.

However, the pharmacies' reliance on section 8 of the Restatement is misplaced. The comments explain that this provision was intended to only apply to claims brought by private plaintiffs, not claims brought by public officials.[104] This is because while the scope of public nuisance claims brought by private individuals has traditionally been narrow, the scope of public nuisance cases brought by public officials "tends to be considerably broader."[105] Federal courts addressing the issue have similarly held that section 8 applies only to public nuisance claims brought by private plaintiffs.[106]

The pharmacies also rely on the Oklahoma Supreme Court's reasoning in *Hunter* for support of their contention that the present suit must be addressed through product liability law. The Oklahoma Supreme Court held that public nuisance does not apply to claims involving the sale of opioids because "(1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer

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[102] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (A.L.I. 2020).

[103] *Id.*

[104] *Id.* cmt. b, g.

[105] *Id.* cmt. a.

[106] *City of Huntington v. AmerisourceBergen Drug Corp.*, 96 F.4th 642, 651 (4th Cir. 2024) ("[T]he text of section 8 expressly outlines the limits of its application by acknowledging that it applies to private suits, rather than to public nuisance claims brought by public officials."); *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d at 824 ("Section 8 applies only to claims for economic loss brought by a private party . . . .").

does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory."[107]

Not only is *Hunter* unpersuasive in light of the differences between Alaska and Oklahoma law discussed earlier, the decision's logic does not even apply to the allegations in this case. On the first point, although it may be rare for the manufacture and distribution of products to violate a public right, it is not impossible. As discussed in the previous section, in highlighting the far-reaching collective consequences of the pharmacies' conduct on the public rights to health and safety, the State has sufficiently alleged unreasonable interference with a public right so as to survive a motion to dismiss.

In relation to the second point of *Hunter*'s reasoning, it is important to focus on the nature of the claims. The State brought suit here against retail pharmacies for allegedly failing to both implement legally required controls in their sale of opioids and respond to red flags indicating opioid diversion. By contrast, in *Hunter*, Oklahoma alleged that the opioid *manufacturer's* marketing and selling of opioids constituted a public nuisance.[108] This distinction is important in several ways. Unlike a manufacturer, a retail pharmacy is an intermediary with direct control over whether the opioids are distributed to consumers. In *Hunter*, Oklahoma's claim rested on an extenuated chain of conduct, including the contributing conduct of intermediary pharmacies, to support its argument that the manufacturer's conduct amounted to an interference with public rights.[109] But, here, the pharmacies acted as the final step in the distribution process, serving as critical "gatekeeper[s]" over consumers' access to

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[107] *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 726 (Okla. 2021).

[108] *Id.* at 720-22.

[109] *Id.* at 728-29 (noting that manufacturer could not control how wholesalers distributed products, how regulations governed distribution by pharmacies, how doctors prescribed its products, and how pharmacies dispensed its products).

prescription opioids. Further, the pharmacies had separate legal duties that they allegedly failed to fulfill, again indicating control over the conduct at issue.[110] By contrast — as the Oklahoma Supreme Court noted — a manufacturer's only duty is to put a lawful, non-defective product into the market.[111]

Relatedly, contrary to the third point in *Hunter*, recognizing a cause of action for public nuisance against the pharmacies would not lead to perpetual liability. The mere presence of opioids in the marketplace is not what created the alleged public nuisance. Instead, it was the pharmacies' alleged failure to implement the legally required controls when dispensing the opioids that substantially interfered with the collective common law rights of Alaskans, particularly public health and public safety.

For these reasons, the logic in *Hunter* is unpersuasive when applied to the facts and circumstances of this case. We agree instead with the U.S. Court of Appeals for the Fourth Circuit's explanation in *City of Huntington v. AmerisourceBergen Drug Corp.* that public nuisance law, rather than product liability law, is best equipped to address certain types of harm, including those alleged here:

> We observe that product liability claims and public nuisance claims are distinct causes of action. While product liability claims focus on harms specifically borne by discrete individuals seeking monetary damages for the injuries they have sustained, public nuisance claims serve a different function in focusing on harm suffered by the public more

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[110] *See* AS 17.30.020 (requiring registered pharmacies to comply with CSA and corresponding federal regulations governing controlled substances); 12 AAC 52.855 (requiring pharmacies dispensing controlled substances to participate in prescription drug monitoring program (PMDP)); 21 C.F.R. § 1306.06 (2026) ("A prescription for a controlled substance may only be filled by a pharmacist, acting in the usual course of his professional practice . . . ."); 21 C.F.R. § 1301.74(b) (2026) ("The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances . . . includ[ing] orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.").

[111] *State ex rel. Hunter*, 499 P.3d at 728.

> generally and seeking abatement of that harm through the court's equitable authority. So by both purpose and defined scope, public nuisance claims allow governmental entities to obtain relief for a broader swath of the population, including relief for those who have not used a particular product but nonetheless have suffered an unreasonable interference with the public health or welfare of the community.[112]

Accordingly, we decline to adopt a categorical bar on public nuisance claims relating to the sale of products when the alleged conduct otherwise satisfies the requirements of Alaska public nuisance law.

V. CONCLUSION

The superior court's decision is AFFIRMED in part and REVERSED in part, and the case is REMANDED for further proceedings consistent with this opinion.

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[112] *City of Huntington v. AmerisourceBergen Drug Corp.*, 157 F.4th 547, 565 (4th Cir. 2025) (citations omitted).