19-1692

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

ROBIN BAPTISTE; DEXTER BAPTISTE, On Behalf of Themselves and All 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

BRIEF OF *AMICI CURIAE* THE PUBLIC INTEREST LAW CENTER AND PHILLY THRIVE IN SUPPORT OF APPELLANT

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This Brief Supports Appellants' and Reversal of the Private Nuisance Ruling by the District Court.

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CORPORATE DISCLOSURE STATEMENT

The Public Interest Law Center states that it has no parent corporation and is not owned in any part by any publicly-held corporation.

Philly Thrive also states that it has no parent corporation and is not owned in any part by any publicly-held corporation.

INTERESTS OF *AMICI CURIAE*[1]

The Public Interest Law Center ("Law Center") is a non-profit legal services organization based in Philadelphia, Pennsylvania. For 50 years, the Law Center has used high-impact legal strategies to advance the civil, social, and economic rights of communities facing discrimination, inequality, and poverty. A member of a national consortium of affiliates of the Lawyers' Committee for Civil Rights Under Law, the Law Center uses litigation, community education, advocacy, and organizing to secure access to fundamental resources and services, including housing, employment, education, healthcare, voting, and environmental justice. The Law Center's environmental justice practice supports historically disinvested communities in advocating for sustainable and equitable neighborhoods.

Throughout its history, an important aspect of the Law Center's work has been to help communities take control of their neighborhoods and to serve communities of color facing disproportionate threats to their health and environments from pollution and unchecked development. Currently, the Law Center is working with environmental justice communities and community groups to secure protections for residents facing unwanted development in their

[1] Counsel for the *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or any other entity (other than the amici and their counsel), contributed money intended to fund its preparation or submission.

neighborhoods, securing legal title to community-owned greenspace and community gardens, and exploring legal strategies to protect vulnerable communities from toxic pollutants. Private nuisance law is one of those strategies, and a crucial environmental protection for residents in these communities. The decision below threatens to vitiate private nuisance class actions across Pennsylvania. Insofar as courts look to the Third Circuit for development of this doctrine and class action law in general, its impact could be felt throughout the 50 states.

Philly Thrive is a nonprofit organization in Philadelphia organizing communities around environmental justice issues. It works to develop leaders in communities disproportionately impacted by pollution—that is, low-income communities and communities of color. Philly Thrive's current campaign is focused on a fossil-fuel refinery that is responsible for over 50% of the toxic air emissions in Philadelphia. As part of its strategy for advancing environmental justice, Philly Thrive has considered legal action, including private nuisance.

This brief is submitted in support of reversal and pursuant to Federal Rule of Appellate Procedure 29. The *amici*'s motion for leave to file by the Court's leave is pending.

STATEMENT OF THE CASE

Appellants are homeowners and renters who reside in Freemansburg, Pennsylvania. On behalf of themselves and their neighbors within a geographical class, Appellants claimed that stench emitted from the defendant's landfill infringed their rights to use and enjoy their homes. They asserted claims for public nuisance, negligence, and private nuisance, all of which the lower court dismissed.[2] This brief addresses the claim for private nuisance—a centuries-old tool for resisting environmental harm.

The lower court dismissed Appellants' private nuisance claim because, the court found, the nuisance encroached on too many properties and reached too far from the source. *See Baptiste v. Bethlehem Landfill Co.*, 365 F. Supp. 3d 544, 550-51 (E.D. Pa. 2019). The court's rationale was arbitrary, contrary to established nuisance doctrine recognized by Pennsylvania and other courts, and would, if affirmed, vitiate the private nuisance class action as a vehicle for relief from the worst environmental injustices.

This brief supports Appellants' position that this Court should reverse.

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[2] The lower court dismissed Appellants' *public* nuisance claim because Appellants—who asserted common harms to residents throughout a geographically defined class area—"[did] not show how their injury is over and above the injury suffered by public." *Baptiste v. Bethlehem Landfill Co.*, 365 F. Supp. 3d 544, 549 (E.D. Pa. 2019). The court dismissed the negligence claim, deeming it a claim for negligence *per se* under the SWMA, because the SWMA creates no private right of action. *Id.* at 552.

SUMMARY OF ARGUMENT

For centuries, private nuisance law has given homeowners and renters a crucial tool for resisting pollution generated by their neighbors, with private remedies that federal regulation and public nuisance cannot offer. And for decades, private nuisance class actions have provided owners and renters a crucial tool to redress common pollution sources and common harms suffered at their properties.

Communities that suffer most from pollution are disproportionately poor. Without the ability to pursue private nuisance as a class, individual members of these communities often lack the knowledge and resources to vindicate their rights against polluters. Consequently, the nuisance class action is a crucial mechanism for relief from environmental harms suffered by the communities the *amici* serve: communities facing discrimination, inequality, and poverty.

This *amici* brief focuses on the importance of the private nuisance claims the lower court dismissed, the court's erroneous rationale for dismissing them, and the devastating impact affirmance would have for affected communities' ability—in this Circuit and elsewhere—to protect themselves from industrial pollution.

ARGUMENT

I. PRIVATE NUISANCE IS A CRUCIAL TOOL FOR PROTECTING COMMUNITIES FROM ENVIRONMENTAL INJUSTICE.

"Environmental justice" is the principle that no group of people should bear a disproportionate share of our society's environmental burdens.[3] But the evidence demonstrates that "pollution-generating facilities are disproportionately located in or near minority and/or poor communities, whether urban or rural."[4] For instance, a recent study funded by three federal agencies found that, whereas white populations experience a "pollution advantage" of 17% less air pollution exposure than is caused by their consumption, on average, African-American and Hispanic

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[3] *See, e.g.*, U.S. EPA, EPA 300-R-04-002, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE 9 (2004) (defining "environmental justice" to include the principle that "no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies"); *Environmental Justice*, PA. DEP'T OF ENVTL. PROT., https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/default.aspx (last visited July 14, 2019) ("Environmental justice embodies the principles that communities and populations should not be disproportionally exposed to adverse environmental impacts.").

[4] Barry E. Hill, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 17 (4th ed. 2018) (observing that more than 100 studies have been conducted on environmental justice); *see also* Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 500 (1997) (noting study that reviewed 64 environmental justice studies and concluded that *all but one*—conducted by a waste management company—found environmental disparities by either race or income).

populations experience a "pollution burden" of 56% and 63% more pollution exposure than caused by their consumption.[5] And numerous studies have shown that landfills and hazardous waste sites in particular are disproportionately sited in low-income and minority communities.[6] Indeed, "more than 30 states have expressly addressed environmental justice, demonstrating increased attention to the issue at a political level,"[7] including Pennsylvania.[8] Likewise, the U.S.

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[5] Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial–Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCI., 6001, 6001 (2019).

[6] *See, e.g.*, Hill, *supra* note 4, at 15 ("[A] substantial number of independent researchers have concluded that the most important predictor of whether a particular community has a hazardous waste landfill is its racial composition…."); U.S. GAO, No. GAO/RCED-83-166, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATIONS WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1 (1983); Luke W. Cole & Sheila R. Foster, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT, Appendix A (NYU Press, 2001); Jennifer M. Norton et al., *Race Wealth, and Solid Waste Facilities in North Carolina*, 115 ENVTL. HEALTH PERSP. 1344, 1344 (2007); Manuel Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URBAN AFFAIRS 1 (2001).

[7] ABA SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY-STATE SURVEY OF LEGISLATION, POLICIES, AND INITIATIVES iii (2004).

[8] For instance, Pennsylvania's Department of Environmental Protection has established an Office of Environmental Justice charged with protecting the low-income and minority populations that are "especially vulnerable to the negative impacts of pollution." *Environmental Justice*, PA. DEP'T OF ENVTL. PROT., https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/default.aspx (last visited July 14, 2019).

Environmental Protection Agency ("EPA") has established an Office of Environmental Justice.[9]

Yet despite this increased attention, environmental laws have been under-enforced in low-income and minority communities. An early study published in the National Law Journal analyzed every U.S. environmental lawsuit concluded over a seven-year period, as well as every residential toxic waste site in the Superfund program, and found that in minority communities, penalties were lower, and cleanup of toxic sites slower.[10] More recent studies have observed similar patterns.[11]

In the absence of state and federal enforcement, communities have resorted to pursuing enforcement on their own. But many early strategies, such as claims under Title VI of the Civil Rights Act of 1964 and the 14th Amendment, have

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[9] U.S. EPA, ENVIRONMENTAL JUSTICE FY2017 PROGRESS REPORT 5 (2017).
[10] Hill, *supra* note 4, at 44-50 (penalties six times lower for hazardous waste sites and 46% lower for enforcement actions; cleanup for Superfund sites 12% to 46% slower).
[11] R. Shea Diaz, Note, *Getting to the Root of Environmental Injustice: Evaluating Claims, Causes, and Solutions*, 29 GEO. ENVTL. L. REV. 767, 777 (2017) (summarizing recent studies that find "enforcement is less vigilant in minority and low-income communities").

proved ineffective.[12] Victims of environmental injustice have thus "turned once again to common law approaches."[13]

Private nuisance—the "backbone" of common-law remedies for environmental pollution[14]—is one such approach. For centuries before the emergence of federal regulation, "the nuisance cause of action was the main tool for environmental protection."[15] And though ancient, it "has hung on from its horse-and-buggy origins" and "continues to be the fulcrum of what is called today environmental law."[16]

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[12] See Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandov*al*, 31 B.C. ENVTL. AFF. L. REV. 27, 27–28, 40 (2004); Mark B. Frost et al., *Protecting the Right to Clean Living*, 41 TRIAL 30, 31 (Feb. 2005) (observing that any hope "environmental justice would become a civil right enforceable in the federal court … has faded in the wake of a slow, steady retrenchment by the courts and in the enforcement philosophy of the federal government"); Hill, *supra* note, at 492-93.

[13] Frost, *supra* note 12, at 31.

[14] *See* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926 (1999).

[15] *See* Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 3-4 & n.14 (2007) (describing history of environmental nuisance litigation and citing *William Aldred's Case*, 77 Eng. Rep. 816 (1611)); *see also, e.g.*, *Pottstown Gas. Co. v. Murphy*, 39 Pa. 257 (1861) (private nuisance claim for air pollution); *Appeal of Pennsylvania Lead Co.*, 96 Pa. 116 (1880) (same).

[16] *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 66–67 (Iowa 2014) (quoting 1 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 1.1 (1986); *id.* § 2.1).

Private nuisance claims in particular—unlike either modern federal regulation and distinct from claims of *public* nuisance—"are based on property rights, are location specific, and provide remedies to rightholders for real harms,"[17] and they allow compensation for property-rights violations—*e.g.*, lost value, lost rent, and/or property holders' diminished ability to use and enjoy their property.[18] As such, private nuisance law is unique in providing "effective means to prevent and remedy environmental pollution, as well as provide full compensation for harmed victims."[19] These remedies have been important for individual victims of environmental injustice and, when a nuisance is pervasive, for victims throughout a geographical class.[20]

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[17] *Id.* at 69 (quoting Roger E. Meiners et al., *Burning Rivers, Common Law, and Institutional Choice for Water Quality, in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 54, 78 (Roger E. Meiners & Andrew P. Morriss eds., 2000)); *see also id.* at 69-70 (collecting additional authority and concluding that "a property owner seeking full compensation for harm related to the use and enjoyment of property at a specific location must resort to common law or state law theories to obtain a full recovery").

[18] Public nuisance does not provide the same damages remedies as those available in private nuisance. *See* Czarnezki & Thomsen, *supra* note 15, at 4. Public nuisance is most often directed at injunctive relief, with damages only available to individual plaintiffs where the harms suffered are unique—that is, unlike the nuisance harms suffered by the public generally.

[19] Czarnezki & Thomsen, *supra* note 15, at 6.

[20] For instance, this Court's decision in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), which allowed a private nuisance class action to proceed, has been lauded for preserving "an important solution for communities plagued with local environmental issues, but lacking the political power necessary to force change." Ingrid Pfister, Bell v. Cheswick*: The Era of Court-Regulated Power*

For instance, in *Freeman v. Grain Processing Corp.*, No. 13–0723 (Iowa Dist. Ct. 2013), owners and renters in a low-income residential neighborhood surrounding a grain processing plant brought a private nuisance class action over smoke, odor, and haze that blanketed the neighborhood. After six years of litigation (including two unanimous rulings from the Iowa Supreme Court[21])—and a nearly $100 million plant upgrade over the course of the litigation—the case settled for $51.5 million to cover money damages to the residents and new pollution controls.

Similarly, in *West Harlem Environmental Action v. New York City Department of Environmental Protection*, No. 92-45133 (Sup. Ct. N.Y. Cty. 1993), residents sued the City of New York in both private and public nuisance for siting a sewage treatment facility in their community. In settlement, the City agreed to "strict enforcement of certain corrective actions," intervention of environmental

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Plants, 42 ECOLOGY L.Q. 437, 456 (2015). *See also, e.g.*, Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 44 (2004) (observing that private nuisance claims are "particularly viable in environmental justice siting cases when a hazardous waste plant is sited in a minority neighborhood, as the products of the plant are likely to unreasonably interfere with the residents' use and enjoyment of their land and cause substantial harm to them"); Alina Das, *The Asthma Crisis in Low-Income Communities of Color: Using the Law As A Tool for Promoting Public Health*, 31 N.Y.U. REV. L. & SOC. CHANGE 273, 300 (2007).

[21] *See Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014); *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105 (Iowa 2017).

justice groups as "co-enforcers" of a consent order, and $1.1 million to address "environmental and public health issues in West Harlem."[22]

II. WHERE A NUISANCE IS PERVASIVE, THE PRIVATE NUISANCE CLASS ACTION IS A RECOGNIZED VEHICLE FOR SECURING RELIEF FOR ITS VICTIMS.

Private nuisance remedies have been recognized by Pennsylvania courts for vindicating property harms to individual victims, *see*, *e.g.*, *Evans v. Moffatt*, 192 Pa. Super. 204 (1960), and also—in cases where a nuisance is pervasive and it is shown that the requirements for class certification are met—for vindicating harms suffered in common by many. For example:

- In *Bruni v. Exxon Corp.*, a Pennsylvania court of common pleas sustained a verdict against a defendant in a private nuisance class action on behalf of a geographically-defined class. 2001 WL 1809819, 52 Pa. D. & C. 4th 484, 505 (Pa. Ct. Com. Pl. 2001).
- In *McQuilken v. A & R Dev. Corp.*, an Eastern District of Pennsylvania district court certified a private nuisance class action on behalf of 150 households in another "geographically compact, readily identifiable class." 576 F. Supp. 1023, 1029, 1032 (E.D. Pa. 1983).
- In *Diehl v. CSX Transportation, Inc.*, another federal district court

[22] Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 720 (1994).

allowed the plaintiffs to proceed with a private nuisance claim on behalf of 1,000 residents of Hyndman, Pennsylvania who had suffered evacuation and inconvenience after derailment of the defendant's train. 349 F. Supp. 3d 487, 494, 507-08 (W.D. Pa. 2018).

- In *Bell v. Cheswick Generating Station*, this Court held that a private nuisance class action on behalf of 1,500 residents was not preempted by the Clean Air Act, 734 F.3d 188, 189-90 (3d Cir. 2013), *cert. denied GenOn Power Midwest, L.P. v. Bell,* 572 U.S. 1149 (2014); and following remand, the district court observed (without ruling) that an amendment re-defining that class in strictly geographic terms "could not be said to be … untenable." 2015 WL 401443, *6 (E.D. Pa., Jan. 28, 2015).

Other federal and state courts have done the same. *See, e.g.*, *Rowe v. E.I. Dupont De Nemours & Co.*, 262 F.R.D. 451, 455, 460-63 (D.N.J. 2009) (certifying private nuisance claims on behalf of 14,000-15,000 residents within two-mile area); *Freeman*, 895 N.W. 2d at 108-09, 130 (affirming certification of private nuisance claims on behalf of roughly 4,000 residents within a 1.5 mile area).

These class actions belie the lower court's belief that it had to dismiss Appellants' private nuisance claim because "too many persons" had been harmed or because the harm extended beyond those households that immediately bordered

the polluter.[23]

III. THE RESTATEMENT, LEGAL SCHOLARS, AND A PENNSYLVANIA DISTRICT COURT ALL REJECT THE LOWER COURT'S RATIONALE.

The rationale for the lower court's private nuisance ruling—that if a nuisance harms many properties beyond the polluter's closest neighbors, then it must be deemed a *public* nuisance and cannot also be a *private* nuisance—is erroneous. It has been rejected by the Restatement, Professors Prosser and Keeton, and the careful analysis of the only other Pennsylvania district court to consider it.

A. The Restatement of Torts Makes Clear: Public and Private Nuisance are Not Mutually Exclusive.

We begin with the Restatement (Second) of Torts, because Pennsylvania courts have adopted its nuisance law principles.[24] The Restatement explains the

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[23] In fact, in *Rowe*, the court considered and expressly rejected the "directly proximate neighbor" requirement imposed by the lower court in this case.

> While the plaintiff's land must be near the nuisance such that the nuisance actually affects his enjoyment of land, it need not be immediately *contiguous*. No authority cited by the court below denied plaintiffs standing on the ground that his land was not geographically contiguous to the source of the nuisance.

262 F.R.D. at 459-60.

[24] *See Waschak v. Moffat*, 379 Pa. 441, 448-49, 109 A.2d 310 (1954) (adopting the first Restatement's § 822 as "unquestionably accurate and comprehensive); *Kembel v. Schlegel,* 329 Pa. Super. 159, 166 n.3, 478 A.2d 11, 15 (1984) (extending *Moffat* to Restatement (Second) and quoting its § 821); *Butts v. Sw. Energy Prod. Co.*, No. 3:12 CV 1330, 2014 WL 3953155, *3 (M.D. Pa. Aug. 12, 2014) (discussing *Moffat* and *Kembel*, and following Restatement principles regarding public *versus* private nuisance).

difference between public and private nuisances, and the relationship between them. Private and public nuisances are distinguished by the character of the rights invaded, not the number of individuals affected.[25] A public nuisance is an unreasonable interference with a right common to the general public. Restatement (Second) of Torts § 821A. A private nuisance is an invasion of another's interest in the private use and enjoyment of land. *Id.* § 821D.[26]

Though the two types of nuisance are distinct, they can exist at the same time. They are not mutually exclusive. It is not unusual for a nuisance to be both public (*i.e.*, to interfere with rights common to the general public) and private (*i.e.*, to invade private use and enjoyment of land); and either one may affect a large number of people. Indeed, the Restatement states that "a private nuisance [that] affects a large number of persons in their use and enjoyment of land…will normally be accompanied by some interference with the rights of the public as well," *id.* § 821B cmt. g; that "[w]hen the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance," *id.* § 821B cmt. h; and that "[w]hen the nuisance, in addition to

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[25] Restatement (Second) of Torts § 822 cmt. a.

[26] *See also id.* 821D cmt. c ("Uses of land are either private or public. The uses that members of the public are privileged to make of public highways, parks, rivers and lakes, are 'public' as distinguished from 'private.' By private use is meant a use of land that a person is privileged to make as an individual, and not as a member of the public.").

interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one," *id.* § 821C cmt. e.[27]

Professors Prosser and Keeton agree. They write that "[a] plaintiff does not lose his rights as a landowner merely because others suffer damage of the same kind or even of the same degree; there is general agreement that he may proceed upon either theory, or upon both." Prosser & Keeton, Torts § 90 (5th ed. 1984).

B. The Middle District of Pennsylvania Applied Precisely These Principles in *Butts* and Rejected the Logic Animating the Lower Court's Decision.

In *Butts v. Southwestern Energy Prod. Co.*, a federal district court considered precisely the rationale used by the court below—and rejected it, following the Restatement principles instead. *See* 2014 WL 3953155, at *7 (M.D. Pa. Aug. 12, 2014).

The court's analysis in *Butts* is careful—and instructive. The plaintiffs in *Butts* claimed that the defendant had created a private nuisance by contaminating their properties' water and air. The defendant responded that the nuisance the

[27] The classic example is pollution-caused nuisance. *See, e.g., id.* § 821B cmt. g ("the pollution of a stream that...prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish...becomes a public nuisance" and "[t]he spread of smoke, dust or fumes over a considerable area filled with private residences may interfere also with the use of the public streets or affect the health of so many persons as to involve the interests of the public at large").

plaintiffs alleged was actually a *public* nuisance (which the plaintiffs lacked standing to pursue), because the contamination reached beyond the plaintiffs' properties. *Id.* at *7. The court disagreed. First, quoting the Restatement and decisions from the Third Circuit and Pennsylvania state courts, it distinguished between public and private nuisance, writing that "[w]hereas a private nuisance involves an invasion of [the plaintiff's] interest in the private use and enjoyment of [her] land, a public nuisance does not require the plaintiff to have a private property interest in the area affected." *Id.* at *7 (internal citations omitted). Thus, "[c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons," but instead "requires interference with a public right." *Id.* (internal citations omitted).

The court went on to explain why public and private nuisances are sometimes confused. Ordinarily, pursuit of a public nuisance is in the hands of the state, since a public nuisance is a quasi-criminal action. *Id.* But in limited circumstances, the court observed, courts had recognized a *private* right of action for a *public* nuisance, and this right was easily conflated with a right of action for *private* nuisance. By arguing that the plaintiffs' claims "sound in public nuisance" simply because the harm was widespread, the defendant had "conflate[d] a private nuisance action and a private right of action for a public nuisance." *Id.* at *8. That is, the defendant had ignored the fact that plaintiffs' claim was for private

nuisance, "*not* a private claim for a public nuisance," and that plaintiffs alleged it was "*their* property that … [defendant] invaded." *Id.* (emphasis added).

The court went on, then, to address the logic (or illogic) of the defendant's argument:

> As such, it is rather odd, for Defendant to suggest that the alleged damage concerns a public right or is even more widespread than Plaintiffs assert. … If, as [Defendant] states, Plaintiffs' allegations go beyond their own property and "affect the entire … community[,]" … then Plaintiffs may also have a private claim for public nuisance. … In sum, [Defendant's] assertion—that Plaintiffs fail to set forth a *private* nuisance claim because they cannot state a private claim for a *public* nuisance—has no merit.

Id. (emphasis added).

Thus, in *Butts*, the court squarely rejected the logic animating the lower court's ruling below: that Appellants lost their private nuisance remedy when Defendant's pollution caused harm beyond their properties. This logic is contrary to the Restatement, refuted by careful analysis in *Butts*, and irrational—as it would immunize the polluters who do the most harm from responsibility to their victims.

CONCLUSION

The lower court's ruling should be reversed.

Dated this 15th day of July 2019.

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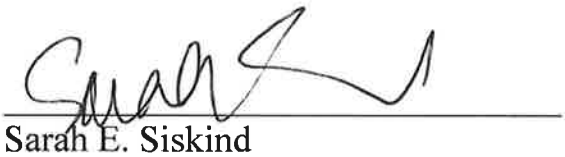
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure (a)(4)(G), this *amici brief* is less than one-half the maximum length authorized for a party's principal brief. Under Federal Rule of Appellate Procedure 29, this brief must not exceed half 30 pages or 13,000 words. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 17 pages but only 4,196 words.

This brief also complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5). It uses proportionally-spaced typeface in 14-point Times New Roman font.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Motion for Leave to File *Amici Curiae* Brief to be served on all parties via the Court's CM/ECF system this 15th day of July, 2019.

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