IN THE SUPREME COURT OF MARYLAND

Misc. No. 1, September Term, 2025
SCM-MISC-0001-2025

EXPRESS SCRIPTS, INC., et al.,

Appellants,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Appellee.

On Certified Question of Law from the
U.S. District Court for the District of Maryland, No. 1:24-cv-00090-MJM
(The Hon. Matthew J. Maddox)

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MARYLAND CHAMBER OF COMMERCE, AMERICAN TORT REFORM ASSOCIATION, PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND AMERICAN CHEMISTRY COUNCIL

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CERTIFIED QUESTION ADDRESSED BY *AMICI CURIAE*

As certified by the U.S. District Court for the District of Maryland, the question presented is: Under Maryland's common law, can the licensed dispensing of, or administration of benefit plans for, a controlled substance constitute an actionable public nuisance?

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (U.S. Chamber), Maryland Chamber of Commerce, American Tort Reform Association (ATRA), Product Liability Advisory Council, Inc. (PLAC), and American Chemistry Council (ACC) file this brief as *amici curiae*.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. It is a statewide coalition of more than 7,000

[1] The parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution toward the preparation of this brief.

members and federated partners working to develop and promote strong public policy that ensures sustained economic health and growth for Maryland businesses, employees, and families. As such, the Maryland Chamber represents the interests of the state's business community before the General Assembly, Executive Branch, and the courts.

Founded in 1986, ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

PLAC is a non-profit association with approximately 85 corporate members representing a broad cross-section of American and international manufacturers.[2] These companies seek to contribute to the improvement and reform of the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the country's leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

[2] PLAC's corporate members are listed at plac.com/web/Amicus_Program/Corporate_Membership.aspx.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improve environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $633 billion enterprise and a key element of the nation's economy.

Each of these organizations regularly files *amicus curiae* briefs in state and federal courts, including this Court, representing the broad perspectives of their members on important liability issues.

Amici urge the Court to follow established principles of public nuisance law. They are concerned that the liability theories advanced here—which are contrary to settled public nuisance principles—will generate unprincipled, open-ended, and industry-wide liability for a wide variety of products that may have foreseeable risks or inherent externalities. The resulting liability would circumvent—or swallow up—both the well-established body of product liability law and regulatory regimes that are specifically designed to balance product risks against their benefits.

SUMMARY OF ARGUMENT

Opioid abuse is a serious problem that demands serious, policy-based solutions. It calls for a legislative response, not one in which governments bring public nuisance claims against businesses irrespective of the well-established property-based bounds of the tort.

In this case, Anne Arundel County is suing companies involved in providing a class of prescription medications, seeking to subject them to liability for costs associated with treating or otherwise responding to individuals who abuse such medications. The County asserts that the social, economic, and health effects of illegal use of opioids qualify as a public nuisance and that those who participate in the chain of commerce of these lawful, federally-approved medicines are liable.

There is substantial dissonance, however, between the allegations against defendants and allowable public nuisance claims. Public nuisance law—in Maryland and other states—does not impose liability or obligations for these types of harms on companies in a product's chain of commerce. That is all the more true when the products help many people and are authorized by the government, here the U.S. Food and Drug Administration (FDA). A public nuisance, as a general matter, tends to have no redeeming qualities, so participating in providing beneficial, authorized products cannot be a public nuisance.

Rather, public nuisance law, which has a distinct history, applies to a different, specific situation not presented by this case. Governments can bring a public nuisance action to stop disruptive activities that unlawfully interfere with the public's right to use communal property, often a public road, waterway, or air. *See, e.g., Wietzke v. Chesapeake Conf. Ass'n*, 421 Md. 355, 374, 26 A.3d 931, 943 (2011) (public "nuisance has evolved to protect the property rights of the public") (citations omitted); *Walser v. Resthaven Mem. Gardens, Inc.*, 98 Md. App. 371, 397, 633 A.2d 466, 478 (Ct. Spec. App. 1993) (dismissing public nuisance claim that did not allege that "the property rights of the public at large have been . . . affected"). When doing so, the government must plead and prove specific elements that are not met here.

First, the County must allege a violation of a "public right." As indicated, these are communal property rights "common to all members of the general public." *Tadjer v. Montgomery County*, 300 Md. 539, 552-53, 479 A.2d 1321, 1328 (1984) (quotations and citations omitted). Classic examples include the public's rights to use roadways or waterways, or criminal activity on a property that poses a danger to the public. *See Adams v. Commissioners of Town of Trappe*, 204 Md. 165, 173, 102 A.2d 830, 834 (1954) (public street); *Block v. City of Baltimore*, 149 Md. 39, 51, 129 A. 887, 892-93 (1925) (waterway); *Whitaker v. Prince George's County,* 307 Md. 368, 377-78, 514 A.2d 4, 9-10 (1986) (operating a bawdyhouse). Second, defendants must have violated this

public right through unlawful conduct. *See Wietzke*, 421 Md. at 374, 26 A.3d at 373; *Walser*, 98 Md. App. at 397, 633 A.2d at 478. Third, the unlawful conduct must have proximately caused the nuisance. *See Tadjer*, 300 Md. at 551, 479 A.2d at 1327. Lastly, the defendant must control the instrumentality that creates the public nuisance. *See East Coast Freight Lines, Inc. v. Consolidated Gas. Elec. Light & Power Co.*, 187 Md. 385, 402, 50 A.2d 246, 254 (1946).

Under this jurisprudence, the County has not pleaded a public nuisance claim. Personal injuries to individuals, even if numerous, from the use or misuse of lawful products, and derivative costs related to the treatment of or other response to such individuals, do not implicate these elements: (1) plaintiff is not alleging an injury to the public's right to use land, water or air; (2) defendants were not engaged in public-nuisance causing conduct, but involved in the sale of a lawful, beneficial, and highly-regulated product; (3) defendants' participation in the products' chain of commerce did not proximately cause any of the remote injuries alleged—individually or collectively; and (4) defendants had no control over how the opioid medicines were used or misused after they were sold to consumers. There are other bodies of law, including products liability, that govern the County's allegations.

Here, Anne Arundel County's claims conflict with the purpose, terms, and remedies of Maryland public nuisance law. Most state high courts, when given the chance, have rejected these types of claims, ruling that fundamental

liability principles governing public nuisance cannot be cast aside. Accordingly, *amici* urge the Court to stay within longstanding Maryland and American jurisprudence by responding "no" to the certified question, and rejecting the broad expansion of public nuisance liability sought here.

ARGUMENT

I. THIS LITIGATION CONTINUES A 50-YEAR EFFORT TO EXPAND PUBLIC NUISANCE TO CLAIMS AGAINST BUSINESSES THAT PROVIDE PRODUCTS BY CIRCUMVENTING SETTLED LAW

Anne Arundel County's attempt to recast the tort of public nuisance in this case represents a radical departure from traditional public nuisance law. Going back to English common law, public nuisance law has provided governments with the ability to stop and abate unlawful interferences with the public's rights to use public land, communal property, and waterways. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743-47 (2003); *State Ctr. LLC v. Lexington Charles, Ltd. P'ship*, 438 Md. 451, 521, 92 A.3d 400, 441 (2014) (a "public nuisance was an offense against the state . . . subject to abatement."). As indicated, Maryland has long followed these limits on the scope of the tort.

Here, as in other states, governments can sue individuals who cause a public nuisance through unlawful conduct for injunctive relief to stop the nuisance-causing conduct and to abate the nuisance to remove the ongoing

interference with the right to use public property. *See Whitaker v. Prince George's County,* 307 Md. 368, 377-78 (1986); *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570-72 (2006). Suppose a person throws nails onto a road to stop people from driving on it. In that scenario, the liability falls on that person—not the companies that sold the nails. In addition, governments are not entitled to *damages* on a public nuisance claim—instead, their remedies are limited to restoring the public's right to use the road. *See, e.g.*, *State Ctr.,* 438 Md. at 521, 92 A.3d at 441.

Since the 1970s, there has been an effort to expand public nuisance beyond its traditional confines as a local public-land and water-use tort into a tool for requiring businesses, rather than individual wrongdoers or society, to pay the costs of social harms associated with lawful products. *See* Schwartz & Goldberg, 45 Washburn L.J. at 547-48. Proponents believed that suing individuals who misused products in a tortious way would be inefficient and that presumably deep-pocketed businesses could address widespread social issues more effectively. The only way to succeed, though, would be to jettison longstanding elements of the public nuisance cause of action—(1) the existence of a public right, (2) unlawful or unreasonable interference with that public right, (3) causation of the public nuisance, and (4) control of the instrumentality effecting the nuisance—as limits on liability.

The first act of this effort was pursuing changes to the public nuisance chapters of the Restatement (Second) of Torts when it was drafted in the 1970s in hopes of breaking "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other things, advocates sought to change public *right* to anything in the public *interest*, and to remove the wrongful-conduct requirement entirely. If adopted, such changes would have been as radical as removing duty and breach from negligence law. Those transformational changes did not enter the black letter of the Restatement. *See* Restatement (Second) of Torts § 821B (1979).

The advocates' first test case failed. In *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971), they pursued businesses that sold products or engaged in activities that allegedly contributed to smog in Los Angeles. The appellate court dismissed the claims as inconsistent with the purpose and terms of public nuisance law. *See id.* at 645. As the court explained, the plaintiffs were "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court." *Id.* The advocates then expressed frustration that this and other courts faithfully adhered to the requirements of public nuisance law, acting as a

"gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy of using public nuisance law to try to circumvent products liability and other bodies of law governing the rights and responsibilities of those who provide products—and to assume a regulatory function best suited for legislatures and administrative agencies—intensified in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (changes sought by environmentalists "invite[d] mischief in other areas—such as products liability"). These cases targeted manufacturers and other providers of lawful products that had inherent risks or could be used or misused in ways that created harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984), *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1990) (PCBs); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco). Again, judges applied traditional public nuisance principles and dismissed these cases.

In such cases, the courts explained that, as a general premise, manufacturers and others in a product's chain of commerce "may not be held liable on a nuisance theory for injuries" caused by a product. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992); *see also Am.*

Tobacco Co., 14 F. Supp. 2d at 973 ("The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law."). Otherwise, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. Companies involved in providing products would be liable whenever someone uses a product to cause harm regardless of the companies' "culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). The Seventh Circuit explained that once a product is sold to the consumer, it is only the consumer who is "in control of the product purchased and [is] solely responsible for the nuisance it created." *Westinghouse*, 891 F.2d at 614.

The idea of expanding public nuisance liability to engulf conduct involved with providing products gained momentum after the tobacco litigation in the mid-1990s settled for nearly $250 billion. What is often misunderstood or ignored, however, is that this expansive framing of public nuisance was *rejected* in court. The only court to rule on a public nuisance claim in the tobacco litigation held that "[t]he overly broad definition of the elements of public nuisance urged by the State is simply not found in case law." *American Tobacco Co.*, 14 F. Supp. 2d at 973. Yet, given the size of the settlement, public nuisance became a misleading element of the litigation's lore. Soon thereafter, lawyers strategizing over suing the firearms industry for local-government costs associated with gun violence turned to public nuisance law, even while

acknowledging that this pursuit had "legal problems" and had "never [won] in court." David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1172 (2000). They claimed that certain industry marketing practices facilitated the illegal secondary market for and illegal use of firearms, thereby interfering with public health and safety. *Id.*

These lawsuits continued to fail as a matter of law. The Illinois Supreme Court explained, in a case with parallels to the case at bar, that "we do not intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials," but the court could not recognize a cause of action "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to" invoke the theory. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114-16 (Ill. 2004); *see also Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) ("[T]he scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.").

Thus, in response to these cases, the nation's courts spoke with clarity and uniformity: public nuisance law does not extend to manufacturing, selling, or otherwise providing products. Public nuisance is a local land and water-use tort. It is not a substitute for a regulatory regime.

II. THIS COURT SHOULD JOIN OTHER STATES' COURTS IN AFFIRMING THAT PUBLIC NUISANCE LAW CANNOT BE CONVERTED INTO AN ALL-ENCOMPASSING CAUSE OF ACTION

Nevertheless, on a few occasions, trial courts in other states have allowed divergences from traditional public nuisance law. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022). These courts have been candid about their desire to tackle a social problem—even when liability was not based on the proper application of the law. *See*, *e.g.*, *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) (not wanting to "turn a blind eye" to lead poisoning); *In re Nat'l Prescriptions Opiate Litig.*, Transcript at 4, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 9, 2018) (Doc. #58) (stating that the court's focus was not "figuring out the answer to interesting legal questions," but to "do something" about prescription drug abuse). Most courts, though, have resisted creating a cause of action that requires companies to pay for social problems regardless of fault, causation, the existence of a public right, or any other traditional element of public nuisance liability.

To this end, when high courts in other states have had the opportunity, they have enforced the traditional limits of public nuisance law. Their rulings are consistent with this Court's application of public nuisance law and provide

an important guide for responding to the types of claims here. They have explained that public nuisance law has distinct elements that do not allow governments to recover costs related to individuals' product-based injuries.

First, courts—including this one—have reaffirmed that the term "public right" refers to something specific: the communal right of the public to use a shared government resource, like a public road, common space, or waterway. *See Tadjer*, 300 Md. at 553, 479 A.2d at 1328. A common-law public nuisance is thus a dangerous condition interfering with the public's ability to use a communal resource. *See, e.g., State v. Lead Indus. Ass'n*, 951 A.2d 428, 447 (R.I. 2008) (calling the existence of a public right "the *sine qua non* of a cause of action for public nuisance") (citing 58 Am.Jur.2d Nuisances § 39, at 598-99 (2002). Based on this understanding, the Rhode Island Supreme Court overturned a trial court's ruling that manufacturers of lead pigment and paint could be subject to public nuisance liability for certain risks of the product (lead poisoning). *See id*. As that court explained, a public right is limited to "the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way.'" *Id*. at 448 (citation omitted).

Accordingly, in Maryland and other states, a public right is not implicated merely because the conduct at issue affects the health of multiple individuals, as is alleged here. *See, e.g.*, *Tadjer*, 300 Md. at 553, 479 A.2d at 1327-28; *Block*, 149 Md. at 52, 129 A. at 892. There are many widespread public

health or safety issues that are in the public's interest to resolve, but they do not automatically implicate public rights, much less establish a public nuisance cause-of-action.[3]

Donald Gifford, a renowned torts scholar and the former Dean of the University of Maryland Carey School of Law, explained this point as follows:

> That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates a "public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.

Gifford, 71 U. Cin. L. Rev. at 815.

The Rhode Island high court adopted Gifford's reasoning, stating that "[h]owever grave the problem of lead poisoning . . . [Plaintiff] has not and cannot allege facts that would fall within the parameters of what would constitute a public nuisance." *Id*. The Illinois Supreme Court agreed, stating that the "public right" element limits when the tort can be used: there is no "public right to be free from the threat that some individuals may use an otherwise legal product. . . in a manner that may create a risk of harm."

[3] The Legislature recognizes as much and designates some—but not all—activities harmful to the public interest as public nuisances. *See, e.g.*, Md. Code, Criminal Law, § 5-605 (declaring "places" used in illegal drug trade "common nuisances").

Chicago, 821 N.E.2d at 1114-16. These courts appreciated that these risks may implicate many private rights and may be of great public (and legislative) interest, but they do not trigger "public rights" under public nuisance law.

Second, public nuisance liability requires a specific type of misconduct. Consistent with Maryland law, courts have held that a person must generally have engaged in unlawful activity when interfering with a public right in order to be subject to liability for a public nuisance. *See East Coast Freight Lines*, 187 Md. at 400-02, 50 A.2d at 253-54 (holding that company did not create a public nuisance by placing an electric pole where "the location of the pole was determined not by the company, but by City authorities"); *cf. Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 130, 622 A.2d 745, 752 (1993) (noting that the Legislature "may legalize what otherwise would be a public nuisance") (citations omitted). Historically, the misconduct requirement was quasi-criminal in nature, and involved violations of laws or regulations. *See Adams*, 204 Md. at 175, 102 A.2d at 836; *Hamilton v. Whitridge*, 11 Md. 128, 146, 1857 WL 3801, at *10 (1857) (State's "remedy in respect to public nuisances is by [criminal] indictment."). Today, criminality is not always required, but the conduct must still be "flagrantly contrary to accepted standards of conduct." *Wietzke*, 421 Md. at 375, 26 A.3d at 375.

For these reasons, providing a product, particularly one approved by the government for its benefits, does not create public nuisance liability—even if

the product comes with risks of harm. As New Jersey's Supreme Court explained: "the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it." *In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007). As another court observed, "the role of 'creator' of a nuisance" seems "totally alien" in the context of those who provide products. *Detroit Bd. of Educ.*, 493 N.W.2d at 521.

Third, courts—including in Maryland—have made clear that causation requirements apply in public nuisance cases just like any other tort. *East Coast Freight Lines*, 187 Md. at 400-02, 50 A.2d at 253-54 (rejecting liability where a third party, not the defendant, caused a public nuisance). "Causation is a basic requirement in any public nuisance action. . . . In addition to proving that the defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause." *Lead Indus. Ass'n*, 951 A.2d at 450.

Precisely because standard causation requirements apply to (and thus limit the availability of) the public nuisance tort, some government plaintiffs have asked courts to lower causation standards in public nuisance cases so they can subject companies to liability for merely contributing to the risk of harm or to substitute the chain of commerce for the chain of causation. However, courts have rejected efforts to create an abstract or aggregate notion of causation for public nuisance cases. The Missouri Supreme Court reaffirmed

that, "[t]o the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (en banc). Otherwise, as an Illinois court cautioned, governments would frame a case "as a public nuisance action rather than a product liability suit" to lower liability standards. *City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

Fourth, a defendant must *control* the conduct creating the public nuisance. Control is a "basic element of the tort." *Lead Indus. Ass'n*, 951 A.2d at 449. As New Jersey's Supreme Court made clear, "a public nuisance, by definition, is related to conduct, performed in a location with the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499. For this reason, this Court has stated in landlord-tenant cases that "when the owner has parted with his control, the tenant has the burden of keeping the premises. . . and for any nuisance created by the tenant the landlord is not responsible." *Matthews v. Amberwood Assocs. Ltd. P'ship, Inc.*, 351 Md. 544, 555, 719 A.2d 119, 124 (1998) (citations omitted). In product cases, as here, control cannot exist because the business that provided the product "has relinquished possession by selling or otherwise distributing the product" and does not control the

product or how it is used when the nuisance is created. Gifford, 71 U. Cin. L. Rev. at 820.

As a result of these state high court rulings, many courts apply "what appears to be an absolute rule": if a product after being sold, creates or contributes to a nuisance, an entity that is in the product's chain of commerce is not liable unless it "controls or directs" the public-nuisance-causing activity. *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511 (S.D.N.Y. 2022).

In addition, courts have held that governments may not obtain monetary damages in public nuisance cases. *See, e.g.*, *In re Paraquat Prods. Liab. Litig.*, MDL No. 3004, 2022 WL 451898 (S.D. Ill. Feb. 14, 2022) (governments cannot "seek damages for their alleged injuries rather than abatement of any true public nuisance"). This makes sense. The government's job is to restore the people's public property rights. If an individual sustained a personal injury from the public nuisance, he or she may bring a separate civil action under Maryland's "special damage rule." *Cf. Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 82, 59 A.3d 545, 449 (2013).

Accordingly, personal injuries from products and their derivative costs cannot be converted into public nuisance liability. It is *insufficient* for a public nuisance claim to allege that the manufacturer or seller "knew of the dangers" but "failed to tackle the problem." *In re Paraquat Prods. Liab. Litig.*, 2022 WL

451898, at *11. Otherwise, "all a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 1st Dep't 2003). In short, an expanded public nuisance tort would be used as a vehicle to evade the established limits on product-liability and other bodies of liability law.

The Restatement Third thus cautions against public nuisance claims "phrased at a level of generality that has sometimes caused confusion," in which any activity involving risks may be described as "invading the rights of the public." Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. b (2020). It observes that "this way of speaking has occasionally caused unsound claims of public nuisance to be brought on facts outside the traditional ambit of the tort." *Id*. The Restatement reaffirms that public nuisance liability has been "rejected by most courts" in product cases "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." *Id*. cmt. g. "Mass harms caused by dangerous products are better addressed through products liability, which has been developed and refined with sensitivity to the various policies at stake." *Id*.

Indeed, imposing liability on manufacturers and others in the chain of commerce "for the acts of a third party seems contrary to every norm of established jurisprudence." *People v. PepsiCo., Inc.*, 222 N.Y.S.3d 907, 916 (N.Y. Sup. Ct., Erie County, Oct. 31, 2024) (rejecting public nuisance claim seeking to impose costs of "plastic pollution crisis" on beverage manufacturers; that theory has "never been adopted by a court in this state or any other"). Yet governments continue to file similar public nuisance claims. *See* Complaint, *Mayor and City Council of Baltimore v. Pepsico, Inc.*, No. C-24-CV-24-001003 (Cir. Ct. Baltimore Cty. filed June 20, 2024).

This Court should confine Maryland public nuisance law to its settled limits and should not permit its unprincipled expansion. Manufacturers, sellers, and others in a product's chain of commerce may not be subject to liability for third parties' use or misuse of the product.

III. COURTS AROUND THE COUNTRY HAVE REJECTED EXPANDING THE TORT OF PUBLIC NUISANCE IN RESPONSE TO COMPARABLE ALLEGATIONS

Adhering to these traditional principles, many courts have rejected the County's expansive theory of public nuisance liability in opioid cases like this one, regardless of which entities in the chain of commerce governments pursued. The Oklahoma Supreme Court became the first high court to overturn a trial court ruling that would have applied the state's public nuisance law to manufacturing, marketing, and selling of opioid medications.

See State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021). The court's opinion embraced rulings tracing the history of the tort, noting that public nuisance applies only to "conduct, performed in a location within the actor's control, which harmed those common rights of the general public." *Id.* at 724 (citing Restatement (Second) of Torts §821B cmt. b (1979)). Accordingly, the court held that the case before it did not involve the "violation of a public right." *Id.* at 726.

There, as here, the government plaintiff "characterized its suit as an interference with the public right of health." *Id.* at 727. The supreme court explained that the invocation of public health does not implicate a public right governed by public nuisance law: the litigation "does not involve a comparable incident to those in which we have anticipated that an injury to public health would occur, *e.g.*, diseased animals, pollution in drinking water, or the discharge of sew[age] on property." *Id.* "Such property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use of treating pain." *Id.* "[A] public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all types of use and misuse of prescription medications." *Id.*

The supreme court then reinforced that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id*. at 725. The responsibility of product sellers "is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id*. at 728. Nor should a manufacturer or seller be held liable for its products after they enter the stream of commerce, and any public nuisance allegedly caused by opioid abuse occurs after the product has been sold. *See id*. at 729. To hold otherwise "would create unlimited and unprincipled liability for product manufacturers." *Id*. at 725.

Recently, the high courts of Maine and Ohio similarly dismissed public nuisance claims seeking costs associated with opioid misuse. *See Eastern Maine Med. Ctr. v. Walgreen Co*., 331 A.3d 380, 392 (Me. 2025); *In re Nat'l Prescription Opiate Litig*., 2024-Ohio-5744, ¶ 34 (2024). As the Ohio Supreme Court understood, "[c]reating a solution to this crisis out of whole cloth is . . . beyond this court's authority." 2024-Ohio-5744, ¶ 34.

Other courts have reached the same conclusions. The federal district court in the West Virginia opioid litigation affirmed that public nuisance does not apply to "the marketing and sale" of a product, only the "misuse, or interference with, public property or resources." *City of Huntington v. AmerisourceBergen Drug Corp*., 609 F. Supp. 3d 408, 472 (S.D. W. Va. 2022).

The theory does not hinge on whether the product is associated with known or knowable risks that the company failed to prevent. Otherwise the theory could be used "against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *Id.* at 474. The court thus joined the chorus of courts against creating a "super tort":

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

Id.

Courts acknowledged that "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money," but they have *acted* based on the reality that to do so would be "bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990, at *8 (Conn. Super. Ct., Jan. 8, 2019); *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019) (dismissing opioid-related claims because state's public nuisance law does not extend to the sale of goods where, as here, one party sold to another a product that later is alleged to effect a nuisance). Put simply, public nuisance law does not create liability

for harms caused by products or shift costs associated with their risks to manufacturers, sellers, or others involved in the chain of commerce.

IV. PRODUCT LIABILITY LAW AND APPLICABLE REGULATORY REGIMES, NOT THE TORT OF PUBLIC NUISANCE, ARE THE APPROPRIATE BODIES OF LAW FOR GOVERNING PRODUCT-BASED RISKS

The Court should also answer the certified question in the negative to ensure that product liability remains the sole body of tort law governing risks associated with products after they are sold. Product-defect causes of action have their own purposes, elements, and remedies. They manage the risks that (as appropriate) product manufacturers, sellers, or other such entities can control, namely putting lawful, non-defective products into the stream of commerce. Product-liability law, not the tort of public nuisance, should continue to be the sole basis of tort liability for claims related to products. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

Products liability does not subject companies to industry-wide liability merely for providing the public with products that may have known risks of harm. These businesses cannot police customers to ensure that products are not misused or neglected in ways that create a public nuisance. They are not insurers against abuse. *See* John W. Wade, *On the Nature of Strict Tort*

Liability for Products, 44 Miss. L.J. 825, 828 (1973) ("[L]iability for products is clearly not that of an insurer.").

Allowing courts to manage these risks through public nuisance law is particularly inappropriate for prescription medications, given that Congress has authorized and directed the FDA to engage in the risk assessments and balancing that Plaintiff asks the courts to perform here. All aspects of prescription medications are comprehensively regulated by the FDA, from risks and benefits to health, to design and labeling. *See* 21 U.S.C. § 821 *et seq*. Even their distribution chain is highly regulated. Companies are registered with state and federal authorities to sell prescription medications; the medicines must be dispensed at licensed pharmacies; and each person must obtain a prescription from a physician to purchase them. *See id.* Further, the FDA continually "evaluates not only the outcomes of opioids when used a[s] prescribed, but also the public health effects of inappropriate use of these drugs." U.S. Food & Drug Admin., Opioid Medications, https://www.fda.gov/drugs/information-drug-class/opioid-medications (last updated Mar. 29, 2021).

Using the blunt judicial tool of public nuisance law to supplant or second-guess the FDA's expert policy decisions would sharply undermine the comprehensive regulatory regime. Ensuring liability law is not used to perform a quasi-regulatory function is a significant concern for *amici* and their members. Businesses that provide all types of products with inherent risks—

from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance product risks and benefits.[4] Otherwise, as Professor Thomas Merrill explains, public nuisance law would violate "the most elemental aspect of the rule of law: that legal duties be sufficiently predictable to guide those to whom they apply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 987-88 (2023). The tort would become "a Rorschach blot" for courts to apply without regard to established principles. *Id*. at 988.

Here, the Court should not allow the circumvention of regulatory or enforcement laws by misapplying and expanding public nuisance law. Anne Arundel County's theory finds no support in Maryland's public nuisance law or that of other states. Under the traditional elements of public nuisance liability—interference with a public right, unlawful conduct, proximate causation, and control—the nuisance claim must be dismissed.

[4] For example, products sold by *amici's* corporate members are regulated under numerous regulatory regimes, including pursuant to the Consumer Product Safety Act, National Traffic and Motor Vehicle Safety Act, Toxic Substances Control Act, and Federal Insecticide, Fungicide, and Rodenticide Act.

CONCLUSION

For these reasons, the Court should answer the certified question in the negative. Under Maryland's common law, involvement in providing a lawful product, including a regulated and controlled substance, does not give rise to public nuisance liability.

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Respectfully submitted,

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1. This brief contains 6,489 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May 2025, the foregoing Brief of *Amici Curiae* was filed and served electronically via MDEC upon all counsel of record.

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