Supreme Court of Ohio Clerk of Court - Filed January 08, 2024 - Case No. 2023-1155

Case No. 2023-1155

IN THE SUPREME COURT OF OHIO

In re National Prescription Opiate Litigation

TRUMBULL COUNTY, OHIO, *et al.*,
Plaintiffs-Appellees

- v. –

PURDUE PHARMA, *et al.*,
Defendants,

WALGREENS BOOTS ALLIANCE, INC., *et al.*,
CVS PHARMACY, INC., *et al.*,
WALMART INC.,
Defendants-Appellants

On Consideration of Certified Question
from the United States Court of Appeals
for the Sixth Circuit (No. 22-3750 *et al.*)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

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State ex rel. Ravnsborg v. Purdue Pharma, L.P.,
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OTHER AUTHORITIES

American Tort Reform Ass'n, *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort"* (2020), https://tinyurl.com/2ajhtmxw 9

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 793 (2003). 6, 7

Lead-Paint Ruling Might Undercut Ohio Lawsuits, THE COLUMBUS DISPATCH (July 2, 2008), http://tinyurl.com/jbkm9z8j 15

Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702 (2023) 6

Peter Krouse, *Bill Could Thwart Cities' Lawsuits on Lead Paint*, CLEVELAND PLAIN DEALER (Dec. 15, 2006) 14

Restatement of the Law 2d, Torts, Section 821B Comment a (1979) 6

Restatement of the Law 3d, Torts: Liab. For Econ. Harm, Section 8 Comment g (2020) 12

State Dismisses Lead-Paint Lawsuit, THE COLUMBUS DISPATCH (Feb. 7, 2009), http://tinyurl.com/3fczbub5. 15

U.S. Chamber Inst. for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* (2019), https://tinyurl.com/mr2whj73 ....7, 9

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STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The Chamber of Commerce of the United States of America (the Chamber) and the American Tort Reform Association (ATRA) submit this amici brief in accordance with Rule 16.06 of the Ohio Rules of Practice of the Ohio Supreme Court.

The 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 in the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

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. For more than three decades, ATRA has filed amicus briefs in cases that threaten the stability of the American tort system.

This is one of those cases. The Chamber and ATRA have an interest in ensuring that Ohio's tort system remains predictable and abides by longstanding principles governing fundamental aspects of tort law. The federal district court's decision—which the Sixth Circuit certified for this Court's review—eviscerates those principles.

Since the Founding, public nuisance has played a limited role in American jurisprudence. It originated as a property-based tort for remedying invasions of public lands or shared resources like highways and waterways. Over the years, whenever plaintiffs or lower courts have tried to expand the public-nuisance tort, legislatures and state supreme courts have stepped in and restored the tort to its original limited role. In Ohio, when it appeared that plaintiffs were trying to expand

public-nuisance liability beyond its historical confines to impose liability for the sale of lawful, non-defective products, the Ohio General Assembly enacted a law stopping that effort in its tracks.

The federal district court ignored that history and the Ohio General Assembly's mandate, creating a public-nuisance super tort that exposes Ohio businesses to unlimited liability for virtually every perceived societal ill. If the federal court's decision stands uncorrected, a local government may next try to leverage a public-nuisance theory to sue fast-food restaurants for causing an obesity epidemic or smartphone manufacturers for harms caused by a generation of distracted drivers. Obesity and transportation safety, like opioid abuse, are public issues that call for policy-driven solutions by elected officials. The federal district court circumvented the democratic process, improperly seizing policymaking power so that it could create its own solution to the opioid crisis.

Transferring legislative power to the judiciary in that way—under the guise of public-nuisance law—would undermine the predictability of Ohio's statutory scheme and exponentially increase tort liability in Ohio. It would chill business activity throughout the State for fear that any product linked to a perceived social problem may lead to astronomical and disproportionate liability. It is not the judiciary's role to create a new tort to address social problems. That job belongs to the legislature, which can weigh competing policy factors and the possible consequences of expanding public-nuisance liability. And here, the Ohio legislature has spoken. This Court should answer the certified question in the affirmative, confirming that the Ohio Product Liability Act forecloses common-law public nuisance claims arising out of the commercial sale of a product.

STATEMENT OF FACTS

Amici adopt the Statement of Facts from Appellants' brief.

ARGUMENT

Proposition of Law: The Ohio Product Liability Act, as amended in 2005 and 2007, supersedes this Court's divided opinion in *City of Cincinnati v. Beretta U.S.A. Corp.,* 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, and clarifies that Ohio recognizes public nuisance's traditional limits and does not allow "any public nuisance claim or cause of action at common law in which it is alleged that the . . . sale of a product unreasonably interferes with a right common to the general public." OHIO REV. CODE § 2307.71 (A)(13), (B).

Opioid addiction is a serious problem that demands serious, policy-based solutions. It calls for a legislative response, not a judicial one.

From the earliest days of the opioid MDL, however, the federal district court displayed a legislative impulse. During its first conference with counsel in January 2018, the court outlined its strategy for solving the opioid crisis even while acknowledging that the job belonged to the other branches of government:

> [I]n my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate [the opioid crisis]. That includes the . . . pharmacies. . . .
>
> [T]he resolution I'm talking about is really -- what I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now.
>
> So that's what I want to accomplish. And then we'll deal with the money. We can deal with the money also and the treatment. I mean, that's what -- you know, we need a whole lot -- some new systems in place, and we need some treatment. Okay? We don't need -- we don't need a lot of briefs and we don't need trials. They're not going to -- none of them are -- none of those are going to solve what we've got.
>
> So, again, you know, ideally, *this should be handled by the legislative and executive branches, our federal government, and our state governments. They haven't seemed to have done a whole lot. So it's here.*

In re Nat'l Prescription Opiate Litig., No. 17-2804, R.71 at 462, 467–68 (N.D. Ohio Jan. 12, 2018) (Transcript of Proceedings Before the Honorable Dan A. Polster and the Honorable David A. Ruiz) (emphasis added). In other words, the district court announced at the MDL's beginning that it

believed that it needed to compensate for perceived legislative and executive failures.

Fast-forward to February 2022, and the district court again acknowledged that the opioid crisis is a problem for the legislative and executive branches while expressing its willingness to stand in for those other branches to formulate a solution:

> *The responsibility to address the long-standing opioid epidemic should rest upon the executive and legislative branches, but they have failed to do their job*. The judicial branch is not equipped to do so, but the nation's States, cities and counties have nevertheless turned to the courts.

Response from Hon. Dan. A. Polster, *In re Harris Cnty.*, No. 21-3637 (6th Cir. Feb. 28, 2022), Dkt. 5 at 2 (emphasis added).

Although the district court lamented what it perceived as legislative inaction, the reality is that the Ohio legislature *has* acted on the precise issue presented in this appeal. It has said in no uncertain terms that common law public-nuisance lawsuits like this one—whether about opioid sales or sales of any other product—are prohibited in Ohio.

In 2002, this Court ruled 4-3 that a gun manufacturer could face liability for creating a public nuisance based on the sale of lawful firearms. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 11. Recognizing that the *Beretta* decision threatened to swallow all of Ohio tort law, the Ohio General Assembly responded by twice amending the Ohio Product Liability Act (OPLA) (first in 2005 and again in 2007) to eliminate product-based public-nuisance claims in Ohio. As amended, the OPLA abrogates "*any public nuisance claim* or cause of action at common law in which it is alleged that the . . . *sale of a product* unreasonably interferes with a right common to the general public." OHIO REV. CODE § 2307.71 (A)(13), (B) (emphasis added).

The Ohio General Assembly's legislative response to the *Beretta* decision restored Ohio public-nuisance law to its historical confines and brought Ohio back in line with the majority of

states that have refused to extend public-nuisance law to harms allegedly caused by the sale of a product. *See, e.g.*, *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor."); *State ex rel. Hunter v. Johnson & Johnson*, 2021 OK 54, 499 P.3d 719, ¶ 18 ("Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap.").

The federal district court effectively nullified the Ohio statute by allowing a jury to tag three pharmacy defendants with public-nuisance liability based on their sale of a product (prescription opioids). Worse, the court issued a 76-page "Abatement Order" requiring the pharmacies to pay more than $650 million to two counties to fund programs aimed at addressing opioid abuse, even though the OPLA prevents any public-nuisance relief relating to the sale of a product.

The federal district court's judgment was judicial in form but legislative in substance. A judge is entitled to personal opinions about the appropriateness of legislative action. But it is never appropriate for a judge to play legislator. *See Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 35 ("It is not the role of the courts to establish legislative policies or to second-guess the General Assembly's policy choices. [T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices." (internal citations omitted)).

The version of public nuisance that the district court recognized—and that the Ohio legislature rejected—represents a new and dangerous species of super tort that is not limited to abating invasions of the public's use of shared resources like highways and waterways. It bears no

resemblance to the public nuisances that courts have recognized in the eight centuries since the claim emerged in the common law. It ignores fundamental legal requirements like statutes of limitations and causation principles. It would do great damage not only to Ohio law but also to the State's businesses. That is why the Ohio legislature rejected it and why this Court should too.

A. Public nuisance has traditionally been limited to conduct that interferes with the use of real property.

The public-nuisance claim recognized by the federal district court is different in kind from the limited public-nuisance tort that has developed in the American legal system.

Originally a mechanism for the English Crown to abate conditions that impeded royal property or public roads and waterways (Restatement of the Law 2d, Torts, Section 821B Comment a (1979)), public-nuisance law found its way into American courts during the early days of the Republic. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 793, 800 (2003). From its early appearances in American jurisprudence, the tort was focused on conduct that interfered with a "public right"—that is, the right to access shared resources like public roads and waterways.[1] *See, e.g.*, *State v. Lead Indus. Ass'n*, 951 A.2d 428,

[1] In earlier briefing, opposing amici argued that there are instances in which courts long ago recognized public-nuisance claims based on the sale of products. For example, in their brief, the Legal Scholars cite an article that references a 1662 treatise that purportedly recognizes a "common nuisance[]" claim for "apothecaries who sell products *unfit for human consumption*." Brief of Legal Scholars at 11, *In re Nat'l Prescription Opiate Litig.*, Nos. 22–3750 (6th Cir. Feb. 20, 2023) (citing Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 716 (2023) (quoting William Sheppard, *The Court-Keepers Guide* (5th ed. 1662))) (emphasis added). But neither that treatise nor the article that amici rely on denies that public nuisance was originally limited to interferences with land—things like public roads and waterways. *See* Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. at 740 (acknowledging that "public nuisance might have begun with interference to public waterways and roadways"). And even if there are examples where courts experimented with expanding public nuisance to toxic or tainted goods, no party or amici has offered support for the proposition that the tort was historically extended to impose liability for the lawful sale of non-defective products like opioids that are regulated by the FDA and prescribed by licensed doctors.

455 (R.I. 2008) (describing the "long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way"). It existed primarily as an injunctive remedy that allowed the government to abate restrictions on those resources. Over time, the liability theory evolved to allow individuals to press private claims for nuisance, but only if their harm was "special" or different in kind from the injury to the public. Gifford, 71 U. CIN. L. REV. at 800; *see also* U.S. Chamber Inst. for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* at 3–4 (2019), https://tinyurl.com/mr2whj73 ("*Waking the Litigation Monster*") (explaining the special-injury rule).

Public nuisance remained confined and stable in that way for hundreds of years. But in the late twentieth century, private plaintiffs' counsel began trying to expand nuisance law beyond its historical limits. *See* Victor E. Schwartz *et al.*, *Can Governments Impose A New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. Rev. 923, 931 (2009); *see also* Gifford, 71 U. CIN. L. REV. at 748–49.

Those early attempts failed. In the 1980s, plaintiffs pressed public-nuisance claims (along with other types of claims) against manufacturers of building materials containing asbestos. Although courts sustained asbestos claims on other theories, "[a]ll of the courts that . . . considered the issue . . . rejected nuisance as a theory of recovery." *Tioga Pub. Sch.*, 984 F.2d at 920. In assessing whether nuisance laws provided a remedy, many courts looked to the "limitations of traditional common law nuisance doctrine," including that, as a general matter, nuisance claims "arise in the classic context of a landowner or other person *in control of property* conducting an activity *on his land* in such a manner as to interfere with the property rights of a neighbor." *Id.* (emphasis added). Without precedent supporting a broader application, courts refused to expand

the doctrine beyond its traditional foundations. *See id.* ("When one considers the fact that the [nuisance] statute is over a hundred years old, the absence of analogous cases supports an inference that the statute was neither intended nor has it been understood to extend to cases such as [those involving asbestos products].").

Other courts saw nuisance claims as a ploy to sidestep traditional legal requirements like statutes of limitations and causation principles. *See, e.g.*, *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. App. 1992) ("[T]he public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim."). As the Eighth Circuit explained, without those traditional limits, "[n]uisance . . . would become a monster that would devour in one gulp the entire law of tort."[2] *Tioga Pub. Sch.*, 984 F.2d at 921; *see also Celotex Corp.*, 493 N.W.2d at 521 (holding that allowing a nuisance claim in asbestos cases "would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products, and not merely asbestos products").

Courts' steady refusal to entertain public-nuisance claims did not stop plaintiffs from trying. The next wave of lawsuits in the 1990s fundamentally changed the dynamics of public-nuisance cases. Through contingency-fee arrangements, private lawyers "signed up local governments to sue for a variety of environmental and social issues associated with the use, misuse,

[2] The Counties' amici did nothing to comfort the Sixth Circuit that the monster can be caged once freed. On the contrary, they suggested that public nuisance is constantly evolving to capture an ever-expanding range of conduct. *See* Brief of Legal Scholars at 7, 11, 13 (emphasizing "broad contours of public nuisance"). And although amici argue that the doctrine can be cabined, for example, by its requirement of an "unreasonable" interference with a "public right" (*id.* at 20), cases like this one expose how amorphous those standards can be. Indeed, under amici's expansive view of public nuisance, just about anything could qualify as a public right so long as it affects enough people.

or disposal of products . . . ." American Tort Reform Ass'n, *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort"* at 3 (2020), https://tinyurl.com/2ajhtmxw.

Tobacco litigation, for example, eventually produced the then-largest settlement in American history, even though no appellate court issued an opinion approving nuisance as a basis for recovery. On the contrary, the lone court to publish an opinion before the settlement rejected the nuisance claim and explained that it was "unwilling to accept the State's invitation to expand a claim for public nuisance beyond its grounding in real property." *Tex. v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997); *see also Waking the Litigation Monster* at 13 ("The great irony in the tobacco litigation was that the only court to actually review the viability of a public nuisance claim against the tobacco companies dismissed it . . . .").

Plaintiffs next pressed public-nuisance claims against lead-paint manufacturers. But every state supreme court to assess those claims refused to expand nuisance liability beyond its historical roots. The New Jersey Supreme Court, for instance, "examin[ed] the historical antecedents of public nuisance and . . . trac[ed] its development through the centuries" and concluded that "permit[ing] these complaints to proceed . . . would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 494–95 (N.J. 2007); *see also id.* (explaining that "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance"). The Rhode Island Supreme Court likewise observed that "[a] common feature of public nuisance is the occurrence of a dangerous condition at a specific location" and that all nuisance actions in Rhode Island were "related to *land*." *Lead Indus. Ass'n*, 951 A.2d at 452 (emphasis in original). The Rhode Island Supreme Court refused to recognize "a new and entirely

unbounded tort" that ignored the "inherent theoretical limitations of the tort of public nuisance." *Id.* at 455; *see also City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. banc 2007) (affirming summary judgment in favor of lead paint manufacturers on public-nuisance claim and rejecting the city's attempt to sidestep traditional causation standards under the guise of a "uniquely public" and "widespread health hazard").[3]

The Supreme Court of Illinois reached the same conclusion when municipal governments and private plaintiffs' counsel pressed public-nuisance theories against gunmakers. After exploring the historical underpinnings of the "public right" requirement—an essential element of a public-nuisance claim—the court held that "there is [no] public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004). Applying traditional public-nuisance principles, the Illinois Supreme Court held that product manufacturers could not face liability for nuisance when others misused their products. *Id.* (This Court went a different direction on nuisance claims against gun manufacturers. But the Ohio General Assembly overrode that decision, as explained below in Section B.)

[3] In *City of Milwaukee v. NL Industries, Inc.*, 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888, ¶ 1, an intermediate Wisconsin appellate court reversed a trial court's dismissal of public-nuisance claims against two lead paint manufacturers. The Wisconsin Supreme Court never weighed in on the propriety of the nuisance claim. *City of Milwaukee v. NL Indus., Inc.*, 2005 WI 136, 285 Wis. 2d 631, 703 N.W.2d 380 (review dismissed); *City of Milwaukee v. NL Indus., Inc.*, 765 N.W.2d 579 (review denied). Likewise, in another outlier decision, the California Court of Appeal ruled that lead-paint manufacturers could be held liable for public nuisance. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 598 (Cal. App. 2017). The Supreme Court of California declined to hear the case. *People v. Conagra Grocery Prods. Co.*, No. S246102, 2018 Cal. LEXIS 1277 (Feb. 14, 2018).

The opioid crisis is just another testing ground for plaintiffs hoping to push public-nuisance liability beyond its historical bounds. Across the country, plaintiffs (primarily local governments and tribal nations represented by private counsel on a contingency-fee basis) have pressed public-nuisance claims alleging that opioid manufacturers, distributors, and pharmacies contributed to the nation's opioid crisis. Most of those cases were consolidated in the MDL, but others proceeded in their home forums. Although a handful of trial courts have entertained opioid-based nuisance suits, recent decisions show that opioid nuisance suits are destined for the same fate that has met other product-based nuisance theories pressed over the last four decades.

In 2021, the Supreme Court of Oklahoma, the only state supreme court in the country to decide whether the sale of prescription opioids can give rise to a public-nuisance claim, decisively rejected the theory—and in so doing, rejected a trial-court ruling much like the district court's ruling in this case. *State ex rel. Hunter*, 2021 OK 54, 499 P.3d 719, at ¶ 18. There, the trial court found that an opioid manufacturer was liable for the State's opioid crisis under a public-nuisance theory and tagged the manufacturer with a $465 million judgment to fund the State's proposed abatement plan. *Id.* at ¶ 6 & n.12. The Supreme Court of Oklahoma reversed. Tracing the historical roots of public nuisance, the court explained that public nuisance law has generally been limited to defendants who "commit[] crimes constituting a nuisance" or "caus[e] physical injury to property or participat[e] in an offensive activity that rendered the property uninhabitable." *Id.* at ¶¶ 6-18. The court emphasized that extending nuisance law to the sale of FDA-approved opioids "would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Id.* at ¶ 18.

The Supreme Court of Oklahoma recognized the lawsuit for what it was: an improper attempt to disguise a product-liability lawsuit as a public-nuisance claim. As the Court explained, the issue was whether the opioid manufacturer "was or should have been aware and that [it] failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products. This classic articulation of tort law duties—to warn of or to make safe—sounds in product-related liability." *Id.* But "public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id.* at ¶ 27 (citing Restatement of the Law 3d, Torts: Liab. For Econ. Harm, Section 8 Comment g (2020)).[4] The court was concerned that a "contrary ruling would allow consumers to 'convert almost every products liability action into a [public] nuisance claim'":

> 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.

Id. at ¶ 34 (quoting *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 761 N.Y.S.2d 192 (2003)).

Many other courts around the country have also rejected public-nuisance claims in opioid litigation.[5] *See, e.g.*, *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp.3d 408

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[4] Amici argue that the Third Restatement is no obstacle here because "[i]t does not address suits like this one: public nuisance actions brought by government plaintiffs." Brief of Legal Scholars at 16; *see also id.* at 15 (suggesting that the action was brought in *parens patriae*). But the Counties here didn't sue purely on behalf of the public; they sued to recover for their *own* alleged downstream costs (like hospital costs and other costs from their own budget) to abate opioid abuse. "In this way, the [Counties'] claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance." *See Benjamin Moore & Co.*, 226 S.W.3d at 116. Accordingly, the Counties here were required to show, but cannot show, that the Pharmacies caused them "special" harm.

[5] Some other courts in opioid-related litigation have allowed public-nuisance claims to proceed. None of those decisions has found approval in a state or federal appellate court.

(S.D.W. Va. 2022); *State v. Purdue Pharma L.P.*, No. 30-2014-00725287 (Cal. Super. Ct. Orange Cnty. Nov. 1, 2021); *State ex rel. Ravnsborg v. Purdue Pharma, L.P.*, No. 32CIV18-000065 (S.D. Cir. Ct. 6th Jud. Dist. Mar 29, 2021). The same result should obtain even more easily for nuisance claims under Ohio law because the Ohio legislature enacted a statute directly resolving the issue.

B. The Ohio General Assembly has confirmed that public nuisance does not extend to the sale of lawful products.

Ohio traditionally cabined public-nuisance law to its historical roots, remaining in lockstep with states like Oklahoma and others that have refused to extend public-nuisance liability to the sale of lawful, non-defective products. *See* Victor E. Schwartz *et al.*, *Article: Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 653 (2010) (explaining that Ohio's public nuisance law was historically limited "to real property and statutory violations" involving public health or safety).

That changed briefly in 2002, when this Court issued a 4-3 decision in *Beretta* concluding that a city could hold gun manufacturers liable for public nuisance based on the lawful sale of firearms. 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶ 11. That decision represented a clean break from Ohio's own body of nuisance law and made Ohio the first and only state whose high court had endorsed a public-nuisance claim against a product manufacturer. As the three dissenting justices observed, the court had taken the first step toward creating a monster. *See id.* at ¶¶ 78-82 (Cook, J., dissenting) ("In extending the doctrine of public nuisance in this manner, this court takes the ill-advised first step toward transforming nuisance into 'a monster that would devour in one gulp the entire law of tort.'" (internal citations omitted)).

The Ohio General Assembly took notice. "Almost immediately, members of the Ohio General Assembly recognized the threat posed by the court's ruling and introduced legislation to preclude public nuisance claims against product manufacturers." Schwartz *et al.*, 62 OKLA. L. REV.

at 653. The Ohio General Assembly "appreciated that the ruling risked venturing down the slippery slope" and that "permitting such a suit would greatly expand the scope of liability for all product manufacturers by allowing any claim for harm caused by a lawfully manufactured product to be brought under a public nuisance theory." *Id.* Indeed, one Cincinnati legislator commented that the amendment was designed to prevent someone from getting around existing law "by cleverly recasting a product liability case as a public nuisance case." *Id.* (internal citation omitted); *see also* Peter Krouse, *Bill Could Thwart Cities' Lawsuits on Lead Paint*, CLEVELAND PLAIN DEALER, at 1 (Dec. 15, 2006). The Ohio General Assembly promptly amended the OPLA, abrogating *Beretta* and bringing Ohio law back into the mainstream consistent with longstanding Anglo-American legal tradition.

As amended, the OPLA confirms that it is "intended to abrogate all common law product liability claims or causes of action," (OHIO REV. CODE § 2307.71(B)), including "any *public nuisance claim* or cause of action at common law in which it is alleged that the . . . *supply, marketing, distribution*, . . . or sale of a product unreasonably interferes with a right common to the general public." *Id.* § 2307.71(A)(13) (emphasis added). The amendment's text makes clear that Ohio prohibits public-nuisance claims predicated on the sale of a product.[6] Courts and would-

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[6] In its Sixth Circuit brief, amicus for the Counties criticized us for "declin[ing] to parse the plain text of the OPLA at all" (Brief of Former Chief Justice Eric S. Brown at 14–15, *In re Nat'l Prescription Opiate Litig.*, Nos. 22–3750 (6th Cir. Feb. 21, 2023))—even though the OPLA by its terms bars "*any* public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." OHIO REV. CODE § 2307.71 (A)(13) (emphasis added). Amicus then resorts to a hyper-technical, and unpersuasive, argument about the distinction between "means" and "includes"—ignoring not only the statute's plain meaning but also its history and timing. To avoid duplication, we refer the Court to the Pharmacies' opening brief, which addresses that argument.

be plaintiffs certainly understood as much: after the amendment, product-based public-nuisance lawsuits dried up.

In 2007, for instance, the Ohio Court of Common Pleas for Lucas County dismissed a pending lawsuit against a lead-paint manufacturer based on the OPLA amendment. *City of Toledo v. Sherwin-Williams Co.*, No. CI 200606040, 2007 Ohio Misc. LEXIS 5632, at *5–6 (Ohio Ct. Com. Pl. Dec. 12, 2007). That court concluded that, in light of the amended statute, the plaintiff city's public-nuisance claim against the manufacturer to recover abatement costs was "expressly subsumed by the OPLA." *Id*. at *5; *see also id.* at *6 n.2 ("Plaintiff argues that authority allowing it to bring a public nuisance action to seek abatement of a condition that is injurious to public health, safety, and welfare, is found in [*Beretta*]. However, *Beretta* was decided and written prior to the enactment of S.B 80 . . . .").

Meanwhile, other cities and the Ohio Attorney General dismissed similar lawsuits that were pending at the time. *See Lead-Paint Ruling Might Undercut Ohio Lawsuits*, THE COLUMBUS DISPATCH (July 2, 2008), http://tinyurl.com/jbkm9z8j; *State Dismisses Lead-Paint Lawsuit*, THE COLUMBUS DISPATCH (Feb. 7, 2009), http://tinyurl.com/3fczbub5.

Ohio law, as written by the Ohio General Assembly, tracks the law in other states that have declined to extend public-nuisance liability to the sale of lawful, non-defective products like opioids. Amici have not located a single published case, other than the *Beretta* decision that the General Assembly abrogated, in which an Ohio appellate court has ruled to the contrary.

C. The federal district court's decision contravenes settled nuisance law and will wreak havoc on Ohio businesses if it is not repudiated.

In allowing a public-nuisance claim based on the sale of a lawful product, the federal district court made mincemeat of the OPLA's text and substituted its judgment for the Ohio legislature's. The decision would push Ohio back down the slippery slope that the Ohio General

Assembly legislated to avoid.

By ignoring settled Ohio law, the district court created a tort that would devour all other torts. Nothing in Ohio law supports that result. On the contrary, when this Court endorsed an expansive public-nuisance theory in 2002, the Ohio legislature acted immediately to reverse course. It did so in response to the same concerns about runaway nuisance liability that have led appellate courts across the country to reject public-nuisance theories like those embraced by the federal district court's decision. *See, e.g.*, *Sturm, Ruger & Co.*, 309 A.D.2d at 96–97 ("[G]iving a green light to a common-law public nuisance cause of action today will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.").

The federal district court may have had a righteous desire to do something about the opioid crisis. But courts must resist the urge to accomplish that goal by redefining public nuisance to suit their preferred outcome. *See Tioga Pub. Sch.*, 984 F.2d at 921. The district court succumbed to that urge, and now every Ohio business is vulnerable to suits seeking to redress complex social problems by selecting a class of defendants to target on a public-nuisance theory. In Oklahoma, for example, before the state supreme court overturned the nuisance judgment against an opioid manufacturer, plaintiffs seeking to capitalize on the boundless liability theory recognized by the trial court filed public-nuisance claims against e-cigarette manufacturers to recover "retrospective and prospective" costs allegedly caused by the "vaping epidemic." Complaint ¶ 232, *Cherokee Nation v. Juul Labs, Inc.*, No. CJ–20–114 (Sequoyah Cnty. Okla. Sept. 3, 2020). Although the Supreme Court of Oklahoma's decision now forecloses that sort of claim, plaintiffs in Ohio will likely try similar theories if this Court does not reverse the district court. There is no telling what

theories "creative mind[s]" will devise. *Sturm, Ruger & Co.*, 309 A.D.2d at 96. This Court should not invite such mischief in Ohio—especially where the legislature has expressly tried to thwart it.

There are other equally troubling ramifications that will follow if this Court fails to confirm that the Ohio legislature has rejected the federal district court's expansive take on public-nuisance law. As the district court made clear from the outset, it managed the opioid MDL with the goal of fixing a social problem that, in its opinion, had not been adequately addressed by the legislative and executive branches. The court ultimately drove to its preferred outcome by creating a public-nuisance regime that allows judges to supplant the legislative branch and act as a master regulator of social problems. Without the traditional limitations on liability, public-nuisance law would empower a single (often unelected) judge or jury to set public policy for the State on a wide range of complex, controversial social and economic problems and then to enforce those policies by doling out fines and penalties under the label "abatement." That is not the proper role for the judicial branch:

> [J]udges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order . . . [including] commission[ing] scientific studies or conven[ing] groups of experts for advice, or issu[ing] rules under notice-and-comment procedures inviting input by any interested person, or seek[ing] the counsel of regulators in the States where the defendants are located.

Am. Elec. Power Co. v. Conn., 564 U.S. 410, 428, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011).

It is neither fair nor reasonable to expect a single judge to make sweeping policy decisions governing all Ohioans. That job belongs to the other branches of government, which can balance the many competing policy factors and study the consequences of remaking nuisance law. *See Stetter*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 at ¶ 35 ("It is not the role of the courts to establish legislative policies . . . ."); *Diamond v. Gen. Motors Corp.*, 20 Cal.App.3d 374, 382–83, 97 Cal.Rptr. 639 (1971) (concluding that "the trial judge showed the greater wisdom" in dismissing a public-nuisance lawsuit where the plaintiffs were "asking the court to do what the

elected representatives of the people ha[d] not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court"). Perhaps Ohio's public-nuisance regime "is not the one [the district court] would have designed, but that is not for [federal judges] to decide." *Mitchell v. City of Warren*, 803 F.3d 223, 233 (6th Cir. 2015) (Sutton, J.) (enforcing Michigan products-liability statute).

Finally, greenlighting a public-nuisance tort unbounded by traditional limitations would force Ohio businesses to operate in a perpetual state of uncertainty. As reimagined by the federal district court, public-nuisance law would offer businesses no way to predict when they may face liability in Ohio. Whatever benefit the two Ohio counties realize from a single nuisance judgment would pale in comparison to the long-term economic harm from businesses leaving or avoiding the State because of the instability and uncertainty generated by the district court's decision.

CONCLUSION

This Court should answer "yes" to the certified question and confirm that the OPLA, as amended in 2005 and 2007, restored the traditional limits on public-nuisance claims in Ohio and abrogates the plaintiffs' common-law claim of absolute public nuisance.

Respectfully Submitted,

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