Case No. CA 25-00917

New York Supreme Court
Appellate Division – Fourth Department

PEOPLE OF THE STATE OF NEW YORK BY LETITIA JAMES,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Plaintiff-Appellant,

-against-

PEPSICO, INC., ET AL.,

Defendants-Respondents.

New York County Clerk's Index No. 814682/2023

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS COUNCIL OF NEW YORK STATE IN SUPPORT OF DEFENDANTS-RESPONDENTS

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Under 22 NYCRR § 500.1(f), *amici* make the following disclosures.

The Chamber of Commerce of the United States of America ("the Chamber") states that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation. The Chamber is affiliated with the Center for International Private Enterprise and the U.S. Chamber of Commerce Foundation. It has the following subsidiaries: CC1, LLC; CC2, LLC; USIBC Global Private Limited; and Article III Films, LLC.

The Business Council of New York State, Inc. ("the Business Council") states that it is incorporated in the State of New York. It has no parent entity. It has the following affiliates: The Business Council of New York State, Inc. Insurance Fund; The Public Policy Institute of New York State, Inc.; New York Jobs Now, Inc.; Jobs New York Committee; The Business Council PAC; and Coalition for an Affordable NY. It also has the following subsidiaries: The Business Council Service Corporation, Inc. and The Business Council Workers' Compensation Administrators, Inc.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters 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.

The Business Council of New York State, Inc. ("the Business Council") is the leading business organization in New York State, representing the interests of large and small firms throughout the State. The Business Council's membership is made up of more than 3,000 companies, local chambers of commerce, and professional and trade associations. The Business Council's membership consists of both small businesses and some of the largest corporations in the world. The Business Council serves as an advocate for businesses in the State's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs.

Amici have a strong interest in this case. The Attorney General seeks to hold Respondents liable for the conduct of unaffiliated third parties who discarded plastic products into the Buffalo River. But Respondents themselves did nothing wrong.

They did not discard those plastic products, they did not break any laws, and they are not responsible for the criminal or negligent acts of unaffiliated third parties. They simply introduced lawful products into the stream of commerce.

This Court should not redefine public nuisance to create liability for the lawful sale of products. Adopting such a theory would chill business activity throughout the State, exposing any company whose product is linked to a perceived social problem to unknowable and potentially astronomical liability.

Plastic waste presents complex issues. But solutions to problems of this nature should come from the Legislature. That is the body constitutionally equipped to weigh competing policy considerations, balance the interests of affected stakeholders, and develop forward-looking frameworks through the democratic process. The Attorney General cannot ask courts to perform this task. The trial court faithfully adhered to the proper judicial role, and the Chamber and the Business Council urge this Court to affirm the dismissal of the Attorney General's meritless lawsuit.[1]

[1] In this brief, *Amici* focus on the Attorney General's public-nuisance claim because her theory is part of a nationwide effort to transform this cause of action from its traditional, limited role into a plenary tool for policymaking outside the legislative process. To the extent the Attorney General seeks to arrogate the same legislative power to herself by refashioning New York General Business Law § 349, New York Executive Law § 63(12), or a failure-to-warn cause of action, the same arguments and public-policy problems discussed in this brief apply.

INTRODUCTION

The Attorney General has brought this case in a transparent effort to short-circuit the legislative process under the guise of public-nuisance law. She invites this Court to impose public-nuisance liability on Respondents for their lawful sale of products. But doing so would conflict with centuries of public-nuisance precedent and the fundamental purposes of the cause of action. It would upend well-established principles of causation. And it would impose devastating consequences on businesses and consumers throughout New York and beyond. This Court should reject the Attorney General's novel and untenable theory of public-nuisance liability.

First, public nuisance is a limited cause of action that does not extend to the manufacture, distribution, or sale of lawful products. For over two centuries, New York courts have consistently confined public nuisance to conduct that directly and physically interferes with public rights—principally, obstructions of public land, highways, and waterways. The Attorney General's attempt to recast public nuisance as a vehicle for imposing liability on lawful commercial activity is part of an improper litigation effort to weaponize public-nuisance law to achieve legislative ends. But courts across the country—in cases involving firearms, lead paint, asbestos, tobacco, opioids, and more—have consistently rejected these efforts. This Court should do the same. There must be "a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of

what constitutes a 'public nuisance.'" *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1107 (1997). Otherwise, "nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'" *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 97 (1st Dep't 2003) (citation omitted).

Second, even if public nuisance could theoretically reach the sale of lawful products, the Attorney General's claim fails on causation. The alleged harm—plastic pollution in the Buffalo River—results not from Respondents' lawful sale of plastic packages, but from the independent and often unlawful acts of unaffiliated third parties. Under well-established principles of proximate causation, such intervening criminal conduct is a superseding cause that severs the chain of causation. And the mere foreseeability that some unidentified consumers or other third parties might unlawfully discard or negligently handle some unknown subset of packaging is insufficient to establish the proximate cause required for public-nuisance liability.

Third, endorsing the Attorney General's radical expansion of public nuisance would have vast and damaging consequences for New York's businesses and consumers. Businesses engaged in ordinary commercial activity would face potentially ruinous liability for the downstream criminal acts of strangers and would be forced to anticipate the next novel lawsuit wherever it may arise. The resulting exposure to litigation, discovery costs, reputational harm, and coercive settlement

pressure would chill lawful business activity across the State. And those costs would inevitably be passed on to consumers in the form of higher prices and reduced access to goods and services. Deciding whether the State should embrace that regime—with all of its pitfalls—is a task "best and more appropriately explored and resolved by the legislative branch of our government." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 302 (1983).

For all these reasons, Supreme Court correctly dismissed this case, and this Court should affirm.

ARGUMENT

I. Public Nuisance Is a Limited Cause of Action that Cannot Be Used to Impose Tort Liability on Manufacturers for Selling Lawful Products.

The Attorney General's theory of liability represents a radical departure from the traditional scope and function of public-nuisance claims. The cause of action developed centuries ago to remedy interferences with public property. Yet, in recent years, enterprising litigants have asked the courts to expand public nuisance to combat all sorts of perceived social problems, without the involvement of the legislature. Courts have consistently and correctly rejected such claims. And this Court should likewise decline the Attorney General's invitation to rewrite public-nuisance law in this case.

A. Public Nuisance Was Developed to Remedy Interferences with Public Property.

"Public nuisance traces its origins back more than 900 years" to the English common law. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 745 (2003). For centuries, the cause of action enabled the Crown to compel the abatement of unreasonable interferences with the public's rights to use communal property. *See id.* at 745–46, 791–97. "The paradigmatic public nuisance case involved the blocking of a public road or navigable waterway." *Express Scripts, Inc. v. Anne Arundel County*, 353 A.3d 1084, 1103 (Md. 2026). And "[t]he available remedies for public nuisances were limited to abatement and criminal prosecution." *Id.* "Actions for damages were not available in such cases." Gifford, *supra*, at 796.

Public nuisance was then "adopted without significant change in colonial America and subsequently in the new republic during its early years." *Id.* at 800. As in England, "a finding of public nuisance" in American courts "historically involved the use of land" by the defendant to the public's detriment. *Id.* at 832. And the cause of action remained a limited mechanism to "terminate" conduct that interfered with these public rights through "abatement actions," not a means to impose damages liability on manufacturers of lawful products. *Id.* at 804.

New York is no outlier in this regard. Its courts have long understood that public nuisance applies to property, not products—and particularly not to the lawful

manufacture, distribution, or sale of products. In *Davis v. City of New York*, 14 N.Y. 506, 528 (1856), for instance, Chief Judge Denio recognized that a railway running along Broadway would constitute a public nuisance "if established without lawful authority." And in *People v. Kerr*, 27 N.Y. 188, 193 (1863), Judge Emott explained that "any unlawful interference with or obstruction of a public highway, is a public nuisance." This line of authority continued in *Callanan v. Gilman*, 107 N.Y. 360, 365–69 (1887), where the Court of Appeals found that using a plank bridge for hours per day over a public sidewalk for the movement of goods constituted a public nuisance. Similarly, in *Wakeman v. Wilbur*, 147 N.Y. 657, 663 (1895), the Court of Appeals declared that "[t]he obstruction of a public highway is an act which in law amounts to a public nuisance." All of these cases thus concerned the use of land.

In the twentieth century, the Court of Appeals reaffirmed that a viable public-nuisance claim requires "an act or omission which obstructs or causes damage to the public in the exercise of rights common to all." *N.Y. Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80 (1949). And it continued to apply the cause of action solely in the context of harmful property use. *See id.* at 80–81 (holding that the defendant could be liable for "blasting" operations that "interfered with the rights of the general public in the vicinity to the quiet enjoyment of life and property"). The Court of Appeals has never expanded public nuisance to punish the lawful sale of

products. Nor has this Court. The Attorney General conspicuously fails to cite a single case to the contrary.

This line of cases reveals a coherent doctrinal framework: Public nuisance claims in New York, as elsewhere, must be confined to "the world of property." Gifford, *supra*, at 833. New York's common law did not contemplate a theory of public-nuisance liability for the otherwise lawful manufacture, distribution, or sale of a product. So this Court should reject the Attorney General's effort to punish Respondents for the downstream consequences of the lawful sale of packaged products. That is simply not within the ambit of a public-nuisance claim.

B. This Case Falls Within a Pattern of Litigation Seeking to Expand Public Nuisance as a Retroactive Regulatory Cause of Action.

The Attorney General's lawsuit is part of a recurring pattern of litigation that seeks to transform public nuisance into a retroactive regulatory cause of action. Since the 1970s, aggressive advocates have tried to expand the scope of public-nuisance law into a tool for holding certain businesses financially responsible for downstream social harms associated with certain categories of products. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 541–43 (2006). In doing so, these advocates have urged courts to strip away the wrongful-conduct and causation elements that have historically cabined the doctrine. That effort "is disconcerting because it would fundamentally change the entire character of public nuisance

doctrine, as well as undermine products liability law" and the primacy of the legislature in defining wrongful conduct. *Id.* at 543. Accordingly, courts across the country—including in New York—have rightly rejected this untenable theory. *See, e.g.*, *Sturm, Ruger & Co.*, 309 A.D.2d at 96–97.

The advocates' first test in court failed in the early 1970s. In *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 376 (1971), a group of plaintiffs sued businesses that sold products or engaged in activities that allegedly contributed to smog. The trial court dismissed the claims as inconsistent with the purpose and limits of public-nuisance law, and the appellate court affirmed. *See id.* at 382–83. As the California Court of Appeal explained, the plaintiffs were improperly "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 [Los Angeles] county, and enforce them with the contempt power of the court." *Id.*

Unable to convince the courts, the plaintiffs' bar tried to leverage the Restatement to break "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) (citation omitted). Among other points, nuisance advocates sought to change the notion of a public right to encompass "'public' interests" more broadly, and to remove the wrongful-conduct requirement entirely. *See* Gifford, *supra*, at 806–07. If successful, this "would have broken the

traditional public nuisance tenet that conduct 'fully authorized by statute, ordinance or administrative regulation would not subject the actor to tort liability.'" Schwartz & Goldberg, *supra*, at 547 (alteration adopted; citation omitted). The Restatement's authors rejected those transformational changes. *See* Restatement (Second) of Torts § 821B (Am. L. Inst. 1979).

The strategy of using public nuisance to circumvent products-liability and marketing laws then intensified in the 1980s and 1990s. *See* Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 637–39 (2010). Cases across the country targeted manufacturers of products that posed inherent risks or could be used or misused by others in ways that created widespread harm. *See, e.g.*, *Johnson County ex rel. Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (asbestos); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1990) (PCB chemical compounds); *State v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (tobacco). Again, judges applied traditional public-nuisance principles and rejected this strategy. *See* Schwartz et al., *supra*, at 639. The cases were all dismissed.

Litigants have persisted in trying to push the bounds of public-nuisance law in recent years. Yet courts have continued to "flatly reject[] the application of public nuisance to actions against product manufacturers." *Id.* at 639–40. As one court put

it, "[p]ublic nuisance focuses on the abatement of annoying or bothersome activities," and it "never before has been applied to products, however harmful." *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 456 (R.I. 2008); *see also, e.g.*, *Express Scripts*, 353 A.3d at 1126 (embracing the "national trend of courts refusing to allow products-based public nuisance claims for economic damages"); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724, 730 (Okla. 2021) (Public nuisance "has historically been linked to the use of land by the one creating the nuisance," and the "clear national trend [is] to limit public nuisance to land or property use."); *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007) ("[E]ssential 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 Third Restatement reflected this growing judicial consensus just a few years ago. Its authors specifically declined to include product-related claims within nuisance law, "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. g (Am. L. Inst. 2020). Any "harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake." *Id.* And if that doctrine or others "do not supply adequate remedies or deterrence, the best response is to address the problems at issue through legislation that can account for

all the affected interests." *Id.* "Litigation should not be used to achieve [these] legislative goals." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1123 (Ill. 2004). After all, "[t]he Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected," and "to investigate and anticipate the impact of imposition of such liability" on product manufacturers. *Murphy*, 58 N.Y.2d at 302; *see Express Scripts*, 353 A.3d at 409.

* * *

In short, public-nuisance law does not extend to the manufacture, distribution, or sale of lawful products, like plastic packaging. The Attorney General's theory on this score "has never been adopted by [any] court in [New York]." *People ex rel. James v. PepsiCo, Inc.*, 222 N.Y.S.3d 907, 914 (Sup. Ct. Erie Cnty. 2024). And the trial court correctly rejected it.

II. The Attorney General's Public-Nuisance Claim Also Fails for Lack of Causation.

In addition to failing to state a public-nuisance claim, the Attorney General's theory fails because Respondents did not cause the alleged nuisance. The alleged nuisance here is not the sale of plastic packaging, but rather, the "pollution in the Buffalo River" that results from *improper disposal* of that packaging. Sup. Ct. Dkt. 2 ("Compl.") ¶ 103. Importantly, the Attorney General does not allege that

Respondents have anything to do with that improper disposal. The disposal is instead brought about by the independent acts of third parties. Under well-established causation principles, that independent act breaks the chain of causation as a matter of law and separately sinks the Attorney General's claim.

A. Respondents Did Not Proximately Cause the Pollution Created by Unaffiliated Third Parties.

"Causation is a basic requirement in any public nuisance action." *Lead Indus. Ass'n*, 951 A.2d at 450. This bedrock requirement of the common law "limit[s] a person's responsibility [to] the consequences of that person's own acts." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). And, as with other torts, but-for causation is not enough to impose liability. *See Martinez ex rel. Martinez v. Lazaroff*, 48 N.Y.2d 819, 820 (1979). Rather, the defendant must be a "proximate cause" of the nuisance. *Sturm, Ruger & Co.*, 309 A.D.2d at 103. In that way, a defendant cannot be liable for nuisance where the harm alleged is "too remote from [his] otherwise lawful commercial activity to fairly hold [him] accountable." *Id.*

Under traditional principles of proximate cause, the intervening volitional act of an unaffiliated third party is a superseding cause that severs the chain of legally cognizable causation. This "doctrine of superseding cause" is applied where "injury was actually brought about by a later cause of independent origin that was not foreseeable." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (citations omitted); *see Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 620 (1986). And that rule

reflects sound public policy. As a matter of simple justice, "there must be a terminus somewhere, short of eternity, at which the second party becomes responsible in lieu of the first." *In re Kinsman Transit Co.*, 338 F.2d 708, 722 (2d Cir. 1964) (citation omitted); *see Ventricelli v. Kinney Sys. Rent A Car, Inc.*, 45 N.Y.2d 950, 952 (1978).

A "third person" committing a "crime" is the paradigmatic example of such an intervening act that breaks the required causal chain. Restatement (Second) of Torts § 448. But that is precisely what the Attorney General relies on here. The Attorney General alleges that "as a result of PepsiCo's and others' persistent manufacturing, production, distribution, and sale of beverages and snack foods in single-use plastic packaging, single-use plastic items have become a dominant form of pollution in urban watersheds" once the "packaging is discarded." Compl. ¶¶ 46, 55. While littering is surely illegal under New York law and various municipal ordinances, *see, e.g.*, N.Y. Penal Law § 145.50; N.Y. Veh. & Traff. Law § 1220; Buffalo, N.Y., Code § 216-9, the Attorney General does not allege that *Respondents* engaged in such unlawful behavior. Nor does she allege that Respondents have anything to do with the loss of plastic packaging "during waste collection, management, or final disposal." Compl. ¶ 82. She alleges only that Respondents have "produc[ed] a product that damages the environment when discarded into the water system *by third parties*." *PepsiCo*, 222 N.Y.S.3d at 911 (emphasis added); *see* Compl. ¶¶ 36–79. That theory of liability depends on independent actors

unlawfully littering or negligently handling Respondents' lawfully packaged products. Such intervening conduct breaks the chain of causation as a matter of law.

B. The Attorney General's Responses Are Unpersuasive.

The Attorney General responds with a pair of cases, but neither moves the needle in her favor. Unlike here, the defendants in those cases themselves violated the law. In *Salter v. Meta Platforms, Inc.*, 240 A.D.3d 1378, 1387 (4th Dep't 2025), the defendant "violated New York law by manufacturing a [firearm magazine] lock that was removable," thereby directly "posing a danger to the general public." And in *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 151 (4th Dep't 2012), the "defendants sold the specific gun used to shoot plaintiff to an unlawful straw purchaser for trafficking into the criminal market." Indeed, the defendants allegedly knew "that the straw purchaser was acting as a conduit to the criminal gun market," thus making the defendants a "'direct link in the causal chain that resulted in plaintiffs' injuries.'" *Id.* at 151–52 (citation omitted). The Attorney General alleges no similar connection between Respondents' lawful activity and the supposed "nuisance" that third parties created by polluting the Buffalo River.

The Attorney General also suggests that the mere foreseeability of unaffiliated third parties' criminal acts is enough to establish proximate cause. That too is incorrect. While "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," *Paroline v. United States*,

572 U.S. 434, 445 (2014), "foreseeability alone" does not permit recovery wherever "ripples of harm" may flow, *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202 (2017) (quotation marks omitted). "Conditioning liability on foreseeability" alone is insufficient because, at a high enough level of generality, all consequences are foreseeable, and the law must "'limit the legal consequences of wrongs to a controllable degree.'" *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552–53 (1994) (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619 (1969)). For this reason, proximate cause "limit[s] a wrongdoer's liability only to those harms that have a reasonable connection to his actions." *Sturm, Ruger & Co.*, 309 A.D.2d. at 104 (quotation marks omitted). And "[a]n ordinary merchant does not become liable for all criminal misuses of his goods, even if he knows that in some fraction of cases misuse will occur." *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 292 (2025) (cleaned up). "The merchant becomes liable only if, beyond providing the good on the open market, he takes steps to 'promote' the resulting crime and 'make it his own.'" *Id.* (citation omitted).

In the decision below, Supreme Court properly applied these principles. "[A]t some point, a party is simply too far removed from the nuisance to be held responsible for it." *Sturm, Ruger & Co.*, 309 A.D.2d at 104; *see Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234–35 (2001). And Respondents "did not pollute the Buffalo River or any other local waterways—other people did." *PepsiCo*, 222

N.Y.S.3d at 916. If "liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow." *Pulka v. Edelman*, 40 N.Y.2d 781, 786 (1976). "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 [or] sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Sturm, Ruger & Co.*, 309 A.D.2d at 96. That is not and should not be the law.

III. Expanding Public Nuisance to Encompass the Sale of Lawful Products Would Greatly Harm New York Businesses and Consumers.

Endorsing the Attorney General's radical theory of public-nuisance liability would also have vast and damaging consequences for New York's businesses and consumers. The Court must carefully consider such "social policy concerns" when deciding whether to create or expand a common-law cause of action. *Ortega v. City of New York*, 9 N.Y.3d 69, 79 (2007). The Court should exercise particular caution where, as here, the legislature is already "consider[ing] whether or not to change the law on this particular issue." *People v. Durant*, 26 N.Y.3d 341, 355 (2015); *see* Senate Bill S1464A, 2025-26 Leg., Reg. Session (2026) (amended bill to enact "packaging reduction and recycling infrastructure act").

Consider just a few of the problems with embracing the Attorney General's theory of public nuisance. *First*, businesses engaged in run-of-the-mill commercial

activity would be exposed to lawsuits—and potentially massive judgments—for past conduct that was never before considered morally or legally culpable. As a result, the traditionally limited cause of public nuisance would transform "into a 'litigation monster' with few, if any, predictable bounds." U.S. Chamber of Commerce Institute for Legal Reform, *Taming the Litigation Monster: The Continued Threat of Public Nuisance Litigation* 1 (Dec. 2022), https://bit.ly/3ZxQxVv. Businesses across every industry would be forced to anticipate the next novel lawsuit wherever it may arise, unable to predict which lawful product might next be targeted for the criminal acts of unaffiliated third parties. The Attorney General's theory might render crowbar manufacturers liable for burglaries; gasoline companies for arson; chemical fertilizer producers for illegal explosives; computer companies for cybercrimes; and drone manufacturers for privacy violations. For businesses that lack the resources to absorb such exposure or mount a defense, the consequences could be existential.

There is of course no need for such unpredictability in the law. It can be avoided if the law develops "through a principled statutory scheme, adopted after opportunity for public ventilation, rather than" retroactively, "in consequence of judicial resolution[s] of the partisan arguments" of individual litigants in individual cases. *Murphy*, 58 N.Y.2d at 302. Again, the fact that the legislature is already

considering new legislation in this space—beyond what is already on the books—only further counsels in favor of this Court staying its hand.

Second, redefining public nuisance to include the Attorney General's nebulous theory of harm would create troubling litigation dynamics. Businesses facing "even a small chance of a devastating loss" might find that "the risk of an error" has "become unacceptable" and opt to settle questionable or meritless claims. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). In the most extreme scenario, defendant businesses might either be forced "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

Even where such cases do not result in a verdict or settlement, businesses would still suffer the additional expense and intrusion associated with defending against such suits. On a loosened theory of public-nuisance liability, the Attorney General could bring cases against "an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be used lawfully." *Express Scripts*, 353 A.3d at 408. And liability could span every type of intervening unaffiliated criminal interaction with a company's service or product. A phone-service provider or a bank, for instance, might be exposed to liability for the

unauthorized and unknown use of the company's services or products by drug dealers or fraudsters.

These same businesses would be subjected to costly and invasive discovery, which could "push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). As one judge put it, "invasive discovery" in modern litigation "uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets." *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of panel rehearing). "These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero." *Id.*

Third, the proliferation of suits predicated on loosely threaded allegations connecting lawful businesses with unaffiliated third-party action would inflict reputational harm on even the most responsible companies. It would create public relations challenges "regardless of the defendant's degree of culpability." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). Even companies that can withstand settlement pressures would be forced to expend significant resources and endure lengthy litigation simply to clear their names.

Fourth, the increased costs associated with litigation, settlement, and reputational repair do not pay for themselves. Businesses would inevitably pass along these costs to consumers. Removing the traditional limits on wrongful conduct and proximate causation would thus impose severe burdens on a wide range of industries—in effect, a "tort tax"—with manufacturers and service providers passing on increased costs to consumers in the form of higher prices, higher insurance premiums, and reduced access to useful goods and services. *See, e.g.*, Editorial Board, *How Lawsuits Cost You $3,600 a Year*, Wall St. J. (Dec. 11, 2022), https://bit.ly/4s3IcER (explaining how the costs of tort litigation are "spread through the economy in the form of higher insurance premiums that fall on nearly every family"). At the same time, these "risk[s] of litigation" will "slow innovation" and "discourage the development and sale of new products." U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 10 (Nov. 2024), https://bit.ly/3D5o9kO. And some companies might choose not to do business in New York altogether.

To avoid these crippling consequences for businesses and consumers, this Court should adhere to the longstanding principles that properly limit public-nuisance liability to conduct for which defendants are directly culpable. That will further the well-settled public policy of this State. And even if "a significant change

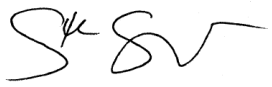
in our law" were needed on this front, then the task "is best left to the Legislature." *Murphy*, 58 N.Y.2d at 301. "Complex societal problems are best suited for the Legislature, and judicial restraint is the appropriate principle to apply here." *Express Scripts*, 353 A.3d at 414.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: June 8, 2026

Respectfully submitted,



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Pursuant to Rules 22 N.Y.C.R.R. §§ 1250.8(b)(6), (f)(1)–(2), (h), and (j), I certify that the foregoing *amicus curiae* brief was prepared on a computer using Times New Roman typeface, uses 14-point font, is double-spaced excepting footnotes that are single-spaced, and contains 5,122 words inclusive of point headings and footnotes and exclusive of tables of contents and authorities, certificates, signature blocks, and appended materials.

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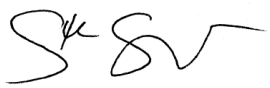

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CERTIFICATE OF SERVICE

The foregoing document has been e-filed and, pursuant to Rule 1245.7(B), the foregoing document was served electronically on all counsel of record.

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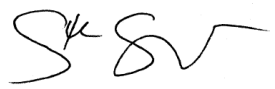

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