Nos. 22-3750, 22-3751, 22-3753, 22-3841, 22-3843, 22-3844

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

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

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division (No. 1:17-md-2804) (The Hon. Dan Aaron Polster)

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street
Charlotte, NC 28280
(704) 444-1000
Counsel for *Amici Curiae*

D. Andrew Hatchett
ALSTON & BIRD LLP
1201 West Peachtree St.
Atlanta, GA 30309
(404) 881-7000
Counsel for *Amici Curiae*

Ethan J. Bond
ALSTON & BIRD LLP
333 S. Hope Street
Los Angeles, CA 90071
(213) 576-1170
Counsel for *Amici Curiae*

Additional counsel listed on next page

Andrew R. Varcoe
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 682-1163

Counsel for the American Tort Reform Association

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici make the following disclosure under Sixth Circuit Rule 26.1:

1. **Are amici subsidiaries or affiliates of a publicly owned corporation?**

No. The U.S. Chamber of Commerce is a nonprofit corporation organized under the laws of the District of Columbia. The American Tort Reform Association is also a nonprofit corporation organized under the laws of the District Columbia.

2. **Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?**

None known.

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT i

AMICI CURIAE'S STATEMENT OF INTEREST 1

ARGUMENT AND AUTHORITIES 3

I. THE DISTRICT COURT IGNORED TRADITIONAL LIMITS ON PUBLIC NUISANCE AND THE OHIO LEGISLATURE'S MANDATE SO THAT IT COULD INVENT ITS OWN SOLUTION TO THE OPIOID CRISIS. 7

A. Public nuisance has traditionally been limited to conduct that interferes with the use of real property. 8

B. The Ohio General Assembly has confirmed that public nuisance does not extend to the sale of lawful products. 16

C. The decision below contravenes settled nuisance law and will wreak havoc on Ohio businesses. 19

II. IN ITS QUEST TO SOLVE THE OPIOID CRISIS, THE DISTRICT COURT ABANDONED FUNDAMENTAL CAUSATION PRINCIPLES. 23

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Elec. Power Co. v. Conn.,
564 U.S. 410 (2011)....................22

Arbino v. Johnson & Johnson,
880 N.E.2d 420 (Ohio 2007)....................26

Cherokee Nation v. Juul Labs, Inc.,
No. CJ–20–114 (Sequoyah Cnty. Okla. Sept. 3, 2020)....................21

City of Chicago v. Beretta U.S.A. Corp.,
821 N.E.2d 1099 (Ill. 2004)....................13

City of Cincinnati v. Beretta U.S.A. Corp.,
768 N.E.2d 1136 (Ohio 2002)....................passim

City of Cleveland v. Ameriquest Mortg. Sec., Inc.,
615 F.3d 496 (6th Cir. 2010)....................23, 24, 25, 26

City of Huntington v. AmerisourceBergen Drug Corp.,
No. 3:17-01362 (S.D. W. Va. July 4, 2022)....................16

City of Milwaukee v. NL Indus., Inc.,
703 N.W.2d 380 (Wis. 2005) (review dismissed)....................12

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765 N.W.2d 579 (Wis. 2009) (review denied)....................12

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691 N.W.2d 888 (Wis. Ct. App. 2004)....................12

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226 S.W.3d 110 (Mo. banc 2007)....................12

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No. CI 200606040, 2007 Ohio Misc. LEXIS 5632 (Ohio Ct. Com. Pl. Dec. 12, 2007)....................18, 19

Detroit Bd. of Educ. v. Celotex Corp.,
493 N.W.2d 513 (Mich. Ct. App. 1992) 10

Diamond v. Gen. Motors Corp.,
20 Cal. App. 3d 374 (Cal. Ct. App. 1971) 22

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992)..23

In re Harris Cnty.,
No. 21-3637 (6th Cir. Feb. 28, 2022) 5

In re Lead Paint Litig.,
924 A.2d 484 (N.J. 2007) 11, 12

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572 U.S. 118 (2014)..26

Mitchell v. City of Warren,
803 F.3d 223 (6th Cir. 2015) 22

People v. ConAgra Grocery Prods. Co.,
227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017)..12

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No. S246102, 2018 Cal. LEXIS 1277 (Cal. Feb. 14, 2018)...........................12

People v. Sturm, Ruger & Co.,
309 A.D.2d 91 (N.Y. App. Div. 1st Dep't 2003) 15, 20, 21

State ex rel. Hunter v. Johnson & Johnson,
499 P.3d 719 (Okla. 2021)..6, 14, 15

State ex rel. Ravnsborg v. Purdue Pharma, L.P.,
No. 32CIV18-000065 (S.D. Cir. Ct. 6th Jud. Dist. Mar 29, 2021) 16

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951 A.2d 428 (R.I. 2008)..8

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No. 30-2014-00725287 (Cal. Super. Ct. Orange Cnty. Nov. 1, 2021)...............16

Stetter v. R.J. Corman Derailment Servs., L.L.C.,
927 N.E.2d 1092 (Ohio 2010) 6, 7, 22

Tex. v. Am. Tobacco Co.,
14 Supp. 2d 956 (E.D. Tex. 1997) 11

Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.,
984 F.2d 915 (8th Cir. 1993) 6, 9, 10, 20

RULES

Fed. R. App. Proc. 29 1

STATUTES

OHIO REV. CODE § 2307.71 ....5, 6, 18, 19

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https://tinyurl.com/2ajhtmxw...10, 11

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RESTATEMENT (SECOND) OF TORTS § 821B 8

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8. 15

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AMICI CURIAE'S STATEMENT OF INTEREST

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 Federal Rule of Appellate Procedure 29.[1]

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.

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[1] All parties have consented to the filing of this amici brief. *Amici curiae* state that 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 intended to fund the preparation or submission of this brief.

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 legal causation and other fundamental aspects of tort law. The decision below threatens to upend 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 order. In Ohio, when it appeared that plaintiffs were trying to expand public-nuisance liability beyond its historical confines to reach product-based offenses, the Ohio General Assembly enacted a law stopping the effort in its tracks.

The district court ignored that history and the Ohio General Assembly's mandate, creating a public nuisance super tort that, if sustained by this Court, would expose Ohio businesses to unlimited liability for virtually every perceived societal ill. Compounding its error, the district court allowed a jury to hold three defendants individually liable for a complex social crisis without proof that they proximately caused the plaintiff's alleged injury—an indefensible extension of tort liability in its own right.

The district court's expansion of public nuisance contravenes Ohio law and promises trouble for businesses in the State. Armed with the decision below, a local government may next try to leverage a public-nuisance theory to sue fast-food restaurants for causing an obesity epidemic or to sue 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 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 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.

ARGUMENT AND AUTHORITIES

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

But from the earliest days of the opioid MDL, the district court betrayed 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.*

R.71 at 462, 467-68 (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 has lamented what it perceives 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 public-nuisance lawsuits like this one—whether about opioid sales or sales of any other product—are prohibited in Ohio.

In 2002, a divided Supreme Court of Ohio 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.*, 768 N.E.2d 1136, 1143 (Ohio 2002). Recognizing that the *Beretta* decision threatened to swallow all of Ohio tort law, the Ohio General Assembly responded by amending the Ohio Product Liability Act (OPLA) 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 remedy 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*, 499 P.3d 719, 725 (Okla. 2021) ("Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap.").

The district court below 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 judgment below 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., 927 N.E.2d 1092, 1101 (Ohio 2010) ("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 traditional 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 that is why this Court should reverse the judgment below.

I. THE DISTRICT COURT IGNORED TRADITIONAL LIMITS ON PUBLIC NUISANCE AND THE OHIO LEGISLATURE'S MANDATE SO THAT IT COULD INVENT ITS OWN SOLUTION TO THE OPIOID CRISIS.

Under Ohio law, traditional limits on public nuisance relegate the tort to a minor, supporting role in the State's legal system. The district court removed those traditional limits in the face of the Ohio legislature's direction to the contrary. If the decision stands, public nuisance will soon star in tort cases not just in Ohio—a result

that the legislature acted to prevent—but in other states too. Indeed, the decision will serve as a playbook for plaintiffs pressing public-nuisance theories across the country.

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

The public-nuisance claim recognized below 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 (SECOND) OF TORTS § 821B cmt. a (Am. Law Inst. 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 limited to conduct that interfered with a "public right"—that is, the right to access shared resources like public roads and waterways. *See, e.g.*, *State v. Lead Indus. Ass'n*, 951 A.2d 428, 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 than 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. Ct. 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." *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, 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 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 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").[2]

[2] In *City of Milwaukee v. NL Industries, Inc.*, 691 N.W.2d 888, 890 (Wis. Ct. App. 2004), 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.*, 703 N.W.2d 380 (Wis. 2005) (review dismissed); *City of Milwaukee v. NL Indus., Inc.*, 765 N.W.2d 579 (Wis. 2009) (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. Ct. App. 2017). The Supreme Court of California declined to hear the case. *People v. Conagra Grocery Prods. Co.*, No. S246102, 2018 Cal. LEXIS 1277 (Cal. Feb. 14, 2018).

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.* (The Supreme Court of Ohio went a different direction on nuisance claims against gun manufacturers. But the Ohio General Assembly overrode the court's decision, as explained below in Section I.B.)

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 against the pharmaceutical industry 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.

Just last year, 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*, 499 P.3d at 725. 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 722 & 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 723–25. The court feared 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 725.

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 734 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (Am. Law. Inst. 2020)). 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 730 (quoting *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96–97 (N.Y. App. Div. 1st Dep't 2003)).

Many other courts around the country have also rejected public-nuisance claims in opioid litigation.[3] *See, e.g.*, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362 (S.D. W. Va. July 4, 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 that directly resolves 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 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).

[3] 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.

That changed briefly in 2002, when the Supreme Court of Ohio 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. 768 N.E.2d at 1143. 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 1157–58 (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. Courts and would-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 dropped similar lawsuits that were pending at the time. *See Lead-Paint Ruling Might Undercut Ohio Lawsuits*, THE COLUMBUS DISPATCH (July 2, 2008), https://www.dispatch.com/story/news/2008/07/02/lead-paint-ruling-might-undercut/24236390007; *State Dismisses Lead-Paint Lawsuit*, THE COLUMBUS DISPATCH (Feb. 7, 2009), https://www.dispatch.com/story/news/2009/02/07/state-dismisses-lead-paint-lawsuit/24066171007.

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 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 decision below contravenes settled nuisance law and will wreak havoc on Ohio businesses.

In allowing a public-nuisance claim based on the sale of a lawful product, the 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 has created a tort that would devour all other torts. Nothing in Ohio law supports that result. On the contrary, when the Supreme Court of Ohio 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 below. *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 district court may have 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 accomplish their preferred solution. *See Tioga Pub. Sch.*, 984 F.2d at 921. The district court gave in to the 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 will now try their hand in Ohio 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.

There are other equally troubling ramifications that will follow if the judgment below is not reversed. 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 accomplished that goal 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 (2011).

It is neither fair nor reasonable to expect one federal district 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 at 286 ("It is not the role of the courts to establish legislative policies . . . ."); *Diamond v. Gen. Motors Corp.*, 20 Cal. App. 3d 374, 382-83 (Cal. Ct. App. 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 wreak havoc on Ohio businesses. As reimagined below, 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 effects of businesses leaving or avoiding the State in light of the instability and uncertainty generated by the district court's decision.

II. IN ITS QUEST TO SOLVE THE OPIOID CRISIS, THE DISTRICT COURT ABANDONED FUNDAMENTAL CAUSATION PRINCIPLES.

One reason why the district court's expanded conception of the public-nuisance tort is so problematic is that it would tempt plaintiffs to charge individual businesses for sweeping social problems without linking the defendant's conduct to their claimed injury. That is precisely what happened below.

Bedrock proximate causation principles dictate that defendants like the pharmacies cannot be liable for conduct that is "too remote" from the plaintiffs' injury. *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 503 (6th Cir. 2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 271 (1992)). Instead, proximate causation includes a "directness requirement" that "'requires some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 502–03 (quoting *Holmes*, 503 U.S. 258 at 268). Consistent with those principles, courts have found that causal chains comprising even a small number of links are too attenuated. *See, e.g.*, *Holmes*, 503 U.S. at 276 (holding that a causal chain with two links was too remote); *Ameriquest*, 615 F.3d at 503 (four links were

too remote where a city sought to recover for its own costs spent responding to the mortgage crisis).

In its first meeting with counsel—before discovery or any evidence had been put before the court—the district court announced that it had predetermined that all defendants were responsible for the opioid crisis, impermissibly forming a crucial conclusion of law and fact before the start of the litigation. And yet even then, the court believed (in prejudging the case) that there were no fewer than *ten* groups of actors involved (including the plaintiffs themselves):

> [I]n my humble opinion, everyone shares some of the responsibility [for the opioid crisis], and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payors, and individuals. Just about everyone we've got on both sides of the equation in this case.

R. 71 at 462.

In its most recent order denying the pharmacies' motion for a new trial, the district court again said that "many, many" different actors, including those outside the supply chain, were responsible for the opioid crisis. R. 4296 at 572205. Yet the district court nevertheless held that the pharmacies proximately caused the crisis because "none of these potential causes shifts the Defendants' independent responsibility to take effective measures to prevent diversion." R. 4295 at 572102.

That thin analysis eviscerates Ohio's "directness" requirement. It ignores that whatever the pharmacies' "independent responsibility" may be, it is impossible to

trace their dispensing lawful opioid prescriptions to the Counties' claimed financial harm. Unsurprisingly, the Counties couldn't prove that any pharmacy filled even one illegitimate prescription that caused even one overdose for which either county spent even one penny in emergency response costs, which the district court acknowledged. *See* R. 4611 at 596690-91 (acknowledging that the claims were "not capable of division based on specific evidence regarding where certain individuals had their prescriptions filled").

That failure of proof is a key reason why the directness requirement exists to bar recovery: "[I]ndirectness adds to the difficulty in determining which of the plaintiff's damages can be attributed to the defendant's misconduct." *Ameriquest*, 615 F.3d at 503 (quoting *Beretta*, 768 N.E.2d at 1148). The difficulty is especially pronounced in cases like this when there are many actors in the chain, including obvious and direct culprits who committed various crimes. There are simply too many "independent actors" and "voluntary choices" by others in the causal chain for it to be appropriate to pin abatement costs on pharmacies who filled legitimate prescriptions by licensed physicians. *Ameriquest*, 615 F.3d at 505.

The district court's ruling is defective for another reason. Ohio's proximate cause regime does not allow the kind of derivative harm that the Counties claim here because there are "other parties who are directly injured and who can remedy the harm" without the problems inherent in a multi-link chain. *Ameriquest*, 615 F.3d at

503 (quoting *Beretta*, 768 N.E.2d at 1148). The most obvious choice are patients who filled opioid prescriptions and later became addicted (assuming that their claims would otherwise be viable). The Counties' claimed financial injury, by contrast, is indirect and derivative, arising only when it spends money to respond to opioid abuse. That kind of downstream liability is disfavored. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014) (no liability where the claimed harm is "purely derivative of misfortunes visited upon a third person by the defendant's acts" (internal quotations omitted)).

For good reason: If a causal chain like the one permitted below stands, it would mark an unwarranted expansion of Ohio law that would unsettle businesses operating in all corners of the State. Indeed, the Supreme Court of Ohio, parroting the Ohio General Assembly, has made clear that the State has an "interest in making certain that Ohio has a fair, *predictable* system of civil justice" that does not promote boundless liability, "which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation." *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 436 (Ohio 2007) (emphasis added) (internal citations omitted).

Businesses respond rationally to risk and adjust their practices to minimize liability. If allowed to stand, the decision below will force businesses to respond to the Pandora's Box that the district court opened, which may involve curtailing

business activity that is beneficial to Ohio and its residents, limiting the availability of goods and services at reasonable prices that would migrate to other states. That result would harm both Ohio businesses and Ohio consumers. The Court should reaffirm Ohio's settled law on causation.

CONCLUSION

This Court should reverse the decision below and hold that the traditional limits on public-nuisance claims continue to apply in Ohio.

Respectfully Submitted,

By: *s/ Brian D. Boone*

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000
brian.boone@alston.com

D. Andrew Hatchett
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
andrew.hatchett@alston.com

Ethan J. Bond
ALSTON & BIRD LLP
333 S. Hope Street, Suite 1600
Los Angeles, CA 90071
(213) 576-1170
ethan.bond@alston.com

Attorneys for the Chamber of Commerce of the United States of America and the American Tort Reform Association

Andrew R. Varcoe
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER

1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for the Chamber of Commerce of the United States of America

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 682-1163

Attorneys for the American Tort Reform Association

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(4)(G), (a)(5), and 32(a)(7), (g) because it contains 6,498 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

s/ Brian D. Boone
Brian D. Boone
Counsel of Record for Amici Curiae Chamber of Commerce of the United States of America and the American Tort Reform Association

CERTIFICATE OF SERVICE

On December 8, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

s/ Andrew Hatchett
Andrew Hatchett
Counsel of Record for Amici Curiae Chamber of Commerce of the United States of America and the American Tort Reform Association