No. 22-1819(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CITY OF HUNTINGTON, WEST VIRGINIA., *Plaintiff-Appellant*,

v.

AMERISOURCEBERGEN DRUG CORPORATION, *Defendants-Appellees*.

On Appeal from the United States District Court for the
Southern District of West Virginia
Case No. 3:17-cv-01362 (Hon. David A. Faber)

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Leslie Kendrick
580 Massie Rd.
Charlottesville, VA 22903

Michael J. Skoler
Sokolove Law, LLC
1330 Boylston Street, Suite 400
Chestnut Hill, MA 02467

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave NW
Suite 900
Washington, D.C. 20001
(202) 868-6915
rdeutsch@deutschhunt.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal

West Virginia

Other States

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are professors of property law, tort law, and related private law subjects at institutions across the United States. *Amici* have extensive experience studying and teaching the doctrines of public nuisance, including those implicated by this case, and share a scholarly interest in their proper application. With this brief, filed in support of neither party, *amici* seek to assist the Court by explaining the scope of settled doctrines and principles relevant to the resolution of this appeal, and to inform the Court of the historical reach and proper contours of public nuisance claims.

Amici submit this brief solely on their own behalf, not as representatives of their universities; institutional affiliations are provided solely for purposes of identification. *Amici* are:

- David A. Dana, Northwestern Pritzker School of Law
- Seth Davis, University of California, Berkeley School of Law
- Gregory C. Keating, USC Gould School of Law
- Leslie Kendrick, University of Virginia School of Law
- Alexandra D. Lahav, Cornell Law School
- Adam Zimmerman, Loyola Law School

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[1] No party or counsel for any party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

INTRODUCTION AND SUMMARY OF ARGUMENT

At early English common law and in its current form, public nuisance has comfortably covered situations like that alleged here: injury to the common good caused by unreasonably harmful product sales. While *amici* take no position on the merits of this specific dispute, they write to share their informed views—based on legal scholarship and teaching experience—about the historical and current scope of the wrongful conduct and conditions covered by public nuisance actions, the remedies available, and the complementary relationship between public nuisance suits and other forms of governmental intervention.[2]

Going back centuries, the common law recognized public nuisance claims based on interference with the public welfare, not just public property. The type of claim here is thus not a novel modern invention, but fully consistent with historical authorities, including a seventeenth-century treatise recognizing claims against "apothecaries" for unsafe products. It also falls well within the scope of the modern tort as applied in West Virginia. The district court wrongly relied upon an inapt

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[2] Key scholarship informing this brief includes Leslie Kendrick, *The Perils and Promise of Public Nuisance*, Yale L. J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130444; Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 Colum. J.L. & Soc. Probs. 135 (2018); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 Stan. L. Rev. 285 (2021); and David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L. J. 62 (2022).

provision of the Third Restatement—which covers the special injury rule for private plaintiffs and does not purport to restate the bounds of public nuisance liability—in concluding otherwise.

Following this consensus view risks no opening of litigation floodgates, as the scope of public nuisance doctrine and the criterion of unreasonableness appropriately cabins liability. As with other torts, an unreasonableness standard recognizes that duties can evolve, and that conduct which is reasonable at the outset can become unreasonable as circumstances change.

The balancing test of nuisance law reflects this dynamic principle, requiring courts to balance the public utility of conduct against its public harms not at a single snapshot in time, but as harms are revealed. In undertaking the balancing here, the district court failed to employ this dynamic perspective, ignoring its own findings on the shift in understanding about the catastrophic public consequences of opioid oversupply.

The wide-ranging harms to public health and welfare resulting from the opioid epidemic have been widely chronicled, Kendrick, *supra*, at 56-57, and appear to be undisputed here. Under black-letter tort principles, the district court should have asked whether, given the dynamic nature of continuing duties, defendants shared responsibility for "unreasonable interference" with public health and safety. Instead,

the district court wrongly ruled the public nuisance doctrine categorically unavailable in products cases.

The district court's remedial analysis suffered from the same blinkered approach, categorically rejecting abatement funds as an impermissible damages remedy. But abatement funds like the remedy sought here are a prospective form of relief that falls within the heartland of public nuisance remedies.

Recognizing the validity of public nuisance doctrine brooks no risk of irreconcilable conflict with regulatory prerogatives. Rather, state courts—including West Virginia courts—have continued to give life to public nuisance claims because they are an important complement to regulatory efforts. Indeed, breach of regulatory duties can constitute a public nuisance, while compliance with such duties does not make defendants' conduct reasonable per se. If any conflict arises with other regulatory approaches, it can be mediated by doctrines that are designed precisely for that purpose. Worries about hypothetical regulatory conflict are no reason to disregard the common law altogether.

In sum, in *amici*'s view, the district court's crabbed understanding of the contours of public nuisance is inconsistent with the historical and contemporary scope of the claim, while the district court's concerns about floodgates and interference with regulatory efforts are largely unfounded.

ARGUMENT

I. Both in Its Origins and Today, Public Nuisance Has Embraced Liability for Harmful Product Sales.

Public nuisance is generally defined as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (Am. L. Inst. 1979). The Supreme Court of West Virginia has stated, "A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 620-21 (W. Va. 1985) (quoting *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945)). In West Virginia, as in other common-law jurisdictions, "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Id.* at 621.

The district court, relying largely on two secondary sources, viewed the "extension of the law of nuisance to cover the marketing and sale of opioids" as "inconsistent with the history and traditional notions of nuisance." *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, 2022 WL 2399876,

at *57 (S.D.W. Va. July 4, 2022). A more comprehensive analysis of the common-law history tells another story.[3]

Historical sources, including contemporaneous accounts, reveal that public nuisance has long encompassed harmful product sales that injured the common good. Contemporary bounds of public nuisance likewise allow a cause of action for the wrongdoing alleged here: distribution of opioid products constituting an unreasonable interference with a right held by the general public, specifically jeopardizing public health and welfare.

A. Public Nuisance Was Capacious Under English Common Law.

While "the archetypal public-nuisance cases remain the medieval actions removing impediments from public roads and waterways," the district court failed to recognize that "the doctrine has contained much more diversity for centuries."

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[3] The district court's two historical citations discussed the very early history of nuisance—up to the start of the fourteenth century, before private and public nuisance had even evolved distinctly. *See* 2022 WL 2399876, at *57 (citing John Baker, *An Introduction to English Legal History* 422 (4th ed. 2002) and 2 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 882, 886-924 (1992)). Both sources elsewhere emphasize the breadth of public nuisance. *See* Baker, *supra*, at 433 ("The scope of common [public] nuisance was far wider than that of private injury to land, although there were close parallels."); *id.* at 463 ("The law of public nuisance was not limited to health hazards. . . . Common nuisance comprehended such diverse wrongs as keeping a dovecote, using amplified sound at night, beating feathers in the street, damaging the highway with an excessively large goods vehicle, and being a common scold."); Oldham, *supra*, at 885 (noting "the breadth of the concept of public nuisance and the ease with which private individuals could prosecute such nuisances").

Kendrick, *supra*, at 15. Dating back to the late thirteenth century, contemporaries noted "several other nuisances" subject to public action besides "the case of a way being stopped.".[4] By the 1660s, William Sheppard identified "common nuisances," including not only those "affecting public highways and waterways," but an array of other wrongful circumstances including "polluting the air 'with houses of office, laying of garbage, carrion or the like, if it be near the common high way'" and "victuallers, butchers, bakers, cooks, brewers, maltsters *and apothecaries* who sell products unfit for human consumption."[5]

Blackstone, too, chronicled the broad sweep of public nuisance. While his list of "common nuisances" in 1769 began with the well-recognized "[a]nnoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass," obstruction of public ways was but the first of *eight* categories of common, or public, nuisances. Kendrick, *supra*, at 16-17 (quoting 4 William Blackstone, *Commentaries* *168).

Because, as Blackstone recounted, "common nuisances are a species of offenses against the public order and economical regimen of the state; being either

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[4] J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 Cambridge L.J. 55, 58 (1989) (citing 1 *Britton: An English Translation and Notes* 402-03 (Francis Morgan Nichols trans., Clarendon Press 1865)).

[5] Kendrick, *Public Nuisance* at 15-16 (emphasis added) (citing Spencer, *Public Nuisance* at 60 (quoting William Sheppard, *The Court-Keepers Guide: Or, A Plain And Familiar Treatise Needful And Useful For The Help Of Many That Are Imployed In The Keeping Of Law-Days, Or Courts Baron* (5th ed. 1662))).

the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires," 4 William Blackstone, *Commentaries* *167 (spelling modernized), his list included, to name only a few, "[t]he making and selling of fireworks and squibs, or throwing them about in any street," "eavesdroppers," and "common scold[s]." *Id.* at *168. Thus, as the law developed, "public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large." Kendrick, *supra*, at 17 (quoting Restatement (Second) of Tort § 821B cmt. b.).

So, contrary to the district court's understanding, at common law, public nuisance actions included liability for harmful product sales. Both Sheppard and Blackstone explicitly include harmful products in their list of offenses. They each also classify as infringements on public rights certain activities and products that some commentators today might classify as implicating exclusively private rights, recognizing that these circumstances can yield not only individualized injury, but also common harm. Blackstone explicitly recognized common nuisances to include "[a]ll those kinds of nuisances, (such as offensive trades and manufactures) which when injurious to a private man are actionable." Kendrick, *supra*, at 16-17, 42 (quoting 4 William Blackstone, *Commentaries* *168). And Sheppard, recall, listed

an array of vendors who sell products unfit for human consumption, including apothecaries, in his list of "common nuisances." *See* Kendrick, *supra,* at 15-16.

Definitive primary sources not considered by the district court thus show that common injury suffered from harmful opioid distribution, such as the harm alleged here, fits comfortably within the historical reach of public nuisance under English common law.

B. Contemporary Public Nuisance Law Is a Well-Established Vehicle for Remedying Public Health Threats Without Opening Floodgates.

Crossing the Atlantic and continuing to evolve in the United States, the scope of public nuisance remained broad. Cases across the country spanned a wide array of harms, ranging from disease-spreading ponds to storage of explosives, and from gambling houses to fireworks in the street to the incompetent and unlicensed practice of medicine. Kendrick, *supra*, at 18 (citations omitted). States sued each other and private corporations for actions causing harm to the general public, including harm to public health. *Id*. at 19-20.

Section 821B of the Restatement (Second) of Torts, finalized in 1979 by members of the American Law Institute, outlines the broad contours of public nuisance actions while still specifying criteria that cabin liability. The Restatement embraced the wide scope of public nuisance, rejecting the proposition that only criminal activities could count as public nuisances and confirming that liability

extends beyond the blinkered focus of the district court here on "public property or resources," *see* 2022 WL 2399876, at *57, to encompass "interference with the public health, the public safety, the public peace, the public comfort or the public convenience," Restatement (Second) of Torts § 821B; *see also State ex rel. Smith v. Kermit Lumber & Pressure Treating Co*., 488 S.E.2d 901, 925 n.28 (W. Va. 1997) (quoting 58 Am.Jur.2d *Nuisances* § 35 (1989), describing public nuisance as "the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public").

Still, because public nuisance liability is "of a piece with both other tort doctrines and the overarching goals of tort law," Kendrick, *supra*, at 9, it hinges on the unreasonableness of the alleged nuisance, *id.* at 59-60. As the West Virginia Supreme Court explained in a case involving a property-based public nuisance, the question is "the reasonableness or unreasonableness of" the conduct or condition at issue—for example, the reasonableness of "the use of the property in relation to the particular locality involved." *Duff v. Morgantown Energy Assoc.*, 421 S.E.2d 253, 257 (W. Va. 1992) (citing *Sticklen v. Kittle*, 287 S.E.2d 148 (W. Va. 1981).

With this informed understanding of the contours of public nuisance liability, the district court's floodgate concerns are unwarranted. Contemporary public nuisance retains many of the traditional limits of tort liability, while also recognizing

the black-letter principle that tort duties are dynamic: a defendant's duties might change if reasonable conduct generates later-arising, unreasonable risks. Kendrick, *supra*, at 69-71. Thus, a defendant could engage in conduct that is reasonable at the time—such as leaving a broken vehicle on the roadside—but that nonetheless creates an unreasonable condition later—such as when night falls and the defendant fails to set out flares or alert authorities. *Id.* at 66-68 (discussing Restatements and cases). What's more, if a defendant becomes aware its conduct causes an unreasonable infringement, "further invasions are intentional." Restatement (Second) of Torts § 825 cmt. d. Such ongoing duties are mainstays of tort law, not alarming floodgates.[6]

Nor are public nuisance claims duplicative of, or an end run around, product liability claims—a devouring-all-torts concern that the district court also invoked, *see* 2022 WL 2399876, at *59. Each type of action covers different harms and has different liability prerequisites. While product liability claims are "focused on the harms specifically borne by discrete individuals," public nuisance claims serve a different function, focusing on "harms to the public," including public health, social welfare, and security. Kendrick, *supra*, at 56 n.265 (citing Dana, *supra* at 100 ;

[6] The unreasonable interference, moreover, must be to a public right, a criterion that also underpins the *parens patriae* standing of plaintiffs such as the cities here, requiring "an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

accord W. Va. Code Ann. § 16-3-6 (West 2022) (including in the category of "public nuisance" risks to public health).

Thus, the nature of public nuisance itself distinguishes it from private-harm-focused torts. Unlike mass torts, which inflict individualized harms, public nuisances create conditions that unreasonably interfere with the rights of people who are not themselves harmed by consumption of the product. In the case of opioids, for example, the harm is not measured only by the costs to those suffering from addiction. Rather, the harm is measured by the damage to the public good, as even those who have never taken a painkiller are adversely affected when public spaces are crowded with unhoused people, crime rates increase, and emergency rooms fill.

This relationship between public nuisance and public harm on the one hand, and mass torts and private harm on the other, mirrors the "relationship between epidemiology and individualized medicine," with "the former focused on the incidence of disease in a community and adverse community wide effects and the latter focused on particular individuals and particular individuals' wellbeing." Dana, *supra*, at 100 n.189.

Also, while courts have "been wary … of extending public nuisance law to cover claims regarding non-defective products that are legally sold, absent some additional wrongdoing," *In re Paraquat Prods. Liab. Litig.*, 2022 WL 451898, No. 3:21-md-3004-NJR, at *9 (S.D. Ill. Feb. 14, 2022), the requirement of "unreasonable

interference" with a public right appropriately bounds the claim. *See Duff*, 421 S.E. 2d at 257 (stating that "a business lawful in itself" may constitute a public nuisance based on unreasonableness).

C. West Virginia's Broad Definition of Public Nuisance Accords with § 821B.

West Virginia law requires the balancing of public costs and benefits to determine whether an alleged nuisance is "unreasonable." 2022 WL 2399876, at *60. While taking no position on the ultimate outcome, *amici* write to describe the proper balancing test, including the expansive nature of public rights and the dynamic balancing that must be conducted.

1. First, as to the expansive nature of qualifying public rights: nothing in West Virginia public nuisance law, when properly construed, precludes product-related claims. West Virginia courts have never held that that public nuisance has the narrow bounds imposed by the district court. In fact, two lower courts have applied public nuisance law to the sale or distribution of opioids, *Brooke Cnty. Comm'n v. Purdue Pharma*, No. 17-c-248, 2018 WL 11242290, (Marshall Cnty. Cir. Ct., Dec. 28, 2018); *State ex rel. Morrisey v. Amerisource Bergen*, No. 12-c-141, 2014 WL 12814021, (Boone Cnty. Cir. Ct., Dec. 12, 2014). The Mass Litigation Panel created to address West Virginia opioid claims has held likewise. *In Re Opioid Litig.*, No. 21-C-9000, (Kanawha Cnty. Cir. Ct. Jul. 1, 2022),

https://tinyurl.com/wsskxj2p (findings of fact and conclusions of law on order partially denying defendants' motion for summary judgment).

West Virginia statutory law, too, has recognized that public nuisances need not be attached to the land. *See* W. Va. Code Ann. § 30-7-14 (unlicensed nursing a public nuisance); *id.* at § 7-1-14 ("abandoned, neglected or cruelly treated" animals a potential public nuisance). Commercial products or material objects also may be a public nuisance. *See id.* at § 22-15A-1(a) (litter a public nuisance); *id.* ("waste tires" a public nuisance presenting risks of contagion "injurious to the public health, safety, and general welfare"); *id.* at § 17C-3-8 (unauthorized traffic signals and signs a public nuisance). And improper practices regarding material objects may also be a public nuisance. *Id.* at § 22C-3-2 ("uncontrolled, inadequately controlled and improper collection and disposal of solid waste" a public nuisance).

Thus, as the West Virginia Supreme Court has repeatedly stated, "[a] public nuisance is an *act* or *condition* that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Sharon Steel Corp.*, 334 S.E.2d at 620-21 (emphasis added). This definition comfortably includes activities surrounding products, such as their distribution or sale.

In stating that public nuisance is an "inept vehicle" to cover public harm from product sales, 2022 WL 2399876, at *57, the district court paraphrased comment g of the Restatement (Third) of Torts: Liab. for Economic Harm § 8 (Am. L. Inst.

2020). That section, however, has nothing to say about the type of claim at issue here. Titled "Public Nuisance Resulting in Economic Loss," Section 8 covers the "special injury" rule for private plaintiffs bringing public nuisance suits. It does not address suits like this one: public nuisance actions brought by government plaintiffs. Comment g, moreover, serves to carve out product claims from the discussion of this special injury rule. It does not purport to conclusively interpret the scope of public nuisance. The Third Restatement project is still underway and has yet to address public nuisance.

Section 821B remains the American Law Institute's definitive public nuisance provision, and West Virginia has its own independent body of precedent, which, to the extent that it incorporates the Restatement, draws upon the Second Restatement. *See, e.g.*, *State of West Virginia ex rel. Amerisourcebergen Drug Corp. v. Moats*, 858 S.E.2d 374, 396 (W. Va. 2021) (Hutchinson, J. concurring) (citing § 821B to describe the contours of a public nuisance); *Sharon Steel Corp.*, 334 S.E.2d at 620 (referencing § 821B). Any reliance by the district court on the Third Restatement to define the limits of public nuisance law was error.

2. West Virginia law is also clear that a public nuisance hurts or inconveniences "an indefinite number of persons," *id.*, including risks to public health. *See Town of Fayetteville v. Law*, 495 S.E.2d 843, 850 (W. Va. 1997) (stating that public nuisance

exists until risk to "public health, safety and the environment is abated" (quoting *Kermit*, 488 S.E.2d at 925).

In conducting a balancing test, the district court appeared to acknowledge that widespread threats to citizen health can constitute a public nuisance. 2022 WL 2399876, at *68 (recognizing "elimination of hazards to public health and safety" as appropriate redress for public nuisance). And, as the district court found, "the dangers of opioids are palpable, as abundantly proven by the social costs incurred by communities such as the City of Huntington and Cabell County." *Id.*, at *60.

3. But the district court fell short in failing to consider the temporal dimension in balancing the public harm of contributing to an ever-worsening opioid epidemic against the public utility of distributing opioids. *Id*. The lower court relied on West Virginia precedent adopting the Second Restatement's balancing test to determine if the deleterious effects on public welfare from the opioid epidemic outweighed the public utility of filling needed prescriptions. *Id*. The court even cited West Virginia precedent acknowledging that, depending on the balancing, even a lawful business can constitute a public nuisance. *Id.* (citing *Duff*, 421 S.E.2d at 257).

Despite pages upon pages of findings chronicling defendants' conduct as the opioid crisis worsened, the district court's balancing was completely static. This analytic temporal vacuum makes little sense given the very evolution of the epidemic that the district court painstakingly detailed. Black-letter tort law principles, too,

consistent across all three Restatements, recognize that duties can evolve over time.[7] The original conduct, like the vehicle abandoned roadside, may be reasonable, but leaving the vehicle unattended creates an unreasonable condition and thus an accompanying duty to take reasonable steps to address that condition. Here, even if distribution of opioids might be reasonable in some other context, it may be unreasonable when the drugs carry hidden addiction risks, the likelihood of illegal redistribution skyrockets, or towns crumble due to opioid addiction. *See* Kendrick, *supra*, at 68.

Whatever the ultimate outcome on this record, the balancing done by the district court was legally flawed from the get-go because it lacked the dynamic perspective needed to answer the central question under West Virginia law: "reasonableness or unreasonableness … in relation to the particular locality involved." *Duff*, 421 S.E.2d at 257. This question cannot be answered in a one-time-fits-all artificial construct, as the district court would have it. *See* 2022 WL 2399876, at *60. Rather, the proper legal test is whether the defendant "*continue[d]* to act reasonably when an unreasonable risk—or, [as with opioids], a catastrophic national crisis—emerged." Kendrick, *supra*, at 68-69.

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[7] Kendrick, *supra* at 66-68 (drawing from, *inter alia*, Restatement (First) of Torts § 321 (Am. L. Inst. 1934); Restatement (Second) of Torts § 321 (Am. L. Inst. 1965); and Restatement (Third) of Torts: Liab. For Physical & Emotional Harm § 39 (Am. L. Inst. 2012)).

II. Abatement Funds Are Consistent with Public Nuisance History and Doctrine.

Like its overly narrow reading of the cause of action, the district court's remedial analysis also misapprehended the scope of public nuisance law. Specifically, the court rejected plaintiffs' proposed abatement fund, construing it as a form of damages. But abatement funds—particularly those like the forward-seeking remedy sought here—are quite distinct from compensatory damages and fully consistent with the injunctive relief historically afforded to nuisance plaintiffs.

A. An Abatement Fund Is Distinct from Damages and Consistent with Traditional Remedies.

Claims for abatement funds—particularly those seeking monies for forward-looking relief like those at issue here—fall comfortably within public nuisance's remedial heartland. Cases awarding abatement funds have noted that such funds are distinct from compensatory damages because they provide prospective relief. For example, in *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982), the Third Circuit concluded that funding for a study of the public health impact of chemical dumping "[wa]s not, in any sense, a traditional form of damages. … [R]equired monetary payments, would be preventive rather than compensatory. The study is

intended to be the first step in the remedial process of abating an existing but growing toxic hazard."

Likewise, a California appeals court upheld the trial court's creation of an abatement fund in a lead paint case. *People v. ConAgra Grocery Prod. Co*., 227 Cal. Rptr. 3d 499 (2017). The court stated categorically that the "abatement fund was not a 'thinly-disguised' damages award." *Id.* at 569. Rather, "[a]n equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm." *Id.*

The California court further held that it was a "reasonable decision to create a remediation fund" to effect the abatement. *Id*. (noting how issuing an injunction for the defendants to remediate would be "difficult for the court to oversee and for defendants to undertake"); *see also County of Santa Clara v. Super. Ct*., 235 P.3d 21, 39 (Cal. 2010) ("This case will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves.").

The broad wingspan of equitable relief thus easily covers creation of a prospective abatement fund. "The essence of equity jurisdiction has been the power … to mould each decree to the necessities of the particular case. Flexibility rather

than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). A "court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in the particular case," *Price*, 688 F.2d at 211, and abatement funds fall within the heartland of this discretion.

B. In Any Event, Damages Are a Permissible Remedy for Public Nuisance Claims.

Although the plaintiffs are not seeking damages here, the district court's underlying suggestion that damages would be inappropriate in a public nuisance case should be roundly rejected. Both early and recent cases have allowed recovery of costs for remediation of past harms, sometimes using the term "damages" and sometimes not.

American courts in the nineteenth century had no difficulty awarding monetary relief to remediate harms caused by public nuisances, and did so on various theories. *See, e.g.*, *Inhabitants of Charlotte v. Pembroke Iron-Works*, 19 A. 902, 904 (Me. 1890) (upholding referee's "award[of] such damages as in his judgment the plaintiffs had sustained"); *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8, 8 (1884) (awarding damages where town "suffered a peculiar and special damage" through road flooding) (Holmes, J.); *Inhabitants of Calais v. Dyer*, 7 Me. 155, 157 (1830) (holding town entitled to "damages by way of reimbursement" for regular flooding of roads). As one court concluded in surveying such cases, where the

plaintiff government is "compelled to repair the defect," the defendants "are by force of the same law, liable to make good the damage, which the plaintiffs have sustained by [the defendants'] act." *Inhabitants of Freedom v. Weed*, 40 Me. 383, 384-85 (1855).

In more recent cases, courts have likewise permitted monetary recovery for past costs when appropriate. Some courts have framed such recovery in terms suggesting restitution. *See City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983) ("Recovery [of costs] has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate.") (collecting cases). Exemplifying this principle, the traditional bar against recovery of costs of emergency services does not apply in public nuisance law, because "while a local government has a duty to provide certain police, fire and emergency services to the public, [] the duty to prevent or abate a nuisance … rests with … the party that caused the nuisance." *County of Erie v. Colgan Air, Inc.*, No. 10-CV-157S, 2012 WL 1029542, at *4 (W.D.N.Y. Mar. 26, 2012), *aff'd sub nom. County of Erie, v. Colgan Air, Inc.,* 711 F.3d 147 (2d Cir. 2013) (internal citations omitted).

Other modern courts have used the term "damages." *See, e.g.*, *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, 910 P.2d 940, 943-45 (N.M. 1995) (allowing compensatory and punitive damages for common-law public nuisance);

United States v. Hooker Chems. & Plastics Corp., 748 F. Supp. 67, 79 (W.D.N.Y. 1990) (denying under state law defendant's motion to dismiss claim for punitive damages for common-law public nuisance); *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (en banc) (allowing trial court to determine appropriateness of compensatory and punitive damages for public nuisance); *United States v. Illinois Terminal R.R. Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) (concluding that "the Court finds nothing to support the railroad's conclusion that equitable relief is the exclusive remedy under a public nuisance theory"); *City of Evansville v. Ky. Liquid Recycling, Inc*., 604 F.2d 1008, 1019 (7th Cir. 1979) (asserting federal-common-law jurisdiction over public nuisance claim for damages).

It thus comes as little surprise that the West Virginia Supreme Court has allowed a public nuisance action seeking damages to proceed. *Kermit*, 488 S.E.2d at 922 (permitting common-law claim to proceed where plaintiff "is seeking damages for the harm caused to the 'public health, safety and the environment'"). Although damages are not sought here, it is inaccurate to suggest they are impermissible.

III. Public Nuisance and State and Federal Regulation Act as Mutually-Reinforcing Safeguards of the Public Interest.

A. The Common Law Co-Exists with and Complements Regulatory Tools.

The district court's reservations about "opening the floodgates of litigation," 2022 WL 2399876, at *59, may reflect a larger concern about applying common-law tools to regulated activities. While public nuisance might raise such concerns in the abstract, *see, e.g.*, Kendrick, *supra*, at 74-85 (identifying separation-of-powers, federalism, and agency-cost issues), specific doctrines have evolved to manage the interaction between the common law and regulation. Wholesale rejection of common-law claims is not the answer.

Courts have repeatedly recognized the continued vitality of state common law—and nuisance claims in particular—even in heavily regulated areas. Preemption analysis, for example, "starts with the basic assumption that Congress did not intend to displace state law." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir. 2005) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "This presumption against preemption is particularly strong when Congress legislates 'in a field which the States have traditionally occupied,' such as health and safety." *Pinney*, 402 F.3d at 454 (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (2008)). Case-specific assessments of potential conflict between common law and regulations occur against this backdrop of state law's presumptive vitality. *See, e.g.*,

Pinney, 402 F.3d at 457 (federal law did not preempt plaintiffs' tort claims against wireless telephone manufacturers); *United States v. Srnsky*, 271 F.3d 595, 605 (4th Cir. 2001) (federal statutes did not preempt assertion of West Virginia common-law easement). Unless and until specific doctrinal criteria are met, the common law remains available to complement federal regulation. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 578 (2009) ("[I]t appears that the FDA traditionally regarded state law as a complementary form of drug regulation.").

Public nuisance claims are suitable complements for statutory and regulatory obligations. Unlawful activity is unreasonable for purposes of public nuisance law. *See West v. Nat'l Mines Corp.*, 285 S.E.2d 670, 670, 677 (W. Va. 1981); Restatement (Second) of Torts § 821B (stating that violation of "a statute, ordinance or administrative regulation" is a circumstance that "may sustain a holding that an interference with a public right is unreasonable"). Meanwhile, an otherwise lawful condition may nevertheless be unreasonable in its context. *Duff*, 421 S.E.2d at 257.

This coexistence of regulation and the common law thus recognizes that the common law serves as a necessary complement to regulatory enforcement efforts. *See, e.g.*, Kendrick, *supra*, at 86. Wholesale rejection of public nuisance without analyzing its potential to complement and buttress regulatory efforts misses a critical aspect of the doctrine.

B. Opioids Are a Catastrophic Illustration of the Need for Public Nuisance Doctrine.

The case of opioids illustrates in urgent terms the necessary role of common-law doctrines like public nuisance. Regulation of prescription opioids was hobbled by lack of information, including through deliberate criminal acts. Purdue Pharma has twice been convicted of federal crimes relating to its drug OxyContin. *See* John Brownlee, U.S. Att'y for the W. Dist. of Va., *Statement of United States Attorney John Brownlee on the Guilty Plea of the Purdue Frederick Company and Its Executives for Illegally Misbranding Oxycontin* 2 (May 10, 2007), https://www.documentcloud.org/documents/279028-purdue-guilty-plea; Off. of Pub. Affs., *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies,* U.S. Dep't. of Just. (Nov. 24, 2020), https://tinyurl.com/ydp2bjt6. There were also extensive lobbying efforts by industry to weaken regulatory oversight. *See* Scott Higham et al., *Inside the Drug Industry's Plan to Defeat the DEA*, Wash. Post (Sep. 13, 2019), https://tinyurl.com/ydp2bjt6. When regulation is based on false information or otherwise hampered, it leaves states, localities, and their citizens to bear the costs. The common law remains one of their only remedies. *See* Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 Geo. L.J. 2049, 2084 (2000) (describing the many reasons for the complementary role of the common law).

Although criminal conduct thwarting regulatory effectiveness offers a clear illustration of the continued role for the common law, common-law liability may also exist regardless of defendants' compliance with regulatory and statutory obligations. Except in the exceptional cases where preemption or other doctrines intervene, regulation typically sets a floor of minimum conduct, not a ceiling. *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1552 (2007) ("[T]he focus on federal floors that serve as 'one-way ratchets' is unsurprising—laws and regulations that cut the other way, that prohibit more protective state regulation of risks, have been rare.").

In the current case, defendants' compliance with their regulatory obligations is hotly contested, while the fact remains that the number of opioids distributed in Cabell County skyrocketed to 142 pills per person. 2022 WL 2399876 at *49. Regulatory compliance, if it occurred, provides no absolute defense to a public nuisance claim, and any regulatory violation itself is of course evidence of unreasonable interference.

The district court, however, appears to have conflated compliance with regulatory obligations, *id.* at *13 — a finding that itself is on appeal— with satisfying the duty to avoid creating unreasonable conditions, *id.* at *35 ("There is nothing unreasonable about distributing controlled substances to fulfill legally

written prescriptions."). But even assuming regulatory compliance, it by no means follows that such defendants fully discharged their common law duties, or that their conduct was "reasonable."

CONCLUSION

For the foregoing reasons, this Court's analysis of West Virginia law should reflect that the historic and contemporary scope of public nuisance encompasses unreasonable interference with the public health by product sales; that duties to avoid harm are dynamic; that abatement funds are appropriate relief; and that public nuisance claims appropriately complement other regulatory efforts.

Date: January 3, 2023

Respectfully Submitted,

By: s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Hyland Hunt
DEUTSCH HUNT PLLC

Leslie Kendrick
580 Massie Rd.
Charlottesville, VA

MICHAEL J. SKOLER
SOKOLOVE LAW, LLC

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Counsel for Amici Curiae certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Fourth Circuit Rule 32(b). This brief contains 5,957 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: January 3, 2023

Respectfully Submitted,

By: s/ Ruthanne M. Deutsch
Deutsch Hunt PLLC

Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on January 3, 2023. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service under Federal Rule of Appellate Procedure 25(c)(2) and Fourth Circuit Rule 25(a)(4).

Date: January 3, 2023

Respectfully Submitted,

By: s/ Ruthanne M. Deutsch
Deutsch Hunt PLLC

Counsel for Amici Curiae