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

IN THE 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, L.P., ET AL.,

Defendants,

WALGREENS BOOTS ALLIANCE, INC., ET AL., CVS PHARMACY, INC., ET AL., WALMART INC.,

Defendants-Appellants.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

INTEREST OF *AMICI CURIAE* 5

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. Both in Its Origins and Today, Public Nuisance Has Embraced Liability for Harmful Product Sales. 9

A. Public Nuisance Was Capacious Under English Common Law. 10

B. Contemporary Public Nuisance Law Is a Well-Established Vehicle for Remedying Public Health Threats Without Opening Floodgates. 13

II. Public Nuisance and State and Federal Regulation Act as Mutually-Reinforcing Safeguards of the Public Interest. 17

A. The Common Law Co-Exists with and Complements Regulatory Tools. 17

B. Opioids Are a Catastrophic Illustration of the Need for Public Nuisance Doctrine. 21

III. Abatement Funds Are Consistent with Public Nuisance History and Doctrine. 23

A. An Abatement Fund Is Distinct from Damages and Consistent with Traditional Remedies. 23

B. In This Case, The Abatement Remedy Fell Well Within the Discretion of the District Court 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Federal

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 15

Bowen v. Massachusetts, 487 U.S. 879 (1988) 23

Cherokee Nation v. McKesson Corp., No. CIV-18-056-RAW, 2021 WL 1200093 (E.D. Okla. Mar. 29, 2021) 19

City and County of San Francisco v. Purdue Pharma L.P., 491 F. Supp. 3d 610 (N.D. Cal. 2020) 19

City of Chicago v. Purdue Pharma L.P., No. 14 CV 4361, 2021 WL 1208971 (N.D. Ill. Mar 31, 2021) 19

City of Huntington v. AmerisourceBergen Drug Corp., __ F. Supp.3d __, No. 3:17-01362, 2022 WL 2399876 (S.D. W.Va. July 4, 2022) 13

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 25

In re Paraquat Products Liab. Litig., 2022 WL 451898, No. 3:21-md-3004-NJR (S.D. Ill. Feb. 14, 2022) 20

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 18

Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015) 18

Qiusha Ma v. Bon Appétit Mgmt. Co., 785 F. App'x 293 (6th Cir. 2019) 17

United States v. Price, 688 F.2d 204 (3d Cir. 1982) 24, 25

Wyeth v. Levine, 555 U.S. 555 (2009) 18

Ohio

City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) 9, 13, 14, 17

Interstate Sash & Door Co. v. City of Cleveland, 74 N.E.2d 239 (Ohio 1947) 20

Jennings Buick, Inc. v. City of Cincinnati, 384 N.E.2d 303 (Ohio 1978) 20

Kramer v. Angel's Path, L.L.C., 882 N.E.2d 46 (Ohio App. 2007) 14

LaPuma v. Collinwood Concrete, 661 N.E.2d 714 (Ohio 1996) 19

Matthews v. State, 25 Ohio St. 536 (1874) 24

Ross v. Nutt, 203 N.E.2d 118 (Ohio 1964) 17

State ex rel. Dewine v. Purdue Pharma L.P., No. 17 CI 261, 2018 WL 4080052 (Ohio Com. Pl. Aug. 22, 2018) 19

Taylor v. City of Cincinnati, 55 N.E.2d 724 (Ohio 1944) 9

Uland v. S.E. Johnson Cos., No. WM–97–005, 1998 WL 123086 (Ohio Ct. App. 1998) 20

Other States

County of Santa Clara v. Super. Ct., 235 P.3d 21 (Cal. 2010) 24

People v. ConAgra Grocery Prod. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017) 25

Statutes

Ohio Rev. Code Ann. § 2307.71 (West) 19

§ 2307.72 19

Other Authorities

1 *Britton: An English Translation and Notes* (Francis Morgan Nichols trans., Clarendon Press 1865) 11

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David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L. J. 62 (2022) ... 6, 15, 16

J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 Cambridge L.J. 55 (1989) 11

John Baker, *An Introduction to English Legal History* (4th ed. 2002) 13

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

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Restatement (Second) of Torts § 821B (Am. L. Inst. 1979) ..... passim

Restatement (Second) of Torts § 825 (Am. L. Inst. 1979) 15

Restatement (Third) of Torts: Liab. for Economic Harm § 8 (Am. L. Inst. 2020) 16

Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 Geo. L.J. 2049 (2000) 22

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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 strong interest in their proper application. *Amici* seek to assist the Court by explaining the scope of settled doctrines and principles relevant to this appeal, including the historical reach and proper contours of public nuisance claims, and the broad wingspan of equitable relief available for abatement.

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
- Adam Zimmerman, Loyola Law School

[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. *Amici* 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 complementary relationship between public nuisance suits and other forms of governmental intervention, and the wide range of equitable remedies available.[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 comfortably within the scope of the modern tort as applied in Ohio, as Judge Polster correctly held.

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[2] Key scholarship informing this brief includes Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 611 (2023); 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: Lessons from Tobacco and Opioids*, 73 Stan. L. Rev. 285 (2021); and David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L. J. 62 (2022).

Contrary to the arguments raised by appellants' *amici*, this consensus view risks no opening of litigation floodgates, as the scope of public nuisance doctrine and the criterion of unreasonableness appropriately cabin liability. With respect to claims predicated on the sale of products, the requirement that the product result in an unreasonable condition which interferes with a right common to the public also keeps the floodgates closed. 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 wide-ranging harms to public health and welfare resulting from the opioid epidemic have been widely chronicled, Kendrick, *supra*, at 753-54, and appear to be undisputed here. The jury's finding that the pharmacy defendants here shared responsibility for "unreasonable interference" with public health and safety is fully consistent with black letter tort principles and does not threaten unbounded liability in future cases.

Nor does recognizing the validity of public nuisance doctrine for the wrongful conduct here pose a risk of irreconcilable conflict with regulatory prerogatives. Rather, state courts—including Ohio courts—have continued to give life to public nuisance claims because they are an important complement to regulatory efforts. Breach of regulatory duties, like those the jury found here, can constitute an absolute public nuisance under Ohio law. What's more, when and if conflict arises with other

regulatory approaches, it can be mediated by doctrines that are designed precisely for that purpose. The district court correctly determined that no such doctrine foreclosed liability here.

Finally, the abatement remedy awarded here falls well within the heartland of public nuisance remedies. The traditional remedy for public nuisance is abatement—that is, the prospective remediation of the offending condition. Because abatement focuses upon prospective relief rather than redress of past injuries, it is distinct from damages. Abatement is the traditional remedy for public nuisance because public nuisances result in ongoing wrongful conditions which must be rectified, as opposed to money damages which repair past harms. Nor is this distinction blurred by the fact that the abatement process often requires defendants to expend funds. Rather, as correctly noted by the district court, requiring defendants to contribute funds for abatement is an established remedial approach, with its specific features subject to the court's broad discretion. In this case, appellants did not submit a serious abatement plan for the district court's consideration, and the plan the court ultimately crafted fell within its discretion.

In sum, in *amici*'s view, the district court's careful analysis of public nuisance law is consistent with the historical and contemporary scope of the claim, and the district court's thoughtfully tailored abatement remedy falls well within the historic

contours and current broad scope of equitable relief allowed for public nuisance claims.

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 doctrine is broad, spanning beyond activity and/or conditions that affect real property, to encompass "the wrongful invasion of personal legal rights and privileges generally." *Taylor v. City of Cincinnati*, 55 N.E.2d 724, 727 (Ohio 1944). Ohio common law, consistent with centuries of precedent, is clear that "there need not be injury to real property in order for there to be a public nuisance." *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). The Supreme Court of Ohio has already held that public nuisance liability encompasses public harms stemming from the sale of products. *Id.*

The district court therefore properly held that the Ohio common law of public nuisance covers the wrongdoing the jury found here. *See, e.g.*, R4611, Abatement Order, PageID# 596652-53 (summarizing the broad scope of public nuisance under Ohio common law). Appellants, correctly, do not challenge this specific holding on the common law scope of public nuisance. Yet Appellants' *amici* insist on ahistorical

limits to the doctrine.[3] *Amici* scholars write to provide a more comprehensive analysis of the common-law history—one that tells another story and confirms the propriety of Judge Polster's ruling.

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: dispensing opioid products in a manner constituting an unreasonable interference with a right held by the general public, specifically jeopardizing public health and safety.

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," appellants' *amici* fail to acknowledge that "the doctrine has contained much more diversity for centuries." Kendrick, *supra*, at 716. Dating back to the late thirteenth century, contemporaries noted "several other nuisances" subject to public action besides "the case of a way

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[3] *See, e.g.*, *Amici Curiae Br. of Chamber of Commerce of the United States of America and the American Tort Reform Association* at 8 (wrongly contending that the "public right" implicated in public nuisance claims was historically limited to "the right to access shared resources like public roads and waterways"); *Amicus Curiae Br. of the Product Liability Advisory Council*, at 5 (describing public nuisance as "a government tort for protecting the right to use government-owned land and water").

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. In his list of "common nuisances" in 1769, obstruction of public ways was but the first of *eight* categories of common, or public, nuisances. Kendrick, *supra*, at 716-17 (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 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

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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 716 (emphasis added) (citing Spencer, *Public Nuisance* at 60 (quoting William Sheppard, *The Court-Keepers Guide* (5th ed. 1662))).

*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 718 (quoting Restatement (Second) of Tort § 821B cmt. b).

So, historically, 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 717, 740 (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 716.

Definitive primary sources ignored by appellants' *amici* thus show that common injury suffered from dispensing harmful opioids, such as the harm alleged

here, fits comfortably within the historical reach of public nuisance under English common law. [6]

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. *See* Kendrick, *supra*, at 718-721 (discussing cases). 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 Second Restatement, followed by Ohio courts, *e.g., Beretta U.S.A. Corp.*, 768 N.E.2d at 1142, embraced the wide scope of public nuisance, rejecting the proposition that

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[6] Appellants and their amici rely heavily on the district court opinion (currently under appeal) in *City of Huntington v. AmerisourceBergen Drug Corp.*, __ F. Supp.3d __, No. 3:17-01362, 2022 WL 2399876 (S.D. W.Va. July 4, 2022), *appeal docketed*, No. 22-1819 (4th Cir. Aug. 4, 2022). But the historical citations in that opinion were incomplete, describing only 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").

only criminal activities could count as public nuisances and confirming that liability extends beyond the blinkered focus of appellants' *amici* on public property or resources. Rather, the doctrine encompasses "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 Kramer v. Angel's Path, L.L.C.*, 882 N.E.2d 46, 52 (Ohio App. 2007) ("A public nuisance . . . arises [] when a public right has been affected."). Thus, "unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." *Beretta U.S.A. Corp.*, 768 N.E.2d at 1142 (quoting § 821B, cmt. h).

Still, because public nuisance liability is "of a piece with both other tort doctrines and the overarching goals of tort law," Kendrick, *supra*, at 710, it hinges on the unreasonableness of the alleged nuisance, *id.* at 755-56. Given this limit on public nuisance liability, any 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. *Id*. at 765-67. 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 762-64 (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.[7]

Nor are public nuisance claims such as these duplicative of, or an end run around, product liability claims—a devouring-all-torts concern that appellants' *amici* also invoke. 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," and compensating those individualized harms, public nuisance claims serve a different function, focusing on "harms to the public," including public health, social welfare, and security. Kendrick, *supra*, at 753 n.265 (citing Dana, *supra* at 100).

The nature of public nuisance itself, therefore, 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 the public, including 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

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[7] The unreasonable interference, moreover, must be to a public right, a criterion that also underpins the *parens patriae* standing of plaintiffs such as the counties 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).

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.

Finally, the Restatement (Third) of Torts: Liab. for Economic Harm § 8 (Am. L. Inst. 2020) poses no barrier to the relief that the Counties have been awarded here. *Contra* Appellants' Br. at 41; Chamber of Commerce Br. at 15; PLAC Br. at 18. 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 to Section 8, 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. Meanwhile, as this Court has noted in an unpublished

opinion, "the Restatement (Third) of Torts is not a reflection of Ohio law." *Qiusha Ma v. Bon Appétit Mgmt. Co.*, 785 F. App'x 293, 296 (6th Cir. 2019).

Rather, Restatement (Second) § 821B remains the American Law Institute's definitive public nuisance provision, and Ohio courts apply that Restatement. In so doing, Ohio courts have expressly recognized that public nuisance liability encompasses products. *See Beretta U.S.A. Corp.*, 768 N.E.2d at 1142. The district court's application of Ohio public nuisance law was correct.[8]

II. 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.

Floodgate concerns raised by appellants and their *amici* may reflect a larger concern about applying common-law tools to regulated activities. While public

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[8] Appellants also challenge the district court's proximate cause analysis. Appellants' Br. at 72-81. Here too, however, the court's approach was consistent with Ohio law. As demonstrated by Appellees, Ohio law defines proximate cause in terms of foreseeability. Counties' Br. at 83; *see, e.g., Ross v. Nutt*, 203 N.E.2d 118, 120 (Ohio 1964) (proximate cause standard asks whether "the injury complained of could have been foreseen or reasonably anticipated"). To whatever extent "remoteness" can limit proximate cause, the Ohio Supreme Court made clear that it did not do so in a case involving public nuisance claims for the marketing, distribution, and sale of products, specifically firearms. *Beretta U.S.A. Corp.,* 768 N.E.2d at 1148-49. To the contrary, the court held that the plaintiff city's "actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services" were "*direct injuries* to appellant, and that such harms are not so remote or indirect as to preclude recovery by appellant as a matter of law." *Id.* (emphasis added). This holding demonstrates why the proximate cause finding in this case is permitted under Ohio law and should not be disturbed.

nuisance might raise such concerns in the abstract, *see, e.g.*, Kendrick, *supra*, at 769-78 (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. As this Court has stated:

> The question whether state law is preempted demands due regard for the presuppositions of our embracing federal system. When Congress acts to preempt state law—especially in areas of longstanding state concern—it treads on the states' customary prerogatives in ways that risk upsetting the traditional federal-state balance of authority. This is why there is a strong presumption against federal preemption of state law, one that operates with special force in cases "in which Congress has legislated . . . in a field which the States have traditionally occupied."

Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 694 (6th Cir. 2015) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (other internal citations and quotation marks omitted). 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.").

In the case of opioids, as Appellees explain, Ohio law does not preempt public nuisance liability of the type asserted here. The Ohio Products Liability Act (OPLA)

blocks only claims for compensatory damages from manufacturers or suppliers, not for equitable relief. Ohio Rev. Code Ann. § 2307.71(A)(13) (West); *id.* § 2307.72; *LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) (OPLA did not abrogate a products-related claim not seeking compensatory damages); *State ex rel. Dewine v. Purdue Pharma L.P.*, No. 17 CI 261, 2018 WL 4080052, at *4 (Ohio Com. Pl. Aug. 22, 2018) (OPLA did not abrogate a common-law public nuisance claim seeking equitable relief).

Nor does the federal Controlled Substances Act preempt the Counties' claims seeking state-law remedies for violations of federal duties, especially given the Controlled Substances Act's express preservation of state authority. 21 U.S.C. § 903. Courts across the country have routinely concluded as much, *see, e.g., City and County of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 662-63 (N.D. Cal. 2020); *City of Chicago v. Purdue Pharma L.P.*, No. 14 CV 4361, 2021 WL 1208971, at *9-11 (N.D. Ill. Mar 31, 2021); *Cherokee Nation v. McKesson Corp.*, No. CIV-18-056-RAW, 2021 WL 1200093, at *7 (E.D. Okla. Mar. 29, 2021). Appellants cite no contrary authority.

What's more, public nuisance claims are welcome complements for statutory and regulatory obligations. Ohio law reflects this complementary relationship. First, it recognizes that unlawful activity is per se unreasonable for purposes of public nuisance law, qualifying as an "absolute nuisance." *See Jennings Buick, Inc. v. City*

of Cincinnati, 384 N.E.2d 303, 307 (Ohio 1978) (quoting *Interstate Sash & Door Co. v. City of Cleveland*, 74 N.E.2d 239, 239 (Ohio 1947) (paragraph one of the syllabus)); *see also* 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"). Second, Ohio law further provides that public nuisance liability can arise from a legal but "culpable or intentional act resulting in harm," when the harm is "is substantially certain to occur," *Uland v. S.E. Johnson Cos.*, No. WM–97–005, 1998 WL 123086, at *5 (Ohio Ct. App. 1998) (internal citations omitted). Here, the jury found that pharmacy defendants' "intentional and/or illegal conduct" was a substantial factor in producing oversupply and diversion of prescription opioids in the Counties. Counties' Br. at 33 (quoting R.4176, Verdict, PageID# 556138-44). This finding is consistent with the complementary relationship Ohio law has carefully fashioned for regulation and the common law.

Thus, 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.*, No. 3:21-md-3004-NJR, 2022 WL 451898, at *9 (S.D. Ill. Feb. 14, 2022), the requirement of "unreasonable interference" with a public right appropriately bounds the claim. Here, substantial evidence supports the jury verdict of such unreasonable interference, and indeed,

intentional and willful misconduct, by defendant pharmacies. *See generally* Counties' Br. at 47-49.

At bottom, the common law serves as a necessary complement to regulatory enforcement efforts. *See, e.g.*, Kendrick, *supra*, at 779. 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 actors 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 undermined, 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).

In the current case, the jury rejected any argument that pharmacy defendants complied with their regulatory obligations. As Appellees chronicle, the pharmacies were well-aware of the dangers of prescription opioids yet were derelict in their duties to monitor red flags and otherwise avoid oversupplying. Counties Br. at 44-47. Specifically, although they started monitoring dispensing data to track diversion of controlled substances, they kept this information from their dispensing pharmacists. They also failed to adequately track or share information about refused prescriptions. Counties Br. at 18-19. And even when they appeared to accede to regulatory obligations, such as putting new policies in place as part of a settlement agreement with DEA, they failed to enforce such policies. Counties Br. at 19-20.

The fact remains that the number of opioids distributed in the Counties skyrocketed under defendants' failure to watch. Between 2006 and 2009 approximately 110 million opioid pills poured into Trumbull and Lake County, two of the worst-hit counties in one of the worst-hit States, "representing 250 pills for

every man, woman, and child residing in the counties." Counties Br. at 1. Failing to close the floodgates to such an opioid tsunami is readily characterized as an unreasonable interference with the public right to health and safety.

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

Appellants dispute the propriety of the district court's abatement remedy. Yet their primary argument—that putting funds toward abatement is the same as paying damages—is incorrect. Abatement funds are distinct from compensatory damages and fully consistent with the injunctive relief historically afforded to nuisance plaintiffs. Attempts to discredit this remedy at a wholesale level should not succeed. And given abatement funds' propriety as a remedy, objections to the specific details of an abatement plan are challenges to highly factual questions well within the broad discretion of the district court.

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

The broad wingspan of equitable relief easily covers creation of a prospective abatement fund. "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). Abatement is a prospective

remedy, readily distinguished from compensatory damages, aimed at the "removal of a thing injurious to the public," rather than redress of past wrongs. *Matthews v. State*, 25 Ohio St. 536, 541 (1874). In practice, abatement of a public nuisance generally causes defendants to expend funds. But whether they expend those resources to accomplish remediation themselves, pay third parties to perform remediation, or pay into a fund to contribute to that very same process, the resources expended remain under the umbrella of the prospective remedy of abatement. *See, e.g., 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.").

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. . . . though it would require monetary payments, [it] 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 (Ct. App. 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").

Creation of a prospective abatement fund thus falls within the equitable heartland. "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 This Case, The Abatement Remedy Fell Well Within the Discretion of the District Court

In this case, the district court acted within its discretion in its crafting of the abatement remedy. The court asked plaintiffs and defendants to submit proposed abatement plans, and defendants, after having been ordered twice to do so, ultimately submitted three paragraphs consisting only of drug disposal programs. R.4220, Order Regarding Abatement Proceeding, at PageID# 570402; R.4319, Order Granting Pls.' Mot. to Compel, PageID# 574286-87; R.4315, Defs.' Obj. to Pls.' Abatement Plan, PageID# 574273-76; R.4337, Defs.' Amended Obj. to Pls.' Abatement Plan, PageID# 575463-75.

The remedy ultimately crafted by the district court held defendants liable for only one-third of the allowable abatement costs in plaintiff counties, in recognition of other entities' contribution to the nuisance. R.4611, Abatement Order, PageID# 596641. The court's calculations were tailored to focus upon harms attributable to prescription opioids, and the court appointed an Administrator to oversee the funds, including assessing whether specific programs are reasonably calculated to abate the nuisance. R.4611, Abatement Order, PageID# 596707-08.

Given the broad nature of the court's equitable discretion and the highly factual nature of the specific details of the remedy, it cannot be said that the district court abused its discretion.

CONCLUSION

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

Date: February 20, 2023

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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 Sixth Circuit Rule 32(b). This brief contains 5,268 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.

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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 Sixth Circuit by using the CM/ECF system on February 20, 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 Sixth Circuit Rule 25(a)(4).

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