IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska,

Appellant,

v.

Albertsons Companies, Inc.;
Albertsons Companies LLC;
Safeway, Inc.;
Carr-Gottstein Foods Co.; and
Fred Meyer, Inc.,

Appellees.

Superior Court Case
No. 3AN-22-06675CI

Supreme Court No. S-19048

AMICI CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICI CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a nonprofit professional association of corporate members representing a broad cross-section of product sellers and manufacturers. These companies seek to contribute to the improvement and reform of the law, with emphasis on the law governing the liability of product sellers and manufacturers and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the products sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product sellers and manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

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

Amici submit this brief to provide the Court with details on (I) why well-established products liability law and applicable regulatory regimes should govern product-based tort liability and other mitigation of public risks associated with products; (II) the traditional parameters of public nuisance law and a history of the repeated—and widely rejected—attempts to expand the tort beyond those parameters, including in opioid litigation; and (III) the reasons courts have held that public nuisance law is inapplicable to sellers of products, including when plaintiffs seek to recover costs from third-parties' use or misuse of products.

INTRODUCTION

For over a century courts and legislatures have incrementally developed and refined products liability law to govern cases involving injuries from products. In addition, numerous federal and state agencies extensively regulate the safety of all manner of products, as well as the general safety of the environment, the workplace, and the practices of medicine and pharmacy. That body of law is also well-developed and overseen by courts and legislatures. The State of Alaska, however, asks this Court to pitch overboard these well-settled rules that focus on the precise product scenarios at issue, in favor of the nebulous standards of public nuisance—a tort that courts (as in this case) have repeatedly refused to extend to the sale of lawful products. The law of public nuisance does not fit the State's theory, which was properly dismissed at the pleadings stage.

As a matter of history and precedent, there are well-established boundaries between public nuisance and products liability law—boundaries that other state high courts and leading commentators rightly believe must be respected. The traditional legal principles of products liability law and the expertise and public accountability of regulatory agencies ably balance the numerous trade-offs inherent in regulating product safety. For good reasons, public nuisance law does not and should not impose blame or obligations for downstream harms for lawful products—particularly when, as here, the products help many people and continue to be approved by the Food and Drug Administration (FDA). There is no need to upend and remake the law of public nuisance, as the State seeks here.

Beyond history and precedent, the consequences of the State's approach would be devastating for the business community and consumers, even outside the prescription medicine context. Under the State's drastic distortion of public nuisance law, virtually any widely used product that causes a significant number of injuries when misused, or that more remotely "created conditions" that then lead to injury, would give rise to a public nuisance cause of action—regardless of the defendant's degree of removal from the harm or other available tort theories of recovery. "Nuisance thus would become a monster that would devour in one gulp the entire law of tort." *Tioga v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993). This would spur nearly standardless, open-ended, industry liability that no one could predict or proactively structure their affairs to avoid. And the chaos, expense, and delay of the litigation itself would be their own negative externalities.

Opioid abuse is a dire problem that demands calibrated, cost-benefit policy solutions and requires a legislative response. Other state supreme courts have rightly rejected the type of invitation the State is making here. This Court should also reject a *post hoc* and *sui generis* judicial response based on inapt litigation against sellers of lawful products regulated by government agencies and subject to a well-developed body of products liability law.

ARGUMENT

I. Expanding public nuisance to claims against product sellers would undermine careful policy compromises in the well-developed area of products liability law and displace applicable regulatory regimes.

Both products liability law and regulatory regimes governing product risks have been incrementally developed over more than a century. From opinions by Judges Cardozo, Learned Hand, and others, the evolution from warranty to negligence to strict liability reflects careful balancing of risks and responsibilities and refining of rules. Plus, agencies like the Consumer Products Safety Commission and FDA promulgate regulations and develop bodies of law to address product risks, as do many other federal and state regulators. Legislatures have reacted to both agencies and the courts in determining who may recover, under what circumstances, and how much for injuries caused by products.

The State is wrong to argue that public nuisance law has already cast aside these well-developed bodies of law. It has not. But before addressing how the State mischaracterizes public nuisance, it is important to understand the well-settled law that already exists but that the State would rather avoid.

The basics of products liability. Products liability applies to persons in the business of selling products and creates liability for products that are unreasonably dangerous because of their design, manufacture, and/or warnings. It determines liability by balancing product risks, benefits, alternatives, and costs, and it abolishes lack of privity as a defense. Under Alaska common law, product defects have their own causes of action, which in turn have their own purposes,

elements, and remedies. *See, e.g.*, Alaska Civil Pattern Jury Instructions, Article 7 (Products Liability); Thomas A. Matthews, *Products Liability in Alaska—A Practitioner's Overview*, 10 Alaska L. Rev. 1 (1993). The hallmark of products liability is that it manages risks that sellers can control, namely by putting lawful, non-defective products into the stream of commerce. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991). These laws and common law doctrines are the basis of liability for claims related to products.

Products liability policy tradeoffs. The well-developed area of products liability law recognizes a key policy tradeoff: companies are not subject to industry-wide liability for selling products with known risks of harm because "liability for products is clearly not that of an insurer." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973). This concept, called "category liability," has been widely rejected. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997). And with good reason: the effect of holding sellers "liable for all the harm their products proximately cause" would be to, in effect, "prohibit altogether the continued commercial distribution of such products." Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329. Because of this, "courts have not imposed liability for categories of products that are generally available and widely used." Restatement (Third) Prods. Liab. § 2 cmt d (1998). This reflects the key fact that sellers cannot police customers to ensure their products are not misused or neglected, including in ways that might create a public nuisance. Wade, 44 Miss. L.J. at 828.

Rather, products liability considers the particular circumstances of an injury that a plaintiff asserts was caused by a product. Issues of negligence, manufacturing defect, design defect, and failures to warn are then determined on a case-by-case basis for the product at issue in the case and not across an industry as a whole.

Product regulations. Products liability common law is supplemented by numerous detailed regulatory regimes promulgated pursuant to statutes enacted by the people's elected representatives. The State inherently (and wrongly) suggests that its wisdom is greater than that contained in the laws governing opioids and their use, which include the Federal Food, Drug, and Cosmetic Act and the Controlled Substances Act, as well as the latter's complementary Alaska statutes. These laws (as well as those regulating the practices of medicine and pharmacy), and not public nuisance, are the proper vehicles to address any allegedly unlawful distribution of a lawful product.

The significance of government regulators is especially important for prescription drugs, including opioids, which are regulated by the FDA. The FDA carefully and continually assesses and balances the risks that the State is asking the court to adjudicate here. To be approved by the FDA, a "product's probable therapeutic benefits must outweigh its risk of harm." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 140 (2000).

All aspects of prescription drugs are highly regulated, from their risks and benefits to human health to their design and labeling. *See* 21 U.S.C. § 821 *et seq*. Even their distribution chain is highly regulated. Defendants are registered with

state and federal authorities to sell prescription drugs, which can only be dispensed at licensed pharmacies. And every person who buys them must get a prescription from a licensed physician before being able to do so. Further, the FDA has been developing risk management plans based on improved surveillance, education, and warnings that call attention to unlawful diversion of opioid medicines. Indeed, "[o]ne of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs."[1]

Law-less desire for cost spreading. Some commentators think that existing regulators have "failed" and that an appropriate response to "regulatory failure" is to use new weapons, such as public nuisance actions. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?* 31 Mealey's Emerging Toxic Torts at 8 (Nov. 1, 2022) (discussing both sides of this debate). And some judges may think that failure to invent something new is to "turn a blind eye," and that the most important thing is to "do something." *See People v. Atlantic Richfield Co.*, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014); *see also* Transcript, *In re Nat'l Prescriptions Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018) (trial judge stating his focus was not "figuring out the answer to interesting legal questions," but to "do something" about prescription drug abuse). One "something" they wish to "do" is to redirect or otherwise spread the cost of a public health or welfare issue. *See* Goldberg, 31 Mealey's Emerging Toxic Torts at 8. For example, in public nuisance

[1] FDA, Opioid Medications, https://www.fda.gov/drugs/information-drug-class/opioid-medications.

climate litigation, plaintiffs want everyone to pay more for coal and oil, thereby redirecting and spreading the costs of climate change. Here, a successful claim would make the people who use opioid medications pay more for their medicines so companies like Defendants can pay treatment costs for those who do not properly use those drugs.

Problematically, this approach casts aside key notions of wrongdoing and causation that permit predictability and compliance planning. It would "violate[] the most elemental aspect of the rule of law: that legal duties be sufficiently predictable to guide those to whom they apply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 987-88 (2023). If this Court adopts Appellants' expanded approach, the tort will become "a Rorschach blot," where courts could apply it without regard to well- established principles. *Id.* at 988.

The price of unpredictability. Manufacturers and sellers need a reasonable amount of certainty under products liability law and regulatory regimes to develop, price, and sell products. Unpredictable and expanded liability would ultimately be passed to consumers through product prices, product sellers' employees through reduced compensation, and stockholders (often mostly people's retirement plans).

Ensuring liability law properly aligns with applicable regulatory regimes is a significant concern for *amici* and their members because sellers of all types of products with inherent risks—from prescription drugs to household chemicals to energy and alcoholic beverages—must be able to rely on compliance with

government regulations that have already balanced consumer and public risks. Weighing the costs, benefits, and social value of products and factoring in any adverse effects is part of the delicate balancing for which only legislatures, and agencies pursuant to statutory authority, are suited. If a company violates laws, there are enforcement remedies tailored to that violation. Appellants should not be able to circumvent the requirements of these directly applicable bodies of law by reinventing public nuisance claims—especially for non-defective, lawful products. As the U.S. Court of Appeals for the Third Circuit said, "[i]f defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity." *Camden County v. Beretta*, 273 F.3d 536, 540 (3d Cir. 2001).

Notably, the conclusion that product claims should be addressed through products liability law and regulatory regimes—and not public nuisance law—does not hinge on whether a product is associated with known or knowable risks that a company failed to prevent. Otherwise, the theory could be used "against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *City of Huntington v. Amerisourcebergen*, 609 F. Supp. 3d, 408, 474 (S.D. W. Va. 2022). The State's proposed expansion of the public nuisance tort to lawful products would, in effect, create a "super tort" that would "open[] the floodgates of litigation." *Id.*

II. This case is part of a failing 50-year effort to expand public nuisance to claims against product sellers and evade products liability law.

Traditional public nuisance law. The State's attempt to recast the tort of public nuisance is a radical departure from traditional public nuisance law in Alaska and elsewhere. Going back more than 250 years of American jurisprudence—and all the way to English common law—public nuisance law has enabled governments to force people to stop and abate unreasonable interferences with the public's rights to use public land, communal property, and waterways. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743-47 (2003). Beyond unreasonable but ultimately "lawful conduct involving conflicting uses of property," courts have previously only allowed public nuisance claims where the underlying conduct involves "unlawful, intentional acts." Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 565 (2006).

For "conduct without the traditional nexus to land," as here, courts have historically held that a public nuisance claim requires (1) the existence of a public right, (2) a defendant's unlawful interference with that public right, (3) causation of the public nuisance by the defendant, and (4) control over the public nuisance by the defendant, as detailed in Section III.A. *Id.* at 565 (citing *City of Chicago v. Beretta*, 821 N.E.2d 1099, 1117 (Ill. 2005).

The crusade to transform public nuisance law. Since the 1970s, aggressive advocates have tried (and failed) to transform public nuisance into a tool for requiring large businesses—rather than individual wrongdoers or society as a

whole—to pay for downstream social harms associated with categories of products, regardless of whether third parties caused the harm or whether the business had control over the product when the harm occurred. *See id*. at 547-48. Proponents of this effort believe that suing individual wrongdoers would be inefficient, and that presumed deep-pocketed sellers can address societal ills on a macro scale. In these cases, the four elements of the public nuisance tort identified above cannot be satisfied with respect to companies that sell products into the stream of commerce. So, those seeking to transform public nuisance have instead tried to change the tort's requirements.

The first act of this failed effort was trying to change the public nuisance chapters of the Restatement (Second) when it was being drafted in hopes of breaking "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other points, nuisance advocates sought to change the notion of a public *right* to anything in the public *interest*, and to remove the wrongful conduct requirement entirely. *Id.* If successful, this would have been as radical as removing duty and breach from negligence. Those transformational changes failed to enter the Restatement.

The advocates' first test case also failed. In *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971), plaintiffs pursued businesses that sold products or engaged in activities that allegedly contributed to smog. An appellate court dismissed the claims as inconsistent with the purpose and terms of nuisance law. *See id*. at 645. The court rightly determined that the plaintiffs were improperly

"asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court." *Id*.

Efforts to circumvent products liability law. Undeterred, nuisance advocates brought new test cases in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809. In those cases, they targeted manufacturers and sellers of products that had inherent risks or could be misused in ways that created harm. Again, judges applied traditional public nuisance principles and rejected these claims. *See, e.g.*, *Johnson County v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984), *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of Bloomington v. Westinghouse Elec. Corp*., 891 F.2d 611 (7th Cir. 1990) (PCBs).

In each of these cases, the courts explained the clear dissonance between the sale of goods and public nuisance liability. Sellers "may not be held liable on a nuisance theory for injuries" caused by a product. *Detroit Bd. of Educ. v. Celotex Corp*., 493 N.W.2d 513, 521 (Mich. App. 1992). Otherwise, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. This would wrongly make product sellers liable whenever someone uses a product to cause harm irrespective of the sellers' "culpability." *Tioga*, 984 F.2d at 921. As but one example, in a case involving PCBs the defendant sold to a customer, the U.S. Court of Appeals for the Seventh Circuit said that once the defendant seller sold its products, the *customer* "was in control of the product purchased and was solely responsible for the nuisance *it* created by not safely disposing of the product." *Westinghouse*, 891 F.2d at 614 (emphasis added).

Tobacco litigation sparks renewed interest in expansion. The failed effort to make nuisance law cover products that might be used in harmful ways gained renewed (but unwarranted) momentum after the tobacco suits of the mid-1990s settled for nearly $250 billion. Though the litigation alleged novel nuisance claims, many people do not realize that courts actually rejected them. Applying traditional nuisance principles, they explained that the "overly broad definition of the elements of public nuisance urged by the State is simply not found" in case law. *Texas v. Am. Tobacco*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997). But given the size of the settlement, the use of nuisance became a misleading part of the litigation's lore.

Gun violence in the crosshairs. Soon after, lawyers took aim at the firearms industry for costs related to gun violence and again turned to public nuisance, even though they acknowledged that such efforts had "legal problems" and had "never [won] in court." David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1172 (2000). Still, they claimed that defendants' marketing practices enabled an illegal secondary market and that the use of firearms interfered with public health and safety. *Id.* Their lawsuits largely failed as a matter of law. The Illinois Supreme Court said that while it did "not intend to minimize the very real problem of violent crime," there was no cause of action "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to" invoke it. *Chicago*, 821 N.E.2d at 1114-16. Applying traditional public nuisance principles, the court held that product manufacturers could not face liability for nuisance when others misused their products. *Id.*

Refusing to paint with a broad brush. Plaintiffs next pressed nuisance claims against lead paint makers. But every state high court to assess those claims refused to expand nuisance liability beyond its historical roots. For example, the New Jersey Supreme Court examined "the historical antecedents" of public nuisance and held 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). And the Missouri Supreme Court rejected a city's attempt to sidestep causation criteria under the guise of a "uniquely public" and pervasive "health hazard." *St. Louis v. Benjamin Moore*, 226 S.W.3d 110, 116 (Mo. 2007).

The Restatement rejects expansion. Reflecting the consensus trend, the Third Restatement rejected including product-related claims within nuisance law "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through products liability, which has been developed and refined with sensitivity to the various policies at stake." Restatement (Third) of Torts § 8, cmt. G (2020). This is significant: *even the Restatement*—which conservative jurists have criticized in other respects as too reflective of its writers' policy preferences rather than the current state of the law[2]—takes the position that expanding public nuisance law to lawful product sellers is "inapt." That is correct.

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[2] *See Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part).

In sum, in response to over 50 years of efforts to evade products liability law and expand public nuisance to cover claims against product sellers, the nation's courts—and, in turn, leading legal commentators—have largely spoken with clarity and uniformity: public nuisance does not extend to the lawful sale of products. The opioid crisis is only the latest testing ground for plaintiffs seeking to dodge legal standards and push public nuisance liability beyond its historical bounds with meritless claims. That effort should be rejected just as previous attempts have been.

III. Alaska should join the majority of other states in affirming that public nuisance may not be used as an end-run around products liability law as applied to the sale of prescription opioids.

When courts in other states have had the opportunity, most have enforced the traditional elements of public nuisance and dismissed opioid cases seeking an end-run around products liability law. Their rulings are consistent with this Court's historically limited application of nuisance law and provide a salient guide for responding to the claims here. They collectively explain that public nuisance law has four distinct elements that do not lend themselves to creating a catch-all cause of action to recover the cost of societal problems from product sellers against which there is no meritorious claim.

A. The traditional requirements of a public nuisance

The bedrock requirements of a public nuisance claim are (1) the existence of a public right, (2) a defendant's unlawful interference with that public right, (3) causation of a public nuisance by the defendant, and (4) control over the public

nuisance by the defendant. *See* Schwartz & Goldberg, *The Law of Public Nuisance*, 45 Washburn L.J. at 562-70. Lawful product-based claims do not meet any of them.

1. The existence of a public right

The existence of a public right is "the *sine qua non* of a cause of action for public nuisance." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 447 (R.I. 2008) (citing 58 Am. Jur. 2d Nuisances § 39 at 598-99 (2002)). Appellees explain well what a public right is: the right to use a shared public resource, like a public road. A public nuisance is a dangerous condition interfering with the public's ability to use that shared resource. *See Maier v. Cty of Ketchikan*, 403 P.2d 34, 38 (Alaska 1965); *Lead Indus.*, 951 A.2d at 447.

As Appellees note, there is a key distinction between public *rights* protected by nuisance law versus health and safety matters in the public *interest*. The latter is a "far broader category." *Lead Indus.*, 951 A.2d at 448. Indeed, there are many types of harms that may be of public interest because they are widespread, but they do not implicate a "public right" under public nuisance law.

The Illinois Supreme Court underscored that the "public right" element limits the tort's use: 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." *Chicago*, 821 N.E.2d at 1114-16. These product risks may invoke private rights and/or be of public interest, but they are not public rights actionable under public nuisance law. This same reasoning precludes opioid public nuisance claims.

2. Unlawful interference with a public right by the defendant

Courts have historically held that a person must have engaged in unlawful activity when interfering with a public right to be subject to liability for a public nuisance. *See* Schwartz & Goldberg, *The Law of Public Nuisance*, 45 Washburn L.J. at 565. The same has been true in Alaska: no Alaska Supreme Court decisions have held that a public nuisance existed where the underlying activity was legal.

For example, blocking a public road as part of an illegal protest may be a public nuisance, but blocking it pursuant to a government contract to repair that road is not. This misconduct requirement is quasi-criminal in nature, like illegally dumping pollutants in a river. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 723 (Okla. 2021). This reflects the fact that public nuisances "have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use of treating pain." *Id.* at 727.

For these reasons, selling a lawful product, particularly one approved by the government for the benefits it provides, does not create public nuisance liability—even if the product carries risks of harm. The New Jersey Supreme Court explained: "In public nuisance terms . . . the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right." *Lead Paint Litig.*, 924 A.2d at 501. Absent unlawful conduct when selling a lawful product, "[t]he negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance." *Chicago*, 821 N.E.2d at 1126.

3. Proximate causation of a public nuisance by the defendant

Courts have also made clear that causation in public nuisance cases is the same as any other tort: "Causation is a basic requirement in any public nuisance action. In addition to proving that the defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause." *Lead Indus. Ass'n*, 951 A.2d at 450. In product cases, the health, safety, or environmental issue asserted often results from acts of third parties. "[T]he role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien." *Detroit Bd. of Educ.*, 493 N.W.2d at 521.

For this reason, some governmental plaintiffs have asked courts to lower causation standards in public nuisance cases so they can subject companies to liability for contributing to the risk of harm, or to substitute the chain of commerce for the chain of causation. But courts have rejected efforts to create abstract or aggregate notions of causation under nuisance law. For example, the Missouri Supreme Court held that "[t]o the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect." *St. Louis v. Benjamin Moore*, 226 S.W.3d 110, 114 (Mo. 2007) (en banc). Otherwise, governments would frame a case "as a public nuisance action rather than a product liability suit" to take advantage of lower liability standards.[3] *Chicago v. Am. Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. 2003).

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[3] The State's public nuisance claim, if allowed to proceed, would also circumvent well-established legal principles in other ways. For example, all of the

4. Control over the public nuisance by the defendant

Finally, a defendant must control the instrumentality causing the public nuisance when the nuisance is created. Control is a "basic element of the tort." *Lead Indus. Ass'n*, 951 A.2d at 449. As the New Jersey Supreme Court made clear, "a public nuisance, by definition, is related to conduct, performed in a location with the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499. In product cases, courts have confirmed that a "distributor who has relinquished possession by selling or otherwise distributing the product" does not control the product when the nuisance is created. Gifford, 71 U. Cin. L. Rev. at 820. Based on these state high court rulings, many courts apply "what appears to be an absolute rule": if a product after being sold creates or contributes to a nuisance, the seller is not liable unless it "controls or directs" the public nuisance causing activity. *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511 (S.D.N.Y. 2022).

* * *

No Alaska case has extended nuisance law beyond these four boundaries that are recognized across the country.

Further, an additional boundary exists in tort law more broadly: governments must look to taxes, not tort claims, to fund their governmental functions. Here, the State seeks "abatement" related to the "costs of the opioid

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claimed harms are derivative of alleged harm to patients who obtained the medication—for example, through misusing the drug and requiring a government-paid ambulance and medical services, or committing crimes causing a law enforcement response. There is a body of law establishing that consequential losses suffered by payors and other third parties are too remote and indirect to permit recovery, but those are the costs the State seeks to recover.

crisis" that are "'borne by the State and other governmental entities.'" Br. at 5 (quoting [Exc. 8]). But government expenses for providing services to the public are not recoverable against an alleged tortfeasor. *See, e.g., City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983). "Expectations of both business entities and individuals, as well as their insurers, would be upset substantially" if this Court imposed liability on business for costs associated with the State performing public services paid for by taxpayers. *Id.* Rather, "the cost of public services for protection" from "safety hazards is to be borne by the public as a whole," not against an alleged tortfeasor who "creates the need for the service." *Id.* Courts throughout the United States have reached this same conclusion.[4]

[4] *See, e.g., Chicago v. Beretta*, 821 N.E.2d 1099, 1145 (Ill. 2004) (rejecting public nuisance claims by governmental entity plaintiffs and observing that "allowing recovery of the costs of routine police and other emergency services could have significant unintended consequences"); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302, 311–16 (1947) (declining to allow federal government to pursue a claim for costs incurred in relation to a soldier injured by a defendants' tortious acts); *Cnty. of Erie, N.Y. v. Colgan Air, Inc.*, 711 F.3d 147, 150–51 (2d Cir. 2013) (concluding that "[i]t is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. Furthermore, it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties"); *D.C. v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) ("Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement.").

For all these reasons, this Court should continue to honor Alaska nuisance law's traditional parameters and not permit its unprincipled expansion such that lawful product sellers can be subject to liability for costs deriving from third parties' use or misuse of those products.

B. Opioid claims rejected in other public nuisance litigation

Adhering to these traditional principles, and as discussed by Appellees, most courts that have considered similar opioid cases have properly rejected Appellants' expansive theory of public nuisance liability. The seminal case is from the Oklahoma Supreme Court, which is the only state supreme court in the country that has decided whether the sale of prescription opioids can give rise to a public nuisance claim. It decisively rejected the theory based on an Oklahoma statute that codified the same common law at issue here. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). In doing so, the Oklahoma Supreme Court embraced rulings that tracked the origins and history of the tort. *See id.* at 724 (citing Restatement (Second) of Torts § 821B cmt. b (1979)). It reinforced that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id.* at 725. The responsibility of product sellers "is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id.* at 728. The court held that sellers should not be held liable for their products after they enter the stream of commerce, and that any public nuisance allegedly caused by opioid abuse occurs after the product has been sold. *See id.* at 729. The Oklahoma high court also cautioned that applying

public nuisance liability to lawful products "would create unlimited and unprincipled liability for product manufacturers." *Id.* at 725.

In addition to the cases cited by Appellees, other courts in similar cases have reached the same conclusions. For example, in a case brought by a city against wholesale opioid distributors, the U.S. District Court for the Southern District of West Virginia concluded that public nuisance law does not apply to the lawful sale of a product, only the "misuse, or interference with, public property or resources." *City of Huntington v. Amerisourcebergen*, 609 F. Supp. 3d, 408, 472 (S.D. W. Va. 2022); *see also State ex rel. Ravnsborg v. Purdue Pharma, L.P.*, No. 32CIV18-000065 (S.D. Cir. Ct. 6th Jud. Dist. Mar 29, 2021) (similar).

Though some courts have acknowledged that "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money," they have recognized that doing so would be "bad law." *City of New Haven v. Purdue Pharma*, 2019 WL 423990, at *8 (Conn. Super. Ct., Jan. 8, 2019). The U.S. District Court for the District of North Dakota dismissed similar opioid public nuisance claims where, as here, the product sold was *later* alleged to constitute a nuisance. *North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019). As the Supreme Court of Iowa poignantly said on different facts, "Deep pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted).

This Court should adhere to the longstanding principles guiding nuisance law and reject the State's invitation to expand the tort beyond recognition.

CONCLUSION

In response to past efforts to expand public nuisance to claims against product sellers and evade products liability law, the nation's courts—and, in turn, leading legal commentators—have largely spoken with clarity and uniformity: public nuisance does not extend to the sale of lawful products and is fundamentally ill-suited to resolving claims against lawful product sellers. This Court should affirm and hold that the sale and distribution of a lawful product, including a regulated and controlled substance as in this case, does not give rise to public nuisance liability.

RESPECTFULLY SUBMITTED this 16th day of September, 2024.

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