IN THE SUPREME COURT OF MARYLAND

Misc. No. 1, September Term, 2025
SCM-MISC-0001-2025

EXPRESS SCRIPTS, INC., et al.,

Appellants,
v.

ANNE ARUNDEL COUNTY, MARYLAND,

Appellee.

On Certified Question of Law from the U.S. District Court for the District of Maryland, No. 1:24-cv-00090-MJM
(The Hon. Matthew J. Maddox)

BRIEF OF *AMICI CURIAE* MARYLAND ASSOCIATION OF COUNTIES AND MARYLAND MUNICIPAL LEAGUE

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CERTIFIED QUESTIONS ADDRESSED BY *AMICI CURIAE*

As certified by the U.S. District Court for the District of Maryland, the questions presented are:

1. Under Maryland's common law, can the licensed dispensing of, or the administration of benefits plans for, a medication approved by the U.S. Food and Drug Administration give rise to a claim for public nuisance?
2. If so, what are the elements of such a public-nuisance claim, and what types of potential relief can a local government plaintiff seek when asserting such a claim?

INTEREST OF *AMICI CURIAE*[1]

Amicus Maryland Association of Counties ("MACo") is a non-profit, non-partisan organization that serves Maryland's 23 counties and Baltimore City by articulating the needs of local government to the General Assembly. MACo's membership consists of county elected officials and representatives from Maryland's counties and Baltimore City. Although MACo does not regularly advocate in the courts, it has chosen to make an exception in this case because of the acute ramifications of this Court's decision for MACo's member jurisdictions. The case will likely have significant implications on the ability of MACo's members to address issues impacting their residents' health and welfare.

[1] The parties consented to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amici Curiae*, their members, or their counsel, made any monetary contribution toward the preparation of this brief.

Amicus Maryland Municipal League ("MML") is a voluntary, non-profit, non-partisan association controlled and maintained by city and town governments throughout the State of Maryland. Founded in 1936, MML represents 157 municipal governments and four special taxing districts across the State. Since its inception, MML has consistently worked to strengthen the role and capacity of municipal government by providing research, legislative advocacy, technical assistance, training and education to its members. MML is the only statewide organization in Maryland composed solely of municipal officials and devoted to the promotion of all branches of municipal administration, and it shares the concerns of amicus MACo regarding the ramifications of this Court's ruling.

Amici have a vital interest in ensuring local governments can protect public health and safety and remedy harm caused by private actors, including corporate entities whose actions constitute public nuisances under Maryland law. Local governments bear the financial and human cost of epidemics such as the opioid crisis and must be empowered to seek both legal and equitable remedies from those who knowingly and unreasonably contribute to them. Smaller municipalities in particular are uniquely vulnerable due to more limited health infrastructure, law enforcement capacity, and financial resource limitations. *Amici* seek to preserve the capacity of Maryland common law to remedy public nuisances caused by the unreasonable conduct of commercial entities within the State. To that end, *Amici* urge the Court to follow established principles of public nuisance law consistent with the liability theories advanced by Anne Arundel County—principles well-

founded in Maryland common law—that will allow Maryland's counties and municipalities to continue to seek redress for harms caused by the opioid epidemic and to seek redress for future large-scale public nuisances.

SUMMARY OF ARGUMENT

The opioid epidemic has imposed immense public health burdens on Maryland's counties and municipalities. According to the most recent annual data, approximately 87% of all intoxication deaths that occurred in Maryland in 2023 were opioid-related, a total of 2,175 Marylanders.[2] Fentanyl-related deaths continued to drive opioid-related deaths in 2023 and were involved in 8 of 10 intoxication deaths.[3] Each of Maryland's counties and municipalities has incurred the substantial costs of emergency response, addiction treatment, and law enforcement to investigate, monitor, treat, and remediate the opioid epidemic.

Opioid abuse is an epidemic that demands accountability. The opioid epidemic was fueled and sustained by those involved in the opioid supply and payment chain, with manufacturers, distributors, pharmacies, and Pharmacy Benefit Managers ("PBMs"), including ESI, OptumRx, and CVS Caremark, each playing a substantial role. Pharmacies and PBMs, who knowingly and unreasonably contributed to this crisis through their administration and dispensing of controlled substances, must be

[2] Maryland Department of Health, *Unintentional Drug- and Alcohol-Related Intoxication Deaths in Maryland, 2023* (Released March 2025), available at https://health.maryland.gov/vsa/Pages/overdose.aspx.

[3] *Id.* at 6.

held accountable.

Under Maryland common law, as informed by the Restatement (Second) of Torts, such conduct constitutes a public nuisance. Public nuisance law—in Maryland and other states—recognizes public nuisance claims arising from unreasonable conduct that interferes with a public right, including public health. Public nuisance law has a distinct history of equipping local governments with the ability stop disruptive activities that unreasonably interfere with the public's right to health and safety. The opioid crisis—fueled PBMs and pharmacies dispensing, administering, and profiting from highly addictive controlled substances—falls squarely within this doctrine.

Defendants' conduct meets the established criteria for public nuisance under Maryland common law as informed by the Restatement (Second) of Torts. Under this jurisprudence, the County has pleaded a viable public nuisance claim. Accordingly, *Amici* urge the Court to stay within longstanding Maryland and American jurisprudence by responding "yes" to the first certified question.

As to the second certified question, *Amici* urge the Court to continue to follow the Restatement (Second) of Torts for the elements of such a public-nuisance claim. In *Tadjer v. Montgomery County*, 300 Md. 539 (1984), this Court adopted the Restatement Second of Torts § 821(B) and the elements of public nuisance described therein. This Court's definition of public nuisance as informed by the Restatement (Second) aligns with its public nuisance opinions for decades preceding *Tadjer* and the Restatement, as well as Maryland public nuisance opinions since *Tadjer* and the Restatement.

While this Court has not had occasion to consider the Restatement (Third) approach, that approach is inapplicable because it addresses claims for economic loss by a private party who has suffered an injury distinct in kind from those suffered by members of the affected community in general. The Restatement (Third) does not address actions by a government actor to abate a condition harmful to the public as a whole, like the opioid epidemic. In fact, the Restatement (Third) instructs readers to refer to the Restatement (Second) as the authority for when a public nuisance extends beyond liability for economic loss. Section 821B of the Restatement (Second) thus remains the American Law Institute's definitive public nuisance provision and it should remain this Court's as well. Accordingly, *Amici* urge the Court to continue to follow the Restatement (Second) of Torts § 821B and the elements of public nuisance described therein.

As to the latter half of the second certified question, *Amici* urge the Court to find that a local government may seek to recover monetary relief, including the costs of public services, as well as the remedy of abatement to address the harm to the public. The two remedies are complementary: the damages remedy is backwards-looking, seeking to make the local government whole for what it has already spent addressing the nuisance, while the abatement remedy is forward-looking, seeking to end, or at least mitigate, the public nuisance that continues to interfere with the public health and welfare of the local government's residents. These remedies are vital to ensure that local governments can continue to serve their critical function of protecting public health and safety.

Local governments have a critical role in identifying, addressing, and mitigating public nuisances. Once identified, effective enforcement is crucial to a local government's ability to address and mitigate a nuisance. Public nuisance law is a vital tool for local governments to maintain community standards and protect the quality of life for residents. Local governments bear the financial and human cost of public nuisances such as the opioid crisis and must be empowered to seek both legal and equitable remedies from those who knowingly and unreasonably contribute to them. Accordingly, for the reasons expressed in full below, *Amici* urge the Court to follow long-standing principles of Maryland common law and allow the County's claim to proceed.

ARGUMENT

I. Under Maryland's Common Law, the Licensed Dispensing of, or the Administration of Benefits Plans for, a Medication Approved by the U.S. Food and Drug Administration Can Give Rise to a Claim for Public Nuisance.

Maryland's opioid crisis stems from coordinated, affirmative misconduct by opioid producers and distributors—including widespread overpromotion, failure to monitor suspicious orders, and oversaturation of supply—that have foreseeably and systemically harmed communities. In this action, Anne Arundel County seeks to hold accountable the pharmacies and PBMs that unreasonably encouraged opioid misuse by selling preferred and unrestricted formulary placements to opioid manufacturers, while also helping them promote high-risk long-term opioid use. This Court has long recognized that public harms from unreasonable conduct involving a product may create a public nuisance. *E.g., Hendrickson v. Standard Oil Co.*, 126 Md. 577, 586-588 (1915). Thus, as detailed in full

below, the claim is well-supported under established principles of Maryland law.

A. The County's Claim is Supported by Maryland Public Nuisance Law.

The County's claim aligns with long-established case law in the State of Maryland. This Court has long recognized that conditions created by a defendant's unreasonable conduct that harm public health or safety constitute public nuisances. In *Tadjer v. Montgomery County*, 300 Md. 539 (1984), this Court relied upon the Restatement Second of Torts § 821(B) and the elements of public nuisance described therein, defining public nuisance as "an unreasonable interference with a right common to the general public[,]" including "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience[.]" *Id.* at 552 (quoting Restatement (Second) of Torts § 821B (1979)).

This Court's definition of public nuisance also aligns with its public nuisance opinions for decades preceding *Tadjer* and the Restatement. *See Burley v. City of Annapolis,* 182 Md. 307, 312 (1943) ("public nuisances" include "those which prejudice public health or comfort"); *see also Adams v. Comm'rs of Town of Trappe*, 204 Md. 165, 170 (1954) ("[P]ublic nuisance is an injury to the public at large or to all persons who come in contact with it[.]"); *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 540 (1937) (finding conduct not a public nuisance because it "has no relation to public health, safety, or the general welfare of the community").

This Court's definition of public nuisance aligns with public nuisance opinions under Maryland law since *Tadjer* and the Restatement. *See Mayor and City Council of Baltimore v. BP P.L.C.,* 31 F. 4th 178, 211 (4th Cir. 2022) ("Circumstances showing an

'unreasonable interference' may include: (1) '[w]hether the conduct involves a significant interference with the public health [or] the public safety'") (quoting *Tadjer*, 300 Md. at 552); *Mayor and City Council of Baltimore v. GlaxoSmithKline LLC, et al.,* Case No. 24-C-20-004788 (Md. Cir. Ct. January 22, 2022) at 21 (government plaintiff stated public nuisance claim based on manufacturer's marketing and sale of lawful drug without adequate warnings of the presence of NDMA and associated risks of cancer, which "significantly interfered with the public health and safety in Baltimore."); *Mayor and City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014 at *10 (D. Md. Mar. 31, 2020) (government plaintiff stated public nuisance claim based on manufacturer's PCB contamination "causing harm to the City's humans, animals, and environment"); *Mayor & City Council of Baltimore v. Purdue Pharma L.P.*, No. 24-C-18-000515 (Md. Cir. Ct. Aug. 15, 2024) at 8 ("[T]he public right for a public nuisance case does not need to be connected to or affecting land specifically or even common natural resources[,] air or water specifically. The Restatement recognizes that the public right may be a more general right based on public health or even public safety.").

This line of cases establishes that to state a claim for public nuisance under Maryland law a plaintiff must allege conduct that unreasonably interferes with a right common to the general public, such as public health or safety. *Tadjer*, 300 Md. at 552. Defendants' attempts to insert additional requirements or limitations should be rejected.

For example, Defendants' suggestion that the sale of a product cannot support a public nuisance claim has been correctly rejected by Courts applying Maryland law. *See Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 469 (D. Md. 2019) ("Because no

case law forecloses this theory of public nuisance liability under Maryland law, I reject defendants' argument that the State's public nuisance claim must be dismissed to the extent it is premised on their manufacture, marketing, and supply of MTBE gasoline."). Instead, Maryland public nuisance has long encompassed harmful product sales that injured the common good. *E.g.*, *Baltimore v. GlaxoSmithKline*, Case No. 24-C-20-004788 (Md. Cir. Ct. January 22, 2022) (holding that the sale of FDA-approved Zantac, which created an increased risk of cancer without an adequate warning, presented a viable public nuisance claim under Maryland law because it "interfered with the right of Baltimore residents to a commercial marketplace and healthcare system free from dangerous substances"); *Mayor and City Baltimore v. Purdue Pharma, L.P., et al.*, Case No. 24-C-18-0515 (Md. Cir. Ct. August 15, 2024) (denying defendants' motion for summary judgment in Baltimore City's opioid lawsuit, including on its claim for public nuisance). Manufactured products can cause archetypical public nuisance harms—including pollution of common resources like air and water, and widespread public health crises. There is no plausible basis in the common law or public policy to limit sources of interference with a public right.

Similarly, Defendants' argument that nuisance claims must involve a defendant's unreasonable use of or interference with property is contrary to black letter law and common sense. As stated, Maryland follows the Restatement (Second) of Torts, which expressly provides that, "[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts § 821B(2)(b), cmt. h (1979). Rather, Maryland law clearly recognizes that public nuisance includes "interferences with the *public health* . . . public morals . . . [and] public peace."

Tadjer, 300 Md. at 552 (quoting W. Prosser, *Law of Torts* § 8 (4th ed. 1971)) (emphasis added); *accord* Restatement (Second) of Torts § 821B, comment b (1979). Interference with public health, which has occurred here due to Defendants' unreasonable conduct, falls within the established law of Maryland as an action that constitutes a public nuisance.

In fact, restraining public nuisance law to cases involving land use is doubly unwise as a matter of law and policy. On the one hand, municipalities can usually complain under ordinary property law doctrines when their property is damaged or destroyed by private behavior—there is less need for public nuisance law in such cases. And, conversely, there is little reason to believe that the kinds municipal-level harms that are typically best addressed through public nuisance law are likely to have any specific connection to property use rather than other public rights. Municipalities must safeguard the rights of residents not only on municipal property, but in a host of other respects. Actions that endanger public rights do not happen only on or in connection with real property.

Finally, Defendants' contention that public nuisance does not encompass claims based on aggregated, individual harms is also contradicted by the Restatement. Indeed, the Restatement provides that "in many cases the interests of the entire community may be affected by a danger to even one individual. Thus the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic." Restatement (Second) of Torts § 821(B) comment g (1979). In the same way here, the epidemic of opioid addiction, though not something everyone in the community experiences individually, has tragically impacted entire communities.

In *Adams v. Commissioners of Town of Trappe*, 204 Md. 165, 170 (Md. 1954), this Court defined a public right as one that implicates "the public at large or . . . all persons who come in contact with it." While the opioid epidemic has resulted in individual injuries, the harms to a larger number of people has resulted in the public and Maryland's counties and municipalities being forced to incur the ensuing consequences.

Indeed, public nuisance law is particularly useful—and necessary—because there is a material difference between the way in which misconduct harms individuals and the way that it causes harm at the municipal level to the community as a whole. For example, individuals exposed to pollution may or may not get sick, so they may or may not have a cause of action to bring for personal injury. But when a municipality's water supply is polluted, it has an immediate obligation to clean it up in a way that no individual does. The abatement of the public nuisance is the municipality's responsibility, so only a public nuisance suit against the tortfeasor by the municipality will place the financial burden of that abatement where it belongs.

At bottom, common law tort doctrines, such as public nuisance, are designed to force businesses to internalize the negative costs that their activities impose on society alongside the profits they internalize from their sales. In this way, nuisance law induces actors to choose socially responsible activities. The costs that are borne by municipalities as a consequence of behaviors like Defendants' here are real, and they should not fall on the taxpayer when Defendants themselves pocket the profits from the same activities. The County's claim seeks to place the risk of harm on the entity most capable of controlling it, rather than on society and Maryland's counties and municipalities. *E.g., Exxon Mobil*

Corp., 406 F. Supp. 3d at 467*; see also Monsanto Co.*, 2020 U.S. Dist. LEXIS 55265 at *32–*34. The County's claim is entirely consistent with, and well founded in, principles of Maryland common law. *See Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 140 (1985) (quoting *Harrison v. Mont. Cty. Bd. of Educ.*, 295 Md. 442, 460 (1983)) ("the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.").

B. The County's Claim is Supported by Courts Throughout the Nation.

The County's claim is consistent with the overwhelming majority of jurisdictions in recognizing public nuisance as a viable cause of action in opioid litigation. Although Defendants and their *Amici* selectively cite a handful of outlier cases that declined to permit public nuisance claims in this context, courts in a wide array of states—including Alabama, Arizona, Arkansas, California, Kentucky, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, and West Virginia—have denied motions to dismiss such claims.[4] In denying motions to dismiss, many of these courts relied on the

[4] *See*, *e.g., Alabama v. Purdue Pharma L.P.*, No. 03-CV-2019-901174.00, slip op. at 11–12 (Ala. Cir. Ct. Nov. 13, 2019); *City of Surprise v. Allergan PLC*, No. CV2019-003439, slip op. at 35–36 (Ariz. Super. Ct. Oct. 28, 2020); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064 (Ark. Cir. Ct. Apr. 5, 2019); *City & Cnty. of S.F. v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610 (N.D. Cal. 2020); *Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.,* No. 18-CI-00846, slip op. (Ky. Cir. Ct. July 18, 2019); *City of Bos. v. Purdue Pharma, LP*, 2020 WL 416406 (Mass. Super. Ct. Jan. 3, 2020); *Mississippi v. Cardinal Health, Inc.*, No. 25C11:18-cv00692, slip op. (Miss. Cir. Ct. Apr. 5, 2021); *Missouri ex rel. Schmitt v. Purdue Pharma L.P.*, No. 1722-CC10626, slip op. at 7–8 (Mo. Cir. Ct. Apr. 6, 2020); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129 (N.H.

Restatement (Second) of Torts § 821B, the standard that Maryland courts have likewise adopted.[5]

Most recently, in *Alaska v. Express Scripts, Inc.*, the federal district court for Alaska denied a motion to dismiss a public nuisance claim, rejecting the argument that a nuisance claim cannot arise from the distribution of a lawful product. 2024 WL 2321210, at *2 (D. Alaska May 22, 2024). Relying on Alaska's adoption of the Restatement (Second), consistent with Maryland precedent, the court held: "Public nuisance claims need not be property-based, and a claim may be based on the use of a lawful product under Alaska law." *Id*.

Maryland's opioid crisis stems from coordinated, affirmative misconduct by opioid producers and distributors—including widespread overpromotion, failure to monitor

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Super. Ct. Sept. 18, 2018); *Nevada v. McKesson Corp.*, No. A-19-796755-B, slip op. (Nev. Dist. Ct. Jan. 3, 2020); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541, slip op. (N.M. Dist. Ct. Dec. 17, 2020); *In re Opioid Litig.*, 2018 WL 3115102 (N.Y. Sup. Ct. June 18, 2018); *Cnty. of Delaware v. Purdue Pharma L.P.*, CV-2017008095, slip ops. (Pa. Ct. C.P. Oct. 25, 2019; Dec. 4, 2019; Mar. 13, 2020); *Rhode Island ex rel. Neronha v. Purdue Pharma L.P.*, 2019 WL 3991963 (R.I. Super. Ct. Aug. 19, 2019); *South Carolina v. Purdue Pharma L.P.*, No. 2017-CP40-04872, slip op. (S.C. Ct. C.P. Apr. 12, 2018); *Tennessee ex rel. Slatery v. Purdue Pharma L.P.*, 2019 WL 2331282 (Tenn. Cir. Ct. Feb. 22, 2019); *In re Texas Opioid Litig.*, No. 2018-77098, slip op. (Tex. Dist. Ct. June 9, 2019); *Vermont v. Cardinal Health, Inc.*, No. 279-3-19 Cncv, slip op. (Vt. Super. Ct. May 12, 2020); *Washington v. Purdue Pharma L.P.*, 2018 WL 7892618 (Wash. Super. Ct. May 14, 2018); *In re Opioid Litig.*, No. 21-C-9000-PHARM, slip op. at 26–35 (W. Va. Cir. Ct. Aug. 3, 2022).

[5] *See City & Cnty. of S.F.*, 491 F. Supp. 3d at 672; *City of Bos.*, 2020 WL 416406; *Commonwealth v. Purdue Pharma L.P.*, 2019 WL 5495866, at *4 (Mass. Super. Ct. Sept. 17, 2019); *Rhode Island ex rel. Neronha*, 2019 WL 3991963, at *7; *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129, at *13; *Kentucky ex rel. Beshear v. Endo Health Sols.*, 2018 WL 3635765, at *6 (Ky. Cir. Ct. July 10, 2018); *In re Opioid Litig.*, 2018 WL 3115102, at *27.

suspicious orders, and oversaturation of supply—that foreseeably and systemically harmed communities, not just individuals. By contrast, the cases cited by Defendants—including *Lead Indus.* and *Beretta*—are distinguishable and unpersuasive. In *Lead Indus*, the Rhode Island Supreme Court rejected a nuisance claim because the harm was confined to individual residences, rather than interfering with a public right. 951 A.2d 428, 453–54 (R.I. 2008). In *Beretta*, the Illinois Supreme Court declined to find nuisance liability for future, and speculative, misuse of firearms. 821 N.E.2d 1099, 1116 (Ill. 2004).

Defendants' reliance on the Oklahoma Supreme Court's decision in *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021), fares no better. That decision has been roundly criticized as an outlier. In *In re National Prescription Opiate Litigation*, the court noted that *Hunter* is "not binding and inconsistent with the public nuisance framework adopted by most other jurisdictions considering opioid-related claims." 612 F. Supp. 3d 777, 786 (N.D. Ohio 2022).

Maryland law stands in stark contrast to the narrow approach in *Hunter*. Maryland courts have long held that public nuisance includes any unreasonable interference with a right common to the general public, regardless of whether the interference is tethered to real property. *See Raynor v. Department of Health*, 110 Md. App. 165, 191 (1996). Maryland's precedent recognizes that modern public health crises—such as the opioid epidemic—can fall squarely within the purview of nuisance law.

II. The Elements of a Public Nuisance Claim Based on Dispensing or Encouraging Misuse of a Controlled Substance are Defined in the Restatement (Second) of Torts, and a Local Government Plaintiff May Seek Legal and Equitable Remedies to Redress the Harm.

In *Tadjer*, this Court adopted the Restatement Second of Torts § 821(B) and the elements of public nuisance described therein. Defendants' request for this Court to review this matter under the Restatement (Third) of Torts represents an unnecessary departure from the long-established adoption of the Restatement (Second) of Torts in Maryland. While this Court has not had any occasion to consider the Restatement (Third) approach, that approach is inapplicable here, because it addresses claims for *economic loss* by a *private party* who has suffered an injury "distinct in kind from those suffered by members of the affected community in general." Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. g. The Restatement (Third) does not address actions by a government actor to abate a condition harmful to the public as a whole, like the opioid epidemic. In fact, the Restatement (Third) "instructs readers to refer to the Restatement (Second)"—specifically § 821B and § 821C—"for a general discussion of public nuisance that extends beyond 'liability for economic loss.'" *City of Huntington v. AmerisourceBergen Drug Corp.,* 96 F.4th 642, 651 (4th Cir. 2024) (quoting Restatement (Third) § 8 reporter's note a).

Section 821B of the Restatement (Second) remains the American Law Institute's definitive public nuisance provision, particularly with regard to municipal suits of the kind at issue here, and it should remain this Court's as well. Under the Restatement (Second), a government public nuisance claim based on conditions caused by dispensing or

encouraging misuse of a controlled substance has three elements. First, a government plaintiff claiming public nuisance must show interference with a public right. *See Tadjer*, 300 Md. at 552 (quoting Restatement (Second) § 821B(1)). Second, a government plaintiff must show that the defendant's conduct is unreasonable. *Id.* (quoting Restatement (Second) § 821B(2)). Third, a government plaintiff must demonstrate that the defendants' unreasonable conduct was a cause of the harm. The County has pleaded all three elements.

A. Public nuisance claims based on dispensing or encouraging misuse of a controlled substance require interference with a public right, unreasonable conduct, and causation.

i. Defendants' conduct interferes with a public right.

A government plaintiff claiming public nuisance must show interference with a "right common to the general public." *Tadjer*, 300 Md. at 552 (quoting Restatement (Second) § 821B(1)). Rights common to the general public include "the public health, the public safety, the public peace, the public comfort or the public convenience." *Id.* (quoting Restatement (Second) § 821B(2)(a)).

The opioid epidemic, as the County alleges, is a human-made epidemic of addiction, overdose, and death. The epidemic has cost the lives of thousands of Marylanders as well as endangered newborns and separated countless families. It has forced Maryland's counties and municipalities to repurpose public property and resources in an attempt to mitigate the ongoing harm. Undoubtedly, the epidemic has interfered with public health and safety.

ii. Defendants' conduct in promoting and distributing opioids constitutes an unreasonable interference.

A government plaintiff claiming public nuisance also must establish that a defendant's interference with a public right was unreasonable. *Tadjer*, 300 Md. at 552 (quoting Restatement (Second) § 821B(1)). There are three categories of conduct that Maryland law finds unreasonable. *Id.* (citing Restatement (Second) § 821B(2)). The first is if the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience. *Id.* (citing Restatement (Second) § 821B(2)(a)). The second is if the conduct is unlawful, because it proscribed by a statute, ordinance or administrative regulation. *Id.* (citing Restatement (Second) § 821B(2)(b)); *see also* Burley, 182 Md. at 312 ("those which are nuisances *per se* or by statute"). The third is those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be maintained. Burley, 182 Md. at 312.

Defendants' dispensing and encouraging the misuse of controlled substances are unreasonable for all three reasons. For the reasons stated above, Defendants' conduct has resulted in a significant interference with public health and safety. As to unlawful conduct, the County has alleged that Defendants' failure to maintain controls against diversion, including not stopping prescriptions with unresolved red flags, has violated federal and Maryland controlled substances statutes laws. *E.g.*, 21 C.F.R. § 1306.04(a); Md. Code Regs. §§ 10.19.03.12(B)(1)-(2), 10.34.10.08(B). Finally, the County has alleged that the Defendants' conduct, even if not always unlawful, was unreasonable under the

circumstances because of its scale and their willful blindness to it: they coordinated the dispensing of millions of opioid pills in a mid-sized county that could not possibly have supported that level of legitimate medical use. Defendants' conduct was thus wholly unreasonable in all respects.

iii. The County has demonstrated a causal link between Defendants' actions and the resulting public health crisis sufficient to support a public nuisance claim.

A government plaintiff claiming public nuisance based on a defendant's unreasonable dispensing or encouraging misuse of a controlled substance must establish that the unreasonable conduct caused the harmful condition. Contrary to Defendants' contentions, a government plaintiff need not allege that Defendants' conduct *alone* was sufficient to cause the harm. Rather, the Restatement (Second) imposes liability if a defendant "participates to a substantial extent in carrying" on an activity that causes a nuisance. *See Exxon* 406 F. Supp. 3d at. at 468 (quoting Restatement (Second) § 834); *see also* Restatement (Second) § 824, cmt. b (sufficient to show conduct is an "indirect cause" of the nuisance).

The Restatement is consistent with this Court's causation opinions. This Court has said that the question of causation is "to be decided in a common sense fashion in the light of the attending facts and circumstances…." *Jubb v. Ford*, 221 Md. 507, 513 (1960); *see Medina v. Meilhammer*, 62 Md. App. 239, 247 (1985) ("The court should not indulge in refinements and subtleties as to causation which would defeat the ends of justice.") (citations omitted).

In the context of opioids, the opioid MDL court has held that a plaintiff can establish public nuisance causation by showing a defendant was responsible for "massive increases in the supply of prescription opioids" while failing "to maintain effective controls against diversion. *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4178617, at *4 (N.D. Ohio Sept. 3, 2019). The County has alleged exactly that. Thus, Defendants have participated to a substantial extent in causing the opioid epidemic.

B. A local government plaintiff may seek legal and equitable remedies in a public nuisance claim based on dispensing or encouraging misuse of a controlled substance.

A government plaintiff claiming public nuisance may seek legal and/or equitable relief. The availability of both forms of relief is consistent with a local government's critical, distinct functions in its governmental and proprietary capacities.[6] In this action, the County seeks abatement of the nuisance and to recover damages for money it has spent in providing public services to address the opioid crisis. The County's claim is consistent with this Court's long-standing recognition that a public nuisance plaintiff, whether a government or private party, may recover damages for past harms. *See Whitaker v. Prince George's County*, 307 Md. 368, 379 (1986) ("[I]n the common law tribunals, redress may be had for damage resulting from public as well as private nuisances.") (quoting *Hamilton v. Whitridge*, 11 Md. 128, 145 (1857)). The County's claim is also consistent with the Restatement (Second) of Torts, which explains that "an award of damages is retroactive,

[6] Counties generally enjoy immunity only when performing governmental, as opposed to proprietary, functions. *Rios v. Montgomery County*, 386 Md. 104, 124 (2005); *Austin v. Mayor and City Council of Balt.*, 286 Md. 51, 53 (1979); *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 192 (2015).

applying to past conduct, while an injunction applies only to the future." Restatement (Second) § 821B, cmt. i. The Restatement further explains that "[i]n determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done" whereas "[i]n action for injunction the question is whether the activity itself is so unreasonable that it must be stopped." *Id.*

Where, as here, a local government has incurred significant damages in the form of money it has spent in providing public services, and where a defendant's conduct creates a public nuisance *condition* that continues to harm the public after the nuisance-creating conduct may have ceased, the defendant is liable for money damages and to abate the harmful condition. The remedy of abatement addresses the harm to the public, which a local government is empowered to redress, while the damages remedy addresses the harm to the local government itself, in the expenditures it has uniquely incurred because of the epidemic. There is no contradiction between the two and no reason a local government may not seek both.

Indeed, in the municipal context in particular, damages and abatement can be two sides of the same coin. As noted above, a municipality has an immediate duty to its residents to abate a serious nuisance, even if it was wholly caused by another. By incurring those costs quickly, it can prevent further harm. If it could not seek retroactive recompense, it would have to either absorb the cost of abatement when the responsibility for it should lie elsewhere, or else wait around for lengthy court proceedings while the situation on the ground continues to get worse. Without the ability to recover costs, local taxpayers would unfairly shoulder the burden created by corporate misconduct. Correctly understood, the

law of public nuisance would never place that choice upon an innocent municipality and its taxpayers. Legal and equitable remedies are critical to the ability of Maryland's counties and municipalities to uphold their duty to protect residents within their jurisdictions against widespread health hazards, including those imposed by Defendants. For these reasons, *Amici* respectfully request that this Court find that a local government plaintiff may seek legal and equitable remedies in a public nuisance claim.

CONCLUSION

For these reasons, the Court should answer the first certified question in the affirmative. On the second certified question, the Court should find that a public nuisance claim based on dispensing or encouraging misuse of a controlled substance requires interference with a public right, unreasonable conduct, and causation, consistent with the Restatement (Second) of Torts. Finally, the Court should find that a local government plaintiff may seek legal and equitable remedies in a public nuisance claim based on dispensing or encouraging misuse of a controlled substance.

Dated: July 17, 2025

Respectfully submitted,

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RULE 8-504 STATEMENT OF FONTS

This brief was printed utilizing proportionally spaced font. The body and footnotes are printed in Times New Roman, 13 Point.

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