STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-73

Eastern Maine Medical Center, et al.,

Plaintiffs-Appellants,

v.

TEVA Pharmaceuticals USA, et al.,

Defendants-Appellees.

On Appeal from Decision of the
Business and Consumer Court

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS, PRODUCT LIABILITY ADVISORY COUNCIL, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM), Product Liability Advisory Council, Inc. (PLAC), and Chamber of Commerce of the United States of America (U.S. Chamber) file this brief as *amici curiae*. The parties have provided their consent to the filing of this brief.

Amici are organizations representing manufacturers and others doing business across the country, including in Maine. They and their members support the lower court's ruling adhering to long-standing public nuisance law. The liability theories in this case are not grounded in traditional legal principles and, if allowed here and by other courts, threaten open-ended, potentially industry-wide liability for a variety of products that may have foreseeable risks or inherent externalities.

Manufacturers and sellers of these products, from pharmaceuticals to oil and gas to household chemicals, engage in commerce of such products every day. *Amici* are concerned that allowing the liability sought here would lead to more litigation against these manufacturers regardless of fault, existing regulatory structures intended to balance product risks, or the benefits the products provide.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in Maine and all other states and every industrial sector. Manufacturing employs nearly 13 million men and women, including 53,000 people in Maine. It also contributes $2.9 trillion to the United States economy annually—$7.9 billion in Maine—has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

PLAC is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products 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 manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,100 *amicus curiae*

briefs on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern related to the proper application of tort and products liability law, including public nuisance law.

SUMMARY OF ARGUMENT

Opioid abuse is a serious problem that demands serious, policy-based solutions. It calls for a legislative response, not a judicial one based on litigation where manufacturers, distributors and sellers of products are sued irrespective of traditional causes of action. Liability laws in Maine and other states do not impose liability for the types of harms

alleged here on companies that put lawful, beneficial products into the stream of commerce. These claims do not satisfy the elements, including causation, of any liability theory. The hallmarks of this litigation, therefore, are novel use of legal theories—from public nuisance to negligence—and attenuated notions of wrongdoing. Most state high courts, when given the opportunity, have rejected these claims, ruling that fundamental liability principles cannot be cast aside. The Court should do the same under longstanding Maine law.

Here, plaintiffs are pursuing companies involved in making and selling prescription opioid medication, trying to subject them to liability for costs associated with treating opioid abusers. They invoked, among other causes of action, Maine's public nuisance law. They assert the social, economic and health effects of illegal use of opioids qualify as a public nuisance, and that manufacturers and sellers of these medications should be held liable. As the Business and Consumer Court properly held, public nuisance theory under well-established Maine law neither applies to this situation nor imposes such unprincipled, open-ended liability.

As the lower court recognized, the tort of public nuisance applies only in narrow situations, namely when a defendant unlawfully

interferes with a right common to the general public. Op. at *10. In Maine and other states, a public right is well-defined; it refers to the communal right to use a shared government resource, usually a public road, communal space, or waterway. *See id.* (citing *Higgins v. Huhtamaki, Inc.*, No. 1:21-cv-00369-NT, 2022 WL 2274876 (D. Me. 2022)). As the *Higgins* court explained, "[a] highway obstruction is a classic example that illustrates the point. Such an obstruction is a public nuisance that tends to affect everyone in the same manner." 2022 WL 2274876 at *8. Consequently, in order to sustain injury from a public nuisance, the plaintiff must be harmed "in the exercise of a public right." *Hanlin Group v. Int'l Minerals & Chem. Corp.*, 759 F. Supp. 925, 936 (1990); *see also Foley v. H.F. Farnham Co.*, 135 Me. 29 (1936) (stating when a right-of-way is blocked by a public nuisance, it "produces a common injury.").

As this jurisprudence shows, the purpose of public nuisance litigation is to resolve a variety of local disputes involving unlawful interferences with publicly held communal spaces such as public roads and waterways. Personal injuries from products and the derivative costs related to their treatment are not injuries incurred in the exercise of such a public right. Products liability law instead governs the allegations here.

Amici fully appreciate that opioid abuse in Maine and other states is a critical public health issue, but that alone is not a tort. Plaintiffs' claims conflict with the purpose, terms and remedies of Maine tort law—especially the traditional law of public nuisance, which is the focus of this brief. *Amici* urge the Court to stay within longstanding Maine and American jurisprudence by affirming the ruling below and rejecting the broad expansion of public nuisance law sought here.

ARGUMENT

I. THIS LITIGATION CONTINUES A 50-YEAR EFFORT TO EXPAND PUBLIC NUISANCE TO CLAIMS AGAINST PRODUCT SELLERS BY EVADING APPLICABLE LAW

Plaintiffs' attempt to recast the tort of public nuisance in this case represents a radical departure from traditional public nuisance law, in Maine and elsewhere. Going back to English common law—and more than 250 years of American jurisprudence—public nuisance law has provided governments with the ability to force people to stop and abate 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). Also, by definition, public nuisances provide no benefits to anyone. *See* Victor

E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 565-66 (2006). As indicated, Maine has long followed these parameters.

Since the 1970s, however, there has been an effort to transform public nuisance from its traditional moorings as a local public land and water use tort into a tool for requiring large businesses, rather than individual wrongdoers or society as a whole, to remediate environmental damage or pay costs of social harms associated with categories of products. *See id.* at 547-48. Proponents of this effort believed that suing individual wrongdoers would be inefficient, whereas presumed deep-pocketed manufacturers could address the issue on a macro scale. In these cases, though, the elements of the public nuisance tort—(1) the existence of a public right, (2) unlawful interference with that public right, (3) causation of the public nuisance, and (4) control over the public nuisance—cannot be satisfied. So, those seeking to transform public nuisance have been trying to change the tort's requirements.

The first act of this effort was pursuing changes to 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 things, advocates for reform sought to change "public right" to anything in the public interest and remove the wrongful conduct requirement. This would be as radical as removing duty and breach from negligence. Their goal was to sue companies for widespread social and environmental harms even when defendants were engaged in lawful commerce and traditional public rights were not involved. Those transformational changes failed to enter the black letter of the Restatement.

The advocates' first test case also failed. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971). In that case, they pursued businesses that sold products or engaged in activities that allegedly contributed to smog in Los Angeles. The intermediate appellate court dismissed the claims as inconsistent with the purpose and terms of public nuisance law. *See id.* at 645. As the court explained, the plaintiffs were "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.* The advocates expressed frustration that courts adhered to

the tenets of public nuisance law as a "gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy of using public nuisance law to try to circumvent products liability and marketing laws intensified in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (observing changes sought by the environmentalists "invite[d] mischief in other areas—such as products liability"). These cases targeted manufacturers of products that had inherent risks or could be used or misused in ways that created harm, including widespread harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. 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); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco). Again, judges applied traditional public nuisance principles and rejected this strategy; the cases were dismissed.

In each of these cases, the courts explained the clear dissonance between the manufacture and sale of goods and public nuisance liability, regardless of the product. Manufacturers and 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); *see also Am. Tobacco Co.*, 14 F. Supp. 2d at 973 ("The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law."). Otherwise, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. Product sellers would be liable whenever someone uses a product to cause harm regardless of their "culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

In *Westinghouse*, the U.S. Court of Appeals for the Seventh Circuit detailed this point. Westinghouse was charged with releasing PCB-waste into Bloomington, Indiana's sewers and landfills, thereby creating a public nuisance. In addition to suing Westinghouse, the city named the company that sold Westinghouse the PCBs in a public nuisance action. The court dismissed the seller, explaining that once the seller sold PCBs to Westinghouse, "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product." 891 F.2d at 614.

Thus, in response to these early cases, the nation's courts spoke with clarity and uniformity: the boundaries of public nuisance law do not

extend to the manufacturing, selling and promotion of products. It is a local land and water use tort.

II. THE COURT SHOULD AFFIRM THAT MAINE'S PUBLIC NUISANCE LAW CANNOT BE CONVERTED INTO AN ALL-ENCOMPASSING CAUSE OF ACTION

Nevertheless, these cases have continued to be filed and, on a few occasions, trial courts in other states have allowed these diversions from public nuisance law. *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 15 (Nov. 1, 2022). Some judges have been candid about their desire to address a problem—even if the liability finding was admittedly not based on the law. *See*, *e.g.*, *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) (not wanting to "turn a blind eye" to lead poisoning); 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). Maine's Business and Consumer Court should be commended for not succumbing to the allure of creating a catch-all cause of action for making companies pay for social

and environmental problems regardless of fault, causation, the existence of a public right, or any other element of traditional tort law.

To this end, when high courts in other states have had the opportunity, they have enforced the traditional moorings of public law in their states. Their rulings provide support for the lower court's holding here that notions of public health in these cases are "too abstract and broad a concept to supply an actionable public right in tort," op. at *10, and that causation cannot be proved in the aggregate, *id.* at *7, n 7. The courts explained that public nuisance law has distinct elements that do not allow recovery related to individuals' product-based injuries.

For example, the Rhode Island Supreme Court overturned a trial court's ruling that manufacturers of lead pigment and paint could be subject to public nuisance liability for the downstream risks of the product (lead poisoning). *See State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). "The law of public nuisance never before has been applied to products, however harmful." *Id.* at 456. "[It] simply does not provide a remedy for this harm." *Id.* "However grave the problem of lead poisoning . . . [Plaintiff] has not and cannot allege facts that would fall within the parameters of what would constitute a public nuisance." *Id.*

Of particular relevance to the ruling below, the court held that the existence of a public right is "the *sine qua non* of a cause of action for public nuisance." *Id*. at 447 (citing 58 Am.Jur.2d Nuisances § 39 at 598-99 (2002)). This right is limited to "the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way." *Id*. at 448 (citation omitted). In these cases, which have direct parallels to the case at bar because they too are based on the aggregation of personal injuries, a public right is not invoked merely because a harm is widespread or implicates the public interest.

Rather, the Restatement "makes clear [that] a public right is more than an aggregate of private rights by a large number of people." *Id.* The court also underscored the distinction between public rights governed by public nuisance law and health and safety matters in the public interest:

> That which might benefit (or harm) "the public interest" is a far broader category than that which actually violates a "public right." For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.

Id. (quoting Gifford, 71 U. Cin. L. Rev. at 815). Thus, some private rights may become matters of significant public interest—including public health matters—but they do not satisfy the elements of public nuisance.

Other high courts have adhered to this same distinction, namely that there is no public right to be free from the threat that someone may use a legal product to create harm. As the Connecticut Supreme Court explained years ago—consistent with the law in Maine—the inquiry is whether a person exercising a common right, such as the right to use a public road, would encounter the public nuisance. *See Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943). Here, neither Defendants nor patients were injured in the exercise of a common right, so public nuisance law does not apply to their allegations.

In addition, courts around the country have 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." *State v. Lead Indus. Ass'n*, 951 A.2d at 450. The Missouri Supreme Court came to the same conclusion: "To the extent the [plaintiff'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 & Co.,* 226 S.W.3d 110, 114 (Mo. 2007). Thus, Plaintiffs cannot aggregate proof of causation in public nuisance law.

The New Jersey Supreme Court reiterated many of these same points in a case also seeking money to treat personal injuries. It held that "plaintiffs' loosely-articulated assertions here . . . cannot sound in public nuisance." *In re Lead Paint Litig.,* 924 A.2d 484, 494 (N.J. 2007). The court reiterated that the elements of public nuisance, while they "might appear . . . general," have specific meanings: "In particular, the right with which the actor has interfered must be a public right, in the sense of a right 'common to all members of the general public,' rather than a right merely enjoyed by a number, even a large number, of people." *Id*. at 497.

The court also reaffirmed that public nuisance liability requires quasi-criminal conduct, such as illegally dumping, that caused the local interference with a public right-of-way. *See id.* at 495 (calling "the use of land by the one creating the nuisance . . . essential to the concept of public nuisance."). By contrast, selling a lawful product—particularly, as here, one approved by a federal regulatory agency because of its benefits—does

not create public nuisance liability, even if the product comes with risk. "[W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action." *Id.* at 501.

Today, as a result of 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 manufacturer or 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). Indeed, the Restatement has affirmed that public nuisance liability has been rejected in product cases "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: Liability for Economic Harm § 8, cmt. G (2020).

Accordingly, personal injuries from products (and derivative treatment costs), no matter how pervasive, cannot be converted into public nuisance liability. And, it is not sufficient for a public nuisance claim to allege the manufacturer or seller "knew of the dangers" but "failed to tackle the problem." *In re Paraquat Prods. Liab. Litig.*, MDL No. 3004, 2022 WL 451898, at *11 (S.D. Ill. Feb. 14, 2022). Otherwise, everyone would be able to "sue almost everyone else [for] pretty much everything that harms us." Amanda Bronstad, *Judge Dismisses Opioid Suits that Sought 'Junk Justice' for Connecticut Cities*, Law.com, Jan. 9, 2019. Liability law in Maine and other states is not so unprincipled.

III. COURTS HAVE LARGELY REJECTED THE PLAINTIFFS' EXPANSIVE THEORY OF PUBLIC NUISANCE LIABILITY

Adhering to these traditional principles, many courts have properly rejected Plaintiffs' expansive theory of public nuisance liability in cases similar to this one. In a high-profile case, the Oklahoma Supreme Court overturned a trial court ruling that would have applied the state's public nuisance law to manufacturing, marketing, and selling of these products. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). In doing so, it embraced rulings that traced the origins and history of the tort, noting public nuisance applies only to "conduct, performed in a

location within the actor's control, which harmed those common rights of the general public." *Id.* at 724 (citing Restatement (Second) of Torts § 821B cmt. b (1979)). Indeed, the Court reiterated that "[o]ne factor in rejecting this imposition of liability for public nuisance is that [the plaintiff] has failed to show a violation of a public right." *Id.* at 726.

In that case, as here, the plaintiff "characterized its suit as an interference with the public right of health." *Id.* at 727. But there, as in Maine, the litigation "does not involve a comparable incident to those in which we have anticipated that an injury to public health would occur, *e.g.*, diseased animals, pollution in drinking water, or the discharge of sewer on property." *Id.* "Such property-related conditions 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.* "[A] public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all type of use and misuse of prescription medications." *Id.*

The Oklahoma Supreme Court then 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 manufacturers and 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. Nor should a manufacturer or seller be held liable for its products after its products entered the stream of commerce, and 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 products "would create unlimited and unprincipled liability for product manufacturers." *Id.* at 725.

Many other courts in similar cases have reached the same conclusions. They have held that public nuisance does not apply to "the marketing and sale" of a product, only the "misuse, or interference with, public property or resources." *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 472 (S.D. W. Va. 2022). The theory does not hinge on whether the product is associated with known or knowable risks the 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." *Id.* at 474. These courts have joined the chorus against creating a "super tort":

> The phrase "opening the floodgates of litigation" is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled.

Id.

As these courts have acknowledged, "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it's bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990, at *8 (Conn. Super. Ct., Jan. 8, 2019); *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019). The Supreme Court of Iowa made this point in a different context, stating "[d]eep pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted). Put simply, public nuisance law does not create liability for harms caused by lawful products or shift costs associated with their risks to the manufacturers and sellers.

IV. TRADITIONAL BODIES OF LAW, INCLUDING PRODUCTS LIABILITY AND THE REGULATORY PROCESS, SHOULD NOT BE SUPPLANTED BY PUBLIC NUISANCE LAWSUITS

The Court should affirm the ruling below and ensure products liability remains the body of tort law governing risks associated with products. Product defect causes of action have their own purposes, elements, and remedies. They manage the risks product manufacturers can control, namely putting lawful, non-defective products into the market. These laws, not public nuisance, should continue to be the basis of liability for claims related to products. *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).

To be clear, products liability does not subject companies to industry-wide liability merely for selling and marketing products with known risks of harm. This concept has been termed "category liability" and has been widely rejected in products liability law. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997). As Professors Henderson and Twerski have explained, the effect of "holding producers liable for all the harm their *products* proximately cause" is to "prohibit altogether the continued

commercial distribution of such products." Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329 (emphasis added); *see also* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998) (reporting "courts have not imposed liability for categories of products that are generally available and widely used"). Manufacturers cannot police customers to ensure products are not misused or neglected in ways that could create a public nuisance. They are not insurers against abuse. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973) ("[L]iability for products is clearly not that of an insurer.").

Allowing courts to manage these risks through public nuisance law is particularly inappropriate for prescription drugs given that the U.S. Food and Drug Administration ("FDA") is directly engaged in the risk assessments and balancing Plaintiffs are asking the courts to do here. 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, the medicines must be dispensed at licensed pharmacies, and each person must obtain a prescription from a physician to purchase them. Further,

the FDA has been working on risk management plans based on improved surveillance, education, and warnings calling attention to unlawful diversion of the medicines. *See* U.S. Food & Drug Admin., Opioid Medications, https://www.fda.gov/drugs/information-drug-class/opioid-medications ("One of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs.").

Using the blunt judicial tool of public nuisance law to supplant or second-guess these policy decisions will undermine this regulatory regime. Ensuring liability law properly aligns with these regulations is a significant concern for *amici* and their members because manufacturers and sellers of all types of products with inherent risks—from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer and public risks. If a company violates any of these regulations, there are enforcement remedies tailored to the violations available to the appropriate government agencies.

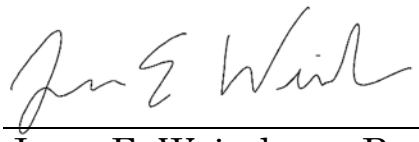
Here, the Court should not allow the circumvention of these regulatory or enforcement laws by misapplying and expanding public nuisance to create a backdoor right of action. Plaintiffs' theory finds no

support in Maine's public nuisance law or the public nuisance law in other states. Their public nuisance claims should be dismissed.

CONCLUSION

For these reasons, *amici curiae* respectfully request that the Law Court affirm the Business Court's order dismissing this case.

Respectfully submitted,



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Dated: November 2, 2023

CERTIFICATE OF SERVICE

I, Jesse E. Weisshaar, hereby certify that two copies of this Brief of *Amici Curiae* were served upon counsel at the address set forth below by email, as agreed to by the parties, on November 2, 2023:

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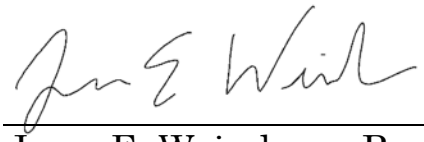

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