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

**In the United States Court of Appeals for the Sixth Circuit**

*In Re: National Prescription Opiate Litigation*

TRUMBULL COUNTY, OHIO ET AL.,
*Plaintiffs-Appellees,*

v.

PURDUE PHARMA, L.P., ET AL.,
*Defendants,*

WALGREENS BOOTS ALLIANCE, INC. ET AL.
CVS PHARMACY, INC. ET AL.
WALMART INC.,
*Defendants-Appellants*

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

# BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE

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## INTERESTS OF THE *AMICUS CURIAE*

*Amicus curiae* The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal levels.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. In this case, the district court's decision to allow money damages to government entities as a form of nuisance abatement departs from the typical equitable relief available to public nuisance plaintiffs and turns nuisance abatement suits into a cash trough for revenue hungry government actors. This is inconsistent with the historical understanding and

[1] Pursuant to Fed. R. App. P. 29 (a)(4)(E), no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

treatment of the judiciary's role in abating nuisances, places politically unpopular industries in the crosshairs of local governments looking for new revenue sources, and effects a taking from companies that may play little role in the creation of the initial nuisance.

## SUMMARY OF THE ARGUMENT

The legal doctrine allowing a court to abate a public nuisance predates the arrival of the first English colonists on American shores. From the doctrine's beginnings, nuisance abatement has been solidly within a court's equity jurisdiction. And over the centuries, courts have consistently exercised that equity jurisdiction to issue injunctions to prevent or abate nuisances. While injunctive relief can carry some financial cost, courts have viewed it as incidental to the equitable relief sought and distinct from money damages. That distinction is worth preserving. The trial court's decision, however, blurs the line between equitable relief in the form of an injunction to abate a nuisance and money damages at law. This brief examines how the judicial power to abate public nuisances arose out of courts' equitable jurisdiction and why judicial action in a public nuisance case should be confined to remedies aimed at abating the nuisance rather than compensating government entities with money damages.

Besides departing from the solid judicial reasoning of the past five centuries, awarding money damages to government entities creates the unhealthy incentive for government entities to address public policy problems by tapping—via litigation—the deep pockets—or perceived deep pockets—of politically unpopular industries. As similar mass settlements have demonstrated, even the best of government intentions to use funds for particular earmarked purposes related to the gravamen of

the suit give way to when other funding priorities appear. Regardless of whether the payments are couched in terms of equitable remediation, government actors will treat the payments as money damages to be spent however they see fit. And regardless of the gravity of the public policy problem at issue, this amounts to taxation by litigation. Equity plainly requires that those who caused public nuisances bear the cost of abating them. But as this case shows, payment of money damages to compensate a government entity for funds spent or expected to be spent tempts those governments to seek recovery from not only those who directly caused the harm, to commercial actors whose role was less substantial but whose ability to pay makes them desirable defendants.

Moreover, to the extent that awarding money damages but labelling them injunctive relief—or "abatement"—shifts the burden of societal costs from the taxpayers at large to particular actors or industries, it violates the free government services doctrine. For these reasons, the Court should reverse and remand the district court's decision and reaffirm and reinforce the distinction between equitable nuisance abatement and compensatory money damages.

## ARGUMENT

In the past decade, opioid misuse has destroyed or damaged millions of American lives. To address this modern plague, the plaintiffs in this action looked to an ancient remedy and invoked the court's equitable power to abate a public

nuisance. Reliance on a public nuisance theory to combat the ills of modern society is not in itself remarkable. Governments have applied it or sought to apply it to address social ills as varied as climate, illegal gun use, and the subprime mortgage crisis. What is remarkable, and as the district court acknowledged—unprecedented—is that the court-ordered ostensibly equitable remedy goes far beyond the direct abatement of the nuisance and extends to funding government programs well into the future. Specifically, in order to abate the nuisance of the easily availability of opioids in the past, the defendants are required to pay roughly $500 million over time to fund certain local government programs for the next 15 years.

### A. The History and Development of Public Nuisance Law and the Court's Equitable Jurisdiction.

Public nuisance is an ancient legal doctrine dating back to the founding of this country. Over a century ago, the United States Supreme Court in *Mugler v. Kansas*, wrote :

> "'In regard to public nuisances . . . 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.'"

*Mugler v. Kansas*, 123 U.S. 623, 672-73 (1887) (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 921, 922 (1839)).

The *Mugler* Court noted the advantages in a court's exercise of its equity jurisdiction to address public nuisances, particularly the ability of courts sitting in equity "to give a more speedy, effectual, and permanent remedy than can be had at law." *Id.* at 673. The virtues of using equitable remedies to address public nuisances also included the ability to "prevent nuisances that threatened, and before irreparable mischief ensures" but also to "arrest and abate those in progress, and by perpetual injunction, protect the public against them in the future." *Id.*

To be sure, the equitable abatement of public nuisances necessarily includes inflicting some financial discomfort on the responsible party. An order requiring a company to take additional steps, for example, in disposing of waste or preventing the escape of pollutants will almost certainly face new costs in complying that order. Likewise, a company ordered to clean up some mess it has made will incur costs in so doing. But "[t]here is no historical evidence [] that the state (or its predecessor under English law, the Crown) was ever able to sue for damages to the general public resulting from a public nuisance." Donald G. Gifford, *Pub. Nuisance as a Mass Products Liab. Tort*, 71 U. Cin. L. Rev. 741, 782 (2003). Instead, the government remedies were "restricted to prosecution or abatement, or both." *Id.*

The drafters of the Restatement (Second) of Torts took up the question of who can recover money damages for a public nuisance. The Restatement recognizes that the ability to sue for money damages for a public nuisance is limited to individuals who have suffered a harm different in kind from the "harm suffered by the general public exercising the right common to the general public that was the subject of the interference." Restatement (Second) of Torts § 821C (Am. L. Inst. 1959). In contrast, a suit to enjoin or abate a public nuisance is available to either a member of the public who has suffered special injury or a public official or public agency representing the state or a political subdivision. *Id*.

This distinction is consistent with the history of public nuisance law. The public nuisance doctrine arose in twelfth-century England as a quasi-criminal action by the Crown. Adam Coretz, Note, *Reparations for A Pub. Nuisance? The Effort to Compensate Survivors, Victims, & Descendants of the Tulsa Race Massacre One Hundred Years Later,* 43 Cardozo L. Rev. 1641, 1649–50 (2022). At that time, the king invoked public nuisance to bring suit against anyone who infringed on the rights of the Crown in order to stop the infringement, and he required the offending party to repair the damage. *Id.* at 1649. Notably, the remedy was the King's alone and tied to the damage done.

When the doctrine evolved in the fourteenth century to provide a right of action for infringements on "rights common to the public," the distinction still evident in the Restatement developed:

> In 1535, an English court, for the first time, allowed individuals to sue and recover damages under the doctrine. The case involved the blocking of a highway and set the precedent that an individual who had suffered "particular damages" could file a public nuisance suit to recover those damages.

Victor E. Schwartz & Phil Goldberg, *The Law of Pub. Nuisance: Maintaining Rational Boundaries on A Rational Tort*, 45 Washburn L.J. 541, 544 (2006) (footnote and citation omitted). But "the individual could not sue for injunction and abatement because those actions were reserved solely for the Crown." *Id.* In other words, public nuisance law envisions two distinct types of plaintiffs and provides distinct and exclusive remedies for each. Suing to abate a public nuisance has always been quasi-criminal in nature and the prerogative of the government.

American law adopted public nuisance as a "species of catch-all low grade criminal offense" William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966). The rule remained, however, that while citizens suffering an individualized injury could sue for their damages, governments were limited to criminal or equitable remedies. This distinction makes sense considering that the government's purpose in prosecuting and abating the nuisance was to serve the

citizenry at large rather than compensate specific citizens for specific harms done to them.

Fast forward to the early 1970s—as environmental advocates sought to use public nuisance theory against alleged polluters, courts maintained the separation between individual plaintiffs who were entitled to money damages based on their particularized harm and government entities with broad equitable and injunctive powers of abatement. *See, e.g. Diamond v. Gen. Motors Corp.*, 20 Cal.App.3d 374, 379 (Cal. Ct. 1971). In *Diamond*, the California Court of Appeals rejected a class action brought by citizens seeking both damages and injunctive relief. *Id*. at 376. The court denied the class claims on the basis that while "a single plaintiff who is specially damaged by a public nuisance may have relief in the form of damages and an injunction," a class, by definition, cannot. *Id.* at 378. Moreover, in terms of seeking a broad injunction, the court pointed out the government's authority to regulate air pollution or bring suit to abate a nuisance. *Id.* at 383.

Discussing the different remedies available to government versus private plaintiffs, Professors Schwartz and Golding have echoed the Restatement, noting that "[w]hen government serves as the plaintiff and is suing in its role as the sovereign, only injunction or abatement remedies are appropriate." Schwartz et al., *supra*, at 570. According to Schwartz and Golding, the rationale for this rule—beyond the distinction's long history—is twofold. First, allowing governments to

collect money damages for a public nuisance is inappropriate because "[e]ven when it acts in the name of public health, the state is not the party who has suffered the special damages being sought." *Id*. (quoting Gifford, *supra*, at 784-785). Second, "the free public services doctrine," which prohibits a government entity from assessing the costs associated with the performance of governmental functions to a few disfavored tortfeasors, rather than the public at large, bars the remedy that the trial court seeks to impose. *Id.* In other words, costs that the government would ordinarily incur to abate some social ill—in this case, funding drug courts, addiction recovery services, etc.—must "be borne by the public as a whole and cannot be assessed against an individual tortfeasor." *Id.*

The district court justified its expansion of public nuisance remedies in essence to impose compensatory damages on this thin reed: "In Ohio '[w]hen a nuisance is established, the form and extent of the relief designed to abate the nuisance is within the discretion of the court.'" 72 Ohio Jur. 3d Nuisances § 49, *see* Abatement Order, 8, *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804-DAP, (Aug. 17, 2022). Thus, according to the district court in exercising its equitable powers, "the court has the discretion to craft a remedy that will require Defendants, if they are found liable, to pay the prospective costs that will allow Plaintiffs to abate the Opioid crisis." *See* Abatement Order, 8, *supra*. Lamentably, the court ignored the remainder of the Ohio Jurisprudence entry that explained the

different types of abatement Ohio Courts have authorized: "narrowly tailored" orders "adequate to eliminate the nuisance," or "perpetually enjoin[ing] the defendant[s] . . . from maintaining the nuisance." 72 Ohio Jur. 3d Nuisances § 49. The court could cite no Ohio case to support its newly minted version of abatement that looks more like compensatory damages than an injunction or abatement authorized under the Ohio law pursuant to which the court apparently finds its authority.

To be sure, the district court's decision describes the $500 million dollar payment over 15 years as abatement of the nuisance rather than money damages. But what matters is not the label the court applies to the payments, but the reality of how they can be used. To local governments, revenue by any other name would smell as sweet. Further, the 1998 multi-state tobacco settlement provides a prominent example of how funds awarded to address a particular issue can be re-purposed.

### B. The 1998 Tobacco Settlement Shows How Funds Dedicated to a Curing a Particular Social Ill can be Redirected.

The Appellant's Brief points out that even if damages disguised as abatement are appropriate, the court's methodology in computing the abatement costs are problematic, at best. (See Appellant's Brief at 87-90). But even if the district court's predictions are spot-on accurate, it is merely a speculative assumption that the funds

awarded today will actually reach the promised abatement programs or that they will be effective in the supposed abatement. This is another reason why it is wrong to apply a pseudo-damages remedy to a public nuisance claim.

The 1998 settlement between major tobacco companies and 46 states provides a cautionary tale in awarding money damages in the hope of remediating a social ill. In that 1998 tobacco settlement, state governments received $246 billion to restrict cigarette sales and marketing by forbidding manufacturers from targeting youth and banning specific types of media (e.g., cartoons). The settlement funds were also to be used for prevention and cessation programs. Michele Gilbert, *What History's Big Tobacco Settlement Means for Today's 'Opiod Remediation,'* Bipartisan Policy Center, Aug. 19, 2021, https://bipartisanpolicy.org/blog/big-tobacco-opioids/.[2] A retrospective assessment conducted 20 years after the

[2] Notably the claims against the tobacco manufacturers which resulted in the Tobacco Master Settlement Agreement were not premised on public nuisance claims, but rather other claims which were not the basis for any verdict in this case. Moreover, the tobacco companies undoubtedly signed the Tobacco Master Settlement Agreement, at least in part, because they knew they could recover any settlement funds paid out with price increases—and they did. "Cigarette prices surged 45 cents per pack on November 16, 1998, the day the Master Settlement Agreement (MSA) was signed. Cigarette manufacturers raised prices to cover the cost of the settlement." Thomas C. Capehart, *Trends in the Cigarette Industry After the Master Settlement Agreement*, U.S Dept. of Agriculture (October 2001) www.ers.usda.gov/webdocs/outlooks/39455/31534_tbs250-01_002.pdf?v=7312.4

settlement by an anti-tobacco advocacy coalition, however, showed that "less than 3% of the settlement funds were used for programs to prevent kids from smoking and to help smokers quit." *Broken Promises to Our Children*, Campaign for Tobacco Free Kids, (Last updated Jan. 12, 2022) https://www.tobaccofreekids.org/what-we-do/us/statereport. Because money is always fungible, there is no guarantee that payments earmarked for addressing particular problems will arrive at their intended destination. Politicians can display an almost child-like imagination in re-purposing, re-classifying, and re-labeling programs in order to qualify them for otherwise earmarked money.

Ohio's own use of tobacco settlement proceeds stands as an example of the insecurity of special set-asides. Following the settlement, the State began by taking prudent steps to evaluate how it would spend the State's initial $330 million payment. In 1999, Governor Bob Taft and the General Assembly created the Tobacco Settlement Task Force in Ohio to develop spending recommendations. The task force conducted a series of public meetings and deliberations and reviewed research and analysis before presenting its recommendations. *See* Ken Slenkovich, *Ohio's Tobacco Master Settlement Agreement: History, Lessons Learned and Considerations for Ohio*, The Center for Community Solutions, (Oct. 15, 2020), https://tinyurl.com/3bzm6jea. "The Task Force based its recommendations on the U.S. Centers for Disease Control and Prevention's *Best Practices for*

*Comprehensive Tobacco Control Programs*," a "guide for states that summarized the best available information at the time regarding programs shown to be effective in reducing tobacco use." *Id.*

In 2000, largely following the Task Force's recommendations, the legislature enacted S.B. 192, which stipulated how funds from the settlement would be distributed and used in the state. "The legislation, largely based on the task force's recommendations, specified that all MSA funds would be deposited into the state treasury to the Master Settlement Agreement Fund (MSA Fund). It also created eight funds in the treasury into which money would be transferred from the MSA Fund." *Id.* The bill included language requiring at least some of the money from three of the funds to be used for activities tied to tobacco-related concerns and specifically created an endowment to fund programs to reduce Ohioans tobacco use, focusing on "youth, minority and regional populations, pregnant women, and others disproportionately affected by tobacco use." *Id.*

This legislation seemed like a solid and responsible plan to ensure that the settlement funds were spent as intended: on preventing tobacco use. But as onetime Ohio resident Mike Tyson observed, "Everyone has a plan until they get punched in the mouth." Mike Berardino, *Mike Tyson explains one of his most famous quotes*, South Florida Sun-Sentinel (Nov. 9, 2012), https://tinyurl.com/hmtzn2f8. The punch in the mouth came in the form of the 2008-2009 Great Recession. Ohio's

employment rate rose to 10.3% and the state found more pressing needs for the tobacco settlement funds. Slenkovich, *supra*. The legislature diverted all of the existing funds from Tobacco Use Prevention and Cessation Trust Fund ("TUPCF") to "a job-creation fund." *Id.* When the TUPCF'S board "took action to prevent the diversion, the state abolished the foundation" and absorbed all of the TUPCF's funds into the state's general revenue fund. The General Assembly later authorized the State Treasurer to securitize the right to future payments and sell capital appreciation bonds backed by future settlement payments. In essence, "the state sold its rights to future [settlement] payments in exchange for a lump sum." *Id*. Thus, the funds placed in trust for the specific purpose of funding smoking cessation and prevention were converted into money damages. As a result, "virtually overnight, Ohio went from having one of the best-funded tobacco control programs to one of the worst-funded." Micah L. Berman, Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience, 67 U. Kan. L. Rev. 1029, 1042 (2019).

Ohio "is emblematic of what happened in a number of other states. * * * Ultimately, in nearly every state, the plan to make long-term, sustained investments in tobacco control was not realized and successful tobacco control programs were dismantled—often as the result of budgetary pressures." *Id*.

Although the district court believes that systems could be put in place to ensure that the money is used to abate the opioid crisis, it is unclear how such an

enforcement mechanism would operate. On the one hand, allowing the various local governments free rein to use the funds would seem to invite the sort of mischief manifest in the use of the tobacco funds. But what appears to one taxpayer as "mischief" may seem to another to be wise use of resources during a crisis. Not to mention, robust court enforcement over sizeable government expenditures raises its own problems. It is a thin line between court monitoring of expenditures and court micromanagement of local government's drug policies. Neither option is appealing from the perspective of government accountability. Policymakers relying on litigation winnings become insulated from voters regarding how that money is spent. New approaches to public policy problems are stymied by the need for court approval. Ineffective policy solutions become immune to review once they are blessed by the court. Reliance on money won in litigation to fund ongoing government services thus raises a significant separation of powers issue.

The Tobacco Master Settlement misadventure is instructive as to why misapplying public nuisance abatement to compensatory damages is an illegitimate legal theory. Federal courts recognize in such situations that "federal equitable principles and an injunction would be a wholly unworkable and inappropriate use of judicial power." *PDF Print Commc'ns Inc. v. Federated Mut. Ins. Co.*, No. CV219896MWFAGRX, 2022 WL 2189631, at *4 (C.D. Cal. Mar. 29, 2022).

### C. The Award Violates the Free Public Services Doctrine and Incentivizes Governments to Fund Themselves through Litigation.

The free public services doctrine, also called the municipal cost recovery rule, provides that public expenditures made in the performance of governmental functions are not recoverable in tort. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144 (2005). The rationale for this rule is that "Congress, not the Court is the custodian of the national purse" *Id.* (citing *United States v. Standard Oil Co. of California*, 332 U.S. 301, 314-315 (1947)). The free public services doctrine rule applies to local governments. *Koch v. Consolidated Edison Co. of New York, Inc.*, 468 N.E.2d 1 (N.Y. 1984) (finding that in the absence of statutory authority, the city cannot recover wages, salaries, and overtime paid to police, fire, and other municipal employees as a result of citywide blackout caused by defendant's negligence).

Here, the trial court's decision essentially sets up a funding mechanism for general government services related to drug addiction treatment and prevention for over a decade to come. The trial court dismissed the free public services argument below summarily finding that the defendants' "ongoing and persistent misconduct" has caused the government to have to exceed what it might have normally budgeted for those services. Abatement Order, 8, *supra*.

But there is no misconduct exception to the free public services doctrine. *See Koch,* 468 N.E.2d 1. The creation of an exception to the free public services doctrine, which heretofore has no foundation in law, opens the door to permit the court to engage in the sort of policymaking ordinarily reserved to the legislative branch..[3] Can a court then justify abandonment of the public services doctrine any time unforeseen problems increasing a government budget can be blamed on someone who may have deep pockets? The court did not explain why a doctrine created to preserve the separation of powers between the judicial branch and the political branches should turn on the defendants' conduct. Indeed, the district court's

[3] Indeed, the trial judge explained "[s]o my objective is to do something meaningful to abate this crisis and to do it in 2018. And we have here — we've got all the lawyers. I can get the parties, and I can involve the states. So we'll have everyone who is in a position to do it. And with all of these smart people here and their clients, I'm confident we can do something to dramatically reduce the number of opioids that are being disseminated, manufactured, and distributed. Just dramatically reduce the quantity, and make sure that the pills that are manufactured and distributed go to the right people and no one else, and that there be an effective system in place to monitor the delivery and distribution, and if there's a problem, to immediately address it and to make sure that those pills are prescribed only when there's an appropriate diagnosis, and that we get some amount of money to the government agencies for treatment. Because sadly, every day more and more people are being addicted, and they need treatment. . . .
But that's what — I think we have an opportunity to do it, and it would be an abject abdication of our responsibility not to try it. And if we can't, then we've got to do the other way. And if we can get some general agreement that we should try it, then we'll figure out today, how do we organize that effort, who is not here that we need to get involved, and we'll get about doing it and what help I'll need." *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804-DAP (Transcript of Proceedings, Jan. 9, 2021, ECF 71, Page ID #462-463).

rationale—that the doctrine applies except when the conduct is egregious—seems to invite local governments to allege egregious conduct. Without the guardrail of the free government services doctrine in place, local governments are—as we see in this case--tempted to fund themselves through litigation. This in turn creates the incentive to find politically unpopular industries with deep pockets and then find some public nuisance for which they can be held liable. The defendants in this action were not opioid producers. They did not participate in marketing the drugs. They did not prescribe the drugs. They simply filled prescriptions. The Defendants argue amply for themselves regarding the lack of proximate cause. Without rearguing those points, to the extent that the defendants in this case bear liability they are second or third tier defendants.

Much as civil forfeiture laws have been shown to drive law enforcement priorities, *see, e.g.* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 Univ. of Chicago L. Rev. 35, 68-69 (1998), allowing governments to fund themselves through public nuisance litigation warps the relationship between the government and the governed.

## CONCLUSION

The old rule limiting government public nuisance plaintiffs to equitable relief in public nuisance actions has stood for nearly half a millennium. There is no reason to ignore or change it by re-characterizing money damages as abatement costs.

Money is fungible, and history has shown that adage to be particularly true when the money is in the hands of the government. Allowing governments to fund themselves through the courts rather than through legislation and appropriations creates its own risk of addiction. The Court should therefore reverse and remand.

For all the foregoing reasons, the district court's decision should be REVERSED.

Respectfully submitted,

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December 8, 2022.

# CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure
Appendix 6

1. This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 8th day of December, 2022.

*/s/ Jay R. Carson*