E-FILED; Baltimore City Circuit Court
Docket: 9/10/2025 6:20 PM; Submission: 9/10/2025 6:20 PM
Envelope: 22880820

EXHIBIT A

In The

Supreme Court of Maryland

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

EXPRESS SCRIPTS, INC., *et al.*,

Appellants,

vs.

ANNE ARUNDEL COUNTY, MARYLAND,

Appellee.

On Certified Questions from the United States District Court, District of Maryland in Case No. 1:24-cv-00090-MJM, (The Honorable Matthew J. Maddox, Judge)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes / Rules

Other Authorities

INTRODUCTION

Anne Arundel County seeks an unprecedented expansion of Maryland's common-law doctrine of public nuisance—a tort grounded in real property—to recover the costs of government services provided to address opioid addiction and abuse by individuals. Recognizing that the County has "asserted a novel claim" under Maryland law, (E617–18), the U.S. District Court for the District of Maryland certified two questions to this Court regarding "whether Maryland's common law permits a party to bring a public nuisance claim in a circumstance such as this, where there is no allegation of interference with the use of property and where the claim is premised on the sale of a product": (1) "Under Maryland's common law, can the licensed dispensing of, or administration of benefit plans for, a controlled substance constitute an actionable public nuisance?" and (2) "[i]f 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?" (E652–54).

The answer to the first question is a resounding "no." In 250 years, this Court has never sustained a public-nuisance claim untethered to property. Instead, this Court has explained that the law of public nuisance applies only to conduct that involves the unreasonable use of property that in turn interferes with the property rights of the public at large. Maryland courts—like many others across the country—have refused to allow the law of public

nuisance to create unbounded liability for lawful business conduct. Indeed, the highest courts in Oklahoma, Ohio, and Maine—the only state high courts to consider the issue—have rejected the expansion of public nuisance to claims relating to prescription opioids. Similarly, the Supreme Courts of Rhode Island, New Jersey, and Illinois all have rejected efforts to expand public-nuisance law to other product-based claims. That trend also aligns with the Third Restatement of Torts, which recognizes that "the common law of public nuisance is an inapt vehicle" for addressing the type of conduct that the County challenges. Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g (2020). Because neither the licensed dispensing of, nor administration of benefit plans for, a controlled substance has a connection to property and does not implicate any public right, it cannot give rise to a public nuisance under Maryland law.

In the absence of legislative action, this Court should adhere to its long-standing tradition to not remake and expand the common law. That is particularly so because the General Assembly's regulation of pharmacies and pharmacy benefit managers (PBMs) supersedes any potential claim for public nuisance. This Court should not usurp legislative authority by making a policy determination about the circumstances in which pharmacies and PBMs can be liable for conduct that the State licenses and regulates—a determination that

would expose countless businesses to limitless tort liability for lawful activity. This Court should answer the first certified question "no."

If the Court reaches the second question, then the required elements of public nuisance underscore why the County's claim—involving the licensed dispensing of, or administration of benefit plans for, prescription medications—fails. The County's claim lacks the required connection to property, and the County's allegations do not meet any of the other required elements of public nuisance: (1) the County alleges an aggregate of individual, private injuries instead of an unreasonable interference with a collective, public right; (2) the chain of causation is not proximate but includes countless intervening acts and third parties that Defendants have no duty or ability to control; and (3) without any showing of special damage or injury, the County seeks reimbursement of past and future costs of public services when its available relief is limited to an injunction and abatement order that does not include monetary relief. The absence of each of these elements confirms that this public-nuisance lawsuit by a local government is the wrong way to address the complex policy and societal problems of opioid addiction and abuse.

STATEMENT OF THE CASE

Plaintiff Anne Arundel County filed this action in the Circuit Court for Anne Arundel County. After Defendants removed the action to federal court, the County filed an amended complaint, asserting a single cause of action for

public nuisance based on Defendants' alleged role in contributing to an "opioid crisis" in Anne Arundel County. (E18–106, E24).

Defendants moved to dismiss the County's amended complaint, arguing that the County's novel public-nuisance theory finds no support in Maryland law. (E107–49). Defendants also moved to certify questions of law to this Court as to whether the County's "novel breed" of public nuisance is cognizable under Maryland law. (E375–76).

The district court granted Defendants' motion for certification and denied without prejudice Defendants' motion to dismiss. (E608). The court expressed skepticism about the viability of the County's theory, explaining that "the County has asserted a novel claim in an unsettled, novel area of Maryland law." (E618). Accordingly, the court concluded that the "question of whether a public nuisance claim can be brought under Maryland common [law] in these circumstances is appropriate for certification" because "[a]n answer to this question would be determinative of an issue in the instant case, and, currently, no controlling appellate decision supplies such an answer." (E617).

QUESTIONS PRESENTED

(1) Under Maryland's common law, can the licensed dispensing of, or administration of benefit plans for, a controlled substance constitute an actionable 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?

STATEMENT OF MATERIAL FACTS

The County presses its public-nuisance claim against three distinct categories of defendants: PBMs, retail pharmacies, and mail-order pharmacies. (E653). Defendants Express Scripts, Inc., Express Scripts Administrators, LLC, Medco Health Solutions, Inc., OptumRx, Inc., Caremark PCS Health L.L.C., and Caremark, L.L.C. offer PBM services. (E121, E608). PBMs "do not manufacture, market, or prescribe opioid medications." *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, ECF No. 1848 at 2 (N.D. Ohio July 15, 2019). Instead, they enter service agreements with their clients—sponsors of health insurance plans—to administer prescription-drug benefits and process prescription claims for medications. (E608). And though the PBM Defendants are registered to do business in Maryland, none is physically located in the State. (E31–39).

Defendants CVS Pharmacy, Inc. and Maryland CVS Pharmacy, L.L.C. operate retail pharmacies, and Defendants ESI Mail Pharmacy Service, Inc., Express Scripts Pharmacy, Inc., OptumRx, Inc., Caremark PCS Health L.L.C., and Caremark L.L.C. operate mail-order pharmacies. (E31–39, E121, E653). None of the mail-order pharmacies operates pharmacy locations in the State.

(E31–39). Pharmacies dispense controlled substances prescribed to patients by a physician. 21 C.F.R. § 1306.04(a). Pharmacies do not decide whether a particular patient should be prescribed a medication; that is a licensed physician's role. 21 U.S.C. § 829(a). Nor do pharmacists decide the appropriate drug strength, dosage form, or quantity. 21 C.F.R. § 1306.05(a).

As summarized by the district court in its certification order, the County's public-nuisance claim against the PBM Defendants "arises out of . . . their formulary and benefit management decisions," which allegedly "facilitate[d] and encourage[d] the use of opioids." (E653). And the County's claim against the retail and mail-order pharmacy Defendants "arises out of [their] actions in filling prescriptions for opioid medications in allegedly excessive quantities and in an allegedly unsafe manner." (E653). The County seeks, among other things, damages to reimburse it for past, present, and anticipated costs of public services related to opioid misuse, such as law enforcement and drug and addiction programs. (E104–05).

STANDARD OF REVIEW

Under the Maryland Uniform Certification of Questions of Law Act, this Court may "answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State." *Fangman v. Genuine Title,*

LLC, 447 Md. 681, 690 (2016) (quoting Md. Code Ann., Cts. & Jud. Proc. § 12-603). In so doing, this Court "confine[s] [its] legal analysis and final determinations of Maryland law to the questions certified." *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 681, (2000).

ARGUMENT

I. THE LICENSED DISPENSING OF, OR ADMINISTRATION OF BENEFIT PLANS FOR, A CONTROLLED SUBSTANCE CANNOT CONSTITUTE AN ACTIONABLE PUBLIC NUISANCE.

Under Maryland common law, a public nuisance requires both an unreasonable use of property and an unreasonable interference with a property interest of the public. But the allegations in the County's complaint confirm that the licensed dispensing of, or administration of benefit plans for, prescription medications does not involve real property in any respect. Indeed, the County's lawsuit has nothing to do with any alleged use of property, nor does it allege any interference with a property interest of the public. Absent legislative initiative expanding public-nuisance liability beyond its historical, property-related confines, this Court should reject the County's invitation to eliminate that fundamental requirement. Doing so would lead to endless lawsuits and boundless liability over lawful business conduct alleged to be a "nuisance." This Court should answer "no" to the first question.

A. Maryland Common Law Does Not Support A Public-Nuisance Claim Absent A Connection To Property.

1. Centuries of Maryland case law confirm that a public nuisance must involve unreasonable use of and unreasonable interference with property.

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" *Miller v. Maloney Concrete Co.*, 63 Md. App. 38, 49 (1985) (Wilner, J.) (citation omitted). But at a basic level, public nuisance involves the maintenance of "a thing or condition on the premises, or adjacent to the premises, offensive or harmful to those who are off the premises." *Sherwood Bros. v. Eckard*, 204 Md. 485, 493 (1954). The offensive or harmful condition must arise from an unreasonable use of "property," and it must unreasonably interfere with or "affect[]" the "property rights of the public." *Wietzke v. Chesapeake Conf. Ass'n*, 421 Md. 355, 374–75 (2011). The absence of property in either respect defeats the claim.

a) A nuisance requires unreasonable use of property.

The unreasonable use of real property is the foundation of all nuisance law in Maryland. This Court has recognized three categories of public nuisances: (1) nuisances *per se*, (2) nuisances in fact, and (3) "those which prejudice public health or comfort." *Burley v. City of Annapolis*, 182 Md. 307, 312 (1943); *accord Prins v. Schreyer*, 43 Md. App. 500, 506 (1979). All three involve the use of property. *See Air Lift, Ltd. v. Bd. of Cnty. Comm'rs of*

Worcester Cnty., 262 Md. 368, 394 (1971) (citing *Burley* for the proposition that "[a] landowner may not use his property to create a public nuisance").

"A nuisance *per se*, or a nuisance at law, involves the use of one's land" that is "so unreasonable . . . it is deemed to constitute an actionable nuisance at all times and under any circumstances." *Wietzke*, 421 Md. at 374–75 (citation omitted). "Such nuisances are typically found only where a particular land use is motivated by malice toward the plaintiff landowner, is forbidden by law, or is flagrantly contrary to generally accepted standards of conduct." *Id.* at 375 (citation omitted). A legislature may also declare by statute or ordinance that certain uses of property constitute a nuisance *per se*. *Burley*, 182 Md. at 313; *see, e.g.*, Md. Code Ann., Crim. Law § 5-605 (defining "'Common nuisance' as "a dwelling, building, vehicle, vessel, aircraft, or other place" where certain illicit activities occur and prescribing that "[a] person may not keep a common nuisance"); Md. Code, Real Prop. § 14-125.1 (defining in Anne Arundel County a "nuisance" as "[a]n act or condition knowingly created, performed, or maintained on private property that constitutes a local code violation" and prescribing rules for how it can be abated).

"A nuisance in fact is an act, occupation, or structure, not a nuisance *per se*, but one which becomes a nuisance by reason of the circumstances, location, or surroundings." *Adams v. Comm'rs of Town of Trappe*, 204 Md. 165, 170 (1954). Nuisances in fact include a "slaughter-house [that] can be shown

to be, by reason of location or . . . by reason of manner of construction or operation, a nuisance," *Mayor & Council of Mt. Airy v. Sappington*, 195 Md. 259, 268 (1950), or "[a]n electric light pole" that "is not of itself a nuisance, although it may become one by reason of its location," *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Balt.*, 187 Md. 385, 397–98 (1946). A nuisance in fact is geographic in nature and depends on the circumstances surrounding the real property on which the alleged nuisance is maintained. *See Horner v. State*, 49 Md. 277, 284 (1878) (when "determining what constitutes" a nuisance in fact, "reference must always be had to the local situation of the nuisance complained of").

When an alleged nuisance is premised on the conduct of a "trade or business" that "is in itself lawful," the analysis turns on the reasonableness of the property use in light of surrounding conditions. *Id.* at 284–85. For example, operating a "brew-house" or "swine-yard" may be a nuisance if it offends "the sight, smell or hearing" of the public in a particular location; "working a mill for steeping sheepskins in water" is a nuisance if the use is "near a highway, and also near several dwelling-houses, whereby the air [is] corrupted"; and "making acid spirit of sulphur" constitutes a nuisance when the use is "impregnated with noisome and offensive stenches, near the King's highway, and near several dwelling houses." *Id.*; *see also, e.g.*, *Adams*, 204 Md. at 170–71 (unreasonable placement of gasoline pump); *Five Oaks Corp. v. Gathmann*,

190 Md. 348, 356–57 (1948) (blinding lights and loud noises emanating from a business). In each of those instances, the recognized nuisance involved the use of one's land in a way that becomes unreasonable in light of surrounding conditions.

The same is true for the third category of public nuisance: activities that "prejudice public health or comfort." *Burley*, 182 Md. at 312. This category typically involves noxious conditions emanating from property, such as "slaughterhouses" and "livery stables." *Id.* at 312; *Bishop Processing Co. v. Davis*, 213 Md. 465, 474 (1957). The nuisances in this category may also be categorized as nuisances *per se* or nuisances in fact, *see Sappington*, 195 Md. at 266–68, and they likewise involve the unreasonable use of property. *See, e.g.*, *Hamilton v. Whitridge*, 11 Md. 128, 144 (1857) (keeping of a bawdy-house).

Across all three categories of common-law public nuisance, this Court has never deviated from "the traditional requirement[] that a nuisance emanate from" the unreasonable use of property. *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *7 n.9 (D. Md. Aug. 17, 2000) (collecting cases). The "long settled" law of Maryland confirms that a public nuisance requires "the use of property." *Bishop*, 213 Md. at 473.[1]

[1] *See also, e.g.*, *Mayor & City Council of Baltimore v. BP P.L.C.*, 2024 WL 3678699, at *9–11 (Md. Cir. Ct. July 10, 2024) (dismissing nuisance claim against fossil-fuel companies for deceptive marketing and sales practices

b) A public nuisance requires unreasonable interference with a property interest of the public.

Just as public nuisance requires an unreasonable use of property, it also requires an unreasonable interference with a property interest of the public. Nuisance originated in "ancient concepts in the Anglo–American common law" and was "originally conceived to protect private landholders from being dispossessed of their property." *Wietzke*, 421 Md. at 373 (citation omitted). The doctrine evolved in the private-nuisance context to become "one of the primary tools for protecting private landholders against substantial interferences" with their interest in "the use and enjoyment of their own lands." *Id.* at 373–74 (quotations omitted); *see Evans v. Burruss*, 401 Md. 586, 610 (2007); *Exxon Corp. v. Yarema*, 69 Md. App. 124, 149 (1986).

Public-nuisance law developed similarly, "evolv[ing] to protect the *property* rights of the public as well." *Wietzke*, 421 Md. at 374 (emphasis added) (citation omitted). Public nuisances were uses of land "tending to obstruct the passage of [highways], or navigation of [rivers] . . . punishable, by fine, at the suit of the King." *Miller v. Lord Proprietary*, 1 H. & McH. 543, 549 (Md. Prov. Ct. 1774). They arose from "purprestures, which were encroachments upon the

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because neither the conduct nor alleged harm involved property), *cert. granted*, No. SCM-REG-0011-2025 (Md. Apr. 24, 2025); *Brady v. Walmart Inc.*, 2022 WL 2987078, at *17 (D. Md. July 28, 2022) (dismissing nuisance claim for wrongful sale of a firearm because "no property [was] at issue in th[e] case").

royal domain or the public highway and could be redressed by a suit brought by the King." Restatement (Second) of Torts § 821B cmt. a (1979); *see Adams*, 204 Md. at 171–72 (a thing or condition on land "near the curbstone of a city street may constitute a nuisance" if it "materially encroaches on a public street"). But when an asserted public-nuisance claim lacked any "interference" with public property, the suit could not be maintained. *City of Baltimore v. Radecke*, 49 Md. 217, 227 (1878).

In *Radecke*, for example, this Court considered whether the maintenance and operation of a stationary steam engine was a public nuisance. 49 Md. at 227. The Court explained that "a stationary steam engine is not in itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public *in the use of the streets*." *Id.* (emphasis added). Because there was "no proof in th[e] record of any such interference" with public property rights, this Court held the steam engine was not a public nuisance. *Id.* at 227–28; *see also Arnsperger v. Crawford*, 101 Md. 247, 258 (1905) ("The obstruction of the King's highways always constituted a public nuisance, . . . [b]ut the obstruction of a private road could not be regarded as a public nuisance.").

Thus, all nuisances—public and private—require an unreasonable interference with real property. The difference between the two is "whether the property rights *affected* are . . . confined to private ownership or are cast

broadly across the general public." *Wietzke*, 421 Md. at 374 (emphasis added). That is why "when a private individual seeks an injunction to remove a public nuisance, he must show that he is *the owner of property injured by the nuisance* and also that he would suffer some special damage different from that experienced in common with the other citizens." *Smith v. Shiebeck*, 180 Md. 412, 421 (1942) (emphasis added). For example, this Court held that the construction of a parking lot was not a public nuisance—even though it caused the plaintiffs' home to flood—because the alleged nuisance affected "only [plaintiffs'] use and enjoyment of their own private property," not any public property rights. *Wietzke*, 421 Md. at 373–74 (confining its "analysis to private nuisance"). By contrast, this Court held that the construction of a house was a public nuisance when it involved both the unreasonable use of property (construction of the house) and interference with *public* property (a public street). *Caine v. Cantrell*, 279 Md. 392, 399 (1977).

Even as public-nuisance doctrine has expanded to encompass broader notions of "public rights," this Court has still required an interference with a property interest. In cases involving alleged interferences with public health, safety, or morals, for instance, conduct could not be "declared a nuisance" unless it was "shown to be in *such proximity* to public ways, or other places of public resort, as to be offensive to those passing or resorting to such places, or that it seriously incommodes the people generally in the neighborhood or

community where the trade is carried on." *Horner*, 49 Md. at 284–85 (emphasis added). The use of property to carry on a bawdy-house or brewhouse constituted a public nuisance because "places *used* as houses of ill-fame," *Henson v. State*, 62 Md. 231, 234 (1884), "endanger[ed] the public peace, by drawing together dissolute and debauched persons" in one physical location, *Herzinger v. State*, 70 Md. 278, 280 (1889), and "creat[ed] a condition which makes travel unsafe or highly disagreeable" for passersby, *Tadjer v. Montgomery County*, 300 Md. 539, 551 (1984) (citation omitted).

In sum, Maryland law does not simply limit public-nuisance claims to those involving the unreasonable use of property; it also requires the alleged injury from the nuisance-causing conduct to interfere with the property rights of the public at large. That is true whether the interference is with property itself (like harm to parks, streets, and roads) or whether the interference is with the public's right to the free use and enjoyment of property (like the right to be free from offensive or odorous conditions in the areas surrounding the alleged nuisance). Property is thus an essential element of both the conduct and the interference the conduct allegedly creates.

2. Maryland common law aligns with the Third Restatement and the laws of numerous States.

Confining public nuisance to claims involving property is in step with "a clear national trend to limit public nuisance to land or property use." *State ex*

rel. Hunter v. Johnson & Johnson, 499 P.3d 719, 730 (Okla. 2021) (collecting cases). The Third Restatement of Torts has observed that "most courts" have appropriately "rejected" attempts to extend public nuisance beyond its property origins to claims alleging harm from products like "tobacco, firearms, and lead paint" because "the common law of public nuisance is an inapt vehicle for addressing [such] conduct." Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g.[2]

The lead paint litigation is illustrative. In that context, the Supreme Court of Rhode Island explained that "[a] common feature of public nuisance is the occurrence of a dangerous condition *at a specific location*" or "related to *land*." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 452 (R.I. 2008) (emphasis added). Although "public nuisance does not necessarily involve an interference with a particular *individual's* use and enjoyment of his or her land[,] . . . public nuisance typically arises on a defendant's land and interferes with a public right." *Id.* The court explained that, "if 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied

[2] This Court frequently relies on the Restatement of Torts, including the Third Restatement. *See, e.g.*, *Barclay v. Castruccio*, 469 Md. 368, 383–86 (2020); *Plank v. Cherneski*, 469 Md. 548, 600–02 (2020). Indeed, the Third Restatement's rejection of product-based public-nuisance claims is consistent with this Court's own long-standing articulation of public nuisance under Maryland law.

the term to matters not connected either with land or with any public right, as mere aberration." *Id.* at 452 (citation omitted).

Other appellate courts have agreed that "[t]he law of nuisance" concerns "the use or condition of *property*, not products." *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521–22 (Mich. Ct. App. 1992) (emphasis added) (plaintiff failed to state a public-nuisance claim against manufacturer of asbestos product when the claim failed to allege "a wrongful use of property," which is "basic to the legal concept of nuisance") (citation omitted); *see also, e.g.*, *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor."); *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007) ("public nuisance has historically been tied to conduct on one's own land or property as it affects the rights of the general public").

3. Maryland trial-court decisions to the contrary are not persuasive.

A handful of Maryland trial courts have allowed public-nuisance claims outside the property context. But those cases are inconsistent with and contradict this Court's long-standing precedent. As the certifying court recognized, the County's earlier public-nuisance lawsuit in the Circuit Court

for Anne Arundel County against opioid manufacturers and distributors survived a motion to dismiss based on a decision "consist[ing] of a single sentence with no analysis." (E617). Another Maryland circuit court reluctantly allowed the City of Baltimore's public-nuisance claim to proceed against opioid manufacturers, distributors, and pharmacy-distributors. *Mayor & City Council of Baltimore v. Purdue Pharma, L.P.*, No. 24-C-18-0515 (Md. Cir. Ct. Aug. 16, 2024). But the certifying court found that case distinguishable and unpersuasive because, "during a hearing, that court expressed 'serious reservations about the use of public nuisance claims to address social problems of this breadth and complexity.'" (E617–18). And as noted above, other trial courts applying Maryland law have rejected public-nuisance claims untethered to property. *See, e.g.*, *BP*, 2024 WL 3678699, at *9 (dismissing nuisance claim against fossil fuel companies for deceptive marketing and sales practices because neither the conduct nor alleged harm involved property); *Brady*, 2022 WL 2987078, at *17 (dismissing nuisance claim for wrongful sale of a firearm because "no property [was] at issue in th[e] case").

In sum, there is no persuasive Maryland authority that untethers public nuisance from its centuries-old, common law roots in property.

B. Neither The Administration Of Benefit Plans For A Controlled Substance Nor The Licensed Dispensing Of A Controlled Substance Concerns Property.

The County's theory fails doubly under Maryland common law because the conduct at issue does not involve the unreasonable use of property *or* interfere with "the property rights of the public." *Wietzke*, 421 Md. at 374.

1. The administration of benefit plans for a controlled substance does not concern property.

The administration of benefit plans for prescription medications by PBMs has absolutely no connection to property. The absence of any property connection is evident based on an understanding of how a PBM operates. PBMs enter service agreements with their clients—sponsors of health insurance plans—to administer prescription drug benefits and process prescription claims for medications. (E608). They essentially "design prescription drug benefit programs . . . that set the criteria and terms under which pharmaceutical drugs are reimbursed." (E608). PBMs also serve as "intermediaries between prescription-drug plans and the pharmacies that beneficiaries use." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 83–84 (2020). "When a beneficiary of a prescription-drug plan goes to a pharmacy to fill a prescription, the pharmacy checks with a PBM to determine that person's coverage and copayment information." *Id.* at 84. "After the beneficiary leaves with his or her prescription, the PBM reimburses the pharmacy for the

prescription, less the amount of the beneficiary's copayment. The prescription-drug plan, in turn, reimburses the PBM." *Id*. Those health-plan services do not involve *any* use of property at all, much less an unreasonable interference with property. The PBMs do not provide these services at any physical location in Maryland (the PBM Defendants have none). Nor do they even involve the PBMs ever physically taking possession or control of a medication or include them directing or sending products into Maryland.

The County also has not alleged (nor could it) that the PBMs have *interfered* with a property interest of the public in any respect. As explained above, even conduct that allegedly interferes with "public health" still requires a property nexus: The alleged nuisance-causing activity must be "shown to be in *such proximity* to public ways, or other places of public resort, as to be offensive to those passing or resorting to such places, or that it seriously incommodes the people generally in the neighborhood or community where the trade is carried on." *Horner*, 49 Md. at 284–85 (emphasis added). The administration of benefit plans for controlled substances (or any other lawful prescription medication) does not involve a use of property in "proximity" to any public way.

2. The licensed dispensing of controlled substances does not concern property.

Similarly, operating a mail-order pharmacy does not involve any use of property in Maryland, much less an unreasonable use of property. And although the retail pharmacy Defendants have physical locations in Maryland, the County's suit is not about the licensed dispensing of controlled substances at any of their individual physical branches. (Nor could it be, given pharmacies' heavily regulated conduct in distributing FDA-approved medication. *See infra*, Section I.D.) Rather, the County's claim with respect to pharmacies concerns company-wide "policies, procedures, and metrics that [allegedly] prevented pharmacists from exercising due diligence to ensure that opioids were dispensed safely." (E103). Those allegations do not involve any use of property.

The County's complaint also contains zero factual allegations that retail or mail-order pharmacies interfered with the property rights of the public in any respect. Indeed, outside of one rote allegation repeating the elements of a public-nuisance claim, (E102), the complaint does not even mention the words "property" or "land." Because there is "nothing in the complaint suggesting how the property rights of the public at large have been in any way affected," the County's complaint cannot give rise to a public-nuisance claim. *Walser v. Resthaven Mem'l Gardens, Inc.*, 98 Md. App. 371, 397 (1993) (Wilner, J.).

C. The Court Should Not Expand Public Nuisance Beyond Its Common-Law Origins.

Although "this Court has authority under the Maryland Constitution to change the common law," *Bowden v. Caldor, Inc.*, 350 Md. 4, 27 (1998), it consistently declines to extend common-law liability when doing so would intrude on the legislature. *See Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 36 (2008) ("It is well settled that, where the General Assembly has announced public policy, the Court will decline to enter the public policy debate, even when it is the common law that is at issue and the Court certainly has the authority to change the common law.").

For example, this Court has repeatedly rejected calls to extend a duty of "dram shop" owners to third parties injured by overserved patrons, despite a number of other state supreme courts so extending. *See State ex rel. Joyce v. Hatfield*, 197 Md. 249, 255–56 (1951); *Felder v. Butler*, 292 Md. 174, 183–84 (1981); *Warr v. JMGM Grp., LLC*, 433 Md. 170, 198–99 (2013). The "fact that there is . . . no such law in Maryland" extending liability in that context "expresses the legislative intent as clearly and compellingly as affirmative legislation would," and shows that the public policy of the State would not support this Court expanding the law. *Joyce*, 197 Md. at 256.

Similarly, this Court has refused to upend Maryland's scheme of contributory negligence despite repeated calls to do so and despite judicial and

legislative shifts to comparative fault schemes in nearly all other States. The "long-established common law rule" regarding contributory negligence has been "unchanged by the legislature and [is] thus reflective of this State's public policy." *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 689 (2013) (citation omitted). For this Court "to change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the Court's long-standing jurisprudence," as it would usurp the legislature's proper role as the determiners of public policy. *Id.* at 695.

The same is true here. The General Assembly's conception of public nuisance as a property-based claim is well established in Maryland law. *See supra*, Section I.A.1.a (citing Md. Code Ann., Crim. Law § 5-605; Md. Code Ann., Real Prop. § 14-125.1). When the General Assembly has sought to abrogate that understanding and expand public-nuisance liability to a novel context—such as firearms—it has done so deliberately and explicitly. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-2502 (stating that a "firearm industry member may not knowingly create, maintain, or contribute to harm to the public" through listed conduct and providing that "[a] violation of this section is a public nuisance").

Though the General Assembly regulates both PBMs and pharmacies in Maryland (as does the federal government), *see infra*, Section I.D., it has never

seen fit to expand the doctrine of public nuisance to cover their conduct. Judicial expansion of the law of public nuisance beyond property without any guidance from the General Assembly would usurp the legislature's role "to weigh policy considerations and craft an appropriate remedy." *In re Nat'l Prescription Opiate Litig.*, --- N.E.3d ---, 2024 WL 5049302, at *7 (Ohio Dec. 10, 2024) (public-nuisance claim involving prescription opioids was abrogated by Ohio Product Liability Act); *see Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 539–40 (1937) (a particular use of property is not a nuisance unless it is "so by common law, or by statutory definition"); *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 467 (2013) (declining "to hold that any amount of secondhand smoke entering from one cooperative housing member's home to another's constituted a nuisance" because to do so "would be one step away from banning smoking in all private homes—an action inconsistent with State statutes"); *accord City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments.").

There are sound policy reasons why Maryland courts should not expand public nuisance here. If administering insurance benefits for an FDA-approved medication prescribed by a doctor and dispensed by a licensed pharmacist can constitute a public nuisance, then "unlimited and unprincipled liability" can

attach to any entity involved in the stream of commerce. *Hunter*, 499 P.3d at 725; *see also Beretta*, 821 N.E.2d at 1116 (rejecting expansion of public nuisance that "would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products"). Banks and credit card companies that issue checks and credit cards used to pay for soft drinks, prescription opioids, or any other lawful product that is claimed to cause harm could be held liable for contributing to a public nuisance. So, too, could the utility companies that provide the electricity, water, and heat for stores where people pay for soft drinks, prescription opioids, or other lawful products, and the taxicab and ride-sharing companies that drive people to shops to pay for soft drinks, prescription opioids, or other lawful products.

By "giving a green light to a common-law public nuisance cause of action today," the Court "will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 195–96 (N.Y. App. Div. 2003). Some of those theories "will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative." *Id.* at 195, 203. This Court should reject the County's suggestion to "create a new and entirely

unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Lead Paint*, 924 A.2d at 494.

Maintaining the historical limits of public nuisance also ensures that enterprising plaintiffs will not use the doctrine as a surrogate for well-defined tort claims, such as negligence. This Court has made clear that plaintiffs cannot use a nuisance theory "to frame an action in negligence using somewhat different terms." *Tadjer*, 300 Md. at 554. The County is attempting to use public nuisance as a creative way to supplant and undermine traditional tort principles that have been refined by this Court over the course of decades. *See also* Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. b (warning against "unsound claims of public nuisance" that are "brought on facts outside the traditional ambit of the tort"). Indeed, allowing a public-nuisance claim premised on pharmacy benefit management services and pharmacy dispensing would result in allowing similar claims to litigation theories in asbestos and lead-paint actions—actions that have been refined by this Court through decades of litigation. But this Court has always kept public nuisance within its narrow sphere of protecting public rights of way. If anything, the County's claim here as to PBMs and pharmacies is even more removed from the traditional tort than in the asbestos and lead-paint contexts; those cases involved manufacturers, whereas this case involves PBMs and pharmacies, which do not manufacture, market, or distribute the at-issue product.

The Court should reject the County's attempt to unnecessarily "extend the definition of [public] nuisance" to sidestep the well-developed boundaries of Maryland tort law. *State ex rel. Bohon v. Feldstein*, 207 Md. 20, 35 (1955); *accord Little v. Union Trust Co. of Md.*, 45 Md. App. 178, 185 (1980).

D. The County's Attempt To Regulate Pharmacies And PBMs Through A Public-Nuisance Claim Is Preempted.

Allowing this lawsuit to go forward would also impermissibly grant the County *regulatory* authority in areas—the practice of pharmacy and the provision of PBM services—that are subject to comprehensive legislation. Where, as here, the General Assembly has occupied an entire field through comprehensive legislation, a local government's public-nuisance action—just as much as a local ordinance—amounts to a seizure of "local control" where none is allowed. *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307, 313, 315 (2013) (citation omitted); *see also Robinson v. State*, 353 Md. 683, 693 (1999) (concluding that common law claims are impliedly preempted "where a statute deals with an entire subject-matter" because the statute is "generally construed as abrogating the common law as to that subject").

1. The General Assembly has preempted local regulation of pharmacy practice and the provision of PBM services.

The Maryland Pharmacy Act establishes a comprehensive statutory and regulatory regime governing pharmacy practice and the operation of

pharmacies in the State. Anyone who wishes to practice pharmacy in Maryland must obtain a license from the Board of Pharmacy, Md. Code Ann., Health Occ. § 12-301(a), and a separate Board permit is required to establish or operate a pharmacy, *id.* § 12-401. Mail-order pharmacies that deliver prescriptions into Maryland are expressly subject to the Act. *Id.* § 12-403(c)(17), (e)–(g). In addition to establishing licensing procedures and pharmacist qualifications, *id.* §§ 12-302–306, the Act creates a Board of Pharmacy to regulate pharmacy practice, *id.* § 12-201. The Board is exclusively responsible for adopting "[r]ules and regulations that are necessary to protect the public health . . . and that establish standards for practicing pharmacy and operating pharmacies," including "standards for filling and refilling prescriptions," as well as "[a] code of conduct that specifies which behaviors are either required or prohibited in the practice of pharmacy." *Id.* § 12-205(a). The Board has adopted detailed rules and regulations. *See* Md. Code Regs. Title 10, Subtitle 34.

Between provisions of the Maryland Pharmacy Act and the rules promulgated by the Board, there are provisions addressing wide-ranging aspects of pharmacy practice and the operation of pharmacies. For example, the Act and its implementing regulations address substitution of generic drugs, Md. Code Ann., Health Occ. § 12-504; prescription labeling requirements, *id.* § 12-505; emergency refills, *id.* § 12-506; pharmacy locations, *id.* § 12-403(c)(2); supervision of the pharmacy, *id.* § 12-403(c)(3)–(4); pharmacy

equipment, *id.* § 12-403(c)(11); drug storage, *id.* § 12-403(c)(12); staffing levels, *id.* § 12-403(c)(15)–(16); pharmacy security, Md. Code Regs. § 10.34.03.06; the temperature level in the area where medications are kept, *id.* § 10.34.03.07; and retention of prescription records, *id.* § 10.34.20.03.

Of particular relevance, the Maryland Pharmacy Act and its implementing regulations set forth specific rules concerning the standards by which a pharmacist may fill or refuse to fill a prescription. In particular, a pharmacist may do so as long as the decision is based on her professional judgment, knowledge, or experience. Md. Code Ann., Health Occ. § 12-501. And if a pharmacist has reason to believe that a prescription was not written for a legitimate medical purpose in the ordinary course of a prescriber's practice, the pharmacist must verify with the prescriber that the prescription is medically legitimate before filling it. Md. Code Regs. § 10.34.10.08.

The Act also establishes a remedial scheme for violations. The Board may enter any permitted pharmacy in the State to inspect for compliance with federal and State laws and regulations. Md. Code Ann., Health Occ. § 12-413. The Act authorizes discipline of pharmacists and pharmacies including suspension or revocation of licenses and permits, civil penalties, and criminal prosecution. *Id.* §§ 12-313, 12-314, 12-409, 12-410, 12-707. And the Act authorizes a civil action to enjoin the unauthorized practice of pharmacy or any conduct that could subject a pharmacist to discipline. *Id.* § 12-319. But,

critically, a county cannot bring such an action. An action may be brought only by the Board, the Attorney General, or a State's Attorney. *Id.*

The General Assembly has likewise enacted comprehensive legislation regarding the provision of PBM services. *See* Md. Code Ann., Ins. §§ 15-1601–42. Maryland legislation addresses matters like PBMs' contracts with pharmacies and health plans, *id.* §§ 15-1628–31, therapeutic interchanges of a substitute drug for the one that was originally prescribed, *id.* §§ 15-1633–39, treatment of certain types of drugs when setting reimbursement amounts, *id.* § 15-1612, and the precise composition of a PBM's "Pharmacy and Therapeutics Committee"—the committee that makes therapeutic recommendations concerning formulary decisions and utilization management, *id.* §§ 15-1613–18.

The General Assembly has also spoken to the two PBM functions that the County focuses on in this case: formulary design and utilization management. (E41–42). As to formulary design, the General Assembly has addressed what information PBMs must consider "when deciding what prescription drugs to recommend to include on a formulary" by requiring only that PBMs have "a process to evaluate medical and scientific evidence concerning the safety and effectiveness of prescription drugs, including available comparative information on clinically similar prescription drugs." Md. Code Ann., Ins. § 15-1617(2). The General Assembly has similarly

addressed PBMs' consideration of utilization-management tools. *Id.* § 15-1617(3) (requiring that PBMs "evaluate medical and scientific evidence concerning the safety and effectiveness of prescription drugs when recommending utilization review requirements, dose restrictions, and step therapy requirements"). The General Assembly has also entrusted the Insurance Administration to enforce the regulatory regime, including through cease-and-desist orders, seeking restitution, imposing fines and civil penalties, and filing petitions in a Circuit Court. *Id.* § 15-1642(c)–(e).

2. The County cannot use a public-nuisance action to bypass existing regulatory regimes.

Through these carefully legislated regimes, the General Assembly has occupied the fields of pharmacy practice and the provision of PBM services. And because these comprehensive regimes include self-contained systems of procedures and remedies for holding regulated persons accountable, "the legislature intended to make [the remedies available under the statutes] *the exclusive* remedies," "to the exclusion of other remedies that may normally be available for common-law negligence." *Cecil v. AFSCME*, 261 Md. App. 228, 260, 264 (2024) (emphasis added).

The County's general nuisance "abatement" authority does not allow it to bypass these existing regulatory regimes. In this lawsuit, the County invokes the authority bestowed on each county to "provide for the prevention,

abatement, and removal of nuisances." Md. Code Ann., Local Gov't § 10-328(a); *see* (E336) (invoking § 10-328); (E31) (invoking Maryland Local Government Code, Title 10). But the County's generalized nuisance-abatement authority cannot serve as a workaround for a carefully calibrated, long-standing regulatory regime administered by a dedicated administrative agency with substantive expertise and enacted by the General Assembly. *See Miller*, 63 Md. App. at 53–54.

Miller is instructive. There, the Appellate Court overturned a county board's finding that a concrete batching plant constituted a public nuisance because of its noise, dust, and use of a traffic lane. *Id.* at 45–47. The court observed that, because the county had separately enacted precise requirements on those subjects, allowing the county to freely define public nuisance would effectively "authorize[ ] [it] to prohibit that which may be perfectly legal" under existing regulations issued by agencies with substantive expertise. *Id*. at 53.

Just like the county board in *Miller*, Anne Arundel County here seeks to redress an alleged public nuisance "pursuant to Md. Code Ann., Local Gov't § 10-328 and common law." (E336). And just like the county board in *Miller*, Anne Arundel County here is attempting to use the "elusive concept of nuisance," *Miller*, 63 Md. App. at 49, to do so. The Court should not permit the County to re-regulate these essential fields via litigation. *See Central GMC,*

Inc. v. Gen. Motors Corp., 946 F.2d 327, 334 (4th Cir. 1991) (noting that litigation can amount to "impermissible state regulation") (citation omitted).

II. THE REQUIRED ELEMENTS OF A PUBLIC-NUISANCE CLAIM CONFIRM THAT THE COUNTY CANNOT ESTABLISH A CAUSE OF ACTION IN THESE CIRCUMSTANCES.

If this Court reaches the second certified question, the required elements of a public-nuisance claim underscore why the claim the County brings here—involving the licensed dispensing of, and administration of benefit plans for, a prescription medication—fails. Aside from lacking any connection to property, those acts do not meet the other required elements of a public-nuisance claim: (1) unreasonable interference with a public right; (2) proximate cause; and (3) a cognizable remedy. In the absence of a special injury, the County is limited to an abatement or injunction without any monetary relief.

A. The County Cannot Establish An Unreasonable Interference With A Public Right.

1. A public-nuisance claim requires unreasonable interference with a public right.

The foundational element of public nuisance is a violation of "the rights of the community at large." *Rosenblatt v. Exxon Co., USA*, 335 Md. 58, 79 (1994). As explained above, that right must concern property. *Supra* Section I.A. It also must be "common to all members of the general public," *Tadjer*, 300 Md. at 553 (quoting Restatement (Second) of Torts § 821B cmt. g), like the

"right of the public to use the streets in a proper manner," *Adams*, 204 Md. at 171.

A public right is not simply an aggregation of "individual right[s]," like the right that "everyone has not to be assaulted or defamed or defrauded or negligently injured." *Tadjer*, 300 Md. at 553 (citation omitted). For conduct to constitute or cause a public nuisance, it must cause harm to "all persons who come in contact with it," *Wietzke*, 421 Md. at 374 (citation omitted), like "the obstruction of a highway," *Rosenblatt*, 335 Md. at 79 n.8, or cause harm to the general "public health or comfort" from "slaughterhouses" and "livery stables," *Burley*, 182 Md. at 312.

Maryland courts have rejected attempts to expand public nuisance to encompass claims based on aggregated, individual harms. *See Little*, 45 Md. App. at 185. In *Little*, tenants of an apartment building alleged that the landlord's improper maintenance of the building was a public nuisance. *Id.* The court rejected that "grasp for a nuisance theory" because the claim was, "in essence," a damages claim for "personal injuries" that "must proceed by way of traditional negligence theory." *Id.* at 185–86.

Other state supreme courts have similarly rejected efforts to expand public nuisance to cover primarily *individual* harms. In *Lead Industries*, the Supreme Court of Rhode Island rejected a public-nuisance claim against lead-paint manufacturers—even though the State alleged interference with the

"health, safety, peace, comfort or convenience" of Rhode Island residents—because the alleged harm did not involve a "public right" but "[t]he right of an individual child not to be poisoned by lead paint." 951 A.2d at 453–54. The Supreme Court of Illinois has similarly rejected public-nuisance claims based solely on "the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another." *Beretta*, 821 N.E.2d at 1116. To rule otherwise would create liability any time a "potentially dangerous instrumentality" was present in a community. *Id.*

The Supreme Court of Oklahoma reached the same conclusion in rejecting a public-nuisance claim related to prescription opioids. *See Hunter*, 499 P.3d at 727. *Hunter* rejected the state's attempt to characterize the opioid crisis "as an interference with the public right of health," noting that opioid abuse does "not involve a comparable incident to those in which [courts] have anticipated that an injury to the public health would occur, *e.g.*, diseased animals, pollution in drinking water, or the discharge of sewer on property." *Id.* Instead, the state's claim involved a "right to be free from the threat that others may misuse or abuse prescription opioids," which does not concern a right of the community at large. *Id.*

Even when a "public" right is at issue, "[n]ot every interference . . . will support a cause of action for nuisance." *Exxon Mobil Corp. v. Albright*, 433 Md.

303, 408, *reconsideration granted in part on other grounds*, 433 Md. 502 (2013). When a nuisance claim is not based on conduct that is a nuisance "at all times and under any circumstances" but on conduct that amounts to a nuisance only in "particular setting[s] and surrounding circumstances," the claimed nuisance "must be one which in view of the *circumstances* of the case, is *unreasonable*." *Wietzke*, 421 Md. at 374–76 (emphasis added; cleaned up); *see also Tadjer*, 300 Md. at 552 ("A public nuisance is an unreasonable interference with a right common to the general public.").

2. The County's theory does not involve an unreasonable interference with a public right.

The County's theory of public nuisance here cannot meet the requirement that a public nuisance involve an unreasonable interference with a public right. The County alleges that "an oversupply of opioids" caused "addiction, overdose, and death," which it claims violated the public right to "public health, public safety, public peace, and the public comfort." (E20, E46, E102). But as the County's own description illustrates, its claim turns on the asserted violation of *individual*—not *collective*—rights. *See Hunter*, 499 P.3d at 726–27 (the collection of individual violations "does not transform the harm from individual injury to communal injury" (quotations omitted)).

Unlike an odorous slaughterhouse or widespread water pollution, the presence of prescription opioids in a community does not harm "all persons who

come in contact with [them]." *Adams*, 204 Md. at 170. Indeed, the County has alleged that opioids injured "a *considerable number* of"—not all—County residents. (E102) (emphasis added). And not only did many people avoid harm from prescription opioids, but many *benefitted* medically from their use. The County itself admits that "a controlled substance prescription" can be "issued for a legitimate medical purpose." (E80); *see Hunter*, 499 P.3d at 727 (describing prescription opioids as "lawful products" that "have a beneficial use in treating pain"). Even accepting as true the County's allegation that "thousands" of individuals suffered harm such as addiction, (E75), the aggregation of those individual injuries does not amount to interference with a "public right," *see Tadjer*, 300 Md. at 553; *Lead Indus.*, 951 A.2d at 453–54; *Beretta*, 821 N.E.2d at 1116; *Hunter*, 499 P.3d at 727.

B. If A Government Can Assert Public Nuisance As A Tort, It Must Establish Proximate Cause.

This Court has never sustained the use of public nuisance by a government as a tort as opposed to a criminal or quasi-criminal action. But if a government can assert public nuisance as a civil tort claim, then like all other claims sounding in tort, the County must establish proximate cause as to each defendant. *See Aravanis v. Eisenberg*, 237 Md. 242, 257, 260 (1965) (To be actionable, the nuisance must "cause[] the harm complained of," "without the intervention of any independent factor.") (citation omitted); *see also E. Coast*

Freight Lines, 187 Md. at 401 (gas company's erection of a pole was not a public nuisance because "[t]he cause of the" injuries could not "be attributed to the pole alone, if at all"). Under Maryland law, proximate cause requires that a defendant's conduct be both "1) a cause in fact, and 2) a legally cognizable cause." *Pittway Corp. v. Collins*, 409 Md. 218, 243–44 (2009) (citation omitted).

Both aspects of the proximate-cause requirement will be critical in this case if the County is allowed to proceed with the public-nuisance theory that it has articulated, where the asserted nuisance is not a discrete condition in a specific location, but rather a nebulous, multi-faceted societal problem: "the opioid epidemic." (E105). The County's alleged opioid-related harm encompasses everything from violent crime and overdose deaths relating to illicit, *non-prescription* drugs to costs arising from lost jobs, traffic collisions, policing services, healthcare, public assistance, and social services. (E100–01, E104). By any plausible measure, Defendants are too far removed to be considered "the 'next' or immediate cause" of the County's alleged injuries. *Aravanis*, 237 Md. at 257. The traditional proximate-cause requirement bars recovery for these remote harms. *See Garitee v. Mayor & City Council of Baltimore*, 53 Md. 422, 442 (1880) (affirming exclusion of evidence of losses in public-nuisance action that were "too contingent and speculative").

Moreover, as to factual cause, the County could not show that its alleged opioid-related harms are "attribut[able]" to Defendants' licensed dispensing of,

and administration of benefit plans for, controlled substances. *E. Coast Freight Lines*, 187 Md. at 401. It is undisputed that Defendants did not design, develop, test, manufacture, distribute, or prescribe any product that was later misused by third parties. Rather, the County relies primarily on a "market share liability" theory of causation, seeking to hold Defendants responsible merely by virtue of their alleged contributions to the overall supply of prescription opioids. (E25–26, E30, E80, E93–94) (highlighting Defendants' market share and overall volume of business). But Maryland does not recognize market share liability. *See Reiter v. ACandS, Inc.*, 179 Md. App. 645, 665–66 (2008) (noting that "the Maryland Court of Appeals has declined to adopt" a "theory of market share liability").

And even if it did, factual cause requires the County to allege and prove facts demonstrating that Defendants' conduct *alone* was sufficient to cause the County's harm. *See Asphalt & Concrete Servs., v. Perry*, 221 Md. App. 235, 261 (2015). Tort law generally (and public-nuisance law particularly) does not permit a finding of causation on the theory that, as a matter of probability, at least some of the claimed harm must have been attributable to Defendants. *See Peterson v. Underwood,* 258 Md. 9, 16 (1970) ("substantial factor" test requires a cause to be a substantial—not merely potential—factor in bringing about harm alleged); *Tadjer*, 300 Md. at 551 (conduct must actually "*cause*[]"

the alleged "inconvenience or damage to the public") (emphasis added; citation omitted).

Those aspects of causation have led numerous courts across the country to reject product-based claims of public nuisance. *See, e.g.*, *Beretta*, 821 N.E.2d at 1132 (finding no proximate cause because the "selling of firearms merely furnishe[d] a condition by which the criminal acts of others [we]re made possible" and was "thus[] too remote to constitute legal cause of a nuisance that results from the aggregate effect of many such acts"); *cf. City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007) (rejecting a public-nuisance claim against lead-paint manufacturers because even if the city could show a statistical probability that each defendant's paint was in some percentage of properties "that would not establish that the particular defendant actually caused the problem"). In the opioid context in particular, courts have recognized the numerous third-party acts—such as those surrounding the illegitimate prescription and illegal diversion of prescription opioids—that eliminate the requisite causation. *See City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 482 (S.D. W. Va. 2022) ("Such oversupply and diversion were made possible, beyond the supply of opioids by defendants, by overprescribing by doctors, dispensing by pharmacists of the excessive prescriptions, and diversion of the drugs to illegal

usage—all effective intervening causes beyond the control of defendants."), *appeal docketed*, No. 22-1819 (4th Cir. Aug. 5, 2022).

Any legally cognizable public-nuisance claim must include a rigorous proximate-causation requirement, particularly in circumstances where the alleged conduct at most constitutes a passive relationship to an alleged injury caused by numerous third parties and intervening acts.

C. Maryland Public-Nuisance Law Provides No Cognizable Remedy To The County.

If the Court reaches the second certified question, it should also clarify that, under Maryland law, the remedy at law for a governmental public-nuisance claim is limited to an indictment by the State and that the equitable relief that a local government may pursue is limited to abatement by injunction—*i.e.*, an order requiring or forbidding some concrete act by the defendant to remove or cease the nuisance. None of these remedies includes monetary relief. Here, the County seeks an injunction "permanently enjoining Defendants from engaging" in certain business "acts and practices," "an order directing Defendants to pay for the abatement" of the alleged public nuisance, and "compensatory damages." (E105). But none of those remedies is available to the County. *See Muhl v. Magan*, 313 Md. 462, 480 (1988) (plaintiff cannot seek "a form of relief generally unknown to the common law").

1. A local government asserting a public-nuisance claim is limited to the equitable relief of abatement by injunction.

Maryland law maintains the distinction between actions seeking remedies at law and actions seeking equitable remedies. *Taylor v. Taylor*, 306 Md. 290, 297–98 n.6 (1986); *see also Mattingly v. Mattingly*, 92 Md. App. 248, 261 (1992) ("relief and defenses that are exclusively within the jurisdiction of equity remain so, despite the merger of" law and equity). The traditional remedy at law for a public nuisance is a criminal indictment. *Rosenblatt*, 335 Md. at 79 n.8. Only the State of Maryland and its State's Attorneys, not individual counties, have authority to pursue an action at law to remedy a public nuisance by indictment. *See, e.g.*, Md. Code Ann., Crim. Proc. § 15-102; *State v. Aquilla*, 18 Md. App. 487, 493 (1973) (describing exclusive duties of the State's Attorney); *Murphy v. Yates*, 276 Md. 475, 489 (1975) ("our State's Attorneys are vested with the broadest official discretion" to bring indictments).

A county may pursue a common-law public-nuisance action to seek the equitable relief of abatement, but only in limited circumstances. Courts of equity "lack[] jurisdiction to grant injunctive relief" when there is an "adequate remedy at law by instituting criminal proceedings." *Clark v. Todd*, 192 Md. 487, 492 (1949). "[A] municipal corporation may invoke the aid of a court of equity" only "if criminal offenses [constituting the public nuisance] are

primarily and essentially an injury to property." *Adams*, 204 Md. at 170–71. Equitable abatement remedies "do not interpose their aid in matters . . . which do not affect any rights of property." *Id.* at 171.

And abatement entails *injunctive* relief only—*i.e.*, a specific court order to take, or refrain from taking, concrete action. *See Spaw, LLC v. City of Annapolis*, 452 Md. 314, 356 (2017) ("Abatement is 'the act of eliminating or nullifying,' or 'to put an end to; nullify.'") (quoting dictionaries); *Whitaker v. Prince George's County*, 307 Md. 368, 377–78 (1986) (authorizing a county's "equitable action to abate or enjoin" a public nuisance). The equitable remedy of abatement, as long understood and applied over centuries of public-nuisance case law in Maryland, must entail an injunctive order to act or refrain from acting in some discrete manner. *See, e.g.*, *Whitaker*, 307 Md. at 377–78 (cease prostitution activities at a bawdyhouse); *Caine*, 279 Md. at 396 (remove parking structure that encroached on public land); *Adams*, 204 Md. at 168 (remove gas pump and tank from public street).

In *Martin v. Howard County*, this Court rejected a local government's attempt to mischaracterize legal relief as equitable abatement relief. There, Howard County brought a nuisance action under Maryland Code, Real Property § 14-120, alleging the defendants' use of a rented property to distribute illicit drugs constituted a common nuisance. 349 Md. 469, 488 (1998). Although the county sought a traditionally legal remedy, eviction, it

argued the claim was equitable and thus defendants were not entitled to a jury trial because it had labeled the suit an "action to abate a nuisance." *Id.* at 480, 488. The Court rejected Howard County's argument, explaining "[t]he verb 'to abate' simply means 'to put an end to' or 'to do away with' or 'to lessen' or 'to diminish' or 'to reduce' or 'to terminate.'" *Id.* (quoting *Abate*, Webster's New Int'l Dictionary (2d ed. 1959)). The Court further explained that an equitable abatement "order would be an injunction" "telling the person in possession [of the nuisance-causing property] to cease the activity or refrain in the future from engaging in the activity." *Id.* at 488–89. The Court therefore held that a claim seeking relief that is legal in nature "does not become equitable when cast in the form of a demand for an equitable decree." *Id.* at 488 (cleaned up).

Accordingly, "abatement" in a public-nuisance action does *not* include monetary relief. *See, e.g.*, *Adams*, 204 Md. at 169–71 ("The underlying principle governing equitable relief in suits to abate nuisances is that the injury is of such a nature that the complaining party cannot obtain an adequate remedy at law."); *Hunter*, 499 P.3d at 729 ("Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health, and criminal issues arising from conduct alleged to be a nuisance."); *City of Huntington*, 609 F. Supp. 3d at 483 (holding request for "abatement

damages" seeking costs associated with the "downstream harms of opioid use and abuse" is "not properly understood as in the nature of abatement").

Here, the County's request for "an order directing Defendants to *pay for* the abatement" of the opioid epidemic, (E105) (emphasis added), is "in effect, an effort to obtain damages," which is "essentially legal." *Tidewater Exp. Lines, Inc. v. Freight Drivers & Helpers Loc. Union No. 557*, 230 Md. 450, 456 (1963). It is a classic effort to "disguise an attempt to obtain monetary relief as a traditional equitable remedy" that was been rejected by the *Martin* court and courts across the country.[3] *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014); *see also New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984) ("a plaintiff may not transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money"); *accord Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) (same).

Moreover, this Court has recognized only a narrow category of "orders for the 'payment of money' which had traditionally been rendered in equity." *Anthony Plumbing of Maryland, Inc. v. Att'y Gen. of Maryland*, 298 Md. 11,

[3] To illustrate the County's efforts to disguise the remedy it seeks, its previous complaint against opioid manufacturers and distributors sought "an order directing Defendants to abate and pay damages for the public nuisance," (E287), but the County deleted the reference to damages in this action to seek: "an order directing Defendants to pay for the abatement of the public nuisance," (E105).

20 (1983). Such orders include "orders for alimony, child support, and related counsel fees," "orders in domestic relations litigation," and an "order directing an assignee for the benefit of creditors to pay certain sums to creditors." *Id.* The "common thread" to these orders is that they involve the payment of "a specific sum of money" and "differ markedly from those of a typical judgment at law for the payment of money." *Id.* This Court has never recognized the payment of money as a component of equitable abatement relief in a county's common-law public-nuisance action.

2. A county has no authority to seek damages in a common-law public-nuisance action.

Although a *private* action for public nuisance can entail an award of damages, no such relief is available in a common law public nuisance action pursued by a county government. Maryland's Local Government Code authorizes a county to "provide for the prevention, abatement, and removal of nuisances" but does not authorize recovery of damages. Md. Code Ann., Local Gov't § 10-328. By specifically identifying the relief available to a county, the General Assembly necessarily excluded all other types of relief. The County's general statutory authority to sue does not change that. Section 9-201's general authorization to "sue and be sued," Md. Code Ann., Local Gov't § 9-201, must be exercised consistent with a county's specific statutory grant of power

concerning nuisances. *See Town of New Market v. Milrey, Inc.-FDI P'ship*, 90 Md. App. 528, 539 (1992).

This limited grant of authority is consistent with two independent principles governing the monetary relief the County seeks: The municipal cost recovery rule and the economic loss doctrine. *See Beretta*, 821 N.E.2d at 1138–47. The municipal cost recovery rule (also known as the free public services doctrine) provides that "public expenditures made in the performance of governmental functions are not recoverable in tort." *Id.* at 1144. Even broad police powers delegated to home-rule cities and counties—including the powers to sue and to abate nuisance conditions—do not include a general right to recover tort damages for the costs associated with providing public services that local governments must provide to their citizens and that citizens already fund through taxes. *See Ritchmount P'ship v. Bd. of Sup'rs of Elections*, 283 Md. 48, 56 (1978) (explaining that Home Rule Amendment does not confer legislative power upon counties, but mandates an expressly enumerated delegation of those powers by the General Assembly); *see also, e.g.*, *Ganim v. Smith & Wesson Corp.*, 1999 WL 1241909, at *6 & n.7 (Conn. Super. Ct. Dec. 10, 1999), *aff'd*, 780 A.2d 98 (Conn. 2001). If local governments could bring tort suits to recover the cost of every public expenditure, courts would effectively supplant this inherently legislative function. *Cf. Flowers v. Rock Creek Terrace Ltd. P'ship*, 308 Md. 432, 447–48 (1987) (discussing public-policy rationales for

the analogous "Fireman's Rule," under which firefighters cannot recover for negligently caused injuries that are inherent in their role).

Similarly, the economic loss doctrine precludes the recovery of tort damages premised on "negligence that causes purely economic harm in the absence of privity, physical injury, or risk of physical injury." *Bel Air Carpet, Inc. v. Korey Homes Bldg. Grp., LLC*, 249 Md. App. 109, 128 (2021) (quoting *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 611 (2017)); *see CVS Pharmacy, Inc.* v. *Bostwick*, 494 P.3d 572, 580 (Ariz. 2021) (dismissing negligence claim in a prescription opioid case brought by an Arizona hospital after finding no case "allowing a negligence claim against a third party for purely economic loss"). When seeking recovery for pure economic loss, an injured party must prove "an 'intimate nexus' between the parties as a condition to the imposition of tort liability," which may only "be satisfied by contractual privity . . . or its equivalent." *Swinson v. Lords Landing Vill. Condo.*, 360 Md. 462, 477 (2000) (citation omitted).[4] Here, the County does not allege personal or property damage; it seeks recovery for the costs of public services it was already obligated to provide. And no privity or

[4] One such "equivalent" recognized in Maryland is for the negligent supply of information for the guidance of others in business transactions. *Swinson*, 360 Md. at 477 (citing Restatement (Second) of Torts § 552). But the County does not, and cannot, allege any justifiable reliance on any allegedly false information supplied by Defendants in carrying out its government functions.

independent duty exists between the County and Defendants, precluding the recovery of these pure economic losses under Maryland law.

This Court should reaffirm that the remedy at law for a public-nuisance claim is limited to an indictment by the State, and a local government's remedy in a common-law public-nuisance action is limited to abatement by injunction.

3. The County has not suffered a special injury required to maintain a private claim for public nuisance.

Sensing the weakness of its ability to bring a claim in its capacity as a local government, the County has tried to recast its public-nuisance claim as also seeking monetary relief "in its proprietary capacity." (E334). While, "[o]rdinarily and generally the remedy applicable to a public nuisance is by indictment," a "private action will lie at the suit of *an individual* who has sustained a special damage differing, not in degree, but in kind, from that to which community has been subjected." *Bembe v. Comm'rs of Anne Arundel Cnty.*, 94 Md. 321, 327 (1902) (emphasis added); *see also Smith*, 180 Md. at 421 (private individual seeking "to remove a public nuisance . . . must show that he is the owner of property injured by the nuisance and also that he would suffer some special damage"). The County's attempt to wedge its claim into this category stretches Maryland law too far.

First, there is no support in Maryland for the proposition that a government plaintiff is legally capable of sustaining the required special damage to sustain an "individual" and "private" action for public nuisance. *Id.* And "[t]here is not a word in the *Restatement* about public officials recovering damages." Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. Tort L. 1, 18 (2011). As both the Second and Third Restatements explain, a private claim contemplates the recovery of damages only in *individual* actions for public nuisance, not in government actions. Restatement (Second) of Torts § 821C cmt. a ("The damage award, however, is limited to the extent of the special injury sustained by the private plaintiff, and is not a remedy available to a public entity plaintiff to the extent that it acts in the place of the 'sovereign.'"); Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. b ("An action by a public official will commonly lie to abate the nuisance by injunction but may not involve monetary recovery for harm done."); *see also Lead Paint*, 924 A.2d at 497–99 ("there is no right either historically, or through the Restatement (Second)'s formulation, for the public entity to seek to collect money damages in general" through public nuisance litigation). Here, by bringing a *public* nuisance suit, the County represents the interests of the community at large, and by the very nature of the claim, any alleged injury must broadly represent the general public's injury as a whole. As a government body, the County is not

suing as a member of the public, but as the public itself. It thus can neither experience nor legally allege injury apart from that of the community.

Second, even if a government plaintiff *could* seek damages, it cannot prove it has suffered a special injury. A special injury is harm that is distinct and particularized, affecting the complainant in a way that is different from the harm experienced by the general public. *Bembe*, 94 Md. at 327; *see also* Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. c ("courts recognize liability for a public nuisance in tort only to a plaintiff who has suffered a 'special injury' distinct in kind from the harm suffered by all members of the affected community").

The Supreme Judicial Court of Maine recently addressed this issue when a group of hospitals alleged that manufacturers, distributors, and pharmacies created a public nuisance in the form of "an increase in the incidence of opioid misuse." *E. Me. Med. Ctr. v. Walgreen Co.*, 331 A.3d 380, 392 (Me. 2025). The trial court dismissed the plaintiffs' nuisance claim for failure to allege the violation of a public right and for failure to allege a special injury. The Supreme Judicial Court held that even if the hospitals had alleged the violation of a public right, they had not suffered any special injury. The hospitals' alleged special injury—economic losses from treating patients with opioid use disorder—was not different in kind from any supposed injury to the public. *Id.* at 393. Rather, those alleged economic injuries were the same kinds of

economic losses claimed by "private and governmental entities, employers, family members, others who served and supported those suffering from opioid use disorders, and taxpayers who funded the cost of the governmental response to the opioid epidemic." *Id.*; *see also Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 130 (Iowa 1984) (rejecting a public-nuisance claim because "whatever damages have been suffered by plaintiffs have also been suffered by the entire business community and, therefore, such damages are *public* in nature rather than *special*").

Like the hospitals, the County does not purport to have sustained any economic injury different from the public. Its attempt to stand in the shoes of a private party for purposes of its damages claim fails.

CONCLUSION

This Court should answer the first certified question "no" and decline to answer the second question as unnecessary.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument in this appeal.

Dated this 22nd day of May, 2025.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

(1) This brief contains 12,218 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

(2) This brief complies with the requirements stated in Rule 8-112.

CERTIFICATE OF SERVICE

I CERTIFY that, on this 22nd day of May, 2025, the Brief for Appellants and Joint Record Extracts were filed and served electronically via MDEC upon all counsel of record. In addition, paper copies of the Brief for Appellants and Joint Record Extracts were sent to all parties via Fedex at the addresses below.

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