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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, Plaintiff-Below, Appellant, v. MONSANTO COMPANY, SOLUTIA, INC., and PHARMACIA LLC, Defendants-Below, Appellees.	No. 279, 2022 Appeal from the Superior Court of the State of Delaware, C.A. No. N21C-09-179 MMJ CCLD

SECOND CORRECTED BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE AMERICAN COATINGS ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing more than 170 manufacturers of paints and coatings, raw materials suppliers, distributors, and technical professionals. As the leading organization representing the coatings industry in the United States, a principal role of ACA is to serve as an advocate for its membership on legislative, regulatory, and

judicial issues at all levels. In addition, ACA undertakes programs and services that support the paint and coatings industries' commitment to environmental protection, sustainability, product stewardship, health and safety, corporate responsibility, and the advancement of science and technology. Collectively, ACA represents companies with more than 90% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

The Chamber, ATRA, and ACA (collectively the "*Amici*") have an interest in ensuring that Delaware's tort system remains stable and predictable, and that it does not retroactively punish businesses for conduct that was lawful when undertaken. In this case, the State alleges that third-party chemical discharges of polychlorinated biphenyls (PCBs) into various waterways have caused environmental degradation. But rather than seek to recover against those third parties, the State seeks to recover under theories of public nuisance and trespass against the manufacturer who lawfully produced and sold the PCBs.

As the Superior Court properly found in its well-reasoned decision, accepting this theory of liability would expand liability for public nuisance and trespass far beyond the bounds of what Delaware law has previously recognized. In accordance with the traditional understanding of the common law, Delaware law limits public-nuisance liability to circumstances in which the wrongdoer exercises control over

the nuisance-causing agent. It likewise limits trespass to recovery by a landowner against a wrongdoer who intrudes upon the land, either in his person or by an instrumentality he controls. The Superior Court correctly recognized that neither circumstance is alleged here.

Expanding public nuisance or trespass to create liability for the lawful selling of a product would transform them into "super-torts," arrogating to the judiciary the authority to act as a retroactive super-regulator. While that prospect would be deeply concerning in any jurisdiction, such an expansion under Delaware law would be incredibly disruptive to the national marketplace, given the number of businesses over which Delaware exercises general jurisdiction.

The Court should uphold the Superior Court's decision and reaffirm the traditional limitations on public-nuisance and trespass liability that the State seeks to set aside in this lawsuit.

SUMMARY OF ARGUMENT

1. While plaintiffs have successfully used public-nuisance claims to redress pollution of the air or public waterways, Delaware has wisely limited such claims to those who control the nuisance, *i.e.*, the alleged polluters themselves. Delaware courts have repeatedly rejected efforts to obtain damages or injunctive relief against manufacturers or distributors of goods under the guise of public nuisance based on the allegation that the *use* of those goods by their customers constitutes a nuisance.

2. Permitting recovery in this case would open Pandora's box. The State seeks to hold a manufacturer liable for the manufacture, sale, and advertisement of a product more than four decades ago. The State makes no allegation that the manufacturing, advertisement, or sale failed to comply with any then-existing statutes and regulations. Moreover, the alleged manufacturing at issue in this case took place entirely outside of Delaware. The State's logic would convert the courts of Delaware into retroactive judicial super-regulators.

3. The Superior Court's decision wisely cabins public-nuisance actions to claims involving alleged tortfeasors who exercised control over the instrumentality that caused the nuisance at the time of the nuisance. That approach not only accords with well-settled Delaware law, but also promotes the stability and predictability of

national commerce by respecting the important policies of federalism and separation of powers.

ARGUMENT

I. The State Seeks to Expand Public-Nuisance and Trespass Claims Far Beyond Their Historical Limits.[1]

A. This Case Falls Within a Pattern of Litigation Seeking the Expanded and Unwarranted Use of Public Nuisance as a Retroactive Regulatory Cause of Action.

The present suit is part of a nationwide trend of enterprising plaintiffs increasingly, and unjustifiably, turning to public nuisance as a theory of recovery. *See generally* U.S. Chamber Institute for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance*, March 2019, *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf [hereinafter "*Waking the Litigation Monster*"]. These efforts threaten to stretch public nuisance far beyond its historical applications and proper use. The Court should not encourage that worrisome trend.

Public nuisance originated in English law as a narrow mechanism for the government to abate conditions that impeded public roads and waterways. *Id.* at 3–5; *see also* Restat. 2d Torts § 821B cmt. a (1979) (noting its origins in

[1] *Amici* concentrate on public nuisance because the State's position is part of a nationwide trend seeking to transform the tort from its traditional role into a plenary tool of nationwide judicial policymaking in areas as diverse as pharmaceutical regulation, firearm policy, and clean-air regulation. To the extent the State seeks to refashion common law trespass to replicate the same judicial quasi-regulatory power that it seeks through its public nuisance claim, the same arguments and public policy problems discussed in this brief apply.

"purprestures, which were encroachments upon the royal domain or the public highway"). Strict principles guided the applicability of public nuisance, including requirements that a public right be involved, that there be a link to real property, and that the defendant proximately cause the harm and control the nuisance.

In recent decades, plaintiffs have sought to use public nuisance to combat a wide range of purported social ills, from asbestos and tobacco to firearms and lead paint. Many courts have appropriately refused to expand public nuisance to supplant more traditional and appropriate tort remedies. *See, e.g.*, *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum* Co., 984 F.2d 915, 920 (8th Cir. 1993) (surveying cases and finding a consensus that post-sale liability could not inhere against asbestos manufacturer because the manufacturer "lacked control of the product after the sale") (citing cases); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("[T]he public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim."); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (explaining, in a tobacco suit, that it was "unwilling to accept the State's invitation to expand a claim for public nuisance beyond its ground in real property"); *In re Lead Paint Litig.*, 924 A.2d 484, 494–95 (N.J. 2007) ("permit[ting] these complaints to proceed . . . would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical

limitations of the tort of public nuisance"); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (dismissing nuisance suit against gun manufacturers; noting that "there is [no] public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another").

One court aptly explained the dangers of using public-nuisance suits against industries perceived to be connected to societal ills:

> [G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, 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.
>
> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

New York ex rel. Spitzer v. Sturm, Ruger & Co., 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

Despite such warnings, plaintiffs have continued to bring public-nuisance claims to seek sweeping changes in public policy that are properly sought from legislatures, not courts. Such suits have targeted opioid manufacturers, the vape industry, energy and natural resources industry companies, firearm manufacturers,

plastics manufacturers, and chemical companies whose products are released into the environment due to the activities of the end-users. ATRA, *The Plaintiffs' Lawyer Quest for the Holy Grail*, at 6–14, (Apr. 14, 2020), available at https://www.atra.org/wp-content/uploads/2020/03/Public-Nuisance-Super-Tort.pdf. Among the common features of these lawsuits is the allegation that certain products ought never to have been manufactured, or should have been placed under more stringent regulatory regimes, and that the companies that profited from selling such products ought to bear the costs of any externalities traceable to their use. *Id.* at 14. But such "an analysis of the harm caused by [a category of products] versus [its] utility is better suited to legislative fact-finding and policymaking than to judicial assessment." *Beretta U.S.A. Corp.*, 821 N.E.2d at 1021. Prospective legislation—not retroactive regulation through judicial liability—is the appropriate response.

In the face of such lawsuits, "courts have enforced the boundary between the well-developed body of product liability law and public nuisance law." *Camden County Bd. of Chosen Freeholders v Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). The Superior Court properly did so here, and this Court should affirm.

B. Delaware Has Consistently Limited the Doctrine of Nuisance to Exclude Simple Products-Liability Claims.

Delaware courts have consistently rejected efforts to expand public nuisance into a public policy tool to regulate industries. From the earliest cases through to the modern era, Delaware law has consistently limited nuisance liability to a party who is in ownership or control of the nuisance at the time of the alleged harm. *See City of Wilmington v. Vandegrift*, 29 A. 1047, 1049–50 (Del. 1893) (sledding down public streets is a public nuisance for which the sled operators, not the city, are liable to a person injured in a crash); *Patton v. Simone*, 1992 WL 398478, at *9 (Del. Super. Dec. 14, 1992) (rejecting public-nuisance liability for an ungated elevator shaft in a suit against elevator servicing company because "[t]his was not [its] property, therefore, it cannot be the source of the nuisance").

Accordingly, Delaware courts have consistently rejected suits against manufacturers and distributers of legally produced goods on theories of products liability. For example, in *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super. Dec. 1, 2000), the Mayor of Wilmington sought to recover damages against handgun manufacturers and trade associations for the effects of gun violence on the people of Wilmington on a number of different theories of liability, including public nuisance. The court held that "no independent claim for public nuisance" had been alleged, explaining that "Delaware has yet to recognize a cause of action for public nuisance based upon products" and that Delaware courts were "hesitant to expand

public nuisance." *Id*. at *7. To the extent that recovery was possible for the lawful manufacture and sale of firearms whose ills the plaintiff characterized as a public nuisance, the court held that it must be under a traditional negligence theory such as for defective design. *Id*.

Likewise, in *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, (Del. Ch. Feb. 4, 2019), the State sought to recover against manufacturers and distributors of opioid pharmaceuticals, and against pharmacies, claiming that the consequences of opioid misuse were recoverable under a number of different theories of liability, including public nuisance. As the decision again explained, "public nuisance claims have not been recognized for products." *Id*. at *12. In addition, "[a] defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance." *Id*. at *13. Thus, while the State could state a claim to recover for allegedly deceptive advertising against a product's manufacturer, it had to do so under traditional theories of negligence and fraud rather than nuisance. *Id*. at *3–4, *15.

The sole Delaware case that has even arguably recognized a public nuisance in the context of the sale of commercial goods is *Craven v. Fifth Ward Republican Club, Inc.*, 146 A.2d 400 (Del. Ch. 1958), which the *amici* supporting the State cite. Amicus Br. at 7, 10. In that case, however, the nuisance claim related not to the sale of goods, but to sales occurring at places and times *forbidden by criminal statute.*

Id. at 402–03. The injunction issued in that case imposed no limitation on sales beyond the existing statutory prohibition, underscoring that Delaware courts will not use the concept of public nuisance as a mechanism for regulation of commercial products that were lawfully in commerce at the time of the alleged tort. *Id*.

Similarly, when the courts of Delaware have recognized a public-nuisance claim arising from alleged pollution, they have done so against the parties which allegedly produced the pollution, and thus were alleged to have exercised control on them at the time they became a nuisance. *E.g.*, *Lechliter v. Dept. of Nat. Resources & Environ. Control*, 2015 WL 9591587, at *17 (Del. Ch. Dec. 31, 2015) (complaining of windmill's sound and light pollution); *Alexander v. Evraz Claymont Steel Holdings, Inc.*, 2013 WL 8169799, at *1–2 (Del. Super. Mar. 31, 2013) (complaining of a steel plant operator's airborne emissions); *Artesian Water Co. v. New Castle Cty.*, 1983 WL 17986, at *1 (Del. Ch. Aug. 4, 1983) (complaining of a county landfill leaching pollutants into groundwater). The reason for that rule is straightforward: a defendant cannot be liable for an alleged nuisance that it cannot control or abate.

No Delaware judicial decision has ever expanded the doctrine of public nuisance to encompass a claim like the State's claim in this case, and the Superior Court properly declined to effect that change in Delaware law. The Court should

affirm the Superior Court's decision and reinforce the traditional limitations on public nuisance claims on which the Superior Court relied.

II. Recognition of the State's Aggressive Theories of Liability Would Result in a Sea Change in Delaware Law That Would Make Delaware a Hotbed for Public-Nuisance Lawsuits.

Expanding the torts of public nuisance to the facts of this case would, in the prescient words of the Eighth Circuit, create "a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15*, 984 F.2d at 921. Without limiting principles cabining this tort, a State can seek massive damages as an "abatement" remedy based solely on the alleged "interference" with some salutary feature of modern society, thereby dispensing with the many elements, defenses, and limitations essential to traditional torts liability. *See Waking the Litigation Monster* at 25–30. Indeed, the State urges this Court to adopt precisely that approach by dispensing with causation in favor of a relaxed standard that assigns public-nuisance liability to any company that "substantially participated" in the now-anathematized industry. Op. Br. at 16 (quoting *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467–68 (D. Md. 2019)). Companies would face substantial tort claims predicated on the lawful sale of legal products.

The expansion that the State seeks would have an enormous disruptive effect on businesses in Delaware and across the nation. Many commercial products involve tradeoffs between their uses and their external costs. For example, the State might sue smartphone manufacturers or social media companies, alleging that their products created a generation of distracted drivers and addicted children who drove

up the need for emergency and mental health services. *See, e.g.*, *Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 141–42 (2018).

To the extent such matters are the province of government at all, they are the domain of the elected, democratically accountable branches. The executive and legislative branches are the appropriate ones to address public concern about diffuse harms allegedly affecting large numbers of people. They are also best equipped to engage in the "fact-finding and policymaking" needed to fashion any necessary response, which typically requires the balancing of a diverse array of incommensurable interests. *Beretta U.S.A. Corp.*, 821 N.E.2d at 1021; *see also Far E. Conference v. United States*, 342 U.S. 570, 574–75 (1952).

As the State acknowledges, the U.S. Congress and the Delaware General Assembly *have* both performed their functions in weighing that balance, enacting laws restricting and regulating the manufacture, sale, and use of PCBs; directing the executive branches to propound administrative regulations; and providing for cleanup and remediation of existing pollution. *See* Op. Br. at 4 (indicating that Congress enacted CERCLA "to remedy hazardous waste sites and oversee the discharge of wastes, including PCBs," and that the General Assembly "enacted the Delaware Hazardous Substance Cleanup Act to address sites not governed by CERCLA"); *see also* 15 U.S.C. § 2605(e) (containing statutory limitations on the manufacture, sale, and use of PCBs, and directing the EPA to engage in

administrative rulemaking). It is the role of the legislature to decide the appropriate framework for pollution regulation; the judicial role is not to enact a parallel common-law public-nuisance regulatory scheme, but instead to ensure adherence to the requirements of due process and administrative law in the rulemaking process. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426–27 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (affirming dismissal of public-nuisance claims regarding greenhouse gases because "the solution … must rest in the hands of the legislative and executive branches of our government, not the federal common law"); *Diamond v. Gen. Motors Corp.*, 97 Cal.Rptr 639, 645 (Cal. App. 1971) ("Plaintiff is simply asking court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court.").

The dangers presented by expanding public-nuisance claims to address generalized social ills are particularly sharp in Delaware. This State is home to—and has personal jurisdiction over—two-thirds of all Fortune 500 companies. *See* Delaware Division of Corporations, *2021 Annual Report*, *available at* https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2021-Annual-Report.pdf. Given the importance of Delaware to the national marketplace, expanding public nuisance to impose liability for the lawful sale of products has the

potential to create a dangerous "super-tort." The Court should reject the State's effort to impose liability on companies whose *lawful* business practices can be arguably connected to broadly felt social problems.

[SIGNATURE PAGE FOLLOWS.]

CONCLUSION

For the forgoing reasons, the Chamber, ATRA, and ACA urge the Court to affirm the Superior Court's decision.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 13(d)(ii)

Counsel for Amici Curiae the Chamber of Commerce of the United States of America, the American Tort Reform Association, and the American Coatings Association hereby certifies:

1. This brief complies with the typeface requirement of Rule 13(a)(1) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitations of Rule 14(d)(1) and Rule 28(d) because it contains 3,363 words, which were counted in Microsoft Word 2016.

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