IN THE

SUPREME COURT OF THE UNITED STATES

Docket No. 18-102

STATE OF LINCOLN,

Petitioner,

v.

CHASE PHARMA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Twelfth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a public nuisance claim predicated on interference with public health involves a nonjusticiable political question if no other branch of government has the explicit, exclusive constitutional authority to manage the opioid industry and the injury alleged can be adequately redressed in tort.

2. Whether the State of Lincoln plausibly pled a claim of public nuisance when the State demonstrated that Respondents acted unreasonably in the creation and control of a marketing scheme aimed at overselling opioids which ultimately interfered with the right to public health, causing the State to expend billions of dollars of public resources.

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STATEMENT OF JURISDICTION

The United States District Court for the District of Lincoln had diversity jurisdiction pursuant to 28 U.S.C. § 1332. *See* 28 U.S.C. § 1332(a)(4) (2018). Following final judgment, the United States Court of Appeals for the Twelfth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. *See id.* § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See id.* § 1254(1).

OPINIONS BELOW

The Decision and Order of the United States District Court for the District of Lincoln is unreported and set out in the Record. R. at 1–15. The opinion of the United States Court of Appeals for the Twelfth Circuit is also unreported and provided in the Record. R. at 16–25.

RELEVANT PROVISIONS

This case involves LINC. STAT. 54–133 (2018). The relevant portion states that a nuisance is "any conduct or activity that is injurious to health; indecent; offensive to the senses; or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property." LINC. STAT. 54–133 (2018). This case also involves the Restatements (Second) of Torts § 821B, adopted by the State of Lincoln in *Seward Cty. v. Blaine*, 233 Linc. 3d 1008 (1998) and reprinted in Appendix A.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Historically, the medical profession used opioids to treat pain in limited circumstances. R. at 2. Most commonly, doctors prescribed opioids to treat short-term pain following surgery or pain associated with cancer treatment or end-of-life care wherein the risk of addiction was most clearly outweighed by the benefit of pain relief. *Id.* Medical professionals limited opioid prescriptions out of concerns for addiction and lack of efficacy to treat acute or malignant pain. *Id.*

Once members of the profession began raising concerns over opioids, Chase Pharma, Inc., *et al.,* ("Respondents") employed new marketing tactics in response to medical profession's reluctance to prescribe opioid medication. *Id.* at 2—3. These tactics involved both branded and unbranded advertising strategies. *Id.* Respondents' branded advertising focused on direct marketing and sales representatives' promotions. *Id.* at 2. The unbranded marketing tactics focused on funding seemingly independent front groups and key opinion leaders that disseminated opioid-favoring assurances in journal articles and at continuing medical education seminars. *Id.*

Respondents' marketing regime aimed to inflate opioid sales through four main tactics. *Id.* at 3—4. First, Respondents identified and targeted providers, such as primary care doctors, who were more likely to treat patients with chronic pain,

such as veterans and the elderly, despite the group's high susceptibility to opioid's negative effects. *Id.* at 4. Second, to ensure long-term use of their medication, Respondents used their marketing to assure the medical community that opioids were safe for the treatment of chronic pain. *Id.* at 3. Third, Respondents addressed medical professional's fears regarding addiction by convincing them that patients who might otherwise be predisposed to addiction can be protected through risk screening, drug testing, and continuous discussions with their care providers. *Id.* Respondents further reassured medical providers that the medications are formulated to be abuse-deterring through the use of time-release formulas. *Id.* If medical professionals remained unconvinced, Respondents claim that the risks of other non-opioid pain relievers like NSAIDs were greater than identified by the Federal Drug Administration ("FDA") and the Center for Disease Control ("CDC"). *Id.* at 4. Finally, if medical professionals became concerned that a patient demonstrates signs of addiction, Respondents re-characterized these symptoms as either physical dependence or "pseudoaddiction." *Id.* 3—4. The root of the "pseudoaddiction," according to Respondents, is untreated pain. *Id.* at 3. Thus, Respondents assured medical professionals that the most effective treatment for seemingly addiction-like symptoms was to increase the drug's dosage. *Id.* Respondents' marketing tactics are regulated by the FDA and Drug Enforcement Administration ("DEA"). *Id.* 2—4.

Respondents' marketing and sales tactics fundamentally changed the way doctors in Lincoln prescribed opioids. *Id.* at 4. Opioids were distributed in large

quantities for long-term use, thereby increasing the number of patients that face addiction. *Id.*

The State of Lincoln, like many states across the nation, is embroiled in a state of emergency stemming from the opioid crisis. *Id.* at 2. Approximately 2,000 people died from opioid use in 2016 alone. *Id.* The State, in an attempt to redress the impact of the opioid crisis, funds public hospitals, police forces, and social services for families affected families. *Id.* at 4. Public hospitals report a weekly average of dozens of overdose patients in addition to regular treatments of infants born opioid-dependent. *Id.* Lincoln's Bureau of Prisons provides opioid-related treatment to thousands of inmates throughout the state. *Id.* Police have responded to increased criminal activity resulting from opioid abusers and illegal drug deals. *Id.* at 4.

Overall, the State of Lincoln spends billions of dollars on this crisis. *Id*. at 2, 5. As such, a state of emergency was declared on January 23, 2017. *Id*. at 2.

PROCEDURAL HISTORY

The State of Lincoln filed suit in Lincoln state Court, challenging Respondents deceptive marketing strategies on April 13, 2017. R. at 1. The State of Lincoln sought relief under the public nuisance doctrine alleging, *inter alia*, that Respondents' conduct in marketing and selling their products contributed to the present opioid crisis and public nuisance in the State of Lincoln. *Id*. Specifically, that Respondents' marketing misleads medical professionals, resulting in over-prescription of opioids.

Respondents removed the action to the United States District Court for the District of Lincoln on April 21, 2017 based on diversity jurisdiction. *Id.* The District Court granted Respondents' Motion to Dismiss pursuant to F.R.C.P. 12(b)(6), finding that the case presented a nonjusticable political question. *Id.* Petitioners appealed the action to the United States Circuit Court of Appeals for the Twelfth Circuit. *Id.* at 16. In a 2–1 decision, the Twelfth Circuit affirmed the dismissal with Judge O'Connor in dissent, finding a justiciable issue and public nuisance. *Id.*

Petitioners filed a writ of certiorari, which was granted by this Court and limited to the following issues: (1) whether a public nuisance claim regarding the deceptive marketing and selling of opioids involves a nonjusticable political question; and (2) if not, whether the State of Lincoln properly stated a public nuisance claim. R. at 26.

SUMMARY OF THE ARGUMENT

The Court should reverse the Twelfth Circuit's judgment because the State's public nuisance claim does not involve a nonjusticiable political question and has been sufficiently pled as a matter of Lincoln public nuisance law.

To resolve the political question issue here, this Court should use the political question test articulated in *Zivotofsky ex rel. Zivotofsky v. Clinton*, which Judge O'Connor highlighted in her dissent, rather than the test articulated in *Baker v. Carr*, which both the District of Lincoln and the Twelfth Circuit applied in their opinions. *Zivotofsky* is more consistent with the Court's political question

jurisprudence over the last several decades and reflects the general duty of federal courts to adjudicate the cases brought before them.

Under *Zivotofsky*, a case involves a political question when either another branch of government holds the explicit and exclusive constitutional authority to decide the issue presented, or the court deciding the case lacks the appropriate judicial standards to fully resolve it. Here, there is no political question.

First, there is no provision in the United States Constitution that vests in either Congress or the Executive Branch the sole authority to manage opioid-related matters. Thus, another political branch does not hold the explicit and exclusive constitutional authority to decide the issue presented in this case. While Congress may have the ability to regulate certain prescription drugs, such regulatory ability does not equate to having the exclusive authority to regulate opioids. Thus, the Court is free to decide a case relating to the marketing and sales practices involved in opioid distribution.

Second, the Court has the appropriate judicial standards to render a decision because Lincoln's public nuisance tort standard gives the Court sufficient guidance to determine whether the State's Complaint plausibly pled a public nuisance claim. While Respondents may try to frame the State's claim as seeking political remedies, the State actually seeks nothing more than a judgment as a matter of public nuisance law and legal and equitable remedies for Respondents' liability in tort.

If the Court applies *Baker* instead of *Zivotofsky*, the result would remain the same. Under *Baker*, a case involves a political question if its resolution requires a

court to make an inappropriate policy determination. This case, however, does not require an inappropriate policy determination because, in applying Lincoln's public nuisance standard, the Court does not need to make any political assumptions or draw any policy conclusions to complete its legal analysis. While Respondents may try to misrepresent the State's case as requiring the Court to decide matters of national opioid policy, the State's claim is strictly limited to whether Respondents' actions within the State's borders constitute public nuisance under Lincoln tort law. Thus, because this case does not involve a nonjusticiable political question under either *Zivotofksy* or *Baker*, the Court should reverse the Twelfth Circuit's judgment on the political question issue.

In addition to reversing the Twelfth Circuit's political question determination, the Court should also reverse its decision on the public nuisance issue and reinstate this case for a ruling on the merits because the State has plausibly pled a claim. Specifically, Respondents have interfered with the public health of the State of Lincoln through their unreasonable marketing practices, leading to the rapid expansion of sales of their product in the State. Respondents' misleading marketing information led prescribers to think that opioids were safe for use in treating chronic, non-malignant pain. As a result, prescribers expanded their treatment with opioids, and more citizens became addicted to the drugs, ultimately culminating in the current state of emergency.

Both the Restatement (Second) of Torts and recent case law define public health as a public right. Defining a public right is a fact sensitive inquiry which

focuses on the nature of the interfering conduct. If the interference affects the public health or another right of the collective community, then the interference is a public nuisance. Respondents not only set off a chain of events which ultimately peaked in the creation of a state-wide health crisis, but also shunted the economic burden of responding to such a crisis to the State itself. In turn, the State has been forced to shift onto the citizens of Lincoln the economic burden that Respondents, themselves, should bear. Because the citizens of Lincoln will suffer economic harm as a result of Respondents' marketing tactics, Respondents' actions, by their nature, unreasonably interfered with a public right.

Additionally, Respondents' conduct was unreasonable because they marketed their product as one that was safe for a particular use when they knew or should have known that such a use carried with it a significant risk of addiction. Even lawful conduct can constitute a public nuisance when carried out unreasonably. Conduct is unreasonable if it either affects public health, or results in long-lasting effects. Respondents' conduct was particularly egregious because it targeted certain vulnerable populations and led their product to be prescribed to individuals who might not otherwise be suitable for long-term opioid use. Because medical providers were persuaded to prescribe Respondents' products in such a way, addiction spread throughout the state and harmed the public health. Citizens and taxpayers in the State will feel the effects of Respondents' actions for generations, as the State works to resolve this epidemic.

Finally, Respondents had the ability to control the instrumentality of the nuisance. The control inquiry in public nuisance law considers whether an action is a material element in bringing about the harm. While Respondents attempt to argue that they did not have control over the drugs at the time they were used illegally, control over the object of the nuisance is unnecessary. Rather, Respondents must have control of the instrumentality, which, in this case, is their system of practices used to market their product. Because Respondents had control over the source of the interference, that is, their marketing regime, and because this marketing regime was material in harming the public health, Respondents are liable in public nuisance.

Thus, because the State has pled a claim for public nuisance which is plausible on its face, this Court should reverse the decision of the Twelfth Circuit and reinstate and remand the matter to the District Court.

STANDARD OF REVIEW

In reviewing motions to dismiss under the political question doctrine, courts apply a *de novo* standard of review. *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527, 533 (D.C. Cir. 2018) (reviewing dismissal under political question doctrine) (citation omitted). On appeal, the Court should accept the factual allegations as true. *See Leatherman v. Tarrant Cty.*, 507 U.S. 163, 164 (1993).

ARGUMENT

I. THE STATE'S PUBLIC NUISANCE CLAIM DOES NOT INVOLVE A NONJUSTICIABLE POLITICAL QUESTION BECAUSE THE COURT CAN APPLY AN APPROPRIATE JUDICIAL STANDARD TO FULLY RESOLVE THE CASE WITHOUT INTRUDING ON ANOTHER POLITICAL BRANCH'S CONSTITUTIONAL AUTHORITY AND WITHOUT MAKING AN INAPPROPRIATE POLICY DETERMINATION.

The Court should reverse the Twelfth Circuit's judgment because this case does not present a political question and is therefore justiciable. As a general constitutional matter, federal courts have a duty to decide the cases that litigants bring before them. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). The political question doctrine, however, serves as a "limited and narrow exception" to that fundamental principle. *Starr Int'l*, 910 F.3d at 533. A case involves a political question when it "revolve[s] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). Such cases are nonjusticiable and require dismissal. *See Baker v. Carr*, 369 U.S. 186, 196, 208–09 (1962). When a party moves to dismiss for nonjusticiability under the political question doctrine, "it must be clear from the Complaint that the case involves or requires determination of an inextricably linked political question." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 438 F. Supp. 2d 291, 295 (S.D.N.Y. 2006) (citation omitted).

This case does not involve a political question. The operative framework for analyzing political questions does not come from *Baker v. Carr*, but rather

Zivotofsky ex rel. Zivotofsky v. Clinton, which cemented a decades-long trend of narrowing the political question doctrine and making it difficult to invoke. Under *Zivotofsky*, this case does not involve a political question because the text of the Constitution does not commit the management of opioid-related matters to another political branch, and because public nuisance tort law provides an appropriate judicial standard for resolving the State's claims. Even if the Court chooses to follow *Baker* instead of *Zivotofsky*, still no political question arises because applying public nuisance law to the facts in the Record does not require the Court to make an inappropriate policy determination. Thus, the Twelfth Circuit erred in concluding that this case presents a political question, and its decision should therefore be reversed.

A. *Zivotofsky*, which Narrowed *Baker's* Inappropriately Broad Political Question Standard, Now Provides the Operative Framework for Determining Whether a Political Question Exists.

The District of Lincoln and Twelfth Circuit erred in relying on *Baker*'s political question standard instead of *Zivotofsky*'s, as Judge Connor's dissent correctly highlighted. *See* R. at 6, 17, 19. In determining whether this case involves a political question, the Court should follow *Zivotofsky*'s framework because it is the most updated and refined standard and reflects sound judicial policy.

In *Baker*, the Court stated that a case presents a political question if any one of the following six factors are present:

> [(1)] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> [(2)] [A] lack of judicially discoverable and manageable standards for resolving it; or
> [(3)] [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
> [(4)] [T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> [(5)] [A]n unusual need for unquestioning adherence to a political decision already made; or
> [(6)] [T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

Over time, however, the Court streamlined this standard: By the 1990s, the Court essentially ignored the last four *Baker* factors, choosing instead to use only the first two factors to decide political question cases. *See Clinton v. Jones*, 520 U.S. 681, 700 n.34 (1997); *Nixon v. United States*, 506 U.S. 224, 228 (1993). By the 2000s, the Court and many other federal circuit and district courts openly acknowledged the first two *Baker* factors' superiority over the last four. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("[The six *Baker* factors] are probably listed in descending order of both importance and certainty."); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 824 (9th Cir. 2017) (explaining that the third, fourth, fifth, and sixth *Baker* factors "are usually less significant than the first two"); *MTBE*, 438 F. Supp. 2d at 297 (citations omitted) (highlighting the Court's emphasis on the first and second *Baker* factors).

The Court solidified this gradual narrowing of *Baker* in 2012 when it decided *Zivotofsky*, the most recent case to clearly and robustly describe the political

question doctrine's scope.[1] *See* 566 U.S. 189, 195 (2012). When providing the framework for analyzing political questions, the Court echoed *Clinton* and *Nixon* and mentioned only the first two *Baker* factors: "[A case] involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citations and internal quotation marks omitted).

In the wake of *Zivotofsky*, lower courts have consistently focused on the first two *Baker* factors when deciding political question cases. *See, e.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 822 (9th Cir. 2017). Both the District of Columbia Circuit and Ninth Circuit, for instance, now relegate the four remaining *Baker* factors to merely "prudential" concerns that may encourage courts to dismiss cases. *See Al-Tamimi*, 916 F.3d at 12; *Ctr. for Biological Diversity*, 868 F.3d at 824–25.

Courts following *Zivotofsky* hesitate to dismiss cases based solely on the third, fourth, fifth, or sixth *Baker* factor. *See Al-Tamimi*, 916 F.3d at 12 ("[I]f the first two *Baker* factors are not present, more is required to create a political

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[1] Last term, the Court dismissed a case because it presented a political question under the second *Baker* factor. *See Rucho v. Common Cause*, 139 S.Ct. 2484, 2494, 2507–08 (2019). While the Court indicated that the second *Baker* factor is just one way that a case could pose a political question, it did not identify the other ways. *See id.* at 2494. Thus, *Zivotofsky* remains the last case to illustrate the Court's complete framework for identifying political questions.

question than apparent inconsistency between a judicial decision and the position of another branch.") (Citation omitted.); *MTBE*, 438 F. Supp. 2d at 299 ("Considering the . . . Court's reticence in applying the later *Baker* [factors] to find a case nonjusticiable, utmost caution is warranted in considering a request based on these [factors]."). Never has the Court itself dismissed a case using any of the last four *Baker* factors; rather, the Court has only dismissed three political question cases after *Baker*, all of which implicated the first two *Baker* factors. *See Rucho*, 139 S.Ct. at 2494, 2507–08 (implicating second *Baker* factor); *Nixon*, 506 U.S. at 229–30, 238 (implicating first and second *Baker* factors); *Gilligan v. Morgan*, 413 U.S. 1, 6–7 (1973) (suggesting first *Baker* factor as basis for dismissal); Carol Szurkowski, *The Return of Classical Political Question Doctrine in* Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012)*, 37 Harv. J.L. & Pub. Pol'y 347, 355 (2014).

Baker's progeny leading up to and following *Zivotofsky* functionally eliminated two-thirds of the possible ways a case could involve a political question, which suggests that the Court has sought over time to make political question dismissals rare occurrences. *See* Zachary Baron Scemtob, Note, *The Political Question Doctrines:* Zivotofsky v. Clinton *and Getting Beyond the Textual-Prudential Paradigm*, 104 Geo. L.J. 1001, 1025 (2016) (highlighting scholars' belief that, after *Zivotofsky*, "the [political question] doctrine itself is ceasing to be"). The Court should continue this practice as a matter of policy, let alone precedent. Beneath the political question doctrine lies a respect for the "separation of powers" principle embedded in the Constitution. *See Baker*, 369 U.S. at 217. But the

doctrine's mere existence gives a court the opportunity to hide from a case in which "the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the [other] political branches." *See Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring in part); *see also* Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" As a Justiciability Doctrine*, 29 J.L. & Pol. 427, 479–80 (2014) (favoring decisions on cases' merits over political question dismissals). Thus, curtailing the political question doctrine's scope limits a court's ability to shy away from politically charged issues that they should resolve.

As this Court first stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). The Court should trust federal courts to have the restraint to hear a politically charged case, review the facts and law, determine whether another political branch's proposed remedy complies with that branch's constitutional authority and, if not, resolve the case on its legal merits. *See* Skinner, *supra*, at 479–80 (highlighting the need for this policy when litigating individual rights). Equipping courts with the trust to decide weighty issues in a principled manner would not only mirror the shift away from overreliance on the political question doctrine, but would also appreciate the judiciary's fundamental role in the "separation of powers."

This Court should decide the political question issue in this case and use the *Zivotofsky* framework rather than the six-factor *Baker* standard to remain

consistent with the Court's gradual narrowing of the political question doctrine since the 1960s. Moreover, applying a framework that appreciates a more limited view of the political question doctrine would invite the Court to thoroughly consider the legal merits of this case and provide principled guidance. While Respondents may highlight that the Court has yet to fully overturn *Baker*, its six-factor test is, at best, an obsolete standard that the Court has swept aside for decades. Thus, *Zivotofsky* provides the appropriate framework for resolving the political question issue in this case.

B. This Case Does Not Present a Political Question Under the *Zivotofsky* Framework.

Under *Zivotofsky*, no political question arises in this case because the Constitution does not exclusively commit the management of opioid-related matters to another political branch, and because public nuisance law provides an adequate judicial standard for resolving the State's claims. To involve a political question, a case must involve either "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (citations omitted). The Court should reverse the dismissal of this case under the political question doctrine because the Constitution gives neither Congress nor the Executive Branch explicit and exclusive control over opioid-related matters, and a well-defined body of tort law will guide the Court to fully resolve the issues presented.

1. The Constitution does not explicitly give another political branch exclusive control over opioid-related matters.

There is no specific constitutional provision that grants Congress or the Executive Branch the exclusive control to manage opioid-related matters; thus, this case does not implicate "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *See Zivotofsky*, 566 U.S. at 195 (citations omitted). A textual commitment to another branch is "the dominant consideration in any political question inquiry." *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991) (citations omitted); *see Vieth*, 541 U.S. at 278.

A textual commitment exists if, to resolve a case involving certain subject matter, a court must encroach upon another political branch's explicit and exclusive constitutional authority to define and exert power over that subject matter. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 872 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *see also Nixon*, 506 U.S. at 240 (White, J., concurring). In *Nixon*, Congress sought to impeach a federal district judge through an official Senate trial pursuant to Art. I, § 3, cl. 6 of the Constitution. 506 U.S. at 226. The Senate issued a rule that a committee of Senators, rather than the Senate in its entirety, would manage the evidentiary hearings. *Id.* at 227–28. The judge sought a declaratory judgment from the Court that this rule violated the impeachment trial provision under Art. I, which entitled him to hearings before the entire Senate. *Id.* at 228. The Court concluded that because this clause of Art. I granted the Senate the exclusive power to conduct impeachment trials, scrutinizing

the designs of these trials would improperly interfere with Congress's constitutional authority. *Id.* at 234–36.

Conversely, if resolving a case falls squarely within the judiciary's constitutional authority, then there is no textual commitment to another political branch. *See Zivotofsky*, 566 U.S. at 195–97 (asking court to determine statute's constitutionality through judicial review); *Baker*, 369 U.S. at 237 (asking court to determine whether state government's actions violate Fourteenth Amendment).

But even in a case where the judiciary's constitutional authority is less explicit, no political question arises under the first *Baker* factor in the absence of a constitutional provision that specifically delegates the authority in question to another political branch. *See Native Vill. of Kivalina*, 663 F. Supp. 2d at 872 (citations omitted). In *Native Vill. of Kivalina*, a municipality and city filed, *inter alia*, a public nuisance claim against a group of energy and oil companies alleging that these companies' practices contributed to global warming and cost the city's residents several million dollars in damages. 663 F. Supp. 2d at 869. Because the Northern District of California could not find a constitutional provision that explicitly granted Congress or the Executive Branch the sole authority to manage these global warming issues, the District Court "presume[d] that no such limitation exist[ed]" and therefore concluded that it could provide a remedy that would not encroach upon another political branch. *Id.* at 873 (citations omitted). The District Court also explained that Congress's ability to regulate activities related to global

warming does not mean that Congress has the "exclusive" constitutional authority to do so. *Id.* at 782 (citation omitted).

In the case at bar, the Record is devoid of any reference to a specific constitutional provision that explicitly grants Congress or the Executive Branch the exclusive authority to manage opioid-related matters. The Court, like the Northern District of California in *Native Vill. of Kivalina*, should therefore "presume that no such limitation exists." *See id.* at 873 (citation omitted). Consequently, deciding the issues raised in the State's Complaint and providing the requested relief would not interfere with another political branch's explicit and exclusive constitutional authority.

The Court should reject any attempt by Respondents to analogize Congress's power to regulate prescription drugs to its power to oversee judicial impeachment trials in *Nixon*. Such analogy would improperly conflate having the *ability* under the Constitution to regulate a certain area with having the *exclusive control* over that area. *See id.* at 782 (citation omitted). As Respondents correctly acknowledge, the Constitution gives Congress the ability to regulate prescription drugs. *See* R. at 4–5, 7 n.4. But as the District of Lincoln correctly noted, this ability does not mean that Congress "has been given exclusive power to do so." *See* R. at 7 n.4. Unlike in *Nixon*, where there was a specific constitutional clause that gave Congress the exclusive power to try impeachment cases, Congress's mere regulatory ability here does not suggest that there is a "textually demonstrable constitutional commitment" to give Congress the sole authority to manage opioid-related issues. *See Zivotofsky*,

566 U.S. at 195 (citation omitted); *Nixon*, 506 U.S. at 228–29. Thus, because there is no constitutional delegation of this subject matter to either Congress or the Executive Branch, deciding this case would not implicate the first *Baker* factor.

2. Public nuisance tort law, a well-defined legal standard, provides an appropriate judicial standard for resolving the State's case.

If the Constitution does not textually commit to another political branch the exclusive authority to decide the issues presented in a case, then a court must "lack . . . judicially discoverable and manageable standards for resolving [that case]" in order to dismiss it for nonjusticiability under the political question doctrine. *Zivotofsky*, 566 U.S. at 195 (citations omitted). Here, the Court has the appropriate judicial standard to resolve this case because the Court must simply apply state tort law to determine whether the State's allegations against Respondents adequately state a public nuisance claim.

A court lacks appropriate judicial standards if it requires the knowledge and expertise of other political branches to adequately address the issues presented and provide the necessary remedies. *See Rucho*, 139 S.Ct. at 2501–02; *Native Vill. of Kivalina*, 663 F. Supp. 2d at 874–76 (having to weigh alternative policies and their respective consequences on a global scale to decide a public nuisance case indicates a lack of appropriate judicial standards). In *Rucho*, a group of voters challenged the constitutionality of the maps for congressional districts in North Carolina and

Maryland, alleging that these districts were gerrymandered in such an exceedingly partisan manner that the maps themselves were unconstitutional. 139 S.Ct. at 2491. This case implicated a political question under the second *Baker* factor. *Id.* at 2494, 2506–07. The Court explained that appropriate judicial standards are those that are "principled, rational, and based upon reasoned distinctions found in the Constitution or laws." *Id.* at 2507 (citation and internal quotation marks omitted). Deciding the voters' case required the Court to determine whether these maps crossed the line from a permissible degree of partisan gerrymandering to an impermissible, unconstitutional degree of partisan gerrymandering. *Id.* at 2501. Essentially, the Court would have to decide what would be a "fair share of political power and influence" within these districts and adjust their maps accordingly. *Id.* at 2500–02. Because no legal principle could guide the Court in making these political power allocations, and thus provide the relief the voters sought, this case lacked appropriate judicial standards and required dismissal. *Id.* at 2501–02, 2508.

If, on the other hand, a court can identify and apply legal principles in a reasoned manner to resolve the issues in question, then adequate judicial standards exist. *See Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 329 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011) ("*AEP*"); *Native Vill of Kivalina*, 663 F. Supp. 2d at 874 ("the relevant inquiry is whether the judiciary is *granting relief in a reasoned fashion*") (citations omitted); *see also Zivotofsky*, 566 U.S. at 201 (analyzing parties' evidence and arguments to make legal determinations "is what courts do"). For instance, the Second, Fifth, Eleventh, and District of Columbia

Circuits indicate that cases do not implicate political questions under the second *Baker* factor if courts can resolve the presented issues and provide remedies using standards derived from tort law. *See, e.g.*, *Al-Tamimi*, 916 F.3d at 11–12; *McManaway v. KBR, Inc.*, 852 F.3d 444, 451 (5th Cir. 2017); *AEP*, 582 F.3d at 326, 328–29 (citations omitted) (including public nuisance standards under Restatement (Second) Torts § 821(B)); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (citation omitted). The possibility that a case may "arise in a politically charged context [would] not convert what is essentially an ordinary tort suit into a [nonjusticiable] political question." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

The Court has appropriate judicial standards to resolve this case because it can apply public nuisance tort law to fully resolve the State's claims and provide the requested remedies. As discussed in Part II, *infra* , Respondents' deceptive marketing and sales practices meet the standard for public nuisance as provided by Restatement (Second) of Torts § 821(B). R. at 2, 10; *see Seward Cty. v. Blaine*, 233 Linc. 3d 1008 (1998) (adopting Restatement (Second) of Torts § 821(B)(1979)). To remedy Respondents' tortious conduct, the State requests an abatement, damages, and further equitable relief, all which courts provide as remedies for public nuisance liability. R. at 1; *see* Restatement (Second) of Torts § 821(B), cmt. i. Resolving the State's claims merely requires the application of a known tort standard to the facts on the record, which multiple circuits have held to be an adequate judicial standard that does not implicate the second *Baker* factor. *See Al-*

Tamimi, 916 F.3d at 11–12; *McManaway*, 852 F.3d at 451; *AEP*, 582 F.3d at 328–29; *Linder*, 963 F.2d at 337.

Any attempt by Respondents to frame the State's claims as "focus[ing] on whether opioid drug use is good for the citizens of Lincoln" and asking the Court to make a "complex *societal* assessment" would fundamentally mischaracterize the State's allegations. *See* R. at 9. This case is not about the inherent "goodness" of opioid use; it is about the specific, concrete harms resulting from Respondents' deceitful methods of marketing and selling opioids, which have created a public nuisance in the State of Lincoln. The State does not seek a "complex societal assessment"; it seeks legal and equitable remedies for the injuries resulting from Respondents' actions in tort. *See* R. at 1, 9 (emphasis removed).

Unlike *Rucho*, which required the Court to determine and manually allocate a "fair share of political power and influence" within congressional districts, the State's claim and requested remedy here simply require the Court to determine whether the facts on the Record meet a public nuisance tort standard. *See Rucho*, 139 S.Ct. at 2502. As the Court noted in *Zivotofsky*, applying law to facts "is what courts do." 566 U.S. at 201. The "politically charged context" in which this case arises does not affect this Court's competence to adjudicate it. *See Klinghoffer*, 937 F.2d at 49.

The Twelfth Circuit cites *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981), to suggest that nuisance principles are "often vague and indeterminate" judicial standards. R. at 17 (citing *City of Milwaukee*, 451 U.S. 304 at 317). But it

is worth noting that the Court in *City of Milwaukee* made this remark to describe federal common law that a federal statute in question had displaced. *See City of Milwaukee*, 451 U.S. 304 at 317. The Court should disregard this remark because it had nothing to do with the quality of the public nuisance standard under Restatement (Second) of Torts § 821(B).

Thus, the existence of appropriate judicial standards shows that the second *Baker* factor does not apply to this case. Because this case implicates neither the first nor second *Baker* factor, the Court should conclude that no political question exists and reverse the judgment of the Twelfth Circuit.

C. If the Court Were to Disregard *Zivotofsky*, this Case Still Would Not Present a Political Question under *Baker* Because Its Resolution Does Not Require an Inappropriate Policy Determination.

Even if the Court chooses to apply the six-factor *Baker* standard instead of the *Zivotofsky* framework, this case still would not present a political question. Choosing to follow *Baker* instead of *Zivotofsky* would allow the Court to also find a political question if one of these last four factors are present:

> (3) [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
> (4) [T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> (5) [A]n unusual need for unquestioning adherence to a political decision already made; or
> (6) [T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. Notably, Respondents do not assert that the fourth, fifth, or sixth factor applies to the case at bar. R. at 21. Therefore, replacing *Zivotofsky*'s political question framework with *Baker*'s would only give the Court one more possible basis for finding a political question—the third *Baker* factor.

As an initial matter, if the Court were to find the third *Baker* factor relevant to the political question analysis in this case, the Court should still consider its prior recognition that this factor is less important than the first two. *See Vieth*, 541 U.S. at 278. Nevertheless, it is possible to decide this case without making an inappropriate policy determination because the Court can complete its public nuisance analysis without needing to decide matters of national opioid policy along the way. By not requiring the imposition of judicial policy on such a complex health issue, this case does not involve the third *Baker* factor.

There is little difference between the second and third *Baker* factors because both signify instances of "decision[-]making beyond courts' competence." *Ctr. for Biological Diversity*, 868 F.3d at 829 (citation omitted). Which of these two factors is immediately relevant depends on the step in a court's decision-making process: First, a court must locate an appropriate judicial standard for resolving a case; otherwise, the case is nonjusticiable under the second *Baker* factor. *See id.* at 828–29 (identifying multistep analysis for determining injunctive relief is an appropriate judicial standard). Then, when applying that judicial standard, the court must not need to "make a policy judgment of a legislative nature" to complete its analysis and render a decision; if the court must make such a judgment, then the case is

nonjusticiable under the third *Baker* factor. *See id.* at 829 (applying steps of injunctive relief analysis, an appropriate judicial standard, does not require court to make "nonjudicial" policy decisions); *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (citation omitted).

If resolving a case requires a court to identify the scope of a wide-ranging political issue, determine how to best correct it, and allocate fault to the actors involved, then it is impossible for the Court to resolve the case without "mak[ing] a policy judgment of a legislative nature." *See EEOC*, 400 F.3d at 784 (citation omitted); *Native Vill. of Kivalina*, 663 F. Supp. 2d at 876–78. In *Native Vill. of Kivalina*, a municipality and city sought damages from several energy and oil companies for their greenhouse gas emissions. 663 F. Supp. 2d at 869. The Northern District of California found that in order to provide the requested remedy, it would have to assess the levels of greenhouse gas emissions and determine the extent to which these companies impacted global warming—a phenomenon to which all humans contribute in some degree. *Id.* at 877. Making such determinations would have required the court to draw policy conclusions that were beyond judicial competence, thus implicating the third *Baker* factor. *Id.*

If, however, resolving a case requires nothing more than "legal and factual analysis," then it is possible to decide it without making an inappropriate policy determination. *See EEOC*, 400 F.3d at 784 (citation omitted). In *MTBE*, a group of municipalities sued several gasoline producers in a products liability case and alleged that an additive these gasoline producers used was contaminating the

groundwater in these municipalities. 438 F. Supp. 2d at 293–94. As a remedy, the municipalities sought to stop the gasoline producers from continuing to release more of this additive into the groundwater. *Id.* at 301 (citation omitted). The gasoline producers argued that ordering such a remedy would require the court to make inappropriate "economic, environmental, energy[,] and security" policy determinations. *Id.* at 300 (citation omitted). The Southern District of New York disagreed because resolving this case simply required it to analyze facts in light of applicable tort standards. *Id.* at 300–02. To provide the requested remedy, the court only needed to apply the products liability standard, determine liability, and prohibit these producers from making future contaminations. *Id.* at 301–02. The gasoline producers' assertion that this case required inappropriate policy determinations "blurred the line" between deciding the gasoline producers' liability in this case as a matter of tort law and making policy determinations about gasoline additive supplies nationwide. *Id.* at 300.

When applying Lincoln's public nuisance standard to the facts alleged in the Complaint, the Court need not make political decisions to fill in any analytical gaps. Unlike the municipalities in *Native Vill. of Kivalina*—which asked the Northern District of California to make broad, amorphous, and conclusive determinations about global warming, as well as allocate fault according to those determinations—the State here simply asks whether these specific marketing and sales practices from these specific pharmaceutical companies meet the legal standard for public nuisance. *See* R. at 1, 4–5; *Native Vill. of Kivalina*, 663 F. Supp. 2d at 877.

Moreover, as in *MTBE*, the State here seeks judicial intervention to stop these particular Respondents from continuing the conduct in question. *See* R. at 1; *MTBE*, 438 F. Supp. 2d at 301. To fully resolve this case, the District of Lincoln would only need to apply a tort standard, determine liability, and implement a remedy based on liability under that standard, just like the Southern District of New York did in *MTBE*. *See id.* at 301–02. At no point would the process of assessing these Respondents' conduct under public nuisance law require the District Court to decide the nuances of national opioid policy.

Respondents, however, frame the State's claims as requiring the District Court to determine, as a matter of policy, "whether and how any opioid drugs should be available and how they should be used." *See* R. at 17. The Court should reject Respondents' framing. Like the gasoline producers in *MTBE*, who "blurred the line" between applying a tort standard to reach a legal conclusion in a specific case and drawing a conclusion about what federal legislative policy ought to be, Respondents here blur the line between deciding whether the marketing and sales practices described in the Complaint constitute a public nuisance and deciding the inherent safety and appropriate use of opioids for citizens across the country. *See MTBE*, 438 F. Supp. 2d at 300. Because this case requires no such policy determination, the third *Baker* factor does not apply. Thus, in addition to not involving the first two *Baker* factors articulated in *Zivotofsky*, this case also does not involve the third *Baker* factor. The Court should therefore reverse the judgment of

the Twelfth Circuit because this case does not present a political question under either the *Zivotofsky* framework or the six-factor *Baker* test.

II. THE STATE PLAUSIBLY PLED A CLAIM FOR PUBLIC NUISANCE BECAUSE RESPONDENTS DELIBERATELY AND UNREASONABLY INTERFERED WITH THE PUBLIC HEALTH THROUGH THE USE OF DECEPTIVE MARKETING PREDICATED ON FALSE ASSERTIONS ABOUT THE SAFETY OF ITS OPIOID DRUGS.

This Court should reverse the decision of the Twelfth Circuit and hold that the State sufficiently pled a plausible claim for public nuisance. Respondents incorrectly claim that their actions neither created nor contributed to the opioid crisis and the resultant state of emergency in the State of Lincoln. While application of public nuisance law to the opioid crisis is novel, public nuisance law can satisfactorily remedy the injuries resulting from such a crisis. Here, the State's well-pled Complaint establishes Respondents' unreasonable interference with the citizen's right to public health; thus, this Court should reinstate and remand the matter for a hearing on its merits to mitigate the economic consequences the citizens have been forced to bear as a result of Respondents' interference with this right.

Public nuisance is a matter of state law, and a federal court deciding a public nuisance issue by diversity jurisdiction should follow the precedent of the highest state court in the jurisdiction to predict how it would decide that issue. *Camden Cty. Bd. of Chosen Freeholders v. Beretta*, 273 F.3d 536, 541 (3d Cir. 2001). Because the Lincoln Supreme Court has adopted the Restatement (Second) of Torts

("Restatement"), this Court should rely on the common law principles of public nuisance interpreted through case law. *See Seward*, 233 Linc.3d 1008 (1998).

The State of Lincoln statutorily defines nuisance as "[a]ny conduct or activity that is injurious to health; indecent; offensive to the senses; or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property." LINC. STAT. 54–133 (2018). The Restatement adds that a public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. If the facts as alleged establish that "the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public," then a party can maintain an action for public nuisance under the definition of the Restatement. *City of Cincinatti v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (3d Cir. 2002).

Courts have relied on both statutory text and the evolution of common law public nuisance to derive a definition of public nuisance. When considering these antecedents, courts generally define public nuisance as an unreasonable and substantial interference with a public right that the defendant either has control of or is capable of abating. *See* Victor E. Schwartz. Phil Goldberg, and Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 940 (2009); R. at 10. This Court should conclude that Respondents' highly calculated, misleading marketing claims, which downplayed

the risks of addiction, led to the opioid crisis by persuading medical professionals to more broadly prescribe Respondents' opioids.

The State's well-pled Complaint establishes a claim for public nuisance because the State sufficiently alleged that: (1) Respondents interfered with the public right to public health, imposing economic burdens on the citizens of Lincoln; (2) the interference was unreasonable because Respondents predicated their marketing campaign on false and misleading information; and (3) Respondents had control over the instrumentality of the nuisance because they had control over their marketing and distributing practices, and further, cessation of those practices would have abated the public nuisance.

Courts also evaluate whether a defendant's conduct or activity proximately caused the issue in question. However, as indicated in the Record, proximate cause is not an issue before this Court. R. at 10 n.8.

Dismissing this case at the pleading stage would undermine the ability of the State to adequately respond to the opioid crisis. Accordingly, the decision of the Twelfth Circuit should be reversed, and this case should be remanded and reinstated for a determination on its merits.

A. Respondents' Conduct in Marketing Their Drugs Interfered with the Public Health and Led to the Imposition of Substantial Economic Costs on the Citizens of Lincoln.

A public right is defined by the nature of the alleged interference, not by naming a particular social interest. *See, e.g.*, *City of Gary King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (2003) (finding that an activity that "generates injury

or inconvenience to others that is both sufficiently grave and sufficiently foreseeable" qualifies as nuisance); *Oklahoma ex rel. Hunter v. Purdue*, No. CJ-2017-816, slip op. at 26 (Okla. Dist. Aug. 26, 2019) (finding nearly analogous conduct as at issue in this case "more than enough to serve as the act or omission necessary to establish the first element of Oklahoma's public nuisance law"); *James v. Arms Technology, Inc.*, 820 A.2d 27, 51 (N.J. Super. Ct. App. Div. 2003) (acknowledging that a public nuisance may exist "if the conduct complained of involves a 'significant interference' with the public welfare"). Therefore, defining a public right requires a fact-sensitive determination which focuses on whether one can expect an activity to impose costs or inconveniences on members of the public which otherwise should be borne by the defendant. *See City of Gary*, 801 N.E.2d at 1231 (citing W. Page Keeton, Prosser and Keeton on The Law of Torts § 88 at 629–30 (5th ed.1984)).

Because the language of the State of Lincoln's nuisance statute is broad, the standards of the Restatement can clarify its application to the particular facts. *See generally, Id.* at 1222. The Restatement defines public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. A right common to the general public is collective in nature, producing a common injury, being dangerous or injurious to the general public, or harming the public health. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1124 (Ill. 2004). The Restatement also asserts that at common law, "'public health' has traditionally been considered a 'public right.'" *In re*

National Opiate Litigation, No. 1:17-MD-2804, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019) (citing Restatement (Second) of Torts § 821B). Courts have found, consistent with the Restatement, a right to public health in the context of opioid litigation. *Id.*; *see also Oklahoma ex rel. Hunter*, No. CJ-2017-816, slip op. at 26 (Okla. Dist. Aug. 26, 2019). In addition, if the nuisance interferes with the exercise of another right affecting the interests of the community at large, then that nuisance interferes with a public right. Restatement (Second) of Torts § 821B, cmt. g.

The State of Lincoln broadly defines nuisance in its statute, indicating its legislative intent to cover a wide range of conduct or activities. LINC. STAT. 54–133 (2018). The District Court erred when it narrowly framed the public right at stake in this case as society's interest in ensuring that individuals do not engage in the illegal use of a legal product. R. at 12. This error resulted from the District Court's reliance on *City of Chicago*, a case which involved a public nuisance claim brought by local government against several gun manufacturers, distributors, and dealers. *City of Chicago*, 821 N.E.2d at 1110.

In *City of Chicago*, the plaintiffs proceeded on the theory that defendants conducted their operations with the knowledge or intent that a significant number of their guns would enter the illegal market, violating the "right of the public to be free from the threat of gun violence and from jeopardy to health and safety." *Id.* at 1109. Despite the court's acknowledgement that the common law public nuisance "eludes exact definition" and that the existence of nuisance is fact-sensitive

determination made on a case-by-case basis, the court chose to define the public right based on a social interest rather than on the nature of the alleged interference. Consequently, the court characterized the public right at issue as the individual right, merely asserted on behalf of a collective, to be free from assault. *Id.* at 1110, 1115—17.

Like the court in *City of Chicago*, the District Court interpreted the requirement that the State allege interference with a public right too narrowly. *See* R. at 11—12. In fact, Lincoln's statute plainly covers "*any* conduct" and proceeds to list disjunctive descriptors to guide courts in analysis. *See* LINC. STAT. 54–133 (2018) (citing, specifically, conduct that is injurious to health) (emphasis added). Contrary to the District Court's interpretation, the public right at issue is not the narrow public right to be free from "cases of addiction or overdose deaths" or "a public right to be free from the risk that someone will engage in the illegal use of a legal product." R. at 12. Rather, Respondents interfered with the public health which resulted in substantial economic costs on the community.

The citizens of Lincoln bear the economic brunt of the billions of dollars that their government spends annually to combat the ongoing opioid crisis. *See* R. at 4. Public hospitals are expending resources to treat individuals who overdose and infants who are born dependent on opioids. *Id.* at 2. Prisons are spending money to treat the 3,200 inmates who would otherwise face potentially fatal withdrawal symptoms. *Id.* Police are spending time and money responding to overdoses and policing illegal drug transactions. *Id.* Because the opioid crisis is ongoing, the

citizens of the State of Lincoln will continue to bear the economic brunt of the State's response. *See id.* at 2. The culmination of this excessive economic burden undeniably amounts to a substantial interference to the public right of health and safety in the State of Lincoln.

In making the determination that this is not a public nuisance claim, the District Court relied on the case of *State v. Lead Ass'n*. 951 A.2d. 428, 454 (R.I. 2008). In so doing, the court opined that public nuisance cases were "reserved more appropriately for those indivisible resources shared by the public at large such as air, water, or public rights of way." *Id.* at 453 (citation omitted).

Unlike Lincoln's statute, Rhode Island's definition of nuisance directly contravenes the Restatement's explanation of public nuisance at comments g and h, even though the court touts that its definition of public nuisance is "largely consistent with . . . the Restatement (Second) of Torts." *Lead Ass'n*, 951 A.2d. at 445. The Rhode Island court states that in order for a nuisance to qualify as "public," it must "deprive *all* members of the community of a right to some resource to which they are otherwise entitled." *Id.* (emphasis added). Meanwhile, the Restatement, which is controlling in the State of Lincoln, expressly states, that "[i]t is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large." Restatement (Second) of Torts § 821B, cmt. g. Additionally, Rhode Island's definition of public nuisance links the interfering conduct to

resources connected with the land, despite the fact that the Restatement explains that "a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts, cmt. h. Because the Rhode Island Supreme Court so egregiously misinterpreted the statute, this Court should adopt the more suitable statutory interpretation found in the Restatement, emphasizing the impact of the conduct or activity over the precise number of individuals affected.

Thus, when defining the nature of the interference at issue here, this Court should rely on the Restatement's explanations which indicate that Respondents interfered with the public right to public health, imposing significant economic burdens on the citizens of the State of Lincoln.

B. Respondents' Marketing of Opioids for the Long-Term Treatment of Chronic, Non-Malignant Pain Constitutes an Unreasonable Interference with a Public Right.

Respondents' conduct not only interfered with a public right, but was also unreasonable because Respondents, acting with the foreknowledge that opioids would likely lead to addiction, deliberately deceived prescribers in order to flood the market with opioids. This Court should find that Respondents' creation and promulgation of a marketing campaign predicated on misleading information unreasonably interfered with the public right to health and safety. Even if an enterprise is highly regulated, a defendant's conduct may still be unreasonable if the conduct: (1) involves significant interference with the public health, safety, peace, comfort, or convenience; (2) is proscribed by statute, ordinance, or

administrative regulation; or (3) is continuing in nature or has produced a permanent or long-lasting effect, and, the defendant knows or has reason to know of the significant effect upon the public right. *City of Chicago*, 821 N.E.2d at 390; *City of Gary* 801 N.E.2d at 1233 (citing Restatement (Second) of Torts § 821B). In this case, Respondents' conduct was unreasonable because it promulgated deceptive marketing and sales practices which led to a significant interference with the public health. Further, Respondents' conduct has produced long-lasting results. The impact of the opioid crisis will be felt for generations as the State works to mitigate the impact of Respondents' conduct.

When determining whether the State sufficiently pled a claim of public nuisance, this Court should focus on the conduct at issue as indicated by the text of Lincoln's nuisance statute. *See City of Gary*, 801 N.E.2d at 1232 (interpreting a nuisance statute identical to the State of Lincoln's and opining that the scope of public nuisance extends beyond the context of real property because the proper focus is not on the historical context in which cases of public nuisance arose but on the text of the statute itself). Such conduct is unreasonable if it either significantly interferes with the public health or produces long-lasting effects within the community and Respondents either knew or had reason to know of the reasonably predictable harm that would result from their actions. *See Id.* at 1234.

Respondents claim that their conduct was lawful because they simply placed lawful products into the stream of commerce. *See* R. at 13. In this vein, Respondents echo the arguments of gun manufacturers in cases such as *Camden*

County Board of Chosen Freeholders v. Beretta, USA Corp. and *City of Philadelphia v. Beretta USA, Corp*. *Camden*, 273 F.3d at 540 ("[N]o New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers [of] lawful products that are lawfully placed in the stream of commerce."); *City of Philadelphia v. Beretta USA, Corp.*, 277 F.3d 415, 422 (3rd. Cir. 2002) (same). What Respondents fail to appreciate, however, is that the State does not contest the lawfulness of opioids themselves. In fact, prior to the 1990s, opioids were prevalent in the stream of commerce and had been used to treat acute and malignant pain with a measure of success. R. at 2. In this case, Respondents' behavior and conduct became unreasonable when they began to urge doctors to prescribe their drug more broadly, effectively flooding the market with their product. *Id.* 2–3. Their once-lawful conduct rose to the level of public nuisance because the enterprise was being conducted in an unreasonable manner. *See City of Chicago*, 821 N.E.2d at1124.

Again, in the context of legal handgun sales, the District Court for the Eastern District of New York found that members of the firearms industry created an unreasonable public harm when they failed to create safeguards to ensure that their guns were not sold to repeat customers. *See generally, NAACP v. AcuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003). The court properly focused its inquiry not on the guns themselves, but on the way in which the guns were being sold. *Id.* The court found that if the members of the industry had taken the requisite steps, then the supplies would have been prevented from entering the illegal handgun market.

Id. at 505. Consequently, the defendant's failure to take this step constituted an unreasonable public harm. *Id.*

Here, Respondents rely on their alleged compliance with federal statutory and regulatory requirements to claim that their conduct was reasonable and to absolve themselves of liability. *See* R. at 3–4. But their continuing reliance on the legality of the product blurs the line between products liability and public nuisance. This Court should reject Respondents' characterization and the resultant conflation of claims because "[a] public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition." *ConAgra Grocery Prods.*, 227 Cal. Rptr. 3d 499, 529 (Cal. Ct. App. 2017). While Respondents' products are regulated and approved by the FDA and DEA, Respondents acted unreasonably and contrary to the public health by engaging in a campaign to assure doctors that opioids were safe and effective for the treatment of chronic, non-malignant pain, specifically targeting doctors who were more likely to treat patients with chronic pain. R. at 3–4. Respondents had "knowledge of the reasonably predictable harm" because they were aware of the risk of addiction that accompanied their proffered treatment method. *Id.; see City of Gary* 801 N.E.2d at 1234. Further, Respondents were or should have been aware of the resultant costs that would be imposed to combat opioid addiction such as increased spending on law enforcement, public healthcare, and social services.

C. Respondents Controlled the Manner in Which They Marketed Opioids to Medical Professionals.

Respondents had control over the way they marketed the drugs in question to medical providers and subsequently influenced how those drugs were prescribed to individuals; therefore, Respondents' lack of control over the actual opioid pills at the time the harm occurred is not fatal to the State's public nuisance claim. *See City of Cincinnati*¸ 768 N.E.2d at 1143. Even if a defendant lacks physical control over the object of the nuisance at the time the nuisance was created, the defendant's contribution to the nuisance through marketing and distribution is a relevant factor in assessing liability. *See City of Chicago*, 821 N.E.2d at 1132. With this understanding, "[t]he relevant inquiry [becomes] whether the harm would have occurred absent the defendants' conduct or, in the alternative, whether defendants' conduct was a material element and a substantial factor in bringing about that harm." *City of Chicago*, 821 N.E.2d at 1134 (citation omitted).

A defendant can have control over the instrumentality of a nuisance by virtue of controlling its own marketing or distribution practices, such as by setting up a distribution system that increases access to the harmful products such as opioids. *See James*, 820 A.2d 27 at 52; *In re Opiate Litig.*, 2019 WL 3737023 at *10. For example, the New Jersey Appellate Division found that gun manufacturers had the requisite control in creating the distribution system that resulted in the manufacturer's guns entering the illegal market. *James*, 820 A.2d 27 at 52. The court found that the defendants were not required to have actual control over the

guns at the time the guns entered the illegal market. *Id.* at 332–33. Rather, the defendant's use of a distribution system, which they established and which they knew or should have known provides easier access to individuals who cannot legally access their products, constituted sufficient control for purposes of public nuisance. *Id.* Because Respondents had control over the way its opioid drugs were marketed and advertised to the prescribing parties, its conduct was material in shaping physicians' prescribing practices, rendering them liable in public nuisance.

Respondents' highly calculated marketing harmed the State of Lincoln because it led prescribers to believe they could safely prescribe Respondents' opidoids to more aggressively treat a wider range of pain. This highly calculated marketing campaign, a response to medical professional's limited use of opioids, included assuring doctors that they could control for risk of addiction through measures such as "screening for risk of addiction, discussions with patients, and drug testing." *Id.* When patients began displaying signs of opioid dependence, Respondents assured doctors that this was a condition called "pseudoaddiction" resulting from untreated pain. This prompted the medical providers to increase the prescribed dosages. *Id.* Respondents' tactics were consequently material in shaping how medical professionals prescribed opioids over the last two decades, evidencing their control in the creation of a scheme, like in *James*, to flood the market with more of their product.

The nuisance in this case stems from the increased prescription of opioids fueled by Respondents' marketing practices, not from the misuse of the product by

third parties. The District Court, therefore, misplaced its reliance on *Camden* and similar cases in coming to its decision. In *Camden*, the Third Circuit found that the presence of third parties, who controlled the sale of firearms after they were manufactured and distributed, broke the chain of control needed for a finding of public nuisance. *See Camden*, 273 F.3d at 541. The Third Circuit and other like-minded courts, however, overlooked the fact that the manufacturers and distributors knew or should have known that the "source of the interference with the public right" in these circumstances was not the object itself, the gun, but rather the fact that their products were being marketed, distributed, and sold in such a way that those who could not legally own firearms were able to obtain access and ownership. *Id.*

In this case, the instrumentality or source of the interference at issue is not the pills themselves, but the marketing techniques Respondents employed. While it is true that the pills are being abused after the point of sale, Respondents catalyzed the chain of events by encouraging doctors to prescribe their products for chronic, non-malignant pain, knowing that there was a significant risk that patients receiving opioids for the treatment of chronic pain would become addicted. *See* R. at 3—4. Respondents engaged in this manipulative conduct with the knowledge that their actions were going to have down-stream effects, and therefore, share in responsibility for the crisis that has emerged in the wake of their deceptive practices.

The comparison between the marketing practices used in the sale of guns and the sale of opioids is baseless because the nature of the products is inherently different. The gun manufacturers do not claim that their product is inherently safe; *See generally Camden*, 273 F.3d at 536; A reasonable person entering into a transaction for the purchase of a gun understands that the object it is contracting for is dangerous and has the potential to inflict serious harm. Additionally, gun manufacturers neither make representations to distributors that the product is safe nor misrepresent crucial information about their products to the distributors. Here, on the other hand, Respondents' marketing was predicated on the false misrepresentations it made to medical providers about the safety and efficacy of their opioids for the treatment of chronic, non-malignant pain. Patients also assume that when a medical provider prescribes a given medication, they are fully informed of any dangers or risks associated with the medication. Therefore, Respondents' marketing practices are substantially different.

Respondents' marketing practices were a material element in forming prescribing practices and the generation of the market for their products. In light of these practices, medically professionals detrimentally relied on Respondents and prescribed Respondents' opioids. Respondents' marketing practices were therefore a substantial factor in bringing about the harm alleged. Additionally, Respondents exercised sufficient control over the instrumentality. Consequently, this Court should reverse the finding the District Court, reinstating and remanding this matter based on the demonstration of public nuisance at this pleading stage.

D. Dismissing this Case at the Pleading Stage Would Undercut the Ability of the State of Lincoln to Adequately Respond to the Opioid Crisis.

There can be little doubt that the opioid crisis in the State of Lincoln has led to the deterioration of public health. While the State has already taken measures to abate the crisis, such as providing social services to affected families, increasing spending on treatment for overdose victims, and increasing spending in public hospitals, the crisis is ongoing. R. at 2, 4. The State should not be forced to bear the burden of remedying the injury caused by Respondents' actions. Therefore, the State brought this action against Respondents to hold pharmaceutical companies accountable for their role in the creation of the current state of crisis. If the District Court declines to decide this case as a matter of public nuisance law, then it will not only be depriving the State of Lincoln of a judicial remedy, but it will also deprive the State of effectively the only remedy for resolving the crisis.

Public health litigation has become a tool employed by the public to affect manufacturers' safety practices. Allowing litigation against product manufacturers creates a feedback mechanism whereby society can voice when it is less willing to accept a product's risks because those risks become too great. Jon S. Vernick, Lainie Rutkow & Daniel A. Salmon, *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 Am. J. Pub. Health 1991, 1995 (2007). In this way, tortious public health litigation can serve the dual role of prompting changes in product design and compensating injured victims. *See* Micah L. Berman, *Smoking Out the Impact of*

Tobacco-Related Decisions on Public Health Law, 75 Brook. L. Rev. 1, 31 (2009) (public health litigation can increase the cost of dangerous products, raise awareness of risks to the public, regulators, and legislators, and uncover and deter misconduct).

Tort has traditionally served a deterrent role. It is a cost-efficient measure of reducing injury by allocating the cost of the injury to those who are causing it. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DePaul L. Rev. 331 (2002). The major costs of maintaining and defending against litigation should guarantee that a company will take all reasonable steps to ensure the safety of its product. *Id.* (outlining the estimated $900 million Big Tobacco spends annually on settlement payments and lawyers' fees.). Consequently, many states and municipalities have begun to turn to the tort of public nuisance to have opioid manufacturers directly redress the injuries resulting from their role in the ongoing opioid crisis. *See* Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trail,* N.Y. TIMES (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html (explaining that more than 2,000 opioid lawsuits are pending around the country on the basis of public nuisance law).

The use of the public nuisance doctrine to redress the opioid crisis would not create unlimited liability. Such arguments against the seeming expansion of public nuisance have been raised by gun and lead paint manufacturers defending public nuisance suits. *See generally City of Chicago*, 821 N.E.2d 1099; *Lead Ass'n* 951

A.2d. 428. However, this speculation has proven to be unfounded insofar as the use of public nuisance law has led not to unlimited liability but landmark settlement agreements. *See* MASTER SETTLEMENT AGREEMENT (1998), https://perma.cc/6NXX-9C8U. For example, following the decades of litigation against tobacco companies, the tobacco industry and forty-six states reached a settlement agreement wherein the states waived any future legal claims they might have against the tobacco companies in exchange for general indemnification for major expenses incurred by the states in redressing tobacco's effect on the public health. *See* MASTER SETTLEMENT AGREEMENT. The tobacco companies also agreed to implement new marketing changes such as prohibiting the direct and indirect targeting of young smokers and restricting placement of their products in entertainment and other media. *Id.*

The tobacco Master Settlement Agreement demonstrates the plausibility of using the tort of public nuisance to obtain both economic and injunctive relief. Although tobacco remains on the market, which some argue is evidence of the ineffectiveness of the public nuisance doctrine, there is a fundamental difference between tobacco and opioids—tobacco cannot be made safe. Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 Brook. L. Rev. 1 (2009). In this way, public nuisance law can achieve for opioids what it could never achieve for tobacco; it can establish a way for states to ensure that a legal, yet potentially dangerous product that enters the state's market is

regulated so that the product which would otherwise be lawful does not end up being used unlawfully within the borders of the state.

Because the State of Lincoln is seeking redress of a distinct injury which took place within its own borders, shifting this issue to the other branches of the government would be inappropriate. This Court should not shy away from the use of this doctrine simply because redressing the effects of the opioid crisis might be perceived as a politically charged issue that has potential to conflict with the policy preferences of the other branches. *See Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring). This is especially important when this Court considers that any remedy that might be granted by the other branches would be ineffective in abating the crisis. As it is, the crisis has developed persisted in spite of FDA and DEA regulations and the Governor's declaration of a state of crisis. R. at 2. Therefore, this Court should reverse the decision of the Twelfth Circuit, remand and reinstate this case for a determination on its merits.

CONCLUSION

For the aforementioned reasons, Petitioner, State of Lincoln, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Twelfth Circuit.

Respectfully Submitted,

/s/_____
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State of Lincoln

APPENDIX A

Restatements (Second) of Torts § 821B Public Nuisance

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.