IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF LINCOLN,  

Petitioner,

v.

CHASE PHARMA, INC., et al.,  

Respondents.

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

BRIEF FOR RESPONDENT

Date: September 20, 2019

Team #2811  
Counsel for Respondent  
Oral Argument Requested
QUESTIONs Presented

I. In *Baker v. Carr*, the Supreme Court held that the political question doctrine bars federal courts from deciding a dispute presented when there is “a lack of judicially discoverable and manageable standards for resolving it,” or the issue would require “an initial policy determination of a kind clearly for nonjudicial discretion. The State of Lincoln alleges that Chase Pharma, a prescription drug manufacturer created a public nuisance. Did the State of Lincoln plead a justiciable question when it alleged that Chase Pharma is responsible for the opioid crisis, even though Chase Pharma fully complied with all FDA and DEA regulations?

II. Courts do not find state law public nuisance claims valid for lawful products which have been lawfully placed in the stream of commerce. The State of Lincoln alleges that Chase Pharma, created a state public nuisance via its role as an opioid distributor. Did the State of Lincoln sufficiently assert state law public nuisance claims when Congress clearly did not authorize such a standard and courts nationwide have consistently held that public nuisance law does not apply without meeting the required elements?
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The decision and order of the United State District Court for the District of Lincoln are unreported and contained in the Record. R. at 3-14. The decision and order of the United States Court of Appeals for the Twelfth Circuit are similarly unreported, and also available in the record. R. at 15-24.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. III, § 2, cl. 1.
STATEMENT OF THE CASE

This case involves allegations that Chase Pharma, a pharmaceutical company, created a public nuisance in the State of Lincoln.

Statement of the Facts

Respondent Chase Pharma is a pharmaceutical company that manufactures a number of prescription drugs, some of which contain opioids, for pain management. R. at 2. Although opium prescriptions overall have been declining for the past few years, opioid medications themselves have been prescribed for many years for pain management. Id. In recent years, cases of opioid misuse have increased in Lincoln, leading Governor Edwin Stanton to declare a state of emergency regarding the “opioid crisis” in 2017. Id.

The State alleges that defendants knowingly made false assertions about the safety of their opioid drugs and intentionally downplayed the risks of addiction in order to overcome the profession’s hesitation. R. at 3. In fact, Chase Pharma’s products are regulated and approved by both the Federal Drug Administration (“FDA”) and the Drug Enforcement Administration (“DEA”). R. at 4. The FDA and DEA closely monitor the promotion and marketing of prescription drugs and regulate manufacturers to ensure the drugs are used for proper medical purposes. Chase Pharma has—at all times— fully complied with all FDA and DEA regulations. At no time were Chase Pharma’s marketing activities inconsistent with industry practice. R. at 5.
Procedural History

On April 13, 2017, in response to declaring an “opioid crisis,” the State of Lincoln brought this suit against Chase Pharma, Inc., alleging that the manufacturers created a public nuisance in the State of Lincoln. R. at 2. Lincoln alleges that the manufacturers’ “sales and marketing practices unreasonably interfered with Lincoln citizens’ common rights to public health, welfare, and safety and created a reasonable apprehension of danger to person and property” from the effects addiction has had on their communities. Id.

Defendant timely removed the case to this Court, correctly asserting diversity jurisdiction under 28 U.S.C. § 1332 and removal jurisdiction under 28 U.S.C. § 1441. Defendants then filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) on April 28, 2017, asserting 1) the State’s claims raise a nonjusticiable political question and 2) the State failed as a matter of law to state a claim of public nuisance. The trial court granted Defendants’ Motion to Dismiss, stating that the claim raised a nonjusticiable political question because “the court would be required to balance the benefits and utility of the legitimate uses of the prescription drugs against the risks posed by their misuse, and there are not consistent, reliable, objective judicial standards by which a court can make such a complex societal assessment.” R. at 9. The trial court also found that the State failed to plead a plausible claim regarding the elements of public nuisance because 1) the State failed to allege any interference with a right held in common by the public; 2) the State failed to allege an unreasonable interference with a public right; and 3) the
State failed to allege that the defendants had control of the instrumentalities (products) at the time of the alleged injury and would have been able to abate any claimed public nuisance. R. at 10. The Twelfth Circuit Court of Appeals affirmed the ruling of the lower court, finding State’s public nuisance suit failed two of the six Baker v. Carr nonjusticiable public question factors. Baker v. Carr, 369 U.S. 186 (1962); R. at 17. Extending the reasoning from the trial court, the appellate court also affirmed the ruling that the State failed to state a claim of public nuisance. R. at 18.
SUMMARY OF THE ARGUMENT

The Court faces the legal questions of whether Lincoln alleged a judiciable question, and whether Lincoln’s may allege a cause of action predicated on a state public nuisance law. Both the issue of standing and the issue of whether or not the public nuisance law provides for a private cause of action are questions subject to de novo review.

I. Nonjusticiable Question

The political question doctrine, as part of the tripartite allocation of power, limits the judiciary from deciding public-policy questions that require a balancing of interests better suited to the political branches than the Court. This doctrine prevents federal courts from deciding a dispute when, inter alia, there is a lack of judicially discoverable standards for resolving the issue, or the issue would require an initial policy determination of a kind clearly for nonjudicial discretion. The State of Lincoln’s alleged harm asks the Court to both—decide a dispute with which they neither have a judicially discoverable standard nor an initial policy determination.

This Court, circuit courts, and state courts have repeatedly ruled that similar questions implicate the political question doctrine. While the State of Lincoln cites a few decisions favorable to their position, these decisions are either distinguishable or provide untenable precedent. In the lower court, the case the dissent found most persuasive, in fact, stated that the critical point is that Congress delegated to the appropriate agency the decision whether and how to regulate the issue and that an
expert agency is surely better equipped to do the job than judges issuing ad hoc, case-by-case decisions. The decisions most analogous to the instant case, and align with this Court’s precedent, all ruled against the plaintiffs. The Supreme Court should follow these decisions, reject the State of Lincoln’s alleged injury and affirm the lower court’s holding that the State of Lincoln’s claims are too vague and indeterminate to provide any real guidance to resolve the issue.

II. Public Nuisance

Under Lincoln law, the tort of Public Nuisance requires that a plaintiff state four elements: (1) the existence of a “public right”; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the instruments of the nuisance; and (4) proximate cause between defendant’s unreasonable conduct and the public nuisance, and any alleged injury. Here, the State failed to allege the existence of a public right, that Chase Pharma unreasonably interfered with a public right, and that Chase Pharma had control of the instruments of the alleged nuisance.

First, the State’s allegations regarding Chase Pharma’s products are more akin to the individual right to be free from the threat that some individual may use lawful products in a harmful way rather than to an established public right held common to the public generally and collectively. Courts have been reluctant to extend a public right under public nuisance law to include such a right, especially when dealing with lawful products that lawfully enter the stream of commerce. Second, even if the State alleged a valid public right, the State fails to allege an
interference with that right. In an area of business that is already highly regulated by federal law, Chase Pharma would have to have violated the applicable regulations, by negligent in carrying out the enterprise, or the regulation of the enterprise would have to be invalid. None of these situations are present in this case. Chase Pharma was fully compliant with the applicable federal regulations, there is no evidence that Chase Pharma was negligent in its conduct, and there is no claim that the federal regulations are invalid. Third, even if there was an unreasonable interference with a public right, Chase Pharma did not and does not control the instrumentality causing the alleged nuisance at the time the damage occurs. The State’s cause of action stems from the harms of addiction and criminal uses of Chase Pharma’s products. By the time such harmful misuses of the product occur by third parties, the chain of connection to Chase Pharma is too attenuated for Chase Pharma to have any control over the alleged public nuisance. Without the element of control, Chase Pharma is unable to abate the alleged nuisance, invalidating the State’s theory of remedy.

Because the State fails to allege three of the required elements of a claim for public nuisance, the Supreme Court should affirm the lower court’s holding that the State of Lincoln failed to allege a claim of public nuisance.
ARGUMENT

I. The Court should affirm the Twelfth Circuit Court of Appeals’s holding that the State of Lincoln’s allegations is a nonjusticiability political question.1

By alleging only a nonjusticiability question, the State of Lincoln’s claim is not appropriate for judicial resolution because it presents a public-policy question that requires a balancing of interests better suited to the political branches than the Court. The political question doctrine bars federal courts from deciding a dispute when there is “a lack of judicially discoverable and manageable standards for resolving [the issue],” or the issue would require “an initial policy determination of a kind clearly for nonjudicial discretion.” Baker v. Carr, 369 U.S. 186, 217 (1962); see also Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012)

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1 The case at bar also implicates the Commerce Clause. Though the Commerce Clause typically operates as a restraint on laws adopted by state legislatures, it also limits state common-law claims that apply to or directly control wholly out-of-state conduct. West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 214 (Iowa 1972). Cf. The Florida Star v. B.J.F., 491 U.S. 524, 532 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (both holding that the First Amendment applies to common law restrictions as well as statutory restrictions). At a minimum, the Commerce Clause precludes: (1) application of state law to “commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State,” and (2) state laws that have the “practical effect” of “directly control[ling] commerce occurring wholly outside the boundaries of a State.” Healy v. Beer Inst., 491 U.S. 324, 335-37 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)). Courts evaluating Commerce Clause challenges must consider “what effect would arise if not one, but many or every, State adopted similar [laws],” id. at 336, because the purpose of the Commerce Clause is to prevent States from “arbitrarily . . . exalt[ing] the public policy of one state over that of another . . . .” Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 667-68 (7th Cir. 2010); see also North Dakota v. Heydinger, 825 F.3d 912, 922 (8th Cir. 2016). Here, the State’s theory of damages attempts to hold Chase Pharma liable for wholly out-of-state conduct. And even if the State restricted its damages theory only to Chase Pharma’s in-state conduct, the “practical effect” of the claims would be to regulate conduct “occurring wholly outside the boundaries of” Lincoln. Healy, 491 U.S. at 336.
(citing Baker, 369 U.S. at 217). This doctrine arises from the Constitution’s core structural values of judicial modesty and restraint. A restraint that is necessary because “[t]he Judiciary is particularly ill suited to make such decisions, and courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.” Japan Whaling Ass’n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (quotation omitted); Vieth v. Jubelirer, 541 U.S. 267 (2004).

As early as Marbury v. Madison, Chief Justice Marshall stated that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, “respect the nation, not individual rights.” Id. at 166.

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the

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2 In Baker v. Carr, the Supreme Court identified, but did not enumerate, six indicators of nonjusticiable political questions: (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 [the issue]; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Baker, 369 U.S. at 217. The Fifth Circuit reasoned that “the inextricable presence of one or more of these factors will render the case nonjusticiable under the Article III ‘case or controversy’ requirement . . . .” Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978).

3 The second Goldwater factor lumps together the second and third Baker factors—inquiring whether the “resolution of the question demands that a court move beyond areas of judicial expertise.” See Goldwater v. Carter, 444 U.S. 996, 998 (1979).
point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. *Baker*, 369 U.S. at 198. Political questions are labeled “nonjusticiable” because there is an undeniable difference between finding no federal jurisdiction at the outset of a case and declaring that a particular matter is inappropriate for judicial resolution only after some consideration of the merits. *Id.*

The *Baker* analysis is not satisfied by “semantic cataloguing” of a particular matter as one implicating “foreign policy” or “national security.” Instead, *Baker* demands a “discriminating inquiry into the precise facts and posture of the particular case” before a court may withhold its own constitutional power to resolve cases and controversies. *Id.* at 216; see U.S. CONST. art. III, § 2, cl. 1. The Supreme Court “has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks omitted).

The Supreme Court requires that Motions to dismiss for failure to state a claim upon which relief can be granted are evaluated under Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), the analysis for dismissal is generally confined to a review of the complaint and its attachments. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). The Court requires enough facts to raise a reasonable expectation that discovery will produce enough evidence to indicate that a claim exists. *Lormand v. US Unwired*, 565 F.3d 228, 257 (5th Cir. 2009). Furthermore,
factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations omitted); see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (making it clear that *Twombly’s* standards apply beyond antitrust cases). Accordingly, these requirements preclude State’s claims.

Here, the State’s claims implicate national concerns, not just individual rights—and such judgment is best left to the political branches. *Marbury*, 5 U.S. at 166. As such, Chase Pharma asks the Court to dismiss the case for failure to state a claim upon which relief can be granted. Even when viewing the facts in the light most favorable to the plaintiff the inextricable presence and implication of the *Baker* factors renders this case nonjusticiable. Therefore, this Court should affirm the Twelfth Circuit Court of Appeals’s holding that the State of Lincoln’s allegations are a nonjudiciable political question.

A. The Court should affirm the Twelfth Circuit Court of Appeals because there is a lack of judicially discoverable and manageable standards for resolving the issue.

The State of Lincoln failed to state a claim upon which relief can be granted by alleging a public nuisance suit that would involve a nonjusticiable political question. The State’s claim walks squarely into the second *Baker* factor: whether there are judicially discoverable and manageable standards for resolving the issue. This factor makes the most sense when placed in the context of separation of

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4 This brief will focus on the prudential factors set for in *Baker*—specifically the second and third factors. The brief will not discuss the first factor or its line of case law because the issue at hand is not one for lack of jurisdiction over the subject matter, but rather for failure to state a claim upon which relief can be granted. This Court may however raise a 12(b)(1) issue *sua sponte*. 
powers: the lack of judicially discoverable and manageable standards is a means by which a court might infer that the issue is beyond its jurisdiction and that it is more appropriately addressed by another branch. The Twelfth Circuit reiterates this point when it states that “[t]he District Court correctly concluded under the second Baker factor that . . . [the] principles of public nuisance are too vague and indeterminate to provide any real guidance to the courts for the type of far-reaching claims brought the plaintiff in this case.” R. at 17 (citing City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317 (1981)).

Specifically, as a “function of the separation of powers,” Baker v. Carr, 369 U.S. at 210, the political question doctrine “excludes from judicial review those controversies which revolve around policy choices and vague 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’y, 478 U.S. 221, 230 (1986). However, because neither the Supreme Court nor the circuit courts have directly addressed the issue at hand, this Court should continue to adhere to an incrementalist approach consistent with similarly situated cases.

In Am. Elec. Power Co. v. Connecticut—the case J. Connor, in dissent, finds “most persuasive”—this Court observed that “[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate . . . emissions.” Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 426 (2011); R. at 20. The Court continued, “[i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of . . . emissions. The expert
agency is surely better equipped to do the job than the individual district judges issuing ad hoc, case-by-case injunctions.” *Id.* at 428. As is the circumstance in this case, the court came to this conclusion because courts “lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.” *Id.*; See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). The Twelfth Circuit agreed stating that the district court correctly concluded that the “[p]rinciples of public nuisance are too vague and indeterminate to provide any real guidance to the courts for the type of far-reaching claims brought by the plaintiff . . . .” R. at 17. The cases of other district and appellate courts demonstrate that, without an ability to balance the benefits and utility of the issue at hand, the court runs the risk of creating an inconsistent, unreliable, and subjective judicial standard—a standard almost all courts leave to the political branch of government. *See* R. at 9.

In *Kanuk v. State Dep’t of Nat. Res.*, the Supreme Court of Alaska examined this Court’s reasoning in *AEP*—and found this Court dismissed federal common-law nuisance claims filed against major electric utilities emitting large quantities of carbon dioxide because the appropriate federal agency, rather than judges, was better equipped to regulate major emitters of greenhouse gases under environmental statutes, such as the Clean Air Act. *Kanuk v. State Dep’t of Nat. Res.*, 335 P.3d 1088, 1098-03 (Alaska 2014). As is the case here, the court simply did not have the legal tools to reach a ruling that is “principled, rational, and based upon reasoned distinctions.” *Vieth v. Jubelirer*, 541 U.S. at 278.; *Alperin v. Vatican*
Bank, 410 F.3d 532, 552 (9th Cir. 2005) (affirming the district court’s grant of defendant’s motion to dismiss with respect to the political question doctrine stating: “The difficulty is that relief lies elsewhere. Not every wrong, even the worst, is cognizable as a legal claim. In this case, the [plaintiff’s] must look to the political branches for resolution [for their claims] which, at base, are political questions.”); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009), aff’d, 696 F.3d 849 (9th Cir. 2012). Here too, relief simply lies elsewhere.

In Native Vill. of Kivalina, the plaintiffs, much like the State of Lincoln here, unsuccessfully argued that the defendants created an unreasonable interference with a public right. The plaintiffs went on to argue that the alleged “significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience” was “of a continuing nature” or had produced a permanent or long-lasting effect and therefore the case was no different from any other claim of public nuisance with regard to discoverable and manageable standards. Native Vill. of Kivalina, 663 F. Supp. 2d at 874; R. at 7. However, the court was not remiss of the fact that the plaintiff’s argument ignored the fact the factfinder must weigh, inter alia, the benefits and utility of the defendant’s behavior. Native Vill. of Kivalina, 663 F. Supp. 2d at 875. In fact, the plaintiffs “fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions. Id. at 875 (citing Alperin, 410 F.3d
at 552. Similarly, the State of Lincoln has simply pled their way out of a claim upon which relief can be granted.

In the instant case, the State of Lincoln declared a state of emergency and alleged costs into the billions of dollars. R. at 2, 9, 9 n.5. The State “concedes [Chase Pharma’s] drugs and their labeling are consistent with FDA regulations and places its focus on whether opioid drug use is good for the citizens of Lincoln.” R. at 9 (emphasis added). This Court is not suited to address whether opioid drug use by the citizens of Lincoln is “good.” See R. at 8-9. This Court would be required to weigh, inter alia, the benefits and utility of lawful prescription drugs against the risks posed by both lawful and unlawful prescription drug misuse, abuse. R. at 9. Assuming, arguendo, the Court could find an objective principle to use, the district court points out that the court “would lack any legal method for calculating damages, crafting remedies, and allocating fault.” Id. It is well-settled law that judicial action must be governed by standard, by rule. Laws and policies promulgated by the political branches can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions. Vieth v. Jubelirer, 541 U.S. at 278.

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5 Mike Moore, former Mississippi attorney general, describes how tobacco settlement funds were spent: “As the years went by, legislators come and go, and governors come and go . . . . So a trust fund that should have $2.5 billion in it now doesn’t have much at all, and unfortunately . . . all across the country hundreds of millions of dollars have gone to states, and the states have made choices not to spend the money on public health and tobacco prevention.” All Things Considered, 15 Years Later, Where Did All The Cigarette Money Go?, (NPR radio broadcast, Oct. 13, 2013 5:52 PM) transcript available at https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go.
Although the Twelfth Court of Appeals correctly points out the *Wyeth* court allowed a tort claim against a drug manufacturer to proceed, this Court has nonetheless distinguished between “political questions” and “political cases.” *Wyeth v. Levine*, 555 U.S. 555 (2009); *Baker*, at 217; *Davis v. Bandemer*, 478 U.S. 109, 122 (1986); *U.S. Dep’t. of Commerce v. Montana*, 503 U.S. 442, 456 (1992). In *Wyeth*, this Court examined not whether agency action itself could preempt state law, but rather whether the agency’s view of the preemptive effect of the statutory labeling scheme was entitled to *Chevron-style* judicial deference. The Court utilized the rules of statutory construction to ultimately conclude that “it is not impossible for *Wyeth* to comply with its state- and federal-law obligations and that *Levine*’s common-law claims do not stand as an obstacle to the accomplishment of Congress’ purposes in the FDCA.” *Wyeth*, 555 U.S. at 581. *Wyeth* never implicated the political-question doctrine and therefore is a distinction without a difference with regard to the case at bar. While *Wyeth* did involve pharmaceuticals and the FDA there are simply no other similarities. And although federal courts undoubtedly are well suited to resolve new and complex issues and cases, this Court should not be persuaded that this is such a case.

In this case, unlike in *Wyeth*, the Court lacks any policy or statute to interpret—an indicator that an initial policy decision by a regulatory body is necessary. *See infra* Part B. As the Supreme Court explained: “Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or
seek the counsel of regulators in the States where the defendants are located.” Rather, judges are confined by a record comprising the evidence the parties present. As such, it becomes quickly apparent that the Court lacks any judicially discoverable and manageable standards for resolving the State of Lincoln’s issue.

Repeatedly, this Court and others have found that common-law suits, such as this one, raise a nonjusticiable political question. The Fourth Circuit has held that political solutions were one of the “checks built into the system to prevent abuses.” North Carolina, ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291, 300 (4th Cir. 2010); see also City of New York v. BP P.L.C., Case No. 18 Civ. 182 (JFK), 2018 WL 3475470, at *6-7 (S.D.N.Y. July 19, 2018) (dismissing suit regarding greenhouse gas emissions under political question doctrine because “litigat[ing] such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon [policy] decisions that are squarely within the purview of the political branches of the U.S. government”).

For yet another example, in Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), the plaintiffs asserted a number of common-law claims, including ones for public nuisance, private nuisance, and trespass. Dismissing the complaint based on the political question doctrine, the court reasoned that it was “unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants’ emissions unreasonably endanger the environment or the public without making policy determinations that weigh the
harm caused by the defendants’ actions against the benefits of the products they produce.” *Id.* at 864. The court went on to find that plaintiffs’ claims “constitute[d] non-justiciable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the Court to make initial policy determinations that have been entrusted to the EPA by Congress.” *Id.* at 865.

In other words, courts have consistently concluded that administrative agencies, not jurists, are best equipped to make the complex technical judgments, and undertake the careful balancing Congress requires in the FDA context.

The Court should therefore apply a consistent precedent declining to hear a political question when it lacks of judicially discoverable and manageable standards for doing so. Under this framework, appellant’s alleged claim is a nonjusticiable political question. Furthermore, to reverse the Twelfth Circuit Court of Appeals would run afoul of not only this Court’s precedent but would take the question away from the branch of government best equipped to answer. Even applying the dissent’s “most persuasive” case, the instant case is easily distinguishable based on the doctrine under consideration and the differing circumstances. For these reasons the Court should affirm the findings of the Twelfth Circuit and uphold the district court’s conclusion that the State of Lincoln failed to allege a claim upon which relief can be granted.

**B. The Court should affirm the Twelfth Circuit Court of Appeals because a resolution necessitates an initial policy determination of a kind clearly for nonjudicial discretion.**
A nonjusticiable political question also exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through a legal and factual analysis. *Baker*, 369 U.S. at 217; *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (citing *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992)). This factor is aimed at preventing the judiciary from “removing an important policy determination from the Legislature.” *Native Vill. of Kivalina*, 663 F. Supp. 2d at 876 (quoting *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006)). The fact that the State of Lincoln seeks an abatement and damages does not counsel a different result. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 876 (“Regardless of the relief sought, the resolution of Plaintiffs’ nuisance claim requires balancing the social utility of Defendants’ conduct with the harm it inflicts.”); *People of State of California v. Gen. Motors Corp.*, C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (concluding that despite the fact that the nuisance claim in *AEP* sought only equitable relief, “the Court finds that the same justiciability concerns predominate and significantly constrain this Court’s ability to properly adjudicate the current [common law nuisance claim for damages] because the Court must still make an initial policy decision in deciding whether there has been an ‘unreasonable interference with a right common to the general public.’”) (quoting *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981).

In *Peabody W. Coal Co.*, the Ninth Circuit found that the political question doctrine was not implicated by the EEOC’s claim because “the district court was not
called upon to make an “initial policy determination.”” Id. Rather, the question before the court was to “[r]esolv[e] whether and how Title VII applies [as] a matter of statutory interpretation and thus involve[d] simply implementing policy determinations Congress ha[d] already made.” Id. The issues were “entirely legal, and [were] of a sort ‘familiar to the courts.’” Id. (citation omitted).

In Kanuk, the Alaska Supreme Court applying Baker’s six-factor political-question test, concluded that the plaintiffs’ request for a declaratory judgment that the State was obliged to reduce carbon dioxide emissions by at least six percent per year from 2013 through 2050 violated Baker’s third factor that the legislature or the executive branch should make public policy decisions rather than the judiciary. Kanuk v. State Dep’t of Nat. Res., 335 P.3d 1088, 1098-03 (Alaska 2014) (citing Am. Elec. Power Co., 564 U.S. at 415-29.)

The State of Lincoln also fails to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about who should bear the cost of the nuisance. Native Vill. of Kivalina, 663 F. Supp. 2d at 876. The State acknowledges that the medical profession, drug dealers, and abusers are responsible on some level for contributing to the current situation. R. at 4. Yet, by pressing this lawsuit, the State of Lincoln is, in effect, asking this Court to make a

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6 To the extent that the opioid use is causing a systemic harm, it is evident that any person, entity or industry which misuses or abuses such drugs bears at least some responsibility for the State's alleged harm. The State of Lincoln readily acknowledges that the medical profession and “criminal activity” are responsible for “additional money” spent. R. at 4. Nonetheless, the State has chosen not to name any of these members in this lawsuit. The seemingly arbitrary selection of defendants, coupled with the gravity and extent of the harm alleged in this case, underscores the conclusion that the allocation of responsibility for the opioid crisis is best left to the executive or legislative branch.
political judgment that the multiple defendants named in this action should be the only ones to bear the cost. *Id.* at 877.

a. The FDA and DEA are expert agencies better equipped with the legal tools to reach a ruling that is principled, rational, and based upon reasoned distinctions.

The FDA, the market gatekeeper and sentinel for prescription medications, is responsible for determining whether prescription opioids meet safety and efficacy standards, and under what conditions they are market eligible. MICHAEL J. MALINOWSKI, HANDBOOK ON BIOTECHNOLOGY LAW, BUSINESS, AND POLICY 127-37 (2016); see also 21 U.S.C. §§ 351-360fff-7 (2012) (requirements for various prescription and over-the-counter products to meet prescription demands in accordance with FDA regulations and DEA Aggregate Production Quotas (“APQs”).

The State of Lincoln concedes that Chase Pharma, at all times, fully complied with all FDA and DEA regulations and that their marketing activities were consistent with industry practice.7 R. at 5. In fact, in May of 2019 an interagency taskforce, convened by the Department of Health and Human Services, in conjunction with the Department of Defense, the Department of Veterans Affairs, and the Executive Office of the President’s Office of National Drug Control Policy, was instructed to determine whether there are gaps in or inconsistencies between best practices for pain management and propose updates to best practices and

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recommendations on addressing gaps or inconsistencies. These entities, rather than
the court, are the experts that can set forth principled advice. Because the instant
case is unequivocally a policy judgment of a legislative nature this Court should
affirm the decision of the Twelfth Court of Appeals.

II. The Court should affirm the Federal Circuit Court for the Circuit
of Lincoln’s holding that the State of Lincoln may not assert a
state law public nuisance claim against Chase Pharma for lawful
products which have been lawfully placed in the stream of
commerce.

Even if the State’s claim is not dismissed based on the political question
doctrine, it should be dismissed because the State failed to plead a plausible claim
by failing to state several required elements of a public nuisance claim. To overcome
a 12(b)(6) motion to dismiss, a plaintiff must allege facts with sufficient specificity
that the stated claim for relief is plausible on face. Ashcroft v. Iqbal, 556 U.S. 662,
678-79 (2009). While this requires the court to assume all factual allegations are
true, the court does not presume that conclusory or legal assertions are true. Id. The

8 The taskforce notably found three interesting conclusions: (1) “Nationwide, nearly half of all opioid
overdose deaths in 2017 involved illicitly manufactured fentanyl;” (2) “Current widespread shortages
of several key parenteral opioids used for fast and reliable analgesic effects...are affecting
hospitals and cancer centers nationwide, leading to compromised acute pain management in the
critical care and postoperative settings;” and (3) “According to a recent CDC report using data from
the National Violent Death Reporting System, the percentage of people who died by suicide and had
evidence of chronic pain increased from 7.4% in 2003 to 10.2% in 2014.” U.S. DEP’T OF HEALTH AND
HUMAN SERVICES MAY 2019, PAIN MANAGEMENT BEST PRACTICES INTER-AGENCY TASK FORCE
REPORT: UPDATES, GAPS, INCONSISTENCIES, AND RECOMMENDATIONS 12,
plaintiff must plead facts to render the asserted claim plausible, but here, the State of Lincoln failed to do so. See id. at 670.

A. Public Nuisance Law Has Distinct Elements and Limits.

The State brings its claim under the State of Lincoln’s nuisance law, which defines nuisance as: “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 state statute follows the common law principles of the public nuisance tort. See Seward Cty. v. Blaine, 233 Linc. 3d 1008 (1998); R. at 10.

Centuries of jurisprudence define the purpose, elements, and boundaries of the tort of public nuisance. See Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. REV. 741 (2003) (describing public nuisance tort’s origin to 12th Century English common law to enable the King to enjoin infringements on its land and force the repair any damages). In general terms, a public nuisance is an “unreasonable interference with a right common to the general public.” City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 348-49 (1981) (Blackmun, J., dissenting) (citing to the Restatement (Second) of Torts § 821B); see also Linc. Stat. 54-133 (2018).9 While common law courts have applied

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9 The quintessential public nuisance is a barrier that stops the general public from being able to use a public right such as a public road or pollution that infects a public waterway. A “public right” has always been considered “the right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights-of-way.” 58 Am. Jur. 2d Nuisances § 32. It is “more than an aggregate of private rights by a large number of injured people.” Id. In other words, a “public right” is “collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.” Restatement (Second) of Torts § 821B, cmt. g (1979). If a person blocks the road for a reasonable purpose, such as landing a distressed plane, there is no
the tort in slightly different ways, the essence of public nuisance liability has remained largely consistent, requiring four time-honored elements: (1) the existence of a “public right;” (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the instruments of the nuisance; and (4) proximate cause between defendant’s unreasonable conduct, the public nuisance, and any alleged injury. See State v. Lead Indus. Ass’n, 951 A.2d 428, 452-53 (R.I. 2009) (calling the four elements “essential to establish” a public nuisance claim); see Seward Cty. v. Blaine, 223 Linc. 3d 1008 (1998); see also Victor E. Schwartz et al., 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). Here, the State failed to allege the existence of a “public right,” failed to allege any unreasonable conduct by the alleged tortfeasor in interfering with that public right, and failed to allege that Chase Pharma has control of the nuisance.

Although Lincoln law does not limit nuisance claims to those involving real property, courts have acknowledged the boundaries of the public nuisance tort. See R. at 10 n.8. Courts have refused to extend public nuisance beyond the traditional categories to the sale or distribution of products—even defective products—which are already the subject of well-developed common law and statutory bodies of law,

liability. “If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it.” Restatement (Second) of Torts § 821A cmt c. (1979). But, if a person unreasonably interferes with the public road, for example as part of an unauthorized protest, the government can enjoin the person from blocking the road and require him or her to abate any damage caused to the road. See Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541, 570 (2006).
and for good reason. As noted in Detroit Bd. of Ed. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. App. 1992), appeal denied, 512 N.W.2d 318 (Mich. 1993), “[t]o [apply public nuisance law to products] would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products,” and would create a limitless liability running from product manufacturers to the world at large for injuries arising from the use or misuse of their products. See also Tioga Pub. Sch. Dist. v. United States Gypsum, 984 F.2d 915, 920 (8th Cir. 1993) (inferring that nuisance law was never intended to apply to product manufacture and distribution; otherwise, nuisance law would “become a monster that would devour in one gulp the entire law of tort”).

Just as public nuisance does not apply to defective products, it likewise does not apply to the misuse of non-defective products by criminal third parties beyond the manufacturers’ control. Many well-designed and well-made products sold today are dangerous if misused or used for improper purposes. If a cause of action could be stated against drug manufacturers on the facts pled, the same claims could be made against automobile manufacturers because independent dealers sell cars in one jurisdiction “knowing” that they can exceed the speed limit in another. Alcoholic beverage manufacturers could be liable because retailers in “wet” counties sell alcoholic beverages which manufacturers “know” can be and are illegally consumed or resold in “dry” counties.

Although no cases directly address the precise issue at bar, for more than 200 years of American jurisprudence, the public nuisance tort has been applied to a very
narrow set of circumstances, namely when defendants are engaged in common-law crimes. *See Tull v. United States*, 481 U.S. 412 (1987) (public nuisance provides “a civil means to redress a miscellaneous and diversified group of minor criminal offenses”) (internal quotation omitted). Courts are particularly loath to apply public nuisance law where such application would undermine a comprehensive regulatory framework establishing uniformity of standards of conduct or performance. “If there has been established a comprehensive set of legislative acts … governing the details of a particular kind of conduct, courts are slow to declare an activity to be a public nuisance if it complies with the regulations.” Restatement § 821B, cmt. f.

For example, in *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004), the court first held that the right to be free from gun violence was not a public, but an individual, right. The court held that “the alleged public nuisance is not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance that is the result of the aggregate of the criminal acts of many individuals over whom they have no control.” *Id.* at 1138; *see also City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004). States then sought to remedy the societal ill of deteriorated lead paint through public nuisance lawsuits, but courts largely rejected such
theories for failure to meet the proximate cause prong traditionally required by public nuisance law\(^\text{10}\)

Courts have also rejected public nuisance claims where the plaintiff failed to assert that the defendant had control over the instrumentalities of the alleged nuisance. For example, in *In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007), the court rejected the public nuisance claim brought by twenty-six New Jersey municipalities against lead paint companies because, even assuming “that the continuing presence of lead paint in homes qualifies as an interference with a common right sufficient to constitute a public nuisance for tort purposes,” nonetheless “plaintiffs’ complaints aim wide of the limits of that theory” because they seek to hold liable a defendant that has no control over the premises where the lead paint is found and thus, no ability to abate the nuisance. Moreover, the court explained that an expansion of public nuisance law was not needed to address problems that the legislature had already addressed by a “careful and comprehensive scheme.” *Id.* at 440; *See also State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 455 (R.I. 2008) (holding complaint failed to allege plausible claim when complaint failed to allege any facts that manufacturer was in control of lead pigment at the time it caused the alleged nuisance).

\(^{10}\) In *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007), the City brought a nuisance suit against lead paint manufacturers seeking damages for the costs of abating lead paint in private residences. The court rejected the suit because the City could not show that “the particular defendant actually caused the problem.” *Id.* at 116. Similarly, in *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005), the City alleged that the defendant paint manufacturers had created a public nuisance by promoting lead-based paint for residential use. The court “conclude[d] that plaintiff has failed to allege sufficient facts to show that defendants were the cause in fact of the alleged nuisance.” *Id.* at 136.
Application of public nuisance law to the highly regulated, lawful distribution of opioids threatens the uniformity and cohesion of the entire opioid regulatory framework. The lower courts in this case recognized the need for judicial restraint and properly refused to rewrite the standards crafted by the legislature and impose liability on Chase Pharma because: “[E]ven if [Chase Pharma] abated [its] practices, the epidemic is just as likely to continue because addicts and those willing to sell to them will find the products regardless.” R. at 15.

Finally, in the most recent opioid litigation, *State v. Purdue Pharma L.P.*, No. CJ-2017-816, (Okla. Dist. Aug. 26, 2019), there are clear distinctions to the present case. Most notably, in the *Purdue Pharma*, there was evidence that the FDA sent the pharmaceutical company a letter stating that its marketing materials contained “false and misleading claims.” *Id.* at *18. No such evidence exists to suggest Chase Pharma violated any FDA regulations or that such a letter was issued by the FDA or the DEA. Chase Pharma’s total compliance with federal regulations in the present case creates such a stark difference from the Oklahoma case that reliance on that opinion is highly misplaced.

Furthermore, the Oklahoma state court failed to discuss the four elements of a public nuisance claim. With regard to the first and second elements, instead of determining that there was an existence of a “public right” or unreasonable conduct interfering with that public right, the Oklahoma state court focused on the state’s proposed plan of abatement. *Id.* at *30-42. Oklahoma’s plan addressed societal education and therapy to opioid addicts. In the present case, the State of Lincoln
fails to propose any similar plan of abatement. Even if the State of Lincoln proposed an abatement plan analogous to the one in *Oklahoma*, such a plan would not be a feasible remedy to actually abate the alleged public nuisance of the effects that opioid addiction and criminal uses have on the public.

With regard to the third and fourth elements, the State of Lincoln cannot establish that Chase Pharma has control over the instruments or parties who are harmfully using their lawful products, Chase Pharma is not in a position to actually abate the alleged nuisance. Simply educating the public and providing therapy to those who are already addicted may have an effect on some users of opioid but is not likely to actually abate the nuisance created by those who harmfully use opioids for criminal purposes. Due to the difference in conduct by the Oklahoma defendant and Chase Pharma as well as the reality of control and ability to abate the alleged nuisance, any reliance on this case by the Petitioner is misplaced.

Because this Court and others have repeatedly held that public nuisance law has distinct elements and limits—this Court should affirm the Twelfth Circuit court of appeals holding that the State of Lincoln may not assert a state law public nuisance claim against Chase Pharma.

i. *The State of Lincoln has not Pled a Right Common to the Public*

The State must show that Chase Pharma’s conduct adversely affected a right that is held in common by the general public to prevail in a public nuisance claim. *See City of Chicago*, 821 N.E.2d at 1114 (Ill. 2004). The first element that the State must allege under a claim for public nuisance is the existence of a right common to
the general public. *Id.* A public right includes the rights of public health, public safety, public peace, public comfort, and public convenience. Restatement (Second) of Torts § 821B (1979). To determine whether a public right, as opposed to an individual right, is at stake for a valid public nuisance claim, the proper test is “not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.” *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001). A public right is common to the public generally and collectively, and is separate from the individual right that everyone has not to be assaulted or negligently injured. *See, e.g.*, *City of Chicago*, 821 N.E.2d at 1116; Restatement (Second) of Torts § 821B, cmt. g.

The State of Lincoln failed to allege an injury to a public right. The State alleges that Chase Pharma’s practices interfered with “Lincoln citizens’ common rights to public health, welfare, and safety and created a reasonable apprehension of danger to person and property from the adverse effects [of] addiction,” but fails to state an actual right held in common to the general public. R. at 2. Although the effects of addiction are unfortunate and serious, there is no public right to be free from the risk that someone will engage in harmful uses of otherwise legal products. *See City of Chicago*, 821 N.E.2d at 1116.

Courts have been reluctant to extend or establish public rights to be free from the threat that some individuals may use a legal product in harmful ways in the context of public nuisance claims. *See, e.g.*, *City of Chicago*, 821 N.E.2d at 1116; *Camden Cty. Bd. of Chosen Freeholders v. Beretta*, U.S.A. Corp., 273 F.3d 536,
540 (3d Cir. 2001); Ganim, 780 A.2d at 131; State v. Lead Indus. Ass’n., Inc., 951 A.2d 428, 448 (R.I. 2008).

In City of Chicago, the court held that the right to be free from gun violence was not a public, but an individual, right. City of Chicago, 821 N.E.2d at 1116. The city alleged that the residents of Chicago had a “common right to be free from conduct that creates an unreasonable jeopardy to the public’s health, welfare and safety, and to be free from conduct that creates a disturbance and unreasonable apprehension of danger to person and property” in its claim for public nuisance. Id. at 1109. Although public safety is a public right, the Supreme Court of Illinois did not find there was a public right to “be free from the threat that members of the public may commit crimes against individuals.” Id. at 1115.

Furthermore, the court was unwilling to affirmatively extend the definition of a public right to include the right to be free from the threat that some individuals may use otherwise legal products, such as guns, liquor, or cars, in a way that may create a risk of harm to another. Id. at 1116. Although the court in City of Chicago did not explicitly decide whether there was a public right because the city’s claim failed to meet other required elements of its public nuisance claim, the court’s reasoning for being reluctant to stretch the bounds of the concept of public rights is extremely persuasive in the context of lawful products that individuals may use in harmful ways. Indeed, the City of Chicago court noted that such an “unprecedented expansion” of public nuisance law would then apply to alcohol brewers and distillers, cell phone manufacturers, electronics distributors, and other sellers of
lawful products that might be used by distracted drivers on public highways. *Id.* An “endless list” of manufacturers and businesses would then be open to public nuisance tort claims. *Id.*

The Supreme Court of Rhode Island pointed out the difference between the interference with a public resource and the manufacture and distribution of products in public nuisance claims. In *Lead Indus. Ass’n, Inc.*, the court found that although the lead poisoning at issue was devastating, the state failed to assert an unreasonable interference with a public right. *Lead Indus. Ass’n, Inc.*, 951 A.2d at 453. The state alleged that there was an interference with the “health, safety, peace, comfort or convenience of the residents of the state,” but the court found that alone did not constitute an allegation of interference with a public right. *Id.* In support of declining to extend the definition of a public right, the court stated that products differ from an interference with a public resource because:

> [t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor’s conduct is unreasonable—is not an actionable violation of a public right . . . [t]he sheer number of violations does not transform the harm from individual injury to communal injury.

*Lead Indus. Ass’n, Inc.*, 951 A.2d at 448 (citing Donald G. Gifford, 71 U. CIN. L. REV. at 817).

Similarly, Chase Pharma’s products are generally purchased and used by individual customers upon a prescription by a physician. R. at 4. Their products are
in compliance with the legal regulations of the FDA and DEA. Id. at 5. The state’s claims are analogous to the city of Chicago’s claims that the court ultimately found to be free from the threat that some individuals may use otherwise legal products in harmful ways. This complaint is not within the bounds of the judiciary’s definition of a public right. The alleged actions by Chase Pharma are not actionable violations of a public right. To extend the definition of a public right to include the right to be free from the threat of harmful uses of legal products would be unprecedented. See City of Chicago, 821 N.E.2d at 1116. Therefore, the State has failed to meet the required element of stating a claim that Chase Pharma interfered with a public right.

ii. The State of Lincoln cannot establish Chase Pharma’s conduct constitute an unreasonable interference.

The second element that the State must include in a public nuisance claim is that the Chase Pharma’s conduct constituted an unreasonable interference with the stated public right. See Restatement (Second) of Torts § 821B. Even if the State’s alleged public right was properly stated, the State has failed to allege that Chase Pharma’s actions constituted an unreasonable interference with that public right. The State suggests that Chase Pharma’s sales and marketing practices were unreasonable interferences with public health and safety. R. at 2. However, because Chase Pharma’s actions were in compliance with the closely monitored federal regulations set forth by the FDA and DEA, the State’s unreasonable interference claim fails.
The City of Chicago court, in rejecting the City of Chicago’s public nuisance claims against firearms manufacturers and distributors, discussed the framework for analyzing the “unreasonable interference” element of public nuisance when the business in question “is highly regulated by state or federal law.” City of Chicago v. Beretta, 821 N.E.2d at 1124. The court in City of Chicago declined to apply the Restatement framework for an unreasonable interference because that analysis has mostly been limited to the context of the use of real property constituting a public nuisance. Id. at 1117. Instead, the court followed the enforced “boundary between the well-developed body of product liability law and public nuisance law.” Id. at 1119, (citing Camden Cty. Bd. of Chosen Freeholders, 273 F.2d at 540). The court stated that in the context of products, while “it is possible to create a public nuisance by conducting a lawful enterprise in an unreasonable manner[,] ... [unreasonable interference] can be met only by the plaintiff’s pleading and proving that (1) the defendant violated the applicable statutes or regulations, (2) the defendant was otherwise negligent in carrying out the enterprise, or (3) the law regulating the defendant’s enterprise is invalid.” City of Chicago, 821 N.E.2d at 1124.

Although the State may contend that the present case is more similar to that of People v. ConAgra Grocery Prods Co., such a comparison is incorrect. The California Court of Appeals in ConAgra Grocery dealt with the promotion of lead paint, which is not as heavily federally regulated as opioids. People v. ConAgra Grocery Prod. Co., 227 Cal. Rptr. 3d 499, 534-40 (Ct. App. 2017). The California court used a different
standard of affirmative conduct that assisted in the creation of a hazardous condition to determine whether the defendants’ were liable based upon their promotional campaigns of their products. *Id.* at 535. Additionally, the products involved in this case and in *ConAgra* are drastically different. The lead paint in ConAgra was a product that caused harm to the immediate user, regardless of any third party’s actions. *Id.* at 515. Chase Pharma’s products, on the other hand, are used for pain management. R. at 2. Opioids are not inherently harmful by exposure. The harms the State of Lincoln alleges are based on harmful uses of an otherwise useful, legal, and highly federally regulated product. Chase Pharma’s promotion and marketing of prescription drugs were also in compliance with the closely monitored FDA regulations. R. at 4-5. There is no indication that lead paints or their manufacturers’ marketing practices are regulated to the same extent as Chase Pharma’s products are regulated. Thus, the correct standard to evaluate the alleged unreasonable interference in the present case is the standard used in *City of Chicago*, where the products discussed were also heavily regulated.

Here, Lincoln has not alleged that federal or state laws regulating the pharmaceutical industry are invalid, nor did the state allege that Chase Pharma violated the applicable regulations or statutes, leaving only the second category of the standard used in *City of Chicago*: that Chase Pharma were “otherwise negligent in carrying out the enterprise.”

The *City of Chicago* court similarly analyzed the case under the second category, noting that “a claim based on negligence . . . may not lie in the absence of a duty
owed by the defendant.” *Id.* at 1125. The question of whether such a duty exists “turns largely on public policy considerations,” found by considering four traditional factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Id.* While Chicago argued that the defendant firearms manufacturers owed the city and its residents a duty of care, the Illinois Supreme Court nonetheless found that no such duty was owed. *Id.* at 1125-26.

In analyzing the four traditional factors to establish the duty of care, the court noted that, while it was “reasonably foreseeable” that criminals would obtain guns that would inevitably result in injuries and deaths, it was “less foreseeable to these defendants that the criminal conduct of individuals who illegally take firearms into a particular community will result in the creation of a public nuisance.” *Id.* At 1126. Further, the court emphasized the extreme burden of imposing a duty of care on the defendants, and the “speculative” nature of the assumed benefits by the city. *Id.* (noting that the city simply assumed that criminals would acquire guns through other means).

In this case, there is similarly no duty owed by Chase Pharma to the State of Lincoln. While it may be foreseeable, if not inevitable, that producing and marketing opioid drugs will result in criminals illegally selling and abusing those drugs, it is much less foreseeable that these lawful acts would result in the creation of a public nuisance. The cost would be similarly burdensome, requiring the
abatement of the supposed nuisance and other equitable remedies. R. at 1. And, finally, any benefit would be similarly speculative: just as the City of Chicago presumed that criminals would not find weapons through other means, Lincoln presupposes that drug dealers would not find other drugs to replace their illegally obtained opioids. Thus, owing to its lack of foreseeability, the extreme cost of abating the drug nuisance, and the massive burden that would be placed on the defendant and all other manufacturers, the court should not find that such a duty exists. Without a duty of care, there cannot be a claim of negligence, and without such a claim of negligence, the State of Lincoln cannot meet its burden under *City of Chicago*. Furthermore, finding Respondent’s statutorily compliant actions to constitute negligence and a public nuisance would unprecedently stretch public nuisance law, especially in an area that is already highly regulated by federal law.

**iii. The lower court properly found that Chase Pharma cannot be liable where they do not control the alleged nuisance.**

In order to prevail on a public nuisance claim, the State must also show that Chase Pharma had “control over the instrumentality causing the alleged nuisance at the time the damage occurs.” *Lead Indus. Ass’n. Inc.*, 951 A.2d at 449. For a public nuisance claim, it is critical that the defendant had control at the time of the damage because the principal remedy for the harm caused by the alleged nuisance is abatement. *Id.* If the defendant does not have control over the instrumentality, the defendant will not have the power to abate the nuisance, thus, the plaintiff cannot succeed on the theory of relief. *See City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (holding when defendants had not been in
control of harmful products since time of manufacture and sale, defendants no longer had power to abate nuisance, a basic element of nuisance tort was absent, and plaintiff could not succeed on the theory of relief). The State’s reliance on environmental cases will be misplaced, as these cases are distinguishable. As noted by the court in City of Philadelphia, “polluters violate the law as soon as their toxins enter a waterway,” whereas “the gun manufacturers’ products lawfully enter the stream of commerce” and any harm to the plaintiff “only occurs because of several intervening actions by independent individuals.” 126 F. Supp. 2d at 897.11

When control over the public nuisance claim is too attenuated to attribute sufficient control to the manufacturers, courts have not held manufacturers liable for public nuisance. See, e.g., Camden Cty. Bd. of Chosen Freeholders, 273 F.3d at 541; Lead Indus. Ass’n. Inc., 951 A.2d at 455. For example, in Camden County, the court found that the manufacturers of lawful handguns could not be held responsible for independent third parties down the chain of control who diverted the handguns to unauthorized owners and criminal uses. Camden Cty. Bd. of Chosen Freeholders, 273 F.3d at 541. In terms of public nuisance liability, the manufacturers could not abate the misconduct of third parties. Id. The court also

11 In Exxon, Exxon was accused of discharging oil into State waters serving the general public. State Dep’t of Envtl. Prot. v. Exxon Corp., 376 A.2d 1339 (N.J. Super Ct. 1977). The court found that Exxon’s co-defendant, ICI, could not be liable in public nuisance because the pollution at issue “was created by an independent third party, i.e., Exxon, over whom the defendant had no control.” Id. at 1349. The court implicitly noted the distinction between control and causation - and that a public nuisance claim requires both—concluding that “[a] person is not civilly liable for a nuisance caused or promoted by others over whom[he] he has no control.” Id. (emphasis added). Here, the State did not, and cannot, allege that the manufacturers control the alleged nuisance. Thus, both Exxon and the common law of Lincoln support dismissal of the State’s complaint and the trial court’s ruling should be affirmed.
stated that the lawful handgun manufacturers did not have a duty to control the misconduct of third parties. *Id.* Because the lawful handgun manufacturers did not have control of the instrumentalities of the alleged nuisance, the county’s complaint failed to assert a public nuisance claim, and court affirmed the dismissal of the complaint.

Extending the logic of *Camden County*, the Third Circuit found that the City of Philadelphia failed to state a public nuisance claim because the gun manufacturers lacked the requisite control over the interference with a public right. *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d. Cir. 2002). The court found weak causal connection in *City of Philadelphia* because the lawful products traveled a “long and tortuous” route from the manufacturer to the third party who misused the products. *Id.* at 423. The gun manufacturers in *City of Philadelphia* complied with the applicable statutes and the improper uses of the products were too remote from the manufacturers for the City of recover on a public nuisance theory. The court reiterated that the gun manufacturers were under “no legal duty to protect citizens from the deliberate and unlawful use of their products.” *Id.* at 425. Therefore, the court dismissed the City’s public nuisance claim against the lawful product manufacturers when “their legally sold, non-defective products [were] criminally used to injure others.” *Id.*

Similarly, Chase Pharma does not have the requisite control over nor could it abate the alleged public nuisance. Although the opioids start their journey at the hands of manufacturers like Chase Pharma, they travel to a number of downstream
parties before they are used by people who abuse them, use them for nonmedical purposes, or criminally sell them on the black market. The chain of connection from the public nuisance harm the State alleges and the actual federally compliant manufacture of opioids is too attenuated to attribute control to the manufacturers. Chase Pharma did not have control over their legally sold, non-defective products at the time of the public nuisance.

Chase Pharma, like the gun manufacturers in *Camden County* and *City of Philadelphia*, has no legal duty when their lawful, non-defective products are used by remote third parties. Even under the State’s theory that the marketing practices of manufacturers contributed to the opioid epidemic, there is no remedy for such claim in this case. Because Chase Pharma does not have control over the instrumentalities of the alleged public nuisance, it would not be able to abate the nuisance. This result would leave the State without a remedy in this claim.

Even if the State claims that it has another remedy as it seeks damages for the economic costs the State expended in response to the alleged nuisance, that theory of remedy run contrary to public nuisance law. Public nuisance law permits governments to abate public nuisance, but it does not traditionally award monetary damages as a legal remedy to government plaintiffs. Nathan R. Hamons, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating A Public Nuisance*, 121 W. VA. L. REV. 257, 268 (2018). Rather, public nuisance law provides for equitable remedies, such as injunctions and possibly costs to help aid local governments regulate conduct that creates the public nuisance to
further efforts of abatement. *Id.* However, in this case, neither an injunction nor costs to help local governments pass regulations will further abatement. Without control over the instrumentality of the alleged nuisance or the third parties who misuse lawful products, Chase Pharma cannot stop the effects of addiction and criminal uses of opioids. Similarly, monetary damages to locally regulate an already highly federally regulated field will not stop the public nuisance that the State alleges.

Petitioner may again erroneously conflate the circumstances of the present case with the recent Oklahoma state court decision awarding monetary damages in the public nuisance claim. A clear and important distinction between the remedy theory in the present case and the Oklahoma case is the lack of an actual plan or mechanism to abate the nuisance. *Purdue Pharma L.P.*, No. CJ-2017-816 at *30-41.

In the context of the ongoing opioid litigation, the overseeing United State District Court noted that if a defendant in these suits are found liable, there must be “some mechanism” to fairly award the prospective future costs of abatement, but “the goal is not to compensate the [alleged] harmed party for harms already caused by the nuisance.” *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4043938, at *1-2 (N.D. Ohio Aug. 26, 2019). In the present case, the economic damages the State of Lincoln seeks are for past “costs the State has expended.” R. at 1. (emphasis added). Although Petitioner may contend economic damages are an appropriate remedy based on the Oklahoma state court’s decision, the wholly different facts of this case and the remedy that the current plaintiff, the State of
Lincoln, seeks are not analogous to the situations of the Oklahoma case. In the present case, the State of Olympus does not seek public nuisance remedies that could abate the alleged nuisance in addition to failing to assert Chase Pharma’s actual control over the instrumentalities of the alleged nuisance.

In this claim, the State lacks not only the requisite element of showing the defendant’s control over the instrumentalities and ability to abate the nuisance, the State has no theory of recovery. Therefore, the State has failed to state a claim for public nuisance.

B. The Court Should Reject Efforts to Transform Public Nuisance Into a Catch-All “Super Tort.”


When lawful products are lawfully placed in the stream of commerce, courts have not allowed public nuisance claims to succeed. See Camden Cty. Bd. of Chosen Freeholders, 273 F.3d at 541. Instead, courts enforce the boundary between the well-developed body of product liability law and public nuisance law. Courts have expressed concerns that permitting public nuisance law to engulf product liability claims, would cause public nuisance to “become a monster that would devour in one gulp the entire law of tort.” Id. At 540.
Extending this logic to the present case, if defective products are not within the bounds of public nuisance as a matter of law, then non-defective, lawful products such as prescription opioids cannot be a nuisance “without straining the law to absurdity.” *Id.* Allowing the court to view the federally compliant marketing of a highly regulated product under a public nuisance claim would open the floodgates to litigation over any product misused by consumers and third parties. Manufacturers, like Chase Pharma, do not have control over the instrumentality or the third-party user of the alleged nuisance, and thus cannot provide the remedy of abatement. Not only would this force liability upon actors who have no control over the third parties’ misuse of their lawful product, it would punish manufacturers who complied with all the existing regulations. Allowing parties to bring public nuisance claims based upon lawful and federally complaint manufacturers would also leave manufacturers to the unpredictability of lawsuits based upon uncontrollable and perhaps unforeseeable harmful uses of their products, forcing them to provide an unattainable remedy of abatement. The creation of such an unpredictable monster runs contrary to the purpose of public nuisance law and the remedy of abatement that it seeks to provide.

C. The Court Should Not Change the Tort of Public Nuisance to allow State Attorneys General to Bring Political Lawsuits.

The Court should appreciate that “public risk” cases, even when brought by governments, expose the weakness of the judiciary to administer cases where there is no objectively wrongful conduct. *See* 2 Am. Law Inst., *ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTER’S STUDY* 87 (1991). Government attorneys may
have a political incentive to target specific companies, such as producers of opioids, lead paint, firearms, and energy, because they are considered unpopular by some constituencies or their services or products have external costs.

Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production or use is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse, and consider all the stakeholders’ interests—not just the state attorneys general and the parties they chose to bring into the lawsuit. The other government branches also have the constitutional authority and tools to investigate the impact of their decisions, transition to new regulatory schemes, and, in this instance, put limits into the broader context of a cohesive national opioid policy. They could then determine whether opioid production should be reduced, by how much, and for which markets.

D. There Is an Implied Limit Of Public Nuisance Claims to Real Property.

Although Lincoln law does not limit nuisance claims to those involving real property this Court should rely predominantly on a series of this Court’s prior decisions applying public nuisance law. See, e.g., Am. Elec. Power Co., v. Connecticut, 564 U.S. 410, 419 (2011); Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) (“Milwaukee I”) (seeking abatement of discharge of raw sewage into Lake Michigan and recognizing right of Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan), vacated on other grounds, Milwaukee v.
Illinois & Michigan, 451 U.S. 304 (1981) (“Milwaukee II”); New Jersey v. City of New York, 283 U.S. 473 (1931) (originally seeking injunctive relief against diversion of waters from rivers); New York v. New Jersey, 256 U.S. 296 (1921) (seeking injunction against discharge of sewage into New York Bay); North Dakota v. Minnesota, 263 U.S. 365 (1923) (seeking injunction for actions causing flooding); Georgia v. Tennessee Copper, 206 U.S. 230 (1907) (seeking injunction from discharge of noxious gasses); Missouri v. Illinois, 200 U.S. 496 (1906) (seeking injunction to restrain the discharge of the sewage of Chicago through an artificial drainage canal into the Mississippi river); Missouri v. Illinois, 180 U.S. 208 (1901) (seeking injunction to restrain discharge of raw sewage into the Mississippi river); Wisconsin v. City of Duluth, 96 U.S. 379 (1877) (seeking injunction to restrain the diversion of the St. Louis river). The subject matter that the State of Lincoln seeks relief upon reveals the transcendently legislative nature of this litigation and would turn decades of precedent on its head.

In conclusion, if this Court upholds the State of Lincoln’s cause of action, a path will be forged for the use of public nuisance law violations in a way that was never intended by federal lawmakers. The healthcare industry is better regulated by expert federal agencies and public nuisance law is well-settled.
CONCLUSION

For the foregoing reasons, Chase Pharma respectfully requests this court affirm the judgment of the Court of Appeals for the Twelfth Circuit.

Respectfully submitted,

Team 2811
Team 2811
Counsel for the Respondent
Date: September 20, 2019
Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.