IN THE
SUPREME COURT OF THE UNITED STATES

State of LINCOLN,

Petitioner

v.

CHASE PHARMA, INC., et al.,

Respondent

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

BRIEF FOR PETITIONER

Date: September 19, 2019

Team #2828

Counsel for Petitioner

Oral Argument Requested
QUESTIONS PRESENTED

I. Whether the State of Lincoln’s public nuisance claim is barred by the political question doctrine, even when Lincoln properly pleads a well-settled common law tort doctrine?

II. Whether the State of Lincoln properly states a Lincoln public nuisance law claim based on Respondents’ conduct, not its product, when common law principles in the Restatement of Torts is broad enough to encompass such conduct for liability?
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The decision and order of the United States District Court for the District of Lincoln are unreported and contained in the Record. R. at 1–15. 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 16–25.
STATEMENT OF THE CASE

This case involves allegations that Chase Pharma, Inc. and other prescription drug manufacturers (“Respondents”) are liable for creating a public nuisance by flourishing an opioid crisis through fraudulent marketing and selling of opioids across the State of Lincoln (“Lincoln”), affecting thousands of their citizens.

A. Statement of the Facts

Respondents in this case are opioid prescription drug companies who manufacture such medications. R. at 1. In order to increase sales, Respondents have engaged in a sophisticated, well-funded campaign to persuade doctors to prescribe opioid drugs for the treatment of chronic pain. R. at 2. Consequently, such marketing campaign caused doctors to prescribe opioids in quantities or for treatment purposes that were dangerous and ineffective, which lead to the current opioid crisis. R. at 4.

Respondents’ medications contain hydrocodone, oxycodone, fentanyl, codeine, and other addicting opioids. R. at 2. Although opioid medications have been prescribed for many years for pain management, prior to the 1900s, doctors limited their use to certain circumstances because of concern over their effectiveness and risk of addiction. R. at 2–3. In order to overcome this reluctance from doctors and increase its drug demand, Respondents and its agents knowingly made false assertions about the safety of opioid drugs and intentionally downplayed the risks of addiction. R. at 3.
More specifically, Respondents assured doctors that opioids were safe and effective for the treatment of pain that is not traditionally prescribed for within the medical profession. *Id.* Respondents communicated these assurances, to the entire medical profession, through direct marketing by branded advertising and statements by sales representatives. *Id.* More importantly, Respondents also engaged in unbranded advertising by funding seemingly independent key opinion leaders and front groups who published these assurances in journal articles and at presentations in medical seminars and similar venues. *Id.*

Respondents wrongfully assured doctors that the risk of addiction is low when opioids are prescribed for treatment of chronic pain, while knowing that the risks associated with long-term opioid use was greater for patients who suffer from such pain. R. at 3–4. Although Respondents’ drugs and marketing practices are regulated and approved by the Federal Drug Administration (“FDA”) and the Drug Enforcement Administration (“DEA”), front groups are organizations controlled by other organizations with other hidden agendas. R. at 4; R. at 3, n.2. FDA monitors the marketing and labels of prescription drugs to ensure that such drug is safe and effective for its intended use. R. at 4–5, n.3. However, Respondents even conceded that the risks of non-opioid pain relievers were higher than what the FDA and the Center for Disease Control (“CDC”) have identified. R. at 4. They also intentionally identified and targeted certain providers who were more likely to treat patients with chronic pain and patients more likely to suffer from such pain as well, such as veterans and elders. *Id.*
Consequently, the State of Lincoln, Petitioner, has experienced a high number of deaths from opioid overdoses, with over 2000 deaths in 2016 alone. R. at 2. Also, Lincoln’s Bureau of Prisons estimates that it is providing opioids to over 3200 inmates, and public hospitals report to see dozens of overdose patients weekly as well as babies born addicted due to the mother’s opioid drug use. Id. Because long-term administration of opioids causes patients to become addicted to painkillers, Lincoln has incurred billions of dollars annually in order to treat the adverse effects of addiction and overdoses in both hospitals and other health care providers, on law enforcement, and on social services. R. at 6. On January 23, 2017, Lincoln’s governor declared a state of emergency regarding the opioid crisis. R. at 2.

B. Procedural History

On April 13, 2017, Lincoln filed its complaint in Lincoln state court against Respondents due to Respondents’ actions amounting to a public nuisance, which adversely affected Lincoln citizens. R. at 5. Lincoln’s ordinary common law public nuisance claim maintains that it is entitled to damages for the profound economic costs Lincoln has expended to combat Respondents’ nuisance. R. at 1. Additionally, Lincoln maintains it is entitled to abatement, and any other equitable remedies this Court deems appropriate, of the nuisance that resulted in the widespread opioid crisis Lincoln is suffering from. Id.

Respondents timely removed this action from the state court to the U.S. District Court for the District of Lincoln asserting diversity jurisdiction under 28 U.S.C. §
1332 and removal jurisdiction under 28 U.S.C. § 1441. R. at 5. Subsequently, Respondents filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). *Id.* In its motion, Respondents assert that Lincoln’s public nuisance suit raises a nonjusticiable political question and that Lincoln could not, as a matter of law, properly state a claim of public nuisance. *Id.* The U.S. District Court for the District of Lincoln agreed with Respondents’ assertions and dismissed Lincoln’s public nuisance claim. R. at 15.

Lincoln subsequently filed a timely notice of appeal, contesting the District Court’s order dismissing its complaint, and putting the case before the Court of Appeals for the Twelfth Circuit. R. at 16. The Twelfth Circuit Appellate Court agreed with the District Court’s findings and affirmed its dismissal on both the political question and the public nuisance issue. *Id.* However, the Honorable S.D. O’Connor disagreed with the Circuit Court’s decision and agreed with Lincoln that this case is a justiciable issue and that Lincoln has plead a successful public nuisance claim. R. at 25.

Following the Circuit Court decision, Lincoln filed a timely petition seeking a writ of certiorari from the Court. R. at 26. The Court granted certiorari on the questions of (1) whether Lincoln’s public nuisance claim states a nonjusticiable question; and (2) whether Lincoln failed to state a claim for public nuisance for the reasons set forth by the lower courts in this case. *Id.*
SUMMARY OF THE ARGUMENT

The Supreme Court should reverse the holdings of the United States Court of Appeals for the Twelfth Circuit on both the nonjusticiable political question and state law public nuisance law issues.

I. Nonjusticiable Political Question

The political question doctrine limits the jurisdiction of federal courts to cases and controversies that fall outside judicial control—issues that are vested entirely in the other branches of government. This controversial doctrine stems from principles of separation of powers and is a rule of judicial restraint. Generally, courts invoke the political question doctrine on sensitive matters of foreign policy and national security. However, courts inconsistently apply the doctrine on a number of complex issues, including environmental and electoral issues. Lincoln’s claim for the common law tort of public nuisance does not fall within the political question doctrine’s narrow exception.

Federal court authorities ranging up to the Supreme Court level have ruled both ways on the question of whether a public nuisance claim amounts to a nonjusticiable political question. While Respondents cite to a number of these decisions favorable to its position, they are distinguishable because in the present case there are specific injuries from identifiable defendants and it is limited to a geographical area in which the nuisance resulted from. Additionally, this Court and circuit courts established that ordinary common law tort suits are justiciable because the judiciary can rely on well-settled legal doctrines and precedent to
resolve these complex issues without overstepping its separation of powers boundaries. More specifically, although these cases do not have the same fact patterns regarding nuisances caused by drug manufacturers, the issues that the court grappled with proved to be much more complicated on a larger scale with far more legislative implications than the issues presented before this Court in the present case. This Court should follow these decisions and reject the Respondents’ assertions that Lincoln’s ordinary common law tort claim is a nonjusticiable political question.

Moreover, the Lincoln District Court stated that the relevant factors that govern this case are the second and third *Baker* factors. However, the Twelfth Circuit Court of Appeals erroneously applied the third *Baker* factor. Development of case law and how courts apply the political question doctrine strongly suggests that only the first two *Baker* factors are relevant when deciding if an issue is a nonjusticiable political question. Public policy dictates a uniformity of the application of laws established most recently by this Court and followed by lower federal courts, to clear the confusion of how the judiciary inconsistently applies the murky *Baker* factors. Furthermore, this Court should reserve the political question doctrine as a narrow exception to sensitive issues. Accordingly, the opinion of the Twelfth Circuit Court of Appeals should be reversed.

II. Public Nuisance
The purpose of public nuisance has historically been to allow governments to use the tort system to stop private individuals from engaging in conduct that unreasonably interferes with a right that is common to the general public. Courts have inherent authority as common law tribunals to determine what conditions qualify as a tort of public nuisance and use it to minimize or eliminate any threat to the public health or safety. The Respondents engaged in fraudulent opioid medication sale and marketing practices, which unreasonably interfered with Lincoln citizens’ common rights to public health, welfare, and safety. Consequently creating a reasonable apprehension of danger to persons and property from the adverse effects opioid addiction has had on their communities.

Some courts have found that governmental plaintiffs have failed to allege an injury to a public right, which are traditionally concerned with health, safety, peace, comfort, and convenience matters. While Respondents cite a number of these decisions favorable to its position, they are either distinguishable from the present case or provide untenable rules for determining an interference with a right common to the public. These decisions hold that at most, plaintiff’s assert harm to individual interests, more akin to a products liability claim. In the present case, Lincoln is not alleging any theory under a product liability claim nor a harm to individual interests, instead Lincoln alleges that Respondents have created a harm to the community as a whole by overwhelming hospitals and other health care providers, law enforcement, and social services, and consequently costing the state billions of dollars annually.
Furthermore, Respondents allege that its fraudulent sales and marketing practices cannot be deemed an unreasonable interference to a common public right because they have fully complied with all FDA and DEA regulations consistent with the industry’s practice. However, like some courts have held, an affirmative conduct that assisted in the creation of a hazardous condition is unreasonable conduct for a public nuisance cause of action, even if lawful. Lastly, Respondents allege they did not control the opioid drugs at the time that they caused harm to the public. Many courts have rejected the control requirement and have held that manufactures whom contribute to the creation of a public nuisance through sales and marketing, are not necessarily precluded from liability simply because they no longer control the product. Additionally, when control is deemed necessary by other courts, it is for abatement purposes. Respondents thus need not control the opioid drugs at the time of the harm but need to control the instrumentality that causes such harm. Respondents’ misleading marketing caused the harm, not its opioids drugs. Accordingly, the opinion of the Twelfth Circuit Court of Appeals should be reversed.
ARGUMENT

The Court faces the legal questions of whether Lincoln’s public nuisance claim is a nonjusticiable political question, and whether Lincoln properly alleges a claim for state law public nuisance. Both the issue of a nonjusticiable political question and the issue of whether or not Lincoln has successfully stated a state law public nuisance claim are questions subject to de novo review. Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

I. This Court should reverse the Twelfth Circuit Court of Appeals’ finding that Lincoln’s common law public nuisance claim presents a nonjusticiable political question because they fail to satisfy the first and second Baker factors.

The Twelfth Circuit Court of Appeals erroneously found that Lincoln’s claim for a common law tort of public nuisance is a nonjusticiable political question. This Court established in Baker a six-factor test to determine whether an issue presented is a nonjusticiable political question. Baker v. Carr, 369 U.S. 186, 217 (1962). These factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially manageable standard for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (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. *Id.* (emphasis added). This Court already determined that only the second and third *Baker* factors are relevant in the present case.

However, following the misapplication and confusion surrounding the use of these factors, this Court most recently departed from the test set out in *Baker* when deciding whether a case is a nonjusticiability political question. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (“Zivotofsky”). Federal courts have increasingly applied most weight on the first two *Baker* factors, if not eliminating the remaining four prudential factors altogether. *Id.; Nixon v. United States*, 506 U.S. 224, 228 (1993). Courts have a bounty of judicial tools developed from common law standards and legal precedent, which are resources for judicially manageable standards, to resolve ordinary tort suits in federal courts. *Comer v. Murphy Oil USA*, 585 F.3d 855, 874 (5th Cir. 2009). The judiciary consistently carries its constitutional obligation to resolve cases and controversies, no matter how complex, relating to public nuisance issues by using these judicial tools available to them. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009) (“AEP”).

Furthermore, even if this Court chooses to veer away from the most recent Supreme Court standard and apply weight to the third *Baker* factor, Lincoln’s public nuisance claim does not require this Court to make initial policy decisions related to nonjudicial discretion. The application of common law doctrines, such as public nuisance, acts as a regulatory gap to efficiently resolve cases without requiring federal courts to make nonjusticiability policy decisions. *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 107 (1972) (“*Milwaukee I*”). Additionally, as a matter
of public policy, Lincoln urges this Court to reserve this doctrine to the narrow exception for issues that involve sensitive matters solely intended for the political branches of government. See Kaplan v. Cent. Bank of Islamic Republic of Iran, 961 F. Supp. 2d 185, 193 (D.D.C. 2013).

The Respondent alleges that Lincoln’s public nuisance claim presents a nonjusticiable political question. However, the common law tort issue presented before this Court is resolvable using judicially manageable standards and does not require this Court to consider nonjudicial policy determinations for adjudication. Therefore, the Twelfth Circuit Court of Appeals erred in finding that this case presents a nonjusticiable political question.

A. A vast array of legal precedent and common law tort principles provides this Court with sufficient judicially manageable standards to resolve this present case.

The Twelfth Circuit Court of Appeals erroneously found that Lincoln’s public nuisance common law tort claim lacks judicially discoverable and manageable standards for resolving it. This Court recently applied only the first two Baker factors when determining if an issue is a nonjusticiable political question. Zivotofsky, 566 U.S. at 195. A controversy is barred from review as a nonjusticiable political question if there is “a lack of judicially discoverable and manageable standards for resolving it.” Baker, 369 U.S. at 217. The judiciary possesses a vast array of legal tools to find discoverable and manageable standards used to provide a principled and rational ruling on a case. Alperin v. Vatican Bank, 410 F.3d 532, 552
(9th Cir. 2005). In evaluating whether a court has those tools to resolve a case, courts must not turn on the nature of the government’s conduct under review but instead, must apply a narrow review on the question the plaintiff discretely raises about the challenged action. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010). Cases that arise from ordinary tort suits allow courts to apply judicial tools that use developed common law standards to sufficiently resolve complex issues. *See United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990); *see also Comer*, 585 F.3d at 874.

Public nuisance claims rest on a well-settled common law tort doctrine that courts utilize to successfully adjudicate cases for over a century—federal courts should not shy away from those complex issues. *AEP*, 582 F.3d at 329; *see e.g.*, *Georgia v. Tenn. Copper Co.*, 240 U.S. 650, 650–51 (1916) (granting injunctive relief to the state of Georgia against toxic gasses emitted by smelters in Tennessee that amounted to a public nuisance and was destructive to vegetation in Georgia).

For example, in *AEP*, the plaintiffs sued electric power corporations that owned and operated power plants across various states, claiming that the fossil fuels burned in those power plants contributed to the public nuisance of global warming. *Id.* at 314. The court held that it had the tools to provide judicially discoverable and manageable standards for resolving the case, and thus was not a nonjusticiable political question. *Id.* at 329. By referencing federal courts’ ability to apply well-settled tort rules to complex problems, the court reasoned that it could apply the common law of public nuisance to resolve the particular issue before it, which does
not involve assessing far-reaching interests of the political branches of government in considering a national global warming policy. *Id.* at 328-29. Furthermore, the court highlighted that this Court constantly relies on the Restatement (Second) of Torts and familiar public nuisance principles to tackle complex scientific evidence used to resolve the issues presented. *Id.* at 327; see also *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 (Fed. Cir. 2001) (looking to the Restatement of Torts for resolving cases stemming from common law nuisance).

In the present case, Lincoln properly pleads a common law public nuisance claim against identifiable defendants. Lincoln is alleging an ordinary tort claim that provides this Court the appropriate tools to find judicially discoverable and manageable standards for resolving its injury. Just as in *AEP*, where the plaintiffs pursued a common law public nuisance claim from fossil fuel emissions discharged by power plants located across various states, the Respondents in the present case created a public nuisance in Lincoln by fraudulently marketing and selling medications containing highly addictive opioids that unreasonably interfered with Lincoln citizens’ common rights to public health, welfare and safety. *AEP*, 582 F.3d at 388. Respondents’ misleading practices in pushing its addictive opioids onto Lincoln citizens created an opioid crisis in the state.

Although the court in *Native Vill. of Kivali* held that the plaintiff's public nuisance claims alleging the emission of greenhouse gasses against twenty-four oil, energy and utility was beyond the scope of judicial expertise, the present case does not ask this Honorable Court to consider such a geographically broad and complex
issue. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009). Instead, Lincoln is alleging Respondents created a public nuisance in the same state they engaged in problematic practices for years, resulting in devastating consequences to individuals and families within a localized geographical area. Moreover, the court in *Native Vill. of Kivalina* highlighted that it did not have the judicial tools to remedy an injury from “innumerable sources throughout the world and *affecting the entire planet and its atmosphere.*” *Id.* at 876 (emphasis added). The court in that case would have had to weigh energy-producing alternatives, safety considerations, and the impact of different alternatives on consumers and business at every level, then weigh benefits of those choices against risk of global warming that resulted from common pollutants from immeasurable sources that could not be located geographically. Jay M. Zitter, *Liability of Corporations for Climate Change and Weather Conditions*, 46 A.L.R. 6th 345 (2009). Although there are complexities involved in the present case, Lincoln is not alleging an injury caused by actors *on a major global scale*. Instead, Lincoln relies on a common law tort for a discrete issue arising from a defendant located within the boundaries of a single geographical area.

Lincoln’s public nuisance claim is resolvable without the need to create overarching remedies based on unmanageable legal standards. Furthermore, courts have been able to resolve much more complex cases where the cause of injuries are traced across state lines by using available judicial resources. The present case pleads an ordinary tort claim within the boundaries of a single state that is traced
to a single defendant. Such a claim is not beyond the judiciary’s expertise with the availability of well-settled tort principles as judicial tools to resolve the narrow question Lincoln discretely raises about the challenged action.

Therefore, because Lincoln pleads a common law tort for a discrete issue, this Court sufficiently possesses the resources to resolve this case by using judicially discoverable and manageable standards from a vast array of tort doctrines and legal precedent. The second Baker factor thus does not bar adjudication due to the political question doctrine.

B. Public nuisance claims act as a regulatory gap to resolve cases in a judicial nature without having to wait for a comprehensive legislative approach.

The Twelfth Circuit Court of Appeals mistakenly applied the third Baker factor because the present case is resolvable without making nonjudicial policy determinations. Although courts recently apply this Court’s political question standard of invoking only the first two Baker factors than the remaining prudential factors, Lincoln’s claim does not require this Court to engage in “initial policy determination of a kind clearly for nonjudicial discretion.” Ctr. for Biological Diversity v. Hagel, 80 F. Supp. 3d 991, 1008–09 (N.D. Cal. 2015), aff’d in part, rev’d in part and remanded sub nom. Ctr. for Biological Diversity v. Mattis, 868 F.3d 803 (9th Cir. 2017) (“Mattis”). Absent applicable federal statutes, common law tort rules act as a regulatory gap that do not require nonjudicial policy determinations to adjudicate a case. Comer, 585 F.3d at 875. The judicial expertise in resolving public nuisance issues empowers federal courts to review a case without making broad
decisions solely reserved for the political branches of government. See Milwaukee I, 406 U.S. at 107.

Issues challenged with common law tort claims are resolvable without requiring a court to make nonjudicial initial policy determinations. Comer, 585 F.3d at 873, 879 (holding that defendants failed to show how any of the issues inherent in the plaintiffs’ nuisance claims have been committed by the Constitution or federal laws “wholly and indivisibly” to a federal political branch): McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir.2007) (explaining that where a case “appears to be an ordinary tort suit, there is no ‘impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion’” when deciding a wrongful death action during an air transportation aid military mission in Afghanistan).

Furthermore, courts are vested the power to effectively adjudicate and resolve common law tort claims without forcing the plaintiff to wait for a comprehensive approach supplied by the political branches of government. Milwaukee I, U.S. at 101–02. In Milwaukee I, the state of Illinois pursued a public nuisance claim against four Wisconsin cities and two local sewerage commissions for allegedly polluting Lake Michigan. Id. at 91. The court held that the public nuisance claim was appropriate to resolve the issue at hand. Id. at 108. In finding that the common law application to abate a public nuisance in interstate waters was judicial in nature, the court reasoned that the state’s claim was not inconsistent with the Water Pollution Control Act and federal courts can appropriately adjudicate public
nuisance claims without waiting for a comprehensive legislative plan to combat water pollution. *Id.* at 104, 107.

Moreover, federal courts have reviewed tort claims involving drug manufacturing complications and hazards without overstepping policy decisions reserved for federal agencies and the political branches of government, such as the FDA. *Wyeth v. Levine*, 555 U.S. 555, 578 (2009) (holding that state law action against a drug manufacturer for improper labeling, even though the FDA *approved* the labeling of the medication, was permissible and tort suits are an extra safety blankets for consumers that uncover unknown drug hazards) (emphasis added); *see also Aetna Inc. v. Insys Therapeutics, Inc.*, 324 F. Supp. 3d 541, 555 (E.D. Pa. 2018) (health insurer’s claims against an opioid drug manufacturer, because of improper label prescriptions, were not based simply on some regulatory duty owed to FDA).

Even if this Court decides to veer away from the standard set forth by *Zivotofsky*, the Twelfth Circuit Court of Appeals erroneously found that this present issue requires initial policy determination of a kind clearly for nonjudicial discretion. Just as in *Milwaukee I*, where the court highlighted that it was able to decide an ordinary tort suit alleging water pollution on interstate waters without requiring to make nonjusticiable policy decisions, the adjudication of Lincoln’s public nuisance to its citizens does not require policy decisions that would infringe on the political branches of government. *Milwaukee I*, 406 U.S. at 107. Lincoln cites specific injuries and seeks damages for specific economic costs to treat and combat the effects of opioid addiction and overdoses caused by the Respondent. Lincoln and
its citizens, whom are currently living their daily lives with a rampant opioid crisis, are forced to spend billions of tax dollars to combat the effects of the Respondents’ actions. Additionally, just as the court in Milwaukee I appropriately remedied the plaintiff’s injury by abating the defendants’ nuisance, abating the Respondents’ nuisance is a just remedy for its tort interference on Lincoln’s suffering. Id. at 104. It would be a miscarriage of justice for Lincoln to have to wait for the legislature or the executive branch to create a comprehensive opioid response before being able to pursue ordinary tort claims against a specific defendant. Instead, Lincoln can rely on well-settled legal doctrines to remedy its injuries without forcing this Court to overstep the separation of powers boundaries.

Furthermore, unlike Milwaukee I and Comer, where the courts in those cases held that it could create remedies for tort suits involving interstate issues without making broad nonjudicial policy decisions, the present case alleges an injury within state boundaries and does not implicate Congress’ enumerated powers over interstate commerce. Id. at 107; Comer, 585 F.3d at 875. The individuals affected by the Respondents’ conduct are citizens limited to a fixed geographical area. Lincoln is not requesting this Court to evaluate national policy decisions with serious interstate economic implications. This public nuisance claim effectively acts as a regulatory gap until the political branches of government create a comprehensive plan to combat this country’s opioid crisis, while remedying Lincoln’s clearly cited injuries caused from Respondents’ nuisance.
Finally, this Court does not need to create policy determinations of a legislative kind to resolve this case merely because it implicates FDA regulations. Just as in *Wyeth*, where the court explained that tort suits act as a regulatory check to agencies like the FDA for consumer protection, this public nuisance suit is a check on Respondents’ harmful practices that led to the suffering of thousands of consumers and thousands of citizens affected by Respondents’ nuisance. Ordinary tort suits are not wholly and indivisibly left for the political branches of government, and Lincoln’s public nuisance suit proves no different. While the FDA closely monitors the promotion and marketing of prescription drug companies, tort claims act as a safety blanket for consumers and those around them to uncover unknown drug hazards. Hearing a tort claim with specific remedies sought, affords this Court with appropriate legal doctrines and precedent to elegantly resolve this issue without making overbroad policy decisions reserved to the political branches of government.

Therefore, this Court should reverse the Twelfth Circuit Court of Appeals finding and hold that adjudicating Lincoln’s public nuisance claim is resolvable without making nonjudicial initial policy decisions because this common law tort claim acts as a regulatory gap and a safety blanket for consumers to combat unknown drug hazards.
C. Public policy dictates that this Court should apply uniformity in the law by employing only the first two Baker factors to guide lower tribunals in invoking the political question doctrine as a narrow exception to adjudicate a case.

The political question doctrine is one of the most controversial and inconsistently applied legal concepts in the modern American justice system. Zachary Baron Shemtob, The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual-Prudential Paradigm, 104 Geo. L.J. 1001, 1004 (2016). Development of recent case law shows that the test for whether an issue at hand amounts to a political question applies only the first two Baker factors. Zivotofsky, 566 U.S. at 195; Nixon, 506 U.S. at 228; Mattis, 868 F.3d at 824. This Court ought to set an example to the lower courts by applying the most recent test determining a political question set forth by Zivotofsky, rather than going astray from this Court’s most recent decision and creating more unnecessary chaos. Shemtob, 104 Geo. L.J. at 1004.

Furthermore, if this Court decides to turn away from an issue involving an ordinary common law tort by invoking the political question doctrine, it will open up the floodgates of lower courts continuously shying away from justiciable cases merely because they pose complex issues. Comer, 585 F.3d at 873. This Court should reserve the political question doctrine as a narrow exception to issues solely under the responsibility of the political branches of government. Zivotofsky, 566 U.S. at 195. By exercising its judicial powers enumerated by Article III of the Constitution, federal courts are well-equipped with hearing issues involving
common law tort doctrines instead of broadly expanding the political question doctrine on issues that are reserved for the judiciary. See AEP, 582 F.3d at 321.

i. This Court ought to follow the political question doctrine test set forth by this Court in Zivotofsky.

As a matter of public policy, this Court should follow the trend set forth most recently in Zivotofsky to promote uniformities of the political question doctrine’s narrow exception and to create a clear guideline for lower courts to follow. When deciding if a controversy is a nonjusticiable political question, courts have applied the most weight on whether (1) “there is a textually demonstrable constitution commitment of the issue to coordinate political department” or (2) if there is “a lack of judicially discoverable and manageable standards for resolving it.” Zivotofsky, 566 U.S. at 195; Nixon, 506 U.S. at 228 (explicitly naming only the first two Baker factors when defining political question). Following the Baker decision, opinions that discuss the political question doctrine reveal that courts lack unity and inconsistently apply different discretionary factors. Shemtob, 104 Geo. L.J. at 1013. Recently, lower federal tribunals evaluate the first two Baker factors with greater importance, showing a trend of departure from the incoherently applied six-factor Baker standard. See Mattis, 868 F.3d at 824. Courts ought to be consistent with the application of the political question doctrine, by following the Zivotofsky standard to avoid substantial confusion in lower courts. Zivotofsky, 566 U.S. at 202 (Sotamayor, J., concurring).
In light of recent decisions reviewing whether an issue is barred by the nonjusticiable political question, there is serious doubt that the final four *Baker* factors can support dismissal. *Id.; see also Kaplan*, 961 F. Supp. 2d at 193 (using the *Zivotofsky* approach and evaluating only the first two *Baker* factors to determine whether a suit against banks that allegedly supplied funds to terrorist groups, presented a nonjusticiable political question); *Mattis*, 868 F.3d at 824 (highlighting that the remaining four *Baker* factors are less significant than the first two when evaluating if the political question doctrine bars an environmental organization's claim seeking declaratory judgment). Additionally, cases decided before the *Zivotofsky* decision recognized the considerable importance of the first two *Baker* factors. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (only evaluating the second *Baker* factor and reasoning that the factors are listed in descending order of both importance and certainty).

The Twelfth Circuit Court of Appeals erred when applying weight on the third *Baker* factor when deciding if this instant controversy poses a nonjusticiable political question. The United States District Court for the District of Lincoln conceded that the court did not implicate the first *Baker* factor in that case despite the fact that the plaintiffs’ claims involved issues of foreign policy. This shows the inconsistent standard that lower courts exercise when evaluating which *Baker* factors are relevant in order to decide whether an issue is barred by the nonjusticiable political question. Moreover, the trial court acknowledged that Lincoln’s public nuisance claim is *not directly relevant* under the *Baker* factors,
further evidencing the lack of guidance lower courts have in evaluating the hodgepodge of the *Baker* test.

As a matter of public policy, this Court should follow the precedent established in *Zivotofsky* to provide a uniform standard that lower courts may use to assess the political question doctrine. By following the trend set forth in *Zivotofsky*, this Court will appropriately utilize the political question doctrine to ensure that courts exercise its jurisdiction reserved for the judiciary enumerated in Article III of the Constitution without overstepping the powers left to the political branches of government. It will also ensure courts do not improperly dismiss a case solely because the case poses complex issues.

Therefore, Lincoln respectfully urges this Court to follow the continuing trend established in *Zivotofsky* and continue to establish a uniform test for the political question doctrine by applying the first two *Baker* factors, so that there is clear guideline for lower courts to follow when deciding whether a claim is a nonjusticiable political question.

ii. *The political question doctrine ought to be reserved for narrow instances of issues solely left for the political branches of government, rather than a tool for courts to use to shy away from complex common law tort issues.*

Public policy dictates that should this Court invoke the political question doctrine on Lincoln’s public nuisance claim, there will be a slippery slope of federal courts shying away from adjudicating issues involving ordinary common law tort claims with legal complexities instead of acting on its constitutional role to hear
cases and controversies. Article III of the United States Constitution requires courts to exercise its powers in a traditional manner for English and American courts. U.S. Const. art. III, § 2; Zivotofsky, 566 U.S. at 203. The political question doctrine limits federal courts to hear cases not requiring relief that would infringe on issues reserved for the political branches of government. Baker, 369 U.S. at 210. However, this doctrine is a narrow exception. Comer, 585 F.3d at 873. Political question issues typically lead to judicial restraint “only in sensitive matters relating to national defense and only then in the rarest of cases.” In re Lupron Mktg. & Sales Practices Litig., 295 F. Supp. 2d 148, 162 (D. Mass. 2003). Courts should exercise its constitutional authority to decide cases and controversies that are within the judiciary’s responsibilities rather than abstaining from sensitive or complex issues that it “would gladly avoid.” See Zivotofsky, 566 U.S. at 194.

Public nuisance claims, albeit complex, do not give federal courts good reason to shy away from adjudication. AEP, 582 F.3d at 329. The varying application of the political question doctrine in complex cases results in stark criticism and the decline of application of the doctrine in recent cases. See Kaplan, 961 F. Supp. 2d at 191 (providing examples of courts describing the political question doctrine as “amorphous,” “not fully defined,” and “murky and unsettled.” (citations omitted)); see e.g., Bush v. Gore, 531 U.S. 98 (2000) (deciding issues that deeply involved the electoral process without mentioning the political question doctrine).

Federal courts are well-equipped with judicial tools to decide issues that arise from public nuisance claims and ought to refrain from abstaining from complex
issues that are within the court’s constitutional obligation to adjudicate. Lincoln properly pleads a public nuisance claim, citing direct monetary injuries from being forced to spend billions of dollars annually to battle the opioid crisis plaguing the state from the Respondents’ actions. Lincoln does not ask this Court to create overarching policy considerations, such as national security or foreign policy issues, that are not fit for the judiciary’s expertise. Rather, Lincoln is merely requesting this Court to exercise its powers to hear a case involving an ordinary tort claim. By shying away from hearing this ordinary tort suit, lower courts will follow this precedent and use the political question doctrine as a way out of deciding a complex tort claim instead of using the judicial tools available to them.

The political question doctrine ought to be reserved for narrow instances that are truly political in nature and reserved for the political branches of government. Lincoln recognizes that this is a complex issue, as injuries include years of Respondents’ harmful practices, which led to an increase in state-wide deaths and opioid treatment in state prisons. However, Lincoln urges this Court to take on the legal challenges presented before it and use available legal standards to grapple with this issue, instead of invoking the political question doctrine on an ordinary tort suit claim and contributing to the inconsistency of its application. Courts possess numerous legal resources with many judicial doctrines to decide this case and should reserve the political question doctrine to the narrow instances reserved for the political branches of government.
Therefore, this Court should refrain from invoking the political question doctrine on this instant ordinary common law tort claim because failing to do so will lead to a slippery slope of lower courts following this precedent and using this doctrine as a way to escape legally challenging cases.

II. **This Court should reverse the Twelfth Circuit Court of Appeals’ holding that Lincoln has failed to plausibly state a claim of Lincoln’s public nuisance law.**

By accurately alleging that over the past two decades Respondents have caused numerous social and financial hardships in many communities within the state, largely related to how the opioid drugs are marketed and sold, Lincoln has properly stated a claim of public nuisance for which relief may be granted. To overcome a 12(b)(6) motion to dismiss, a complaint must state a claim that is plausible on its face with sufficient specificity. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This requires the court to assume all factual allegations are true. *Id.*

The Lincoln Supreme Court has held that its nuisance law follows the common law principles set forth in the Restatement of Torts. *Seward Cty. v. Blaine*, 233 Linc. 3d 1008 (1998) (adopting Restatement (Second) of Torts § 821B). Lincoln’s nuisance law 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). In order to constitute a public nuisance, there are four requirements: (1) the offending conduct or activity must substantially
interfere with a right held in common by the public; (2) be unreasonable; (3) be within the defendant’s control and be capable of abatement by the defendant; and (4) proximately cause the injury in question. See Victor E. Shwartz, Phil Goldberg & 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). The proximate causation requirement is not an issue relating to public nuisance on appeal in the present case.

Lincoln alleges that (A) Respondents’ conduct has adversely interfered with a right held in common by the public; (B) interference with that public right is unreasonable; and (C) Respondents’ had the necessary control over its instrumentalities at the time the harm was caused, in order to abate the public nuisance. Respondents’ fraudulent conduct, regarding its sales and marketing practices of opioid drugs, has unreasonably interfered with Lincoln citizens’ common rights to public health, wealth, and safety, affecting their communities as a whole. Furthermore, Respondents have the necessary control of its sale and marketing of opioids to abate. Therefore, the Twelfth Circuit Court of Appeals erred in not finding that the Lincoln adequately pleads a public nuisance claim on these three grounds.

A. Respondents’ conduct adversely interfered with the public rights of health and safety because they flourished the opioid crisis by overwhelming public resources and costing the state billions of dollars annually.
Lincoln has established that Respondents’ conduct has substantially interfered with a right common to the public by alleging that the drug companies’ marketing and sales of opioid drugs interfered with Lincoln citizens’ common interest in public health, welfare and safety. Respondent’s conduct has overwhelmed hospitals and other health care providers whom treat opioid addiction and overdose and diverted other public resources to address the opioid crisis. A public right is a right common to all members of the public and not merely one that is enjoyed by a large number of people. Restatement (Second) of Torts § 821B, cmt g. The test to determine this is whether the public at large might be adversely annoyed by the invasion of its rights. See Ganim v. Smith & Wesson Corp., 780 A.2d 98, 132 (Conn. 2001) (emphasis added). Such rights include the rights of public health, safety, peace, comfort, and convenience. Restatement (Second) of Torts § 821B(2)(a). In asserting that Respondents’ sales and marketing of opioid drugs has interfered with the public’s health, welfare, and safety, Lincoln has plausibly identified a right common to the public.

i. The harm suffered by Lincoln’s community as a whole, not individual residents, relates to public rights of health and safety.

Lincoln citizens’ and taxpayers’ common right has been substantially interfered with by Respondents’ fraudulent conduct. A public nuisance claim is broad and includes any “unreasonable interference with a right common to the general public.” Albert C. Lin, Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing, 85 Notre Dame L. Rev. 955, 973 (2010). Generally, public
nuisance is described as “the doing of or failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public.” *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at *7 (W.Va. Cir. Dec. 12, 2014). Thus, it includes a *wide variety* of harmful conduct and includes common law public rights in health and safety. The conduct, however, must be one “that could hurt any member of the public, not just a plaintiff situated in circumstances unique to an individual or subsection of the general public.” Lin, 85 Notre Dame L. Rev. at 976.

Lincoln acknowledges that there is no common law public right to a certain standard of medical care, as Lincoln is not alleging that the opioid drugs are interfering with such standard. Instead, Lincoln is alleging that the Respondents’ *marketing and sale of opioid drugs* interfered with the activities of an entire community by diverting the state’s public resources and funds to deal with the adverse effects of the opioid crisis. Such conduct has substantially interfered with the public right to generally promote the health and well-being of its citizens. This is not just a circumstance unique to a plaintiff or subsection of the general public, as it affects the whole state.

For example, in *State ex rel. Morrisey*, the Virginia Supreme Court of Appeals held that the defendants, distributors of addictive controlled substances, interfered with West Virginia residents’ common right to public health and safety when they were exposed to the risk of addiction of prescription drugs, actually became
addicted, and/or suffered other adverse consequences from the use of such drugs. *State ex rel. Morrisey*, No. 12-C-141, 2014 WL 12814021, at *8–9. The court there reasoned that the state plausibly alleged West Virginian’s have a common right “to be free from unwarranted injuries, addictions, diseases, and sicknesses.” *Id.* at *8.

In 2016 alone, over 2000 deaths in Lincoln were attributed to opioid use. On average public hospitals report dozens of overdose patients on a weekly basis as well as babies born addicted as a result of their mother’s opioid drug use. Similar to *Morrisey* where defendants wrongfully distributed the drugs, Respondents in the present case, fraudulently marketed opioid drugs and interfered with Lincoln’s public at large. *Id.* at *9. Consequently, in January 23, 2017, Governor Edwin Stanton declared a state of emergency regarding the opioid crisis in Lincoln.

Additionally, in *City of Cincinnati*, Judge Hildebrandt in his concurring opinion stated that “the city should be permitted to bring suit against the manufacturer of a product under a public-nuisance theory, when, as here, the product has allegedly resulted in widespread harm and widespread costs to the city as a whole and its citizens individually.” *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). Furthermore, the harms being alleged by Lincoln, mirror the harms alleged by the plaintiffs in *Ganim*. See *Ganim*, 780 A.2d 98. They are harms that injure the citizens of Lincoln “who may be so circumstanced as to come within the influence of that conduct.” *Id.* at 132. In *Ganim*, “plaintiffs alleged Bridgeport has suffered irreparable harm and financial harm, including additional expenses for police services, emergency services, and expenses for . . . health care . . . and
necessary facilities.” *Id.* at 109. The Supreme Court of Connecticut acknowledged that the definition of common law public nuisance was broad enough to include such allegations. *Id.* at 132.

Moreover, in *City of Chicago*, the Illinois Supreme Court held that the sale of illegal firearms was nothing more than an assertion of an individual’s right not to be assaulted because it was concerned about the breadth of public right law. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004). However, in *City of Chicago*, none of the defendant manufacturers and distributors were alleged to have engaged in any conduct within the city. *Id.* at 1114. Instead, the harm was made by defendants’ actions elsewhere and by other persons. *Id.* Thus, the question there was “whether there is a public right . . . to be free from the threat of illegal conduct by others.” *Id.* In the present case, Respondents and its agents acted fraudulently within the State of Lincoln and created a reasonable apprehension of danger to person and property from the adverse effects addiction has had on their communities. The Illinois Supreme Court was “reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.” *Id.* at 1116. As opposed to in *City of Chicago*, where the presence and use of defendants’ illegal firearms created the alleged interference with a public right, in Lincoln, Respondents’ conduct adversely interfered with the public right to health and safety. Respondents’ well-funded, false campaign persuaded doctors to prescribe opioids in ineffective ways. Most importantly, the court “note[d] that although other
courts have dismissed public nuisance suits against similar groups of defendants, no such case has been dismissed for failure to properly plead the existence of a public right affected by the alleged nuisance.” *Id.* at 1114. Accordingly, Lincoln citizens have a right to be free from such harm.

ii. The fraudulent marketing and sale of a legal product may cause a violation of a public right.

The lower courts interpreted the right common to the public requirement too narrowly. For example, the Supreme Court of Ohio held that a public nuisance claim can be based on harms caused by products, under the Restatement’s broad definition, if it is established that the marketing or sale of the product unreasonably interferes with a general public right. *City of Cincinnati*, 768 N.E.2d at 1142. Respondents and its agents knowingly made a number of false assertions about the safety of its opioid drugs, intentionally downplayed the risks of addiction, and targeted health care providers and patients likely to deal with chronic pain, interfering with public health and safety.

For example, the Illinois First District Appellate Court, in *Young*, held that plaintiffs sufficiently pled a public nuisance claim against gun manufacturers, finding that the defendant’s marketing and distribution practices, which allowed an underground firearms market to flourish, fell within the scope of the public nuisance broad Restatement definition. *Id.* at 1142–43. Like in *Young*, Lincoln also properly pleads a public nuisance claim against Respondents, not “an individual consumer’s tort remedy for the negligent sale of a defective product.” *Young v. Bryco Arms*, 765 N.E.2d 1, 16 (Ill. App. Ct. 2001). Although the Supreme Court of Illinois reversed the Appellate Court’s holding, it was because plaintiffs did not properly plead the proximate cause requirement of public nuisance, not an issue on appeal in the present case. *See Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004). In the
present case, Respondents' fraudulent marketing campaign caused doctors to prescribe opioid in quantities or for treatment purposes that were dangerous and ineffective. Respondents therefore allowed an opioid crisis to flourish through affirmative wrongful conduct.

Additionally, the Ohio Supreme Court was the first state Supreme Court that permitted a public nuisance claim to proceed against a product manufacturer, finding that claims sounding like products liability, may encompass a public nuisance claim. Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 653 (2010). Although the Ohio General Assembly amended the Ohio Product Liability Act shortly thereafter barring defective product claims under public nuisance, Lincoln is not alleging a products liability claim. *Id.* at 655. Lincoln is not alleging that the opioid drugs are defective nor that there was a failure to warn. Instead, Lincoln is alleging that Respondents promoted its opioids using misleading marketing, increasing the market for opioids. Such conduct proved to exponentially increase rates of addiction, overdose deaths, and babies born addicted to opioids, which is substantially injuring public health and safety.

Unlike products liability law, which is designed specifically to hold manufacturers liable for harmful products that the manufacturers have caused to enter the stream of commerce, public nuisance focuses on the abatement of annoying or bothersome activities. *In re National Prescription Opiate Litigation*, 34
2019 WL 2477416, at 11 (N.D. Ohio Cir. Apr. 1, 2019). Lincoln is seeking abatement of Respondents’ fraudulent practices that have caused the public nuisance, not to hold them responsible for its drugs entering the stream of commerce. Lincoln concedes that opioid drugs have been prescribed for many years for pain management and that opioids, if properly prescribed, are effective. However, the Respondents engaged in “annoying activities”, such as knowingly making false assertions, downplaying the risks of addiction, and targeting providers and patients likely to deal with chronic pain. Consequently, opioids have been prescribed in dangerous and ineffective ways, significantly contributing to the opioid crisis.

Furthermore, similar to in In re National Prescription Opiate Litigation where plaintiff’s nuisance claims did not have to do with the legal manufacture and distribution of products lawfully placed in the stream of commerce, Lincoln’s claim concerns Respondents’ misleading marketing of opioids to obtain more sales, not the manufacture and distribution of it. Id. There the court held that the state’s public nuisance claim was proper based on defendants’ deceitful and misleading conduct in marketing its tobacco products or suppressing information. Id. The court reasoned that such methods utilized in marketing are affirmative promotions, which created the public nuisance. Id. Thus, Lincoln also adequately pleads a cause of action for public nuisance, not products liability.

This Court should therefore apply the definition of public nuisance more broadly. Allowing valid public nuisance claims against manufacturers of products is not an inappropriate expansion of a public right violation. Some courts have found that
since products are generally purchased and used by individual consumers, any harm manufacturers cause, even if the use of the product is widespread and the manufacturer's conduct is unreasonable, is not a public right violation. *State v. Lead Industries Ass’n, Inc.*, 951 A.2d 428, 448 (R.I. 2008). However, an interference to the public right to health, safety, and welfare is an actionable violation of a public right. *See id.* at 442. When manufacturers wrongfully market harmful products to increase sales, which consequently fuels a crisis that substantially interferes with such public right, there has been a violation. Common law evolves to reflect societal changes and is able to maintain its preeminence because of its inherent capacity for keeping pace with civilization’s ever-changing demands. *Id.* at 445. Such evolution reflects the “necessities of the time, the prevalent moral and political theories, [and the] intuitions of public policy.” *Id.* (citing Holmes, *The Common Law* at 1). The substantial interference with a whole state’s safety and health, due to a product manufacturer’s fraudulent conduct, reflects such theories and requires such evolution.

This Court therefore should reverse the findings of the Twelfth Circuit Court and hold that Lincoln plausibly alleges an interference with a common public right as required for a public nuisance state law claim.

B. **Respondents’ interference with the public right is unreasonable because they engaged in false, deceptive and misleading marketing of opioid drugs.**

Lincoln properly established that Respondents’ marketing and promotional activities were an unreasonable interference to the public’s health and safety. The
second requirement of a public nuisance claim is that the defendant’s conduct must unreasonably interfere with the asserted public right. See Restatement (Second) of Torts § 821B. An unreasonable interference with a public right includes: (1) conduct that involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) conduct that is proscribed by a statute, ordinance or administrative regulation; or (3) conduct that is of a continuing nature or has produced permanent or long-lasting effects, and the actor knows or should know, it has a significant effect upon the public right. Id. (emphasis added). Thus, reasonability turns on the significance of the conduct’s interference and focuses on the resulting interference with a public right. Lin, 85 Notre Dame L. Rev. at 977–78.

i. Just because Respondents complied with FDA and EDA requirements does not make its conduct unreasonable.

Respondents knowingly engaged in affirmative conduct that created a hazardous condition. The Supreme Court of Illinois found that defendants’, manufacturers of handguns, reckless and intentional marketing and distribution was not the type of “unreasonable conduct” that results in public nuisance liability. See City of Chicago, 821 N.E.2d at 1109 (reasoning that Illinois courts have only acknowledged that a public nuisance may arise when defendant’s conduct in creating the nuisance involved the use of land or when the conduct was in violation of a statute or ordinance). However, according to the Restatement (Second) of Torts and case law, a public nuisance claim is not limited to just those two circumstances. See

For example, in ConAgra Grocery, the court recognized that “[t]he fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance.” ConAgra Grocery, 227 Cal. Rptr. 3d at 554. The broad definition of nuisance requires consideration and balancing of a variety of factors. Id. Like in ConAgra Grocery, where the court did not find that the existence of lead paint was a public nuisance, Lincoln is not alleging that the opioid drugs created the public nuisance. The court there held that only “the specific targets of its order produce” has been shown to threaten public safety. Id. (finding that defendants conduct in promoting lead paint for interior residential use, while knowing of the hazard it would create, was unreasonable under the statutory definition of public nuisance). Similarly, in the present case, Respondents intentionally targeted and persuaded health care providers and patients, likely to deal with chronic pain, to prescribe or take opioid drugs. Additionally, they funded seemingly independent key opinion leaders and front groups to publish false, misleading assurances. These front groups are not under the control of the FDA or EDA and are controlled by other organizations with hidden agendas. Respondents knew or reasonably should have known that such wrongful conduct will lead to a substantial increase in opioid addiction, overdoses, babies being born addicted, criminal activity and more. Respondents therefore significantly and unreasonably interfered with public health and safety.
Furthermore, the Sixth District Court of Appeal, held that a public nuisance is unreasonable if its social utility is outweighed by the gravity of the harm inflicted. *Id.* at 552. Substantial increase in opioid deaths and addiction, public resources being overwhelmed, and billions of dollars annually being spent due to opioids being wrongfully prescribed, outweighs the social utility of opioid drugs, which is to treat pain management when prescribed as intended. Prior to the 1900s, medical professionals limited the use of opioids and discouraged them because of their concern about the effectiveness and risk of addiction. Respondents unreasonably interfered with Lincoln's public health and safety by intentionally targeting and encouraging doctors to prescribe opioid drugs in ineffective and highly addicted ways. Thus, the assurances made by Respondents and its agents, although in compliance with FDA and EDA, were misleading and false. Respondents even conceded that the risks of non-opioid pain relievers were higher than what the FDA and CDC identified. Had Respondents focused on and engaged in marketing and sales of opioids that were accurate and true, in order to deter misuse of opioid drugs, doctors would not be ineffectively prescribing opioids. Instead, Respondents focused its marketing and sales practices with the goal of increasing sales, with total disregard to whether opioids were actually being prescribed as intended. The fact that Respondents complied with all FDA regulations has no merit to the fact that they engaged in unbranded advertising. Unbranded advertising is not directly regulated by the FDA. Creative Marketing + Design Solutions, *The Often Overlooked Role of Unbranded Content in Pharma* (Feb. 28, 2019), available at

Such advertising gives product manufacturers the ability to “include content that doesn’t fit within the specific indication approved with the FDA.” Id. Thus, Respondents unreasonably interfered with Lincoln citizens’ public health and safety. Additionally, such conduct has produced a long-lasting negative effect, which Respondents knew or had reason to know would significantly adversely affect public health.

Additionally, in City of Chicago, the Supreme Court of Illinois was reluctant to allow a public nuisance claim based on the effect of a lawful conduct that does not involve the use of land. City of Chicago, 821 N.E.2d at 1117. However, just because no case law expressly authorized such application, public nuisance is not expressly limited to defendant’s conduct involving the use of land or to conduct that is in violation of a statute or ordinance. Id. As Professor Antolini stated in her article, “public nuisance is a broad and flexible cause of action with great promise as a remedy for community injury.” Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755, 776 (2001). For example, in City of Gary ex rel., the Supreme Court of Indiana allowed such claim to proceed against handgun manufacturers and balanced the usefulness of the activity against the harm to others. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1230 (Ind. 2003) (recognizing that “Indiana courts have consistently referred to the common law reasonableness standard in applying Indiana nuisance statute”). Lincoln, like Indiana, follows the common law principles
set forth in the Restatement of Torts. Seward Cty., 233 Linc. 3d at 1008. The Restatement supports the view that a public nuisance does not need to involve interference with use of land nor unlawful conduct. See Restatement (Second) of Torts § 821B, cmt h. The Restatement (Second) of Torts section 821B(2)(b), unlawful conduct, is only one of three circumstances that give rise to an unreasonable interference to a public nuisance claim. Consequently, the Supreme Court of Illinois concluded “that it is possible to create a public nuisance by conducting a lawful enterprise in an unreasonable manner.” City of Chicago, 821 N.E.2d at 1124. Unlike in City of Chicago, where the facts did not establish that defendants’ design, manufacturing, marketing, or sale of handguns unreasonably interfered with a public right, Lincoln has undoubtedly established that Respondents’ fraudulent marketing and sale practices, although legal, unreasonably interfered with public health and safety. Id. at 1118.

Moreover, Indiana recognizes that one is liable for a nuisance not only when he carries on the activity that caused the nuisance, but when he also participates to a substantial extent in carrying it on. City of Gary ex rel., 801 N.E.2d at 1234. The court held that unreasonable interference may be “lawful activity conducted in such a manner that it imposes costs on others.” Id. (reasoning that the law of public nuisance is shifting the resulting harm from the general public to the party who creates it). In the present case, Respondents created the harm and substantially participated in such creation by knowingly engaging in a deceptive, well-funded, sophisticated campaign only to increase opioid sales and demand. Respondents also
hired agents and targeted clients, flourishing the opioid crisis in Lincoln. The Supreme Court of Indiana held that “gun regulatory laws leave room for the defendants to be in compliance with those regulations while still acting unreasonably and creating a public nuisance.” *Id.* at 1235. Similarly just because Respondents complied with all FDA and EDA regulations, does not necessarily mean that they acted reasonably nor that they did not create a public nuisance.

Currently, the FDA’s highest priority is working on an approach to reduce the misuse and abuse of opioids in the United States. U.S. Department of Food and Drug Administration, *Opioid Medications* (July 1, 2019), available at https://www.fda.gov/drugs/information-drug-class/opioid-medications. According to the FDA, decreasing exposure and preventing new addiction “may be achieved by ensuring that only appropriately indicated patients are prescribed opioids and that the prescriptions are for durations and doses that properly match the clinical reason for which the drug is being prescribed [for].” *Id.* (emphasis added). This is exactly what Respondents are not doing. For the forgoing reasons, Respondents’ fraudulent conduct, although currently lawful, is unreasonable interfering with public health and safety.

Accordingly, Lincoln sufficiently alleges Respondents unreasonably interfered with a public right.

ii. *This Court has authority and public policy to decide such claims under public nuisance law and create new precedent.*
It is well established that a *parens patriae* action can be used to defend governmental interests in protecting their citizens from public health crises. Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. Health Care L. & Pol’y 331, 341 (2011). The State of Georgia has characterized the *parens patriae* as a tool for a state to “address ‘matters of grave public concern [where they had] an interest apart from the particular individuals who may be affected.’” Id. Thus, such actions have enjoined dangers of public health through public nuisance actions. Id. Public nuisance is the basis for the mass settlement in the tobacco litigation of the 1900s. Schwartz, 62 Okla. L. Rev. at 638. Public nuisance is also the basis for the recent decision against Johnson & Johnson, whose case is most similar to this one, where the opioid manufacturers were ordered to pay approximately $572 million for its role in Oklahoma’s opioid crisis. *State of Oklahoma*, No. CJ-2017-816. The Honorable explained that “[t]he state met its burden, . . . proving the company acted improperly with its ‘misleading marketing and promotion of opioids.’” Fortier, *supra*.

One of the primary reasons courts have declined to use the tort of public nuisance to impose judicial solutions to broad public policy issues is because they believe that the question of who should pay to correct a widespread problem, arising from a lawfully manufactured and often highly regulated product, may be a political question for the legislature to address. U.S. Chamber Institute for Legal Reform, *Waking the Litigation Monster*, at *32 (Mar. 2019), available at
The tort of public nuisance, however, is broad and elastic with “the inbuilt capacity to stretch to address public health [matters].” Rustad, 14 J. Health Care L. & Pol’y at 342. Courts have authority to determine what conditions qualify as a public nuisance and minimize or eliminate any threat to the public health and safety. Thus, this Court can clarify the modern scope of public nuisance once and for all and address this problem.

Additionally, most public nuisance claims are not successful because courts generally hold that plaintiff’s fail to allege defendants’ conduct was the proximate cause of the injury in question. See e.g., In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007); Young, 821 N.E.2d 1078. This element is not an issue on appeal. Other courts have recognized plaintiffs’ arguments and, with a sense of moral imperative, have pushed the law to its outermost limits in order to obtain an equitable result. Schwartz, 62 Okla. L. Rev. at 652 (citing Frederick C. Schaefer & Christine Nykiel, Lead Paint: Mass Tort Litigation and Public Nuisance Trends in America, 74 Def. Couns. J. 153, 154 (2007)); see also Lead Industries Ass’n, 951 A.2d at 455–56). For example, the Court of Appeals of Wisconsin recognized that public policy consideration must be considered because liability for creating a public nuisance can be limited on such grounds. City of Milwaukee v. NL Industries, Inc., 691 N.W.2d 888, 892 (Wis. Ct. App. 2004) (emphasis added).

The opioid crisis is not a catastrophe only in Lincoln. In 2017, President Trump declared a public health emergency, regarding the opioid epidemic. James K.
Holder, *Opioid Litigation and the Scope of Public Nuisance Law*, at *33 (2018), available at https://www.gordonrees.com/Templates/media/files/Opening%20the%20Door%20Wider%20Opioid%20Litigation.pdf. Consequently, the legislative and executive branches are being criticized as “sluggish and ineffective” due to their slow response to this major health crisis. *Id.* The legislature had the opportunity to tackle the opioid epidemic at its early stages and failed to do so. *Id.* at *34. Furthermore, FDA’s Commissioner admitted that they “missed key opportunities to ‘get ahead’ of the opioid crisis and ‘a lot of people didn’t do what they needed to do in the past or we wouldn’t be in the situation we’re in right now.’” *Id.* Because all products have some risk of harm, especially if the product is misused or not maintained, courts via tort law are there to protect consumers even when manufacturers comply with the appropriate regulations. Moreover, the government has authority to protect the public from unreasonable interference to a public right via public nuisance claims. With that being said, if we keep waiting for the FDA or the legislature to affirmatively do something it would be a miscarriage of justice. In America, more than 90 people die daily of an opioid overdose and the economic burden due to its misuse is $78.5 billion a year. *Id.* at *33.

Furthermore, if this Court recognizes products-based public nuisance claims, it will encourage companies to act efficiently from an economic perspective. Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 Wash. & Lee L. Rev. 1019, 1031 (2001). Companies will feel compelled to at least consider, or
take into account, all the costs of its proposed activity by insuring efficient investments in safety. *Id.* This Court’s holding “can force actors to take account of costs they would otherwise ignore because existing legal rules do not provide liability for those costs.” *Id.* at 1031–32.

For the foregoing reasons, this Court should hold that Respondents’ conduct satisfies the unreasonable interference requirement for Lincoln’s public nuisance claim and create appropriate precedent.

C. **Respondents sufficiently controlled the marketing and sale of opioid drugs, at the time the harm occurred, which they can abate.**

Lincoln has established Respondents sufficiently control the instrument that caused the harm because Respondents control its marketing and sale practices currently and when the public nuisance flourished, which they can abate. The third requirement for a public nuisance claim is control. The defendant’s instrumentality, giving rise to the alleged nuisance, must be within their control, either at the time of abatement or when the nuisance was created. Schwartz, 62 Okla. L. Rev. at 633. Courts disagree over whether control should be evaluated at the time of abatement or at the time the harm occurred. *Id.* at 635. Because the principal remedy for the harm caused by the nuisance is abatement, some courts hold that control is a critical requirement. *Lead Industries Ass’n*, 951 A.2d at 449.

Although control over the instrumentality that caused the public nuisance is a prerequisite to imposition of liability for public nuisance, many courts have rejected this requirement. These courts reason that the control requirement is merely a
“relevant factor” and that contribution to a public nuisance creation is enough. City of Chicago, 821 N.E.2d at 1132 (emphasis added). The Illinois Supreme Court held that if the illegal use of products by third parties results in a public nuisance, liability is not necessarily precluded merely because manufacturers no longer control the product. Id. The general rule of nuisances is that one who creates the nuisance continues to be liable as long as the nuisance continues and that all those who contribute to the nuisance are liable as well. Rush v. Concrete Materials & Construction Co., 238 P.2d 704, 707 (Kan. 1951). The Chief Justice, from the New Jersey Supreme Court, concluded that control is not a necessary element at common law for a public nuisance claim. In re Lead Paint Litigation, 924 A.2d at 510 (Zazzali, C.J., dissenting). When all other requirements are met, this Court should recognize a public nuisance claim based on manufacturers no longer having control over the product.

For example, in California, a defendant’s control of the nuisance is not necessary for a public nuisance action. ConAgra Grocery, 227 Cal. Rptr. 3d at 594. Similar to County of Santa Clara, where defendants helped create the nuisance by concealing dangers of lead, mounting campaigns against regulation of lead, and promoting lead for uses defendants knew were hazardous, Respondents in the present case helped create the opioid crisis by intentionally making false assertions about the safety of opioid drugs, downplaying addiction risks, and engaging in unbranded advertising to promote opioid prescriptions, while knowing opioids consequently were being prescribed dangerously and ineffectively. County of Santa Clara v. Atlantic
Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006). The court found that the question when deciding whether a defendant can be liable for public nuisance is not whether they control the product nor whether abatement is possible, but rather whether the defendant created or assisted in the creation of the nuisance. *Id.* The Sixth District Court of Appeal held that the plaintiffs adequately alleged defendants are liable for abatement of the public nuisance they created through affirmative promotion of lead. *Id.* at 328. Thus, Lincoln also properly alleges Respondents are liable for the abatement of the public nuisance they created through fraudulent marketing and sales.

Furthermore, both in Ohio and Illinois, a defendant’s lack of control over their product after point of sale, does not preclude liability for their participation in the creation of the alleged public nuisance. *See City of Chicago,* 821 N.E.2d at 1132; *City of Cincinnati,* 768 N.E.2d at 1143. In *City of Chicago,* the defendants had ownership and control of the firearms at some point in the distribution chain. *City of Chicago,* 821 N.E.2d at 1132. The Supreme Court of Illinois held that if a public nuisance subsequently results from the use or misuse of a product by third parties, lack of control at time of harm does not bar liability. *Id.* Consequently, in Illinois control is not a separate element of causation to a public nuisance claim, but rather a relevant factor for the proximate cause requirement which is not an issue before this Court in the present case. *Id.; see City of Cincinnati,* 768 N.E.2d at 1143 (holding that lack of control of product at the time the harm occurred, is not necessary for appellant’s public nuisance claim). Under this view, since
Respondents controlled the opioid drugs before third parties misused them, Lincoln’s public nuisance claim is not automatically barred.

Even if this Court rejects to follow in these courts’ footsteps and considers the control requirement, the lower courts wrongfully interpreted Lincoln’s allegations and public nuisance common law. Lincoln is alleging that Respondents had control over its fraudulent conduct, not the actual opioid drugs, at the time the harm occurred. Furthermore, Lincoln is alleging that such conduct created the harm, not the product itself. Thus, the public nuisance claim is not framed to arise from third party misuse, but from the Respondents’ conduct which is abatable. Control is required because the “principle remedy for the harm caused by the nuisance is abatement.” Lead Industries Ass’n, 951 A.2d at 449. Lincoln is not asking Respondents to abate the manufacturing or distribution of opioids, but to abate its fraudulent marketing practices in order to increase sales.

Additionally, like in City of Cincinnati, where Cincinnati alleged that appellees created a nuisance through their ongoing conduct of marketing and selling firearms, Lincoln alleges that Respondents’ fraudulent marketing and selling facilitated the opioid crisis. City of Cincinnati, 768 N.E.2d at 1143. The Supreme Court of Ohio found that appellees controlled the creation and supply of the illegal, secondary market for firearms which caused the harm. Id. (reasoning that appellant did not allege that the actual use of the firearms caused the harm). The court held that just as individuals who fire the guns may be held liable for injuries sustained, appellees may be liable for creating a public nuisance. Thus, like Cincinnati, Lincoln
adequately pleads Respondents controlled the instrumentality that caused the harm.

Moreover, the Supreme Court of Rhode Island held that “[o]ne who controls a [public] nuisance is liable for damages caused by that nuisance.” *Lead Industries Ass’n*, 951 A.2d at 449 (citing *Friends of the Sakonnet v. Dutra*, 749 F.Supp. 381, 395 (D.R.I.1990) (*Dutra II*). In *Lead Industries Ass’n*, the court acknowledged that “a product manufacturer . . . does not control the enterprise in which the product is used [and cannot be] in the situation of one who creates a nuisance.” *Id.* (reasoning that under leading treatise concerning products liability law, a product which has caused injury cannot be classified as a nuisance to hold liable the manufacturer for the product’s injurious effects). However, unlike *Lead Industries Ass’n*, Respondents did more than just conceal the hazards of opioid drugs and misrepresent its safety, Respondents intentionally targeted hospitals, other health care providers, and patients likely to deal with chronic pain to increase sales. *See id.* at 440. Respondents’ affirmative conduct caused opioid drugs to be prescribed in amounts and for purposes that were dangerous and ineffective, knowingly threatening public health and safety. Furthermore, in *Lead Industries Ass’n*, the state alleged that the defendant’s lead caused the nuisance, which requires defendants have control of the lead. *Id.* at 449. Instead, Lincoln is alleging that Respondents’ conduct caused the nuisance, not the product. At the time the harm occurred, Respondents were in control of such conduct. For this Honorable Court therefore to hold that
Respondents do not control its marketing and sales practices, which caused the public nuisance, is erroneous.

The New Jersey courts require a degree of control by the defendant over the source of the interference. *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (N.J. Super. Ct. App. Div. 2001). In *Camden County*, the court found that independent third parties, whom the manufacturers had no control over, caused the criminal use of the lawful handguns. *Id.* The court held defendants did not exercise the necessary control. *Id.* (reasoning that there was no real showing that defendants were realistically in a position to prevent the wrongs). Unlike in *Camden County*, Lincoln properly alleges that Respondents were in a position to prevent the harm. *Id.* Respondents intentionally targeted opioid providers and patients, engaged in a wrongful marketing campaign, and dangerously promoted opioid drugs in order to increase sales, disregarding the threat to public health and safety. Thus, Respondents were in the position to market and sale its drugs in effective and proper ways to prevent the opioid crisis from flourishing. This Court should therefore hold that Respondents sufficiently controlled the instrumentality that caused the harm.

In conclusion, if this Court upholds the Twelfth Circuit Court of Appeals holding, no one will be held liable for such harm and a path will be forged for the use of fraudulent marketing and sale by drug manufacturers in a way that was never intended by federal lawmakers. Such conduct will continue to significantly and unreasonably interfere with the public health and safety.
CONCLUSION

For the foregoing reasons, the State of Lincoln respectfully requests this Court reverse the judgment of the Court of Appeals for the Twelfth Circuit.

Respectfully submitted,

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Date: September 19, 2019