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IN THE SUPREME COURT OF MARYLAND

No. 11
September Term, 2025

MAYOR & CITY COUNCIL OF BALTIMORE,
Appellant,
v.

B.P. P.LC., *ET AL.*,
Appellees.

Appeal from the Circuit Court for Baltimore City
Honorable Videtta A. Brown

CITY OF ANNAPOLIS,
Appellant,
v.

B.P. P.LC., *ET AL.*,
Appellees.

ANNE ARUNDEL COUNTY, MARYLAND,
Appellant,
v.

B.P. P.LC., *ET AL.*,
Appellees.

Appeal from the Circuit Court for Anne Arundel County
Honorable Steven I. Platt

BRIEF OF AMICI CURIAE THE DRI CENTER FOR LAW AND PUBLIC POLICY AND MARYLAND DEFENSE COUNSEL, INC. IN SUPPORT OF APPELLEES

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Statement of Interest[1]

Maryland Defense Counsel, Inc. ("MDC") is a voluntary, statewide organization of defense lawyers dedicated to the integrity and preservation of the civil justice system. MDC's purpose is to bring together civil defense lawyers to promote the efficiency of the legal system as well as fair and equal treatment under the law. MDC membership is open to all Maryland lawyers who devote the majority of their practice to the defense of civil litigation. The organization was founded in 1962 and today has over 300 members, making it one of the larger civil defense lawyer organizations in the country. MDC regularly brings the defense perspective to the appellate courts through amicus briefs.

The DRI Center for Law and Public Policy (the "Center") is the public policy "think tank" and advocacy voice of DRI, Inc.—an international organization of approximately 16,000 attorneys who

[1] *Amici* represent that, under Maryland Rule 8-511, all parties have provided reciprocal blanket consent for amicus briefs, and thus this Brief is filed by consent. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution toward the preparation of this brief.

represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as amicus curiae in the U.S. Supreme Court and federal courts of appeals, and also joins—at the request of its affiliated, state civil defense organizations—important amicus curiae efforts in state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system.

While MDC and the Center recognize that this case can be disposed of by simply affirming the Circuit Courts' conclusions that Appellants' claims are preempted by federal law, their interest in this case is specific to ensuring that the scope of state tort law, and particularly the law of nuisance, is properly defined and limited. The members of MDC and the Center are keenly interested in the proper application of state tort law to ensure the continued fairness, consistency, and efficiency of the civil justice system. Many of those members (or their clients) repeatedly face attempts to expand state tort law to redress perceived social ills when

common law torts and the courts are not particularly well equipped to do so.

MDC, the Center, and their members believe that Appellants' theory of nuisance law (which, as explained below, goes against about 150 years of settled law), if accepted, will generate boundless liability for an untold number of lawful, useful, and indispensable products used by hundreds of millions of Americans (let alone a substantial number of the billions who inhabit the Earth) daily. Put another way, if Appellants are allowed to pursue their expansive theory of nuisance liability, nuisance would swallow whole the regulatory and statutory regimes that are designed to balance the externalities of lawful products against their benefits.

Statement of the Case, Statement of Questions Presented, and Statement of Facts

MDC and DRI adopt by reference the Statement of the Case, Statement of Questions Presented, and Statement of Facts and Procedural History from the Principal Brief of Appellees.

Summary of Argument

Appellants ask this court to upend 150 years of Maryland case law limiting nuisance liability to uses of land and sanction their expansive

(indeed, all-encompassing) theory that nuisance liability can be predicated on business activities untethered to the use of land. But no Maryland appellate court has ever sanctioned such a boundless theory of nuisance liability, and the Circuit Courts rightly rejected Appellants' position and dismissed their claims.

Appellants go even further by insisting that a nuisance defendant need not have any control over the alleged nuisance. Again, nearly 150 years of Maryland precedent is to the contrary. The Circuit Courts again rightly rejected Appellants' capacious theory of nuisance liability.

This Court should reassert its commitment to a properly bounded theory of nuisance liability, allow the democratically accountable branches of government to determine whether and how to address the perceived harms Appellants allege, and affirm.

Argument

I. For nearly 150 years, Maryland law has limited potential nuisance liability to harms caused by the use of real property, but Appellants concede they do not seek to hold Appellees liable for their use of their real property.

The traditional rule in Maryland is that a nuisance is a "thing or condition *on the premises*, or adjacent *to the premises*, offensive or harmful to those who are off *the premises*." *Sherwood Bros., Inc. v.*

Eckard, 204 Md. 485, 493 (1954) (emphasis added); *see also Aravanis v. Eisenberg*, 237 Md. 242, 260 (1965). Before this Court articulated the traditional Maryland rule so succinctly in *Sherwood Brothers*, it recognized that nuisance law is limited only to conditions or conduct stemming from the use of land. *See Short v. Baltimore City Passenger Railway Co.*, 50 Md. 73, 82 (1878) (" . . . the true test is, whether in the act complained of, the owner *has used his property* in a reasonable, usual and proper manner . . .") (emphasis added); *see also Dittman v. Repp*, 50 Md. 516, 522 (1879) ("And in determining the question of nuisance . . . reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of *using the property* producing the annoyance and injury complained of.") (emphasis added). That is, for nearly 150 years, Maryland has limited nuisance actions to conduct or conditions stemming from the use of real property.

Modern Maryland courts have consistently reiterated that the law of nuisance applies to owners or possessors of land and the uses to which they put that land. *See, e.g., Wietzke v. Chesapeake Conf Ass'n*, 421 Md. 355, 374-75 (2011) (defining a nuisance *per se* as the "use of *one's land*, which is 'so unreasonable,' that it is deemed to constitute an actionable

nuisance 'at all times and under any circumstances'" and nuisances in-fact as arising "where, considering the 'particular setting' and surrounding circumstances, *a particular land use* constitutes a nuisance even though 'the conduct might not be a nuisance in another locality or at another time or under some other circumstances.'") (emphasis added); *Hoffman v. United Iron & Metal Co., Inc.*, 108 Md. App. 117, 133 (1996) ("Where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a *neighboring owner* . . .") (emphasis added); *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (recognizing that nuisance law is limited to an "interference with a *neighbor's* use and enjoyment of *the land*.") (emphasis in original); *Melnick v. C.S.X. Corp.*, 312 Md 511, 521 (1988) (declining to "impose liability upon an adjoining *landowner*" for alleged nuisance caused by natural growth of trees, plant, roots, and vines) (emphasis added); *Air Lift, Ltd. v. Bd. of Cnty Comm'rs of Worcester Cnty*, 262 Md. 368, 394 (1971) ("A *landowner* may not use *his property* to create a public nuisance . . . nor to create a nuisance to *adjoining property owners*.") (emphasis added); *Stottlemyer v. Crampton*, 235 Md. 138, 143 (1964) ("The law is clear that where a trade or business as carried on

interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a *neighboring owner* . . .") (emphasis added); *Callahan v. Clemens*, 184 Md. 520, 525-27 (1945) (rejecting nuisance claim because, among other reasons, the defendant did not own the land on which the unabated nuisance, a defective retaining wall, existed).

The common theme from this century-and-a-half of precedent is that nuisance liability stems, if at all, *only* from the use of real property and not as Appellants incorrectly urge from the marketing and sale of (lawful) products. OB.35-43. Notably, as the Appellees correctly highlight, Appellants have not cited, and indeed cannot cite, a single reported case from a Maryland appellate court broadening nuisance liability as urged by Appellants here. Rather, and again as Appellees detail at pages 34 and 35 of their Principal Brief, the Maryland authorities on which Appellants rely confirm that nuisance liability stems from the use of one's land, not from the placing of (lawful) products into commerce. Further, Appellants cite no authorities indicating that Maryland law is trending in the direction of the inapposite out-of-state authorities on which they rely.

Rather, as recently as 2011, this Court reiterated that nuisance liability, if any, arises from the use of land. *Wietzke*, 421 Md. at 374-75 (2011) (defining a nuisance *per se* as the "use of *one's land*, which is 'so unreasonable,' that it is deemed to constitute an actionable nuisance 'at all times and under any circumstances,'" and nuisances in-fact as arising "where, considering the 'particular setting' and surrounding circumstances, *a particular land use* constitutes a nuisance even though 'the conduct might not be a nuisance in another locality or at another time or under some other circumstances.'") (emphasis added) (quoting David A. Thomas, Thompson on Real Property, §§ 67.02(a), at 114; 67.03(a), at 118; & 67.03(b), at 124 (2d ed., 2011 Supp.)).

Maryland's long-running limitation of nuisance liability to uses of land is consistent with other states' approaches. For instance, in rejecting attempts by the State of Oklahoma to impose nuisance liability for the sale of prescription opioids, the Oklahoma Supreme Court detailed the history of Oklahoma's nuisance law and observed that public nuisance "has historically been linked to the *use of land* by the one creating the nuisance." *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724 (Okla. 2021) (emphasis added). North Dakota law is the same. *Tioga Pub.*

Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993) ("North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity *on his land* in such a manner as to interference with the property rights of a neighbor.") (emphasis added).

Tethering nuisance liability to land uses makes good policy sense and leaves nuisance liability limited to its proper scope. If this Court were to accept Appellants' position, nuisance would become a boundless tort that parties and governments could use to assert liability for any lawful business activities they dislike on the tenuous theory that those business activities may have had some remote link to perceived social ills. But Appellants present no authorities that even suggest that the tort of nuisance was meant to have such a wide-ranging reach.

Rather, redressing such social ills is better left to the legislative and regulatory processes. These processes allow for the careful and thoughtful balancing of competing interests and consideration of complex data and information by subject matter experts and those who are democratically accountable. Courts do not have the requisite expertise or resources to engage in this sort of intricate policymaking. *See People ex*

rel. Spitzer v. Sturm, Ruger & Co. Inc., 761 N.Y.S.2d 192, 202-04 (App. Div. 1st Dep't 2003) (explaining that the legislative and executive branches are far better equipped than courts to "address, investigate, evaluate, and resolve perceived societal problems" that may be associated with lawful products).

As the New York Appellate Division aptly put it over 20 years ago, if Appellants' theory were to prevail, "all a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Id.* at 196.

Simply put, the Circuit Courts correctly concluded that Maryland's law of nuisance is confined to a defendant's use of land and cannot be predicated on allegedly deceptive marketing and the placing of lawful consumer products into commerce. E.23. This Court should, therefore, affirm.

II. Appellees cannot be liable under any nuisance theory because they did not control the instrumentality of the alleged nuisance—the burning of fossil fuels.

For over 150 years, Maryland has required that the nuisance complained of be "caused or created by the act of the party sued." *Flynn v. Canton Co. of Baltimore*, 40 Md. 312, 326 (1874) (finding defendant not liable for nuisance because ice was not formed because of actions of defendant or from water flowing from defendant's property). *See also Callahan v. Clemens*, 184 Md. 520, 525-27 (1945) (rejecting nuisance claim because defendants had no control over the alleged nuisance, a defectively constructed retaining wall); *E. Coast Freight Lines v. Consolidated Gas & Elec. Power Co. of Baltimore*, 187 Md. 385, 401-02 (1946) (rejecting nuisance claim against utility because the nuisance was a poorly placed grass plot and lack of warning signs or lights when the plot and ability to place warnings was "entirely in the control of the City"); *Matthews v. Amberwood Assocs. Ltd. P'Ship, Inc.*, 351 Md. 544, 555 (1998) (finding that, in landlord-tenant cases, "when the owner has *parted with his control*, the tenant has the burden of keeping the premises . . . and for any nuisance created by the tenant the landlord is

not responsible.") (emphasis added). Appellants cite no authority to the contrary.

Rather, Appellants insist that the instrumentalities of the nuisance are Appellees' allegedly "deceptive business practices." OB.45. But this position runs head-long into two fatal flaws. First, as Appellees correctly note, Appellants' argument regarding control of the instrumentality cannot be squared with their allegations that the cause of the nuisance is the combined effect of the use of fossil fuels by essentially the entire world over many decades. OB.36; E.23, E.42, E.68-73, E.151, 7557 3, 36-45, 227; E.1016-17, E.1059-62, E.1152, ¶¶ 5, 48-56, 237; E.1194-95, E.1249-52, E.1334-35, ¶¶ 5, 49-57, 237. Appellants, however, do not and cannot allege that Appellees controlled the use of fossil fuels by the vast majority of the world's population across many generations.

Second, and perhaps more fundamentally, taking Appellants' argument that the alleged nuisance is Appellees' "deceptive business practices" (and assuming, without conceding, those business practices can form the basis of nuisance claims) Appellants' claims then fail because that alleged instrumentality cannot be the cause of the alleged harm. The business practices themselves do not emit pollutants that

damage any land of the Appellants. *See, e.g., Rosenblatt*, 335 Md. at 80 (alleged nuisance must interfere "with a neighbor's use and enjoyment of the land."). Rather, it is the burning of fossil fuels that causes the allegedly offensive and damaging emissions.

Appellees have no control over the way the world's population (which would surely include Appellants themselves, as well as residents of the City of Baltimore and other localities in Maryland) uses their (lawful) products and what steps, if any, they take or have taken to mitigate any allegedly harmful emissions the burning of fossil fuels may cause. Without allegations that Appellees are the ones who directly discharged any harmful emissions or pollutants, Appellees cannot be liable under Appellants' nuisance (public or private) claims. *See, e.g., E. Coast Freight Lines*, 187 Md. at 401-02 (1946) (rejecting nuisance claim against utility that owned pole that existed on grass plot because the City and not the utility controlled the alleged nuisance, i.e., the location of the plot of land).

Jettisoning the control requirement as Appellants urge would also have far reaching consequences for a wide variety of lawful products. For instance, governments around the country, including the Mayor and City

Council of Baltimore, have recently attempted to hold beverage makers liable for plastic pollution under a nuisance theory. *See* Complaint, *Mayor & City Council of Baltimore v. Pepsico, Inc.*, No. C-24-CV-24-001003 (Cir. Ct. Baltimore Cty. filed June 20, 2024).

But at least one court has already rejected such an attempt by another government. That court astutely observed that imposing nuisance liability on the makers of these drinks "for the acts of [third parties] seems contrary to every norm of established jurisprudence." *People v. PepsiCo., Inc.*, 222 N.Y.S.3d 907, 916 (N.Y. Sup. Ct., Erie County, Oct. 31, 2024). S*ee also Spitzer*, 761 N.Y.S.2d at 202 (affirming dismissal of public nuisance claim against gun manufacturers because "a line must eventually be drawn since there will be many instances in which a party may have contributed in some remote way and yet it is inappropriate to subject that party to tort liability. In other words, at some point, a party is simply too far removed from the nuisance to be held responsible for it.").

Governments are also attempting to use the law of nuisance to impose liability for the sale and marketing of prescription opioids. *See, e.g., Hunter*, 499 P.3d 719. Those courts, too, have rejected such nuisance

claims because the maker of the product no longer controls it once it is sold. *Id.* at 728-29 ("Without control, a manufacturer cannot remove or abate the nuisance . . .").

Properly defining and limiting that control requirement also serves the important policy goal of leaving the regulation of lawful products to the political branches of government. As the *Spitzer* court detailed, if this Court were to expand nuisance liability to allow, as Appellants urge, claims against a product manufacturer after the product has left its control, there will be an:

> outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce—some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motived and exploitative. Such lawsuits could be leveled not merely against these defendants, but, well beyond them, against countless other types of commercial enterprises, in order to address a myriad of societal problems—real, perceived or imagined—regardless of the distance between the 'causes' of the "problems" and their alleged consequences, and without any deference to proximate cause. *Spitzer*, 761 N.Y.S.2d at 202-03.

The *Spitzer* court's observation was prescient. Although courts have regularly rejected attempts to expand nuisance liability in the way Appellants urge here, parties like Appellants continue undeterred to try to redress "societal problems" through the courts rather than legislative

and regulatory processes. This Court should once again reject these attempts and affirm the Circuit Courts.

Conclusion

For the above reasons, this Court should affirm and leave the question of whether and, if so, how to address potential societal problems that may be caused by the use of lawful products to the political branches of government. First, for at least a century-and-a-half, Maryland law has limited nuisance claims to only alleged harms arising out of the use of land. Appellants fail to allege, however, that the supposed nuisances Appellees engaged in are uses of their land. Rather, they assert a novel (and unrecognized in Maryland) theory that Appellees' business practices can constitute an alleged nuisance. Contrary to Appellants' unsupported position, the Circuit Courts rightly concluded that Maryland law does not countenance the broad theory of liability Appellants urge.

Second, Maryland law has (also for nearly 150 years) required that the defendant to a nuisance claim have control over the alleged instrumentality of the nuisance. Here, the instrumentality of the alleged nuisance is the burning of fossil fuels and the emissions therefrom by the world's population (including Appellants). Appellees had no control over

how the world uses their products, including any steps they may have taken to mitigate the allegedly harmful effects of the use of those products. Thus, even if this Court were to expand the scope of potential nuisance liability to cover allegedly deceptive business practices, Maryland law still does not sanction Appellants' theory of this case. The Circuit Courts thus correctly dismissed Appellants' claims, and this Court should affirm.

Certification of Word Count and Compliance with Rule 8-112

1. This brief contains 3,380 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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

s/Jacob F. Hollars
Jacob F. Hollars (*pro hac vice* pending)

Certificate of Service

I HEREBY CERTIFY that on this 15th day of July, 2025, copies of this BRIEF OF AMICI CURIAE THE DRI CENTER FOR LAW AND PUBLIC POLICY AND MARYLAND DEFENSE COUNSEL, INC. IN SUPPORT OF APPELLEES was served via MDEC on all parties entitled to service.

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