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United States Court of Appeals
for the
Fourth Circuit

IN RE EXPRESS SCRIPTS, INC.,

Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CASE NO. 5:24-cv-142-JPB

PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION

“In this circuit, a petition for a writ of mandamus is the proper way to challenge the denial of a jury trial.” *In re Lockheed Martin Corp.*, [503 F.3d 351, 353](#) (4th Cir. 2007). Express Scripts seeks mandamus relief because the district court improperly denied it a civil jury trial on *legal* claims by 120 West Virginia cities, counties, and towns. Plaintiffs expressly seek *money damages* and thus their claims fall within the heartland of the Seventh Amendment’s protection. *SEC v. Jarkesy*, [603 U.S. 109, 123](#) (2024). Mandamus independently is warranted because the court ordered a two-phase trial, first on Express Scripts’ alleged *statewide* liability, and then on *statewide* relief, even though Plaintiffs do not represent the State but are instead *local governments* with standing only to sue on their behalf. This Court should grant mandamus to limit the district court “to a lawful exercise of its prescribed jurisdiction,” *Cheney v. U.S. Dist. Ct.*, [542 U.S. 367, 380](#) (2004) (citation omitted), and avoid the massive waste of resources that would occur from a sprawling trial before the wrong factfinder seeking jurisdictionally unavailable relief.

RELIEF SOUGHT

Express Scripts respectfully requests a writ of mandamus directing the district court to vacate its Case Management Order setting a statewide bench trial on Plaintiffs' public-nuisance claims. Add.1–6.

ISSUES PRESENTED

1. Whether Express Scripts has a Seventh Amendment right to a jury trial on Plaintiffs' public nuisance and other claims seeking monetary relief.

2. Whether the district court exceeded its jurisdiction in ordering a statewide trial on Plaintiffs' public-nuisance claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Plaintiffs' Actions

On July 25, 2024, Ohio County and 10 other West Virginia local governments filed an action in the U.S. District Court for the Northern District of West Virginia (“the *Ohio County Action*”) asserting claims for common law public nuisance, violations of the federal civil RICO statute, negligence, civil conspiracy, and unjust enrichment. R.Doc. 84. The complaint expressly sought monetary and equitable relief. *Id.* ¶¶855, 890, 916, 940 & p.313. Plaintiffs twice amended their complaint to add 66 other West Virginia cities, counties, and towns as plaintiffs (for a total

of 77 plaintiffs in the *Ohio County* Action). R.Docs. 85; 128. On May 21, 2025, Express Scripts filed its answer and jury trial demand. R.Doc. 173.

Shortly thereafter, the City of Wellsburg and 42 other West Virginia local governments—represented by the same Plaintiffs’ counsel as those who filed the *Ohio County* Action—filed a complaint nearly identical to the Second Amended Complaint in the *Ohio County* Action, seeking identical forms of monetary and equitable relief. *City of Wellsburg v. Express Scripts, Inc. et al.*, No. 5:25-cv-00164-JPB (N.D.W. Va. July 23, 2025) (“*Wellsburg* Action”), ECF No. 2 ¶¶702, 737, 763, 776, 787 & p. 225. The two actions were later consolidated. Add.1.

B. The Parties’ Competing Case Management Proposals

The district court ordered the parties to submit a proposed case structure and scheduling order. R.Doc. 172 at 1. Express Scripts proposed a bellwether trial process whereby the parties would “select representative Plaintiffs for trial that fairly encompass the range of factual and legal issues present across all Plaintiffs’ jurisdictions.” R.Doc. 183 at 9. Plaintiffs proposed a bifurcated case structure. In Phase I, Plaintiffs’ claims would be consolidated into a statewide liability trial in which they planned to rely only on “aggregate” proof. *Id.* at 3–7. In

Phase II, the parties would address “specific causation” and Defendants’ affirmative defenses. *Id.*

On July 28, 2025, the Court held a hearing to discuss the competing proposals. Add.22–49. At the hearing, Plaintiffs presented the case as only “a public nuisance case.” Add.30. Plaintiffs argued that, by proceeding only on public nuisance and “sever[ing]” the other claims, at Phase I they would only need to “establish that there’s a statewide opioid epidemic that permeates every corner of the state.” Add.26, Add.45. At Phase II, Plaintiffs argued, the parties would litigate “the question of whether or not the conduct by the defendants was a substantial factor in” causing Plaintiffs’ alleged injuries. Add.26. Plaintiffs also took the position that the public-nuisance claims should be tried as a bench trial, beginning with a Phase I bench trial on statewide public-nuisance liability. Add.25.

After expressing doubt that it has “jurisdiction” to hold a statewide liability trial that would implicate the interests of absent parties, the district court asked if Plaintiffs were taking the “position that [they are] going to try [the statewide liability trial] just as the state of West Virginia.” Add.27, Add.30. Plaintiffs responded in the affirmative,

claiming to have “authority and standing” to bring statewide claims “on behalf of the general public . . . represent[ing] the same human lives that the Attorney General would be representing.” Add.26, Add.35–36. Indeed, Plaintiffs’ counsel asserted that they had previously “represented the state through the counties and cities” that have filed suit. Add.38. Plaintiffs disclaimed that they were seeking to recover their own “expenditures” or “private economic losses.” Add.30, Add.36.

Express Scripts opposed Plaintiffs’ proposals on numerous grounds. It argued that Plaintiffs’ proposal for bifurcated bench trials was a “nonstarter” because the case involved claims for which Express Scripts had an undisputed “jury trial right.” Add.39. It pointed out that Plaintiffs had failed to cite a single case where a federal court had adopted such a structure. It explained that Plaintiffs lack standing to bring a statewide action on behalf of the citizenry. And it opposed the statewide Phase I trial because it would constitute a *de facto* class action outside the strictures of [Federal Rule of Civil Procedure 23](#). Add.39–40.

C. The Case Management Order And Denial Of Reconsideration

The district court entered a Case Management Order (the “Order”) that severed, but did not dismiss, Plaintiffs’ causes of action other than

public nuisance and ordered bifurcated bench trials on public nuisance.

Add.1–2. At Phase I, the district court ordered it would decide two issues:

Issue #1: Whether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opio[i]ds *throughout West Virginia*; and

Issue #2: Whether the alleged oversupply and diversion of opio[i]ds *throughout West Virginia* is a public nuisance, which is broadly defined as an unreasonable interference with a right common to the general public’s health and safety.

Add.1–2 (emphases added). The district court ordered that Phase I would focus on “[g]eneral causation,” which it defined as “whether Defendants caused the oversupply and diversion of opioids in West Virginia.” Add.2. If “liability for public nuisance” is established, the parties would proceed to a “statewide abatement trial” in Phase II, where the issues would involve “causation of opioid epidemic harms in Plaintiffs’ communities that relate to the equitable remedy of abatement.” Add.2.

According to the district court, the purpose of the case structure was to promote efficiency by “avoiding the prejudice and confusion of multiple, single plaintiff trials” and relieve Plaintiffs of the burden “of trying multiple lawsuits to determine whether the Defendants are liable for public nuisance as to each city or county.” Add.3. In the district court’s

view, “[t]he opioid crisis is ubiquitous” and “knows no boundaries and is not limited to a specific city or county in West Virginia.” Add.3.¹

Express Scripts moved for reconsideration and, in the alternative, certification of several issues for interlocutory appeal under 28 U.S.C. § 1292(b). R.Doc. 200. Express Scripts argued the district court could not order bench trials without infringing Express Scripts’ Seventh Amendment right to a jury trial because each of Plaintiffs’ claims expressly seeks money damages. R.Doc. 200 at 5–10. Express Scripts also argued that the Order exceeds the district court’s authority because Plaintiffs lack Article III standing and statutory authority to bring statewide representative claims on behalf of their residents or the public. R.Doc. 200 at 10–14. And Express Scripts argued a statewide trial premised on aggregate proof would constitute a *de facto* class action

¹ The Order also imposed restrictions on Express Scripts’ ability to take meaningful discovery to defend itself—granting Plaintiffs unlimited access to dozens of depositions ongoing in the federal opioids multi-district litigation (“MDL”) but limiting Express Scripts to 20 non-expert depositions across all 120 Plaintiffs. Add.3. Express Scripts sought reconsideration on those aspects of the Order, which the district court denied. R.Doc. 200 at 15–16; Add.7–21.

without any of the procedural guardrails of Federal Rule of Civil Procedure 23. R.Doc. 200 at 14.

While Express Scripts' reconsideration motion was pending, the West Virginia Attorney General filed a materially identical action on behalf of the State. *See West Virginia ex rel. McCuskey v. Evernorth Health, Inc., et al.*, No. 5:25-cv-00182-JPB (N.D.W. Va. Aug. 15, 2025) ("AG Action"), ECF No. 1. Because that action is proceeding before the same judge overseeing this action, Express Scripts requested that the district court convene a status conference with counsel for all parties to discuss how to proceed and coordinate the *Ohio County, Wellsburg*, and AG actions. R.Doc. 209. Express Scripts further requested that the Court stay the *Ohio County / Wellsburg* consolidated cases pending resolution of the AG Action. R.Doc. 209.

The district court denied Express Scripts' motions. Add.7–21. Accordingly, as of today, the AG Action is proceeding separately from the consolidated *Ohio County* and *Wellsburg* Actions. Add.18. The district court also held that "the Seventh Amendment does not confer a right to a jury trial in this matter" because "[a] governmental public nuisance action seeking only abatement" by injunction "is equitable in nature and,

therefore, outside the scope of the Seventh Amendment jury-trial guarantee.” Add.10. Although the district court acknowledged Express Scripts’ right to first have a jury trial on common factual issues related to Plaintiffs’ other legal claims, it declined to revise the Order because “Plaintiffs’ have indicated their intention to seek client authorization to dismiss their legal claims in advance of the August 202[6] bench trial” if this Court confirms the viability of their public-nuisance claim in *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 22-01819 (4th Cir.)— a case by two West Virginia local governments (both of which are also Plaintiffs here) that lost at trial alleging an opioid-related public nuisance. Add.12.²

The district court also rejected Express Scripts’ request to reconsider the statewide trial. Despite Plaintiffs’ representations to the

² In *Huntington*, the district court held a bench trial on public-nuisance claims by two West Virginia local governments against opioid distributors, but only after those defendants asserted a right to a jury trial and then waived that right. See Defendants’ Notice of Consent to Bench Trial, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362 (S.D.W. Va. Mar. 4, 2020), ECF No. 191. After losing at trial, the two plaintiffs dismissed their pending claims against Express Scripts in *Huntington*, see *id.*, ECF No. 1543, and then joined as Plaintiffs in this case, see R.Doc. 85 ¶¶121–22. The district court denied Express Scripts’ motion to dismiss them. R.Doc. 140 at 44–53.

contrary, the district court held that they “are not proceeding on behalf of the State as *parens patriae*” and are not “asserting a statewide cause of action.” Add.13. The court also rejected Express Scripts’ arguments against statewide relief, concluding “[t]he trial plan does not purport to determine the rights of counties or municipalities that are not parties to this litigation,” Add.13—even though the trial order expressly states that “[t]he Court intends to hear evidence on a single, statewide abatement remedy,” Add.2. And the district court found “no merit in the argument that the trial plan amounts to a class action in disguise . . . [b]ecause non-parties are neither entitled to relief nor bound by any judgment in this case.” Add.13–14.

LEGAL STANDARD

It is “the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury.” *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962); see *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) (“[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled.”). This Court accordingly has recognized that “a petition for a writ of mandamus is the proper way to challenge the denial of a jury

trial.” *Lockheed Martin*, [503 F.3d at 353](#). More generally, mandamus is warranted where (1) the petitioner has a “clear and indisputable right to the requested relief”; (2) the petitioner has no other adequate means to obtain the relief sought; and (3) the writ is “appropriate under the circumstances.” *In re Murphy-Brown, LLC*, [907 F.3d 788, 795](#) (4th Cir. [2018](#)) (citation omitted). Correcting a district court’s “unlawful exercise of jurisdiction . . . is a traditional, appropriate use of the writ.” *In re Lowe*, [102 F.3d 731, 733](#) (4th Cir. [1996](#)).

REASONS THE WRIT SHOULD ISSUE

This Court should issue a writ of mandamus to correct two fundamental errors in the Order. *First*, the district court violated Express Scripts’ Seventh Amendment right to a jury trial by ordering a bench trial on Plaintiffs’ claims for public nuisance. *Second*, the district court exceeded its jurisdiction in ordering a statewide trial because Plaintiffs indisputably lack Article III standing to pursue—and the district court lacks authority to resolve—a public-nuisance claim on behalf of the State.

I. EXPRESS SCRIPTS HAS A CONSTITUTIONAL RIGHT TO A JURY TRIAL ON PLAINTIFFS’ CLAIMS.

The Seventh Amendment guarantees “the right of trial by jury” in suits “at common law.” [U.S. Const. amend. VII](#). “[T]he thrust of the

Amendment was to preserve the right to jury trial as it existed in 1791.” *Curtis v. Loether*, 415 U.S. 189, 193 (1974). “The right to trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care.” *Jarkesy*, 603 U.S. at 121 (citation omitted).

Express Scripts has a clear and indisputable Seventh Amendment jury trial right on Plaintiffs’ public-nuisance claims because such claims historically involved legal rights and Plaintiffs seek legal relief. In reaching the opposite conclusion, the district court fundamentally misapplied the Seventh Amendment analysis and ignored the relief Plaintiffs requested. The district court’s order also curtails Express Scripts’ indisputable right to a jury trial on Plaintiffs’ other claims. It is undisputed that Plaintiffs’ causes of action for civil RICO, negligence, and civil conspiracy, are legal claims subject to the Seventh Amendment, yet the Order presents an ongoing risk that Express Scripts’ right will be lost because the resolution of the public-nuisance claim in a bench trial would involve adjudication of facts that Express Scripts has a

constitutional right to have decided by a jury. Mandamus is warranted to preserve Express Scripts' constitutional jury trial right.

A. Plaintiffs' Public-Nuisance Claims Are Subject To The Seventh Amendment Jury Trial Right.

The Supreme Court has adopted a two-step inquiry to determine whether an action is a “[s]uit at common law” and therefore subject to the Seventh Amendment. U.S. Const. amend. VII; see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). “First, [the court should] compare the . . . action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, [the court should] examine the remedy sought and determine whether it is legal or equitable in nature.” *Granfinanciera*, 492 U.S. at 42 (citation omitted). “The second stage of this analysis is more important,” *id.*, and in determining whether a “state-created claim [i]s legal or equitable,” the court must look to “federal law,” even if the underlying “substantive dimension of the claim asserted finds its source in state law,” *Simler v. Conner*, 372 U.S. 221, 222 (1963). Here, both steps lead indisputably to the conclusion that Express Scripts has a jury trial right for Plaintiffs' public-nuisance claims.

1. Public-Nuisance Claims Are Historically Legal In Nature.

In 18th-century English courts, a “public nuisance [was] subject to criminal jurisdiction,” and the mechanism for adjudicating such a suit was a “proceeding *at law*”—namely, an “indictment or information, by which the nuisance may be abated.” *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97–98 (1838) (emphasis added); *see District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (explaining that “public nuisances [were] indictable at common law” and defendants had a right to “trial by jury” in a court of law); *accord R. v. White & Ward* (1757), 97 Eng. Rep. 338, 340 (KB) (“The very existence of the nuisance depends upon . . . matter[s] of fact, to be judged of by the jury.”). Having juries adjudicate public-nuisance suits followed the broader principle that criminal “rights and remedies . . . were enforced, at common law, through trial by jury.” *Pernell v. Southall Realty*, 416 U.S. 363, 381 (1974). By contrast, courts of equity historically had “no jurisdiction in criminal matters [and] steered very clear of the field of crime [because] there was to be no criminal equity.” *In re Search Warrants Issued Feb. 18, 2022*, 111 F.4th 316, 323 n.14 (4th Cir. 2024).

Before independence, English courts of equity interposed to enjoin public nuisances only in “confined and rare” cases involving “encroachment on the king’s soil.” *Georgetown*, 37 U.S. at 98. Even in those cases, equity jurisdiction “acted on with great caution and hesitancy” and thus “had lain dormant for a century and a half; that is, from Charles I[] down to the year 1795”—four years *after* the Seventh Amendment was ratified. *Id.* As Justice Story put it, “[t]he question of nuisance or not must, in cases of doubt, be tried to a jury; and the injunction will be granted or not, as that fact is decided.” 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 923, at 202–03 (1st ed. 1836). Courts of equity, moreover, recognized “that [actions] upon the ground of public nuisance . . . must be tried by a Jury . . . before an injunction should issue” and “there [was] no instance of holding [alleged misconduct] a nuisance, and therefore enjoining it, without a trial” by jury. *Att’y Gen. v. Cleaver* (1811), 34 Eng. Rep. 297, 299–300 (Ch.); *accord Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 n.1 (1829); *Georgetown*, 37 U.S. at 98.

The first step of the Seventh Amendment analysis accordingly supports Express Scripts’ assertion of a jury trial right because public-

nuisance claims were historically legal in nature and equity jurisdiction was the exception, not the rule.

2. Plaintiffs' Public-Nuisance Claims Seek Remedies That Are Legal In Nature.

Step two of the analysis confirms Express Scripts' right to a jury trial because Plaintiffs request legal relief for their public-nuisance claims. Plaintiffs expressly seek "all *legal* . . . relief as allowed by law . . . including . . . *compensatory and exemplary/punitive damages, and all other damages allowed by law.*" R.Doc. 128 ¶922 (emphasis added). "Money damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Assocs.*, [508 U.S. 248, 255](#) (1993); see *Jarkesy*, [603 U.S. at 123](#) ("[M]oney damages are the prototypical common law remedy."); *Def. Indus., Inc. v. Nw. Mut. Life Ins. Co.*, [938 F.2d 502, 506](#) (4th Cir. 1991) ("Over one hundred years ago the Supreme Court held that the seventh amendment guarantees a jury determination of the amount of tort damages."). The Seventh Amendment also "guarantees the right to a jury determination of the amount of punitive damages." *Def. Indus., Inc.*, [938 F.2d at 507](#).

Plaintiffs' request for damages is "all but dispositive." *Jarkesy*, [603 U.S. at 123](#). It categorically triggers Defendants' Seventh Amendment

right to a jury trial, irrespective of any other relief sought by Plaintiffs. *See FDIC v. Marine Midland Realty Credit Corp.*, [17 F.3d 715, 721](#) (4th Cir. 1994) (where plaintiff's claim "also requests monetary relief" it is "clearly requesting a legal remedy" and therefore "presents a claim which is unquestionably legal"). Combined with the historically legal nature of public-nuisance claims, Plaintiffs' request for monetary relief guarantees Express Scripts a jury trial right.

B. The District Court Misapplied The Seventh Amendment Analysis To Plaintiffs' Public-Nuisance Claims.

In denying Express Scripts' request for a jury trial on Plaintiffs' public-nuisance claims, the district court fundamentally misapplied the Seventh Amendment analysis. It started on the wrong foot by beginning with step two (the relief Plaintiffs seek), rather than step one (the historical nature of the action). Add.10. In doing so, the district court erroneously concluded that Plaintiffs' public-nuisance claims seek "only" an "equitable" remedy of abatement, ignoring their explicit requests for damages. Add.10. The court compounded its error by circularly holding that public-nuisance claims seeking only equitable abatement were historically equitable in nature. Add.10–12.

1. The District Court Erroneously Concluded That Plaintiffs' Public-Nuisance Claims Seek Only Equitable Relief.

The district court's Seventh Amendment analysis was wrong from the start. Beginning with the nature of the remedy sought, it found that the only "relief sought here—abatement—is an equitable remedy, distinct from damages, and thus does not implicate the jury-trial right." Add.11. That reasoning was erroneous for at least two reasons.

First, the record flatly contradicts the district court's finding. Plaintiffs' public-nuisance claims do not seek "only abatement" but specifically request "legal" relief, including "compensatory" damages, "exemplary/punitive" damages, and "all other damages allowed by law." R.Doc. 128 ¶922. Those damages claims have not been dismissed, and the district court is not free to disregard them. *See Skippy, Inc. v. CPC Int'l, Inc.*, [674 F.2d 209, 215](#) (4th Cir. 1982) (holding that a "case presented issues purely equitable in nature that could be resolved by the court without empaneling a jury" only because the district court "dismissed [plaintiff's] claims for damages leaving only claims for injunctive relief").

In fact, because Plaintiffs expressly seek damages, their additional request for abatement is largely irrelevant for Seventh Amendment

purposes. Plaintiffs' requests for damages alone triggers Express Scripts' jury trial right because the Seventh Amendment cannot "be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action." *Beacon Theatres*, 359 U.S. at 510 (citation omitted). And the jury "right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Tull v. United States*, 481 U.S. 412, 425 (1987) (citation omitted); accord *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119 (4th Cir. 1981) (holding the Seventh Amendment applies "even where the trial judge characterizes the legal issues as 'incidental' to equitable issues"). It was error for the district court to ignore Plaintiffs' clear and unequivocal requests for damages, which independently trigger Express Scripts' Seventh Amendment right.

Second, even assuming Plaintiffs had not expressly sought damages, the district court erred by blindly accepting Plaintiffs' characterization of their "abatement" relief as "an equitable remedy, distinct from damages." Add.11. "[A]ny claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002). That is

why “the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.” *Dairy Queen*, 369 U.S. at 477–78. Rather, a court must look to the substance of the relief requested. *Id.*

Here, Plaintiffs’ request for abatement is not limited to equitable relief. Both Plaintiffs and the district court acknowledged that a court may award equitable abatement only “by injunction.” Add.10; R.Doc. 213 at 10–15; *see Tull*, 481 U.S. at 423–24 (explaining “public nuisance cases brought in equity sought injunctive relief, not monetary penalties”); *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 483 (S.D.W. Va. 2022). But Plaintiffs are seeking “injunctive relief” separately from “abatement,” R.Doc. 128 ¶922, and Plaintiffs’ request for abatement is pecuniary, not injunctive. Their complaints explain that they seek a “judgment that the PBM Defendants *fund the abatement* of the ongoing public nuisance.” R.Doc. 128 ¶911 (emphasis added). Plaintiffs have also clarified that the purpose of the “abatement” award they seek is to “compensate[] [them] for the costs of rectifying the nuisance.” R.Doc. 213 at 13 (citation omitted). Thus, in substance, Plaintiffs’ “abatement” remedy is nothing more than a request for a

money judgment. *See Great-W. Life*, 534 U.S. at 210 (“[S]uits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages.’” (cleaned up)); *Dairy Queen*, 369 U.S. at 477 (“[W]e think it plain that [a] claim for a money judgment is a claim wholly legal in its nature however the complaint is construed.”); *Tights, Inc. v. Stanley*, 441 F.2d 336, 344 (4th Cir. 1971) (A “claim for a money judgment is legal in nature.”).

Although Plaintiffs attempt to hide the true nature of their requested relief by labeling it “abatement,” that does not make it so. *Dairy Queen*, 369 U.S. at 477–78. “[A]ny distinction that might exist between ‘damages’ and monetary relief under a different label is purely semantic, with no relevance to the adjudication of [a] Seventh Amendment claim.” *Granfinanciera*, 492 U.S. at 49 n.7. Plaintiffs’ admission that the purpose of their purported “abatement” is “compensation” proves crucial because “compensation is a purpose traditionally associated with legal relief.” *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710–11 (1999) (citation omitted). Thus, “[a]lthough they often dance around the word, what [Plaintiffs] in

fact seek is nothing other than compensatory *damages*—monetary relief for all losses” they allegedly sustained. *Mertens*, [508 U.S. at 255](#).

To be clear, Express Scripts maintains that Plaintiffs cannot lawfully obtain damages or other monetary relief as part of an abatement award. *See Huntington*, [609 F. Supp. 3d at 484](#) (“Any such monetary award—whether styled as damages or ‘abatement damages’—is not properly an element of equitable abatement relief.”). But so long as the district court proceeds with its plan to try a claim seeking monetary abatement, the Seventh Amendment entitles Express Scripts to a jury.

2. The District Court Improperly Collapsed The Two-Step Analysis Into A Single, Circular Inquiry And Looked To State Law For The Answer.

Although Plaintiffs’ unequivocal request for damages and other monetary relief is dispositive of Express Scripts’ jury trial right, the district court compounded the error in its Seventh Amendment analysis by (1) improperly conflating the two-step inquiry, and (2) improperly relying on state law to inform its answer.

First, after erroneously concluding that Plaintiffs seek only the equitable remedy of abatement, the district court concluded that “governmental actions to abate a public nuisance by injunction were

historically recognized as actions in equity.” Add.10. But that is historically inaccurate; prior to the Seventh Amendment’s adoption, English courts of equity typically would not grant equitable relief until a jury had first issued a verdict. *See supra* I.A.1. The district court’s reasoning also “conflates the two parts of [the] Seventh Amendment inquiry.” *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 571 n.8 (1990). Step one looks only to the nature of the “action” to determine if it was one “ordinarily” or “customarily” brought “in English law courts in the late 18th century.” *Granfinanciera*, 492 U.S. at 42 (citation omitted). The nature of the “remedy sought” in a particular case is confined to step two. *Id.* The district court misapplied that analysis by collapsing the two-part inquiry into a single, self-fulfilling question. The question is not whether a public-nuisance claim seeking a particular form of relief was historically legal or equitable; the question is whether public-nuisance claims in general were “ordinarily,” “customarily,” and “typically” brought in court of law. *Granfinanciera*, 492 U.S. at 42–44 (emphases added).

Second, the district court improperly relied almost exclusively on state-court authority to inform its circular “historical inquiry.” Add.10–

11. For example, the court relied on a decision from the West Virginia’s Mass Litigation Panel (“MLP”) denying defendants’ request for jury trials on materially similar public-nuisance claims to hold that “West Virginia law has long characterized public nuisance abatement actions as equitable.” Add.4 (quoting *State ex rel. Amerisourcebergen Drug Co. v. Moats*, 859 S.E.2d 374, 385 (W. Va. 2021)). But “*federal* law determines whether there is a jury trial right in a case involving state law that has been brought in federal court, and . . . state law on the subject is wholly irrelevant.” 9 Fed. Prac. & Proc. Civ. § 2303 (4th ed. 2025); *accord Simler*, 372 U.S. at 222 (“the jury-trial right is to be determined according to federal law”); *WEGCO, Inc. v. Griffin Servs., Inc.*, 19 F. App’x 68, 73 (4th Cir. 2001) (similar). There is good reason for this: state courts are not bound by the Seventh Amendment, *see Minneapolis & St. Louis. R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916), and they are generally free to blur the lines between legal and equitable relief.

The only controlling federal authority the court cited—the Supreme Court’s decision in *Tull*—confirms Express Scripts’ right to a jury trial. In *Tull*, the Supreme Court considered whether a statutory claim under the Clean Water Act (“CWA”) is subject to the Seventh Amendment. 481

U.S. at 414. The government argued that its CWA claims were equitable in nature because they were analogous to “an action to abate a public nuisance.” *Id.* at 420. The Supreme Court rejected the government’s argument that public-nuisance claims are primarily equitable. *Id.* at 420–21. Although the Supreme Court acknowledged that claims seeking to abate public nuisances by injunction were “classic example[s]” of claims brought in courts of equity, it reasoned that “[t]he essential function of an action to abate a public nuisance was to provide a civil means to redress . . . criminal offenses,” which are legal in nature. *Id.* at 421, 423 (citation omitted). The Supreme Court then held that the Seventh Amendment jury right applies to CWA claims, from which it necessarily follows that the Seventh Amendment jury right applies to its public-nuisance analogues. *Id.* at 427.

Like the government in *Tull*, the district court fundamentally erred by focusing only on public-nuisance claims seeking equitable relief instead of looking to the “essential function” of public nuisance, which is legal in nature. If it had, it would have concluded that public nuisance was historically a common-law crime tried in courts of law and, therefore, that Express Scripts has a right to a trial by jury in this case.

C. Express Scripts Has A Clear And Indisputable Right To A Jury Trial On Plaintiffs' Other Legal Claims.

The Order independently violates Express Scripts' Seventh Amendment right to jury trials on Plaintiffs' claims for negligence, civil RICO, and civil conspiracy. When a civil action "contain[s] both legal and equitable claims," a court "may not resolve equitable claims first if doing so could prevent legal claims from getting to the jury." *Perttu v. Richards*, 605 U.S. 460, 471 (2025). Instead, "district courts should structure their order of operations to preserve the jury trial right" by ensuring that a jury decides any common factual issues before the court adjudicates the equitable claims. *Id.*; see *Beacon Theatres*, 359 U.S. at 509–11.

In opposing reconsideration, Plaintiffs did not dispute that Express Scripts has a right to have a jury trial on common issues relating to Plaintiffs' claims for negligence, civil RICO, and civil conspiracy. R.Doc. 213 at 16–17. Nor did they attempt to justify the district court's decision to deny that right when it prioritized bench trials on public nuisance, effectively conceding the Order violates Express Scripts' Seventh Amendment right. *Id.* Instead, Plaintiffs insisted Express Scripts' arguments are "not ripe" because Plaintiffs *may* choose to dismiss their non-nuisance claims if this Court revives the viability of their novel

public-nuisance theory in the pending appeal in *Huntington. Id.* The district court accepted Plaintiffs' arguments in full, holding Express Scripts must await a decision from this Court in *Huntington* before knowing whether it will be forced to defend against Plaintiffs' fallback claims. Add.12.

That ruling is fundamentally at odds with Supreme Court precedent, which requires courts to “structure their order of operations” to allow juries to *first* try common factual issues before the court adjudicates any remaining equitable claims. *See Perttu*, [605 U.S. at 471](#); *Beacon Theatres*, [359 U.S. at 509–11](#). Here, there is clear overlap of common factual issues between Plaintiffs' public-nuisance claims and their claims of negligence, civil RICO, and civil conspiracy. As Judge Polster recognized in the federal opioids MDL involving materially similar claims, “the great majority of facts the jury will need to find to decide plaintiffs' legal claims (federal RICO . . . and civil conspiracy) are the same as those any finder of fact would have to determine to decide the nuisance claims.” *In re Nat'l Prescription Opiate Litig.*, [2019 WL 4621690](#), at *3 (N.D. Ohio Sept. 24, 2019). For example, “facts regarding the existence of conditions that generated the alleged [harms] (e.g., the

alleged fraudulent marketing practices, inadequate diversion controls, and oversupply of opioids” in Plaintiffs’ communities) “are also relevant to determining the conditions constituting the alleged nuisance.” *Id.* “[F]acts relating to alleged intentional or unlawful conduct resulting in liability under the legal claims also inform the decision as to whether that conduct unreasonably interferes with a commonly-held public right.” *Id.* And facts regarding the alleged “causal link” between Express Scripts’ alleged conduct and Plaintiffs’ alleged injury “involve[s] facts common to all of plaintiffs’ claims.” *Id.*

The district court’s failure to account for Express Scripts’ Seventh Amendment jury trial right on Plaintiffs’ non-nuisance claims warrants mandamus relief. Because of the “importance” of “[t]he right to trial by jury,” federal courts must protect against “any *seeming* curtailment of the right.” *Jarkesy*, 603 U.S. at 121 (citation omitted; emphasis added). Here, the court’s decision to prioritize “equitable claims first” while severing Plaintiffs’ pending legal claims is “not permissible,” because it “*could* prevent a full jury trial on the legal” issues by allowing the court, in a bench trial, to impermissibly resolve common factual issues. *Perttu*, 605 U.S. at 471 (citation omitted). Indeed, by preventing a jury from first

considering these common issues, the district court disregards its duty “to conform [any] equitable findings to a jury’s verdict . . . [on] issues common to both [types of] claims, *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987), and invites a “collision with the Seventh Amendment.” *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

The Order is indisputably “wrong and deprive[s]” Express Scripts of the “right to a trial by jury.” *In re Simons*, 247 U.S. 231, 239–40 (1918). That “order that should be dealt with now, before [Express Scripts] is put to the difficulties and the Courts to the inconvenience that would be raised by” the district court’s “mistake.” *Id.*

II. THE DISTRICT COURT EXCEEDED ITS JURISDICTION BY ORDERING A STATEWIDE TRIAL.

In addition to its erroneous deprivation of Express Scripts’ Seventh Amendment right, the district court exceeded its jurisdiction in ordering a statewide trial despite the absence of any valid claims on behalf of the State in the consolidated *Ohio County* and *Wellsburg* Actions. That error provides an independent basis for mandamus relief.

A. The Statewide Trial Clearly Violates Judicial Limits.

The court's decision to order a statewide liability trial is premised on Plaintiffs' erroneous representations that they are bringing their public-nuisance claims solely on behalf of a statewide constituency. The district court accepted those arguments and ordered statewide trials. But Plaintiffs—cities and counties in West Virginia—lack Article III standing or statutory authority under West Virginia law to bring a statewide public-nuisance claim. And the court lacks jurisdiction to order relief for Plaintiffs on a statewide basis.

1. Plaintiffs Lack Article III Standing To Bring Claims On Behalf Of The State And Its Citizens.

Plaintiffs have made clear that their public-nuisance claims are on behalf of the State and that they seek to “represent the same human lives that the Attorney General would be representing.” Add.36. When the district court expressed doubt that it had “jurisdiction” to permit a statewide trial, Plaintiffs' counsel doubled down, assuring the court that they had previously “represented the state through the counties and cities” in the MLP. Add.38. In fact, Plaintiffs expressly disclaimed that they were seeking to recover their own “expenditures” or “private economic losses.” Add.30, Add.36. Based on these representations, the

district court ordered a statewide trial on liability and a separate trial on a “statewide abatement remedy.” Add.2. But as Express Scripts explained in its motion for reconsideration, the court was clearly wrong.

To satisfy Article III, a plaintiff must have a “sufficiently concrete” interest in the action “to create an actual controversy.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). “[P]arens patriae is a standing doctrine under which a state may under proper circumstances sue on behalf of its citizens when a separate quasi-sovereign interest also is at stake.” *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) (citing *Alfred L. Snapp*, 458 U.S. at 600–01). But the doctrine “is a quite limited one.” *Id.* It confers standing upon a state to bring suit on behalf of its citizens only if there is “an independent *state* sovereign interest at stake.” *Id.* (emphasis added).

West Virginia law similarly provides no basis for local governments to bring a public-nuisance claim on behalf of the State. The Attorney General has exclusive authority to assert civil claims for public nuisance on behalf of the State’s citizens. *See, e.g., State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 642 (W. Va. 2013) (“[O]nly the Attorney General ha[s] authority to bring the civil petition in the name of the

State.”); *State v. Ehrlick*, 64 S.E. 935, 936–37 (W. Va. 1909) (dismissing county’s civil action for public nuisance). Unless expressly authorized by statute, local governments have “no [] power or authority” to bring a public-nuisance action “on the part of the state.” *State ex rel. Morrissey v. W. Va. Off. of Disciplinary Couns.*, 764 S.E.2d 769, 789 (W. Va. 2014). There is no such statutory authorization here, and no legal basis for Plaintiffs to assert claims on behalf of the State. That is only clearer now that the Attorney General has brought a separate suit for the State. See *McCuskey, supra*; see also *City of Huntington v. State Water Comm’n*, 73 S.E.2d 833, 841 (W. Va. 1953) (“subordinate” local governments “regulate and administer . . . local and internal affairs,” whereas the State regulates “those matters which are common to and concern the people at large of the State.”).

Indeed, Plaintiffs do not even have standing to bring a public-nuisance suit on behalf of their *own* residents. Federal courts in this and other circuits have uniformly held that a local government lacks Article III standing to bring suit “on behalf of its citizens.” *Town of Milton v. FAA*, 87 F.4th 91, 96 (1st Cir. 2023) (dismissing local government’s suit on behalf of its citizens for lack of standing); see, e.g., *City of N. Miami v.*

FAA, [47 F.4th 1257, 1277](#) (11th Cir. 2022) (same); *El Paso County v. Trump*, [982 F.3d 332, 338](#) (5th Cir. 2020) (same); *City of Olmstead Falls v. FAA*, [292 F.3d 261, 267](#) (D.C. Cir. 2002) (same); *City of Rohnert Park v. Harris*, [601 F.2d 1040, 1044](#) (9th Cir. 1979) (same); *City of Chicago v. Marriott Int’l, Inc.*, [2019 WL 6829101](#), at *3 (D. Md. Dec. 13, 2019) (same); *Bd. of Sup’rs of Warren Cnty. v. Va. Dep’t of Soc. Servs.*, [731 F. Supp. 735, 741](#) (W.D. Va. 1990) (same). It must allege a “concrete harm” to *its own* interests. *Milton*, [87 F.4th at 98](#).

Faced with their lack of standing, Plaintiffs “attempt[ed] an end-run around this body of case law by disclaiming any intent to represent” the State or their residents as *parens patriae*. *Id.* at 96–97. In opposing Express Scripts’ motion for reconsideration, Plaintiffs claimed instead that “each Plaintiff” is bringing its “own individual claim.” R.Doc. 213 at 17–18. The district court accepted Plaintiffs’ new position without question and denied reconsideration of its order setting a statewide trial. Add.13. But Plaintiffs’ about-face underscores that there is no basis to hold a statewide trial. As Plaintiffs now concede, they are not the State, and they do not (and cannot) represent the interests of the State or its citizens.

2. The District Court Lacks Jurisdiction To Issue Statewide Relief.

Federal courts are constrained by Article III and the Judiciary Act of 1789 to adjudicating only those cases properly before them and granting relief only to the parties to such cases. *See Trump v. CASA, Inc.*, [606 U.S. 831, 844](#) (2025) (“It is an elementary principle that a court cannot adjudicate directly upon a person’s right without having him either actually or constructively before it.”) (citation omitted). The district court exceeded its jurisdiction here by ordering a statewide trial “on a single, statewide abatement remedy,” Add 2, for Plaintiffs’ public-nuisance claims when no statewide case or controversy is before it. Plaintiffs did not (and cannot) allege harm on behalf of the State. *See supra* II.A. Throughout their complaint, Plaintiffs allege particularized injuries to their communities, not a statewide nuisance or statewide injury. For example, they allege that “*the Plaintiffs’ Communities* were being flooded with an oversupply of these dangerous drugs,” R.Doc. 128 ¶495 (emphasis added), and they seek relief for the public nuisance that Defendants allegedly “created, contributed to, and/or maintained *in Plaintiffs’ Communities.*” R.Doc. 128 ¶910 (emphasis added). “What might be a nuisance in one locality might not be so in another; and,

conversely, what might not be a nuisance in one place may become a nuisance in another.” *Harless v. Workman*, [114 S.E.2d 548, 553–54](#) (W. Va. 1960) (quoting 66 C.J.S. *Nuisances* § 25). Because Plaintiffs do not, and cannot, allege harm on behalf of the entire state, the court cannot order a statewide trial or grant statewide relief. *See CASA*, [606 U.S. at 844](#); *Gill v. Whitford*, [585 U.S. 48, 73](#) (2018) (rejecting plaintiffs’ claim of “statewide injury” and cautioning “that ‘standing is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”) (citation omitted).

The court’s reliance on federal and state MDL precedent to justify statewide proceedings was wrong. Add.2. The federal MDL court never conducted a statewide liability trial; it employed traditional bellwether trials focused on individual plaintiffs’ specific claims—an approach that differs fundamentally from the sweeping statewide adjudication ordered here. *In re Nat’l Prescription Opiate Litig.*, [2019 WL 4686815](#), at *2 (N.D. Ohio Sept. 26, 2019) (noting the success of the bellwether process in reaching “global resolution” of claims). And state MDL proceedings have no relevance because Article III does not apply in state court. *Maryland Shall Issue, Inc. v. Hogan*, [971 F.3d 199, 219](#) (4th Cir. 2020) (“Standing

to sue in any Article III court is a federal question which does not depend on the party's standing in state court.") (cleaned up).

The statewide trial structure also treats this case as if it were a class action in which the particular Plaintiffs in this case can act on behalf of everyone in West Virginia. *See* Add.9 ("The Court's reference to a 'statewide' trial reflects the aggregate nature of the proof, recognizing that the opioid epidemic has become a pervasive public harm affecting the vast majority of West Virginia."). Yet Plaintiffs neither pleaded nor moved for class certification, and the court has not certified a class under Federal Rule of Civil Procedure 23. It is accordingly clear error to treat this case as if it were a class action. *See* *CASA*, 606 U.S. at 849 ("A properly conducted class action . . . can come about in federal courts in just one way—through the procedure set out in Rule 23.") (citation omitted). By "forging a shortcut to relief that benefits parties and nonparties alike," the Order "circumvent[s] Rule 23's procedural protections." *Id.* (citation omitted).

B. Mandamus Is Appropriate Under The Circumstances.

The erroneous Order requiring a statewide trial satisfies the requirements for mandamus. *First*, Express Scripts' right to relief is

“clear and indisputable” because the district court’s statewide trial rests on multiple, clearly “erroneous view[s] of the law.” *SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010) (citation omitted); *In re Murphy-Brown*, 907 F.3d at 797 (granting mandamus where petitioner “demonstrated a ‘clear and indisputable’ right to relief” from order “breach[ing] basic [constitutional] principles”). As explained above, the district court clearly exceeded its authority in awarding a statewide trial because Plaintiffs lack standing to sue on behalf of the State and the district court lacks authority to issue relief beyond the parties before it. *See supra* II.A–B.

Second, Express Scripts has “no other adequate means to attain the relief” it seeks. *Cheney*, 542 U.S. at 380. Absent mandamus relief, Express Scripts must submit to a statewide trial on claims that Plaintiffs lack Article III standing to bring and the district court lacks authority to adjudicate. This Court and others have consistently recognized that correcting such an “unlawful exercise of jurisdiction” falls within the proper office of mandamus. *In re Lowe*, 102 F.3d at 733; *see Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 308-09 (1989) (mandamus warranted to reverse district court that “plainly acted beyond its jurisdiction”); *In re Bituminous Coal Operators’ Ass’n, Inc.*, 949 F.2d 1165, 1168 (D.C. Cir.

1991) (mandamus available where order “exceeds the limits of the district court’s . . . authority” under Article III).

Third, the writ is appropriate under the circumstances. The statewide trial order is so fundamentally at odds with Article III that the parties have not been able to identify any analogous federal authority supporting the district court’s conclusion. It therefore “presents a novel and significant question of law or a legal issue whose resolution will aid in the administration of justice.” *In re United States*, 945 F.3d 616, 628 (2d Cir. 2019) (cleaned up). And it will undermine the rights of other litigants who “may be involved in future legal proceedings,” by creating a novel precedent for statewide trials by plaintiffs who lack standing to bring them, against defendants who are unable to defend them. *In re Murphy-Brown*, 907 F.3d at 802. Mandamus is appropriate to correct the district court’s unprecedented order directing a statewide trial.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus directing the district court to vacate its Order.

Respectfully submitted, this 22nd day of October, 2025.

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CERTIFICATE OF COMPLIANCE

This Petition complies with the requirements of Federal Rule of Appellate Procedure 21(d) because, excluding accompanying documents and the parts of the petition exempted by Rule 32(f), it contains 7,752 words. This petition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Christopher G. Michel

DATED: October 22, 2025.

Christopher G. Michel

CERTIFICATE OF SERVICE

I certify that on October 22, 2025, I electronically filed this petition with the Clerk of the Court using the CM/ECF system. I further certify that on this day I caused a copy of this petition to be served, via FedEx, upon the district court and all counsel of record:

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ADDENDUM

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

OHIO COUNTY COMMISSION, et al.,

Plaintiffs,

v.

Civil Action No. 5:24-CV-142

Judge Bailey

EXPRESS SCRIPTS, INC., et al.,

Defendants.

ORDER

On July 11, 2025, the parties to this action filed a Status Report providing alternative suggestions on how this matter should proceed. [Doc. 183]. On July 28, 2025, this Court convened a Status Conference to hear discussion concerning the progress of this case. [Doc. 187]. Based upon the foregoing, this Court **ORDERS** as follows:

1. The case of ***City of Wellsburg v. Express Scripts, Inc.***, Civil Action No. 5:25-CV-164 shall be consolidated with this case for all issues with this being the lead case;

2. This Court will hold a Bench Trial on the issue of public nuisance beginning **August 4, 2026, at 9:00 a.m.** The issues to be considered are:

Issue #1: Whether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia; and

Issue #2: Whether the alleged oversupply and diversion of opioids throughout West Virginia is a public nuisance, which is broadly defined as an unreasonable interference with a right common to the general public's health and safety.

General causation will be addressed in the Phase I trial of liability for public nuisance against the Defendants. If general causation is proved in any of the Phase I trial, then specific causation will be addressed in a Phase II, statewide abatement trial. Phase I will address whether Defendants caused the oversupply and diversion of opioids in West Virginia. Phase II will address causation of opioid epidemic harms in Plaintiffs' communities that relate to the equitable remedy of abatement.

The causes of action contained in the operative Complaint other than public nuisance will be severed from this trial.

Such bifurcation is consistent with the MLP's (West Virginia Mass Litigation Panel's) bifurcated trial plan in *In Re: Opioid Litigation*, Civil Action No. 19-C-1900 (Cir. Ct. Kanawha Cty) which (after the Supreme Court of Appeals of West Virginia refused to disturb via a writ of prohibition) led to the successful resolution of the claims of sixty-three (63) West Virginia governmental plaintiffs and the State of West Virginia, and all cases pending in the MDL. (*In re Nat'l Prescription Opiate Litig.*, 1:17-MD-2804 (N.D. Ohio)) in an efficient and fair manner.

Consistent with the procedure set forth by the MLP, if one (1) or more Defendants are found to be liable in Phase I, this Court will then set an expedited bench trial on causation and abatement. The Court intends to hear evidence on a single, statewide abatement remedy and will consider allocation of fault amongst those Defendants found liable for purposes of inchoate contribution.

This Court agrees with the reasoning of the MLP that the Plaintiffs contend the opioid crisis that is the subject of this Mass Litigation is a public nuisance for which the Defendants should be held liable. The opioid crisis is ubiquitous. It knows no boundaries and is not limited to a specific city or county in West Virginia. The Court finds that a consolidated Bench Trial to determine whether the Defendants are liable to the City/County Plaintiffs for public nuisance will promote judicial dispatch and economy, while avoiding the prejudice and confusion of multiple, single plaintiff trials. It will also promote convenience of the parties and witnesses, conserve available judicial resources, and substantially decrease the length of time, amount of expense, and burden on all parties of trying multiple lawsuits to determine whether the Defendants are liable for public nuisance as to each city or county. MLP October 27, 2021 Order, TID 67047934 at ¶ 7.

This Court agrees that depositions will be limited to account for the discovery already conducted in the other opioid cases and to ameliorate the burden on witnesses and the parties. Specifically, Plaintiffs may already cross-notice the multiple depositions of Defendants being taken concurrently in other opioid cases, including the two (2) bellwether cases in the middle of fact discovery currently brought by the cities of Rochester, New York, and Ogdensburg, New York in the MDL, as well as the cases currently in active discovery brought by the State of Alaska and the City of Martinsville, Virginia. Given the numerous depositions Plaintiffs will have access to and can participate in, this Court directs that Plaintiffs are limited to five (5) depositions of non-expert witnesses (any cross-noticed depositions will not count against Plaintiffs' deposition limit) and that Defendants should be limited to twenty (20) non-expert depositions.

This Court further directs that absent an agreement between Plaintiffs and the Defendants, no party shall re-depose any witness whose deposition a party received notice of and declined to cross-notice.

Further, for any witness that has already been deposed in the MDL, then a party is required to demonstrate good cause exists for that party to depose that witness, instead of designating that witnesses' prior deposition testimony. A party should show that an additional deposition is warranted because the witness is likely to have knowledge that is specific to Plaintiffs' claim (e.g., Ohio County, West Virginia specific knowledge) that was not available at the time of the witnesses' prior deposition, and that such topics were not discussed in the prior deposition. Any new depositions of previously deposed witnesses should be limited in scope to only these new topics.

The Parties are directed to meet and confer in good faith regarding depositions of any witnesses already deposed in the MDL to determine if good cause does exist, and if so, the scope of any such deposition.

For the reasons noted above, this Court will adopt the ruling of the MDL Court which held: "The parties will make a good faith effort to limit their deposition questions of all witnesses, including experts who have previously been deposed in the opioid litigation, to matters that were not inquired into or adequately addressed in the witness's prior depositions."

This Court adopts the Plaintiffs' proposal that they exchange fact sheets using the format previously agreed to in the MDL opioid cases. A number of Plaintiffs with cases in the MDL opioid litigation have already submitted these fact sheets. Plaintiffs propose that

the remaining Plaintiffs produce fact sheets on a rolling basis under the schedule set forth below.

An ESI agreement and proposed protective order shall be provided by **August 15, 2025**.

Plaintiff fact sheets shall be provided on a rolling basis on or before **December 31, 2025**.

Defendant fact sheets shall be provided on or before **October 31, 2025**.

All fact and Phase I expert discovery shall be completed by **May 29, 2026**.

Expert witnesses with burden on non-abatement issues shall be disclosed by **March 31, 2026**.

Expert witnesses without burden on non-abatement issues shall be disclosed by **April 30, 2026**.

Motions in Limine shall be filed on or before **June 12, 2026**, with responses filed **fourteen (14) days** thereafter.

Rule 23(a)(3) disclosures shall be filed on or before **June 12, 2026**, with objections filed **fourteen (14) days** thereafter.


Dispositive motions shall be filed on or before **June 12, 2026**, with responses due **July 3, 2026**, and replies due **July 13, 2026**.

Mediation shall be completed by **June 30, 2026**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: August 4, 2025.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

Case 5:24-cv-00142-JPB Document 222 Filed 10/01/25 Page 1 of 15 PageID #: 5257

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

OHIO COUNTY COMMISSION, et al.,

Plaintiffs,

v.

Civil Action No. 5:24-CV-142
Judge Bailey

EXPRESS SCRIPTS, INC., et al.,

Defendants.

ORDER

Pending before this Court is Express Scripts Entities' Motion for Reconsideration or in the Alternative to Certify for Interlocutory Review [Doc. 199] and a Motion and Memorandum of Law in Support of Express Scripts' Requesting a Status Conference and to Stay Proceedings [Doc. 209]. Responses [Docs. 213 & 216] and Replies [Docs. 217 & 218] were filed for each Motion. This Court will address each Motion in turn.

I. Express Scripts Entities' Motion for Reconsideration or in the Alternative to Certify for Interlocutory Review [Doc. 199]

In defendants'¹ Motion for Reconsideration or in the Alternative to Certify for Interlocutory Review (hereinafter "Motion for Reconsideration"), they move the court under Federal Rules of Civil Procedure 54(b) and 59(e) for reconsideration of its August 4, 2025

¹Defendants consist of Express Scripts, Inc., Express Scripts Administrators, LLC, Medco Health Solutions, Inc., ESI Mail Order Processing, Inc., ESI Mail Pharmacy Service, Inc., Express Scripts Pharmacy, Inc., Express Scripts Specialty Distribution Services, Inc., Express Scripts Sales Operations, Inc., Evernorth Health, Inc., Evernorth Care Solutions, Inc., Evernorth Direct Health, LLC, Evernorth Behavioral Health, Inc., and Evernorth Sales Operations, Inc.

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Order [Doc. 192]. See [Doc. 199]. In the alternative, defendants move the Court under 28 U.S.C. § 1292(b) to certify its August 4, 2025 Order for immediate interlocutory review to the United States Court of Appeals for the Fourth Circuit. [Id.].

On August 4, 2025, the Court ordered an expedited two-phase bench trial on public-nuisance liability, severing but not dismissing all other claims. Defendants now move for reconsideration, arguing that the Order infringes their Seventh Amendment right to a jury trial by assigning legal issues to a bench trial, improperly establishes a statewide liability and abatement trial despite the absence of statewide plaintiffs or a certified class, and imposes unfair discovery limitations by restricting defendants to twenty (20) depositions while allowing plaintiffs broader access to discovery through cross-noticing. See [Doc. 200 at 2–3]. Defendants contend these deficiencies, coupled with the lack of full briefing or explanation on key constitutional and procedural issues, create manifest injustice and warrant reconsideration or, alternatively, certification for interlocutory review under 28 U.S.C. § 1292(b). [Id. at 3–4].

The decision whether to reconsider or modify interlocutory rulings is within the sound discretion of the district court. ***St. Annes Dev. Co., Inc. v. Trabich***, 443 Fed.App'x. 829, 832 (4th Cir. 2011). Courts generally limit the grounds for a Rule 54(b) motion for reconsideration to (1) an intervening change in the law, (2) new evidence that was not previously available, or (3) correction of a clear error of law or to prevent manifest injustice. ***Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.***, 148 F.3d 396, 403 (4th Cir. 1998). A motion under Rule 54(b) should not be used to rehash arguments the court has already considered because the movant is displeased with the outcome, nor should it be used to

raise new arguments that could have been asserted previously. ***Blankenship v. Fox News Network, LLC***, [2021 WL 3706683](#), at *5 (S.D. W.Va. Aug. 20, 2021) (Copenhaver, Jr., J.) (citations omitted). Reconsideration of a judgment is generally an “extraordinary remedy [that] should be used sparingly.” ***Pac. Ins. Co.***, [148 F.3d at 403](#).

First, the Court’s August 4, 2025 Order is a proper exercise of the authority and broad discretion afforded the Court in managing complex litigation. Federal courts possess inherent powers to manage complex litigation, supplemented by the Federal Rules of Civil Procedure, including Rule 16(c)(2)(L), which authorizes “special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,” and Rules 16(c)(2)(M) and 42(b), which permit separate trials of particular claims or issues. Severance is “one of the trial judge’s most useful trial management devices to ensure the just and efficient determination of civil actions as required by Rule 1.” ***Simon v. Philip Morris Inc.***, [200 F.R.D. 21, 27](#) (E.D.N.Y. 2001).

This case is complex, and the Court properly exercised its discretion in bifurcating the issues. Under the trial plan, Phase I addresses the common issues of whether an opioid-related public nuisance exists across the plaintiff jurisdictions and whether defendants engaged in wrongful conduct contributing to that nuisance. Trying these common issues together avoids duplicative trials, promotes judicial economy, and provides an efficient vehicle for the presentation of evidence. The Court’s reference to a “statewide” trial reflects the aggregate nature of the proof, recognizing that the opioid epidemic has become a pervasive public harm affecting the vast majority of West Virginia. The trial plan

does not relieve plaintiffs of their burden of proof but merely postpones specific causation until Phase II, consistent with sound case management principles. This sequencing ensures that without proof of general causation, specific causation need not be reached, thereby conserving judicial resources. If plaintiffs prevail in Phase I, defendants will retain the opportunity to present defenses and to challenge whether their conduct substantially contributed to a nuisance in each jurisdiction.

Second, the Court holds that the Seventh Amendment does not confer a right to a jury trial in this matter. A governmental public nuisance action seeking only abatement is equitable in nature and, therefore, outside the scope of the Seventh Amendment jury-trial guarantee. See *Tull v. United States*, [481 U.S. 412, 423](#) (1987) (“A public nuisance action was a classic example of the kind of suit that relied on the injunctive relief provided by courts in equity.”). As the commentators at the time noted, governmental actions to abate a public nuisance by injunction were historically recognized as actions in equity. 2 Story, Commentaries on Equity Jurisprudence §§923-924 (5th ed. 1849).

West Virginia law has long characterized public nuisance abatement actions as equitable: “Courts of equity have an ancient and unquestionable jurisdiction to prevent or abate public nuisance, and this alone would give jurisdiction, even if it had not been decided that this was a public nuisance.” *Town of Weston v. Ralston*, [48 W.Va. 170, 36 S.E. 446, 456](#) (1900); see also *McMechen v. Hitchman-Glendale Consol. Coal Co.*, [88 W.Va. 633, 107 S.E. 480, 481](#) (1921) (recognizing that “[a] court of equity, having jurisdiction in such case to abate the nuisance, may assess, and enter a decree for, such

damages, . . . the jurisdiction so to do [being] merely incidental to the exercise of the jurisdiction to abate the nuisance.”).

In the context of the opioid litigation, the Supreme Court of Appeals rejected a Writ of Prohibition by other opioid defendants after the West Virginia Mass Litigation Panel (“MLP”) sought to hold a bench trial on similarly asserted public nuisance claims seeking only abatement noting:

As to the issue in this case—public nuisance—we observe that “[c]ourts of equity have an ancient and unquestionable jurisdiction to prevent or abate public nuisance[.]” But, we also observe the opposite. For example, while one court found that the public nuisance claim before it was equitable, it noted that nuisance claims seeking damages had, in some cases, been heard by a jury before the merger of law and equity.

State ex rel. Amerisourcebergen Drug Co. v. Moats, [245 W.Va. 431, 441, 859 S.E.2d 374, 385](#) (2021).

The relief sought here—abatement—is an equitable remedy, distinct from damages, and thus does not implicate the jury-trial right. As Judge Dan Aaron Polster in the federal opioid Multi-District Litigation (“MDL”) concluded:

[T]he fact that “nuisance” is sometimes characterized as a variety of “tort” does not change the fact that an equitable claim to abate a nuisance is not a tort claim seeking compensatory damages. Defendants also argue that what Plaintiffs’ label as a claim for “abatement costs” is in fact a “claim for damages.” Unlike tort damages that compensate an injured party for past

harm, abatement is equitable in nature and provides a prospective remedy that compensates a plaintiff for the costs of rectifying the nuisance.

In re Nat'l Prescription Opiate Litig., [2019 WL 4194272](#), at *3 (N.D. Ohio Sept. 4, 2019).

To the extent defendants rely on contrary authorities, those cases are either distinguishable, dicta, or otherwise unpersuasive. Rule 39(a)(2) directs this Court to conduct a bench trial when no federal jury-trial right exists, and such is the case here. Accordingly, the Court concludes that defendants are not entitled to a jury trial on plaintiffs' public nuisance abatement claim.

Third, the Court finds that defendants' contention that the present trial plan cannot proceed because of the pendency of legal claims is unfounded, or at best premature. This Court has already determined, in denying Defendants' Motion to Dismiss [Doc. 188], that West Virginia law recognizes a public nuisance cause of action. Plaintiffs have indicated their intention to seek client authorization to dismiss their legal claims in advance of the August 2025 bench trial, consistent with their prior representations to the Court. At present, however, plaintiffs are unable to pursue such dismissal because the Fourth Circuit's forthcoming decision in ***City of Huntington v. Amerisource Bergen Drug Corporation***, Nos. 22-1819(L) and 22-1822, may alter the controlling law. If the Fourth Circuit affirms the viability of public nuisance claims, plaintiffs will seek to dismiss their remaining legal claims. If, however, the Fourth Circuit rules otherwise, the public nuisance claims would no longer be before this Court, and the Court would then issue a revised trial plan addressing any surviving legal claims.

Fourth, the Court finds that defendants' challenge to the Court's trial plan—framed in terms of standing, statewide relief, and an alleged *de facto* class action—is without merit. Express Scripts conflates the question of standing with the evidentiary methods by which Plaintiffs may prove their claims.

As to the first point, the Court rejects defendants' standing argument. Plaintiffs are not proceeding on behalf of the State as *parens patriae*, nor are they asserting a statewide cause of action. Rather, each city and county brings its own claim under statutory authority permitting it to abate public nuisances within its respective jurisdiction. Nothing in the trial plan alters the substantive nature of those claims. The fact that plaintiffs intend to rely on aggregate evidence of the opioid epidemic's impact across West Virginia does not transform the claims into a statewide action. Proof that the epidemic exists statewide necessarily establishes that it exists in the plaintiff jurisdictions, which together represent the vast majority of the State's population. This is a matter of evidence at trial, not a matter of legal standing. Each plaintiff must still establish every element of its own claim in order to prevail.

With respect to the second argument, the Court finds that defendants' contention regarding improper statewide relief is likewise unfounded. The trial plan does not purport to determine the rights of counties or municipalities that are not parties to this litigation. Any judgment in favor of plaintiffs will extend only to the named plaintiffs, and non-parties remain free to pursue their own claims. By the same reasoning, if defendants prevail, non-parties will not be barred from pursuing independent actions.

Regarding the third contention, the Court finds no merit in the argument that the trial plan amounts to a class action in disguise. Because non-parties are neither entitled to

relief nor bound by any judgment in this case, the structure of the trial does not create a class proceeding.

Fifth, district courts possess broad discretion to manage both the scope and timing of discovery. See *Hinkle v. City of Clarksburg, W.Va.*, [81 F.3d 416, 426](#) (4th Cir. 1996). A key purpose of bifurcation is to delay the expense of extensive discovery and trial preparation until threshold liability questions are resolved. See *Novopharm Ltd. v. Torpharm, Inc.*, [181 F.R.D. 308, 312](#) (E.D. N.C. 1998) (Boyle, C.J.). One of the significant advantages of bifurcation is thus the streamlining of discovery. See *Honican v. Stonebridge Life Ins. Co.*, [2005 WL 2614904](#), at *2 (E.D. Ky. Oct. 13, 2005).

Consistent with this authority, the Court limited Phase I discovery to matters directly relevant to the issues set for trial, including restricting defendants to twenty (20) depositions. Defendants contend this limitation impairs their ability to defend themselves. The Court disagrees. The Phase I proceedings are confined to determining whether a public nuisance exists, whether an oversupply of opioids created that nuisance, and whether defendants' conduct contributed to that oversupply. The areas in which defendants assert broader discovery is required—such as plaintiff-specific causation, affirmative defenses, and third-party fault—are reserved for Phase II and will only be reached if plaintiffs prevail in Phase I. Discovery on those matters has not been foreclosed; it has simply been deferred.

Furthermore, the Court has not yet entered any order governing Phase II discovery, which may ultimately prove unnecessary if plaintiffs are unsuccessful in Phase I.

Accordingly, defendants' objections are premature, and the Court finds that the scope of Phase I discovery is properly limited and proportionate to the issues designated for trial.

Sixth and finally, interlocutory appeals under 28 U.S.C. § 1292 are permitted only in extraordinary circumstances that warrant departing from the strong policy favoring appellate review after final judgment. See *Terry v. June*, 368 F.Supp.2d 538, 539 (W.D. Va. 2005) (Michael, J.). No such circumstances are present here.

The issues defendants seek to certify are procedural in nature and do not present controlling questions of law whose resolution would materially advance this litigation. Courts routinely deny certification where the dispute centers on the discretionary adoption of a trial management plan. Moreover, the proposed questions are not case-dispositive, there is no genuine basis for substantial disagreement, and the trial plan rests on sound legal reasoning. Certification at this stage would serve only to delay, rather than expedite, the resolution of the case.

For the foregoing reasons, Express Scripts Entities' Motion for Reconsideration or in the Alternative to Certify for Interlocutory Review [Doc. 199] is **DENIED**.

II. Motion and Memorandum of Law in Support of Express Scripts' Requesting a Status Conference and to Stay Proceedings [Doc. 209]

In defendants' Motion and Memorandum of Law in Support of Express Scripts' Requesting a Status Conference and to Stay Proceedings (hereinafter "Motion Requesting a Status Conference"), defendants request that the Court convene a hearing with counsel for all parties to discuss how best to proceed and coordinate these matters. [Doc. 209 at 2–3]. Defendants further request that the Court stay the above-styled case, including the consolidated case, pending resolution of West Virginia Attorney General John B.

McCuskey's separate lawsuit (hereinafter "AG Action") against defendants on behalf of the State of West Virginia. [Id. at 2, 3–4].

A. Status Conference Request

First, defendants, pursuant to [Federal Rule of Civil Procedure 16](#), request a status conference with the Court to discuss coordination of the related pending actions. [Id. at 2–3]. Defendants state there are presently three (3) related actions before the Court that raise materially overlapping issues: (1) the above-styled case (hereinafter **Ohio County Action**), (2) **City of Wellsburg v. Express Scripts, Inc. et al**, Civil Action Number 5:25-CV-164 (N.D. W.Va.) (Bailey, J.) action (hereinafter **City of Wellsburg Action**), and (3) the recently filed AG Action. [Id. at 2]. In this case, plaintiffs represented that they act on behalf of the same interests as the Attorney General, asserting that counsel represents the State through its counties and cities. [Id.]. The Attorney General, in turn, asserts standing as *parens patriae* to pursue claims on behalf of the public health and general welfare of the State. [Id.]. Defendants argue that given the overlapping nature of these cases and the need for coordination, a hearing is warranted to discuss how best to proceed. [Id. at 3].

In Response, plaintiffs state:

Plaintiffs have been litigating this case for more than a year, including the denial of fully briefed motions to dismiss (ECF Nos. 108, 109, 131, 135, 139, 140, and 188), negotiation and entry of orders governing the use and disclosure of confidential information and Electronically Stored Information (ESI) (ECF Nos. 204 and 205), the entry of a comprehensive discovery and

trial plan which sets a bifurcated trial on Plaintiffs' public nuisance claims in August of 2026 (ECF No. 192), and discovery (ECF Nos. 193, 194, 195, and 215). Over the past 18 months, Plaintiffs' counsel have also been leading the national discovery efforts against Express Scripts in the federal MDL on behalf of political subdivisions which discovery has been incorporated into the record in this case. ECF No. 205.

In stark contrast, in ***State of West Virginia ex rel. McCuskey v. Evernorth Health, Inc., et al.***, No. 5:25-cv-00182-JPB (N.D.W. Va.) (**AG Action**), Express Scripts has not yet been served and anticipated motions to dismiss have not even been filed. (ECF No. 209, at 1.) In the AG Action, the State has asserted multiple theories of liability beyond public nuisance, including claims under the West Virginia Consumer Credit and Protection Act which Plaintiffs in this case have not asserted. AG Action, ECF No. 1, Complaint, at Count Three.

[Doc. 216 at 1–2 (footnote omitted)].

In Reply, defendants argue a status conference should be set for at least six (6) reasons:

First, under West Virginia law, the Attorney General's lawsuit and the interests he represents take primacy over Plaintiffs' claims. *Second*, Plaintiffs concede that, while the Attorney General may have authority to assert *parens patriae* claims, they do not. *Third*, Plaintiffs previously told this Court that the Attorney General adequately represented their interests in

related state-court litigation. *Fourth*, Plaintiffs admit that the current case structure violates Express Scripts' Seventh Amendment jury trial right. *Fifth*, the current case structure was premised on the absence of the Attorney General. *Sixth*, Plaintiffs will suffer no harm or prejudice from the requested hearing and stay, whereas both Express Scripts' and the Attorney General's interests would be harmed by proceeding with the *Ohio County / City of Wellsburg* consolidated cases on the current trajectory.

[Doc. 218 at 2]. Defendants argue a status conference is necessary because the Attorney General's action carries primacy under West Virginia law and materially overlaps with the municipal plaintiffs' cases. [Id. at 2–3]. Municipalities possess only derivative authority to pursue their own interests, while the Attorney General holds broad constitutional and statutory authority to control litigation on behalf of the State and its citizens. [Id. at 3]. Defendants argue the current case management plan was adopted in the absence of the Attorney General as a party, but with the State now pursuing overlapping claims, reconsideration of case management is warranted. [Id. at 4]. Coordinating the cases will promote efficiency, avoid constitutional concerns, and ensure consistent treatment of materially identical claims. [Id. at 5].

The Court finds no good reason or efficiencies to be gained at this time by conducting a status conference to discuss coordination of these cases, given their substantially different procedural postures and differing theories of liability. Thus, defendants request for a status conference [**Doc. 209**] is **DENIED**.

B. Stay Request

Defendants next request that the Court stay the **Ohio County / City of Wellsburg** Actions pending resolution of the AG Action. Defendants argue judicial economy, hardship, and equity weigh in favor of staying the consolidated **Ohio County / City of Wellsburg** Actions. [Id.]. Unlike those actions, which involve 120 separate municipal plaintiffs and create significant administrative and discovery burdens, the AG's Action proceeds with a single plaintiff and avoids many of the complications associated with statewide proceedings. [Id. at 4]. Defendants argue proceeding with the AG Action would minimize duplicative discovery and conflicting litigation positions while fully representing the same interests the municipal plaintiffs seek to advance. [Id.]. The **Ohio County / City of Wellsburg** plaintiffs will not be prejudiced by a stay, as the AG Action is brought on behalf of the entire State, including their residents. [Id.].

In Response, plaintiffs argue they assert individual claims under their own statutory authority to abate public nuisances, and the fact that those claims collectively cover most of West Virginia does not transform them into claims brought on behalf of the State. [Doc. 216 at 2]. Plaintiffs further argue the use of aggregate proof is an evidentiary matter, not an issue of standing, and does not convert plaintiffs' claims into a statewide action. [Id. at 2–3]. Moreover, plaintiffs assert the Attorney General cannot settle or release plaintiffs' claims, and thus the contention that the AG Action fully represents their interests is incorrect. [Id. at 3 (citing **Brooke County Comm'n v. Purdue Pharma**, Civil Action No. 17-C-248, Order Denying Cardinal Health, Inc.'s Motion to Dismiss, at * 5 (Cir. Ct. Marshall County Dec. 28, 2018) (finding the "WVAG did not have the power to bring, let alone

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release, Plaintiff's nuisance claim"), *writ denied, State ex. Rel Cardinal Health, Inc. v. Hummel*, No. 19-0204 (W. Va. 2019)].

In Reply, defendants argue a stay is warranted for the same reasons a status conference is warranted. [Doc. 218 at 5]. Defendants assert a stay of the *Ohio County / City of Wellsburg* consolidated cases is warranted because proceeding with 120 separate municipal plaintiffs would create unnecessary burdens and inefficiencies, while the Attorney General's action—brought by a single plaintiff with authority to represent statewide interests—provides a more efficient vehicle for resolution. [Id.]. Defendants argue discovery in the municipal cases has already proven unmanageable, with plaintiffs refusing to provide information from each municipality, whereas the AG Action will streamline discovery and trial. [Id.]. They also argue plaintiffs will suffer no prejudice from a stay, as those cases remain in their early stages and any abatement relief obtained in the AG Action would benefit their communities. [Id. at 6]. Lastly, they argue allowing both actions to proceed simultaneously would only increase expense, delay, and hardship, while a stay would promote judicial economy and efficiency. [Id. at 7].

Judicial economy, hardship, and equity strongly favor denying defendants' request for a stay. This case already has a trial date, a bifurcated trial plan, and active discovery underway, and a stay would only increase delay, expense, and prejudice while failing to resolve plaintiffs' individual claims. Proceeding under the existing trial plan is therefore the most efficient and equitable path forward. Thus, defendants request for a stay [**Doc. 209**] is **DENIED**.

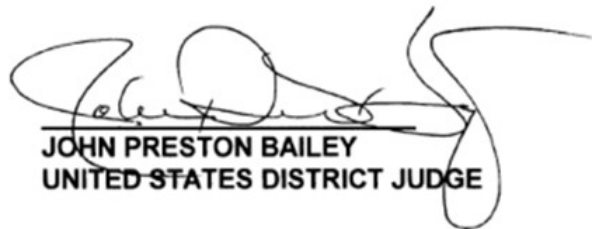
III. Conclusion

Express Scripts Entities' Motion for Reconsideration or in the Alternative to Certify for Interlocutory Review [**Doc. 199**] and Motion and Memorandum of Law in Support of Express Scripts' Requesting a Status Conference and to Stay Proceedings [**Doc. 209**] are **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: October 1, 2025.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

Ohio County Commission, et al.,
Plaintiffs,

VS.

CIVIL ACTION NO.
5:24-cv-142

Express Scripts, Inc, et al.,
Defendants.

- - -

Proceedings had in the status conference of the
above-styled action on July 28, 2025, before Honorable John
Preston Bailey, District Judge, at Wheeling, West Virginia.

- - -

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23 Proceedings recorded utilizing realtime translation.

24 Transcript produced by computer-aided transcription.

25

1 Monday Morning Session,
2 July 28, 2025, 11:00 a.m.

3 - - -

4 THE COURT: I'd ask the clerk to call the case.

5 THE CLERK: This is the case of the Ohio County
6 Commission, et al. versus Express Scripts, Inc., et al., Civil
7 Action Number 5:24-CV-142.

8 Will the parties please note their appearance for the
9 record.

10 MR. FITZSIMMONS: Bob Fitzsimmons on behalf of the
11 plaintiffs. And also with me, Your Honor, to my left is Paul
12 Farrell. To my right is Anthony Majestro. Also present behind
13 me is Mark Colantonio, Clayton Fitzsimmons, and John Hurst.

14 MR. BAILEY: Yes, may it please the Court, it's
15 Charles Bailey, Mark Kepple, and Justin Taylor of Bailey &
16 Wyant here on behalf of the defendant. And with me is Patrick
17 King from Quinn Emanuel, and Elisabeth Miller and Justin Taylor
18 and Mark Kepple.

19 THE COURT: All right. We have a status report and
20 proposed discovery plan that I wanted to discuss, and I guess
21 the important things to start with are, you both want
22 bifurcation, but you disagree how to do it. Who wants to
23 address the issue as to what your position is?

24 MR. FARRELL: Thank you, Your Honor. Paul Farrell,
25 Jr. on behalf of the plaintiffs. It's my first time in front

Cindy L. Knecht, RMR/CRR/CBC/CCP
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1 of your Court, so it's an honor to be here.

2 Let me start off by saying that this iteration of the
3 opioid litigation is now the fourth stage of what we've done.
4 We've addressed this public nuisance theory in the opioid
5 litigation with the manufacturers, the distributors, the chain
6 pharmacies or dispensers, and now this fourth and hopefully
7 last iteration, the pharmacy benefit managers. We've done this
8 in federal court up in the MDL, where I had the honor of
9 serving as the colead, and we've also done it in the mass
10 litigation panel where I had the honor of serving with Bob
11 Fitzsimmons as colead of the distributors phase.

12 What we believe is that we can present this case to
13 you in a bifurcated manner, very similar to what Judge Moats
14 did, and we'd take the liability side and general causation and
15 we try it first to the fact finder, which we propose would be
16 you, and then the secondary phase, if you get an answer in the
17 affirmative to the factual issues, we move to causation.

18 I don't think there's any dispute between the parties
19 as to the bifurcation of liability and general causation to the
20 abatement phase. What I think it really comes down to is the
21 first decision that needs to be made is whether or not we're
22 going to try this case county by county by county -- and
23 there's 52 of the 55 counties in the case -- or we're going to
24 take the mass litigation panel approach and try this case as a
25 single opioid epidemic in the state of West Virginia. We

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1 believe that it's most expedient to do that for a number of
2 different reasons, which we can get into briefing and explain
3 why.

4 But what I wanted to emphasize is that before you in
5 the pleadings, the named plaintiffs, we represent -- if you
6 draw a geographic circle around the governmental entities in
7 this case representing the general public, we represent more
8 than 97 percent of the general public of the state of West
9 Virginia. So what we believe is that we can present to you a
10 record. We believe we can establish that there's a statewide
11 opioid epidemic that permeates every corner of the state, that
12 we have the authority and standing of plaintiffs to bring to
13 you that for 97 percent of the state, and then we move to the
14 question of whether or not the conduct by the defendants was a
15 substantial factor in bringing about the public nuisance.

16 If we proceed in that way, I think that it is like a
17 domino effect on all of the decisions we need to make regarding
18 discovery. And so I think that to make your ultimate decision,
19 respectfully, I think you need to decide whether or not we're
20 going to do this piecemeal, plaintiff by plaintiff, or whether
21 we're going to take the approach that the West Virginia courts
22 have taken and do it on a statewide basis.

23 We cited in our brief the West Virginia mass
24 litigation panel order, and I actually brought a copy, if you'd
25 like. If I may approach.

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1 THE COURT: You may.

2 MR. FARRELL: This is probably the most concise and
3 direct answer to the question of how the mass litigation panel
4 approached it. This is filed January 25th, 2022. This is the
5 order affirming in part and modifying in part the January 4,
6 2022 and January 12, 2022 discovery orders. And what you'll
7 find on page 3 is this is where Judge Moats and Judge Swope
8 identified the two first -- the first two factual issues in the
9 bifurcated MLP trial, and this is how we propose moving
10 forward, Your Honor.

11 THE COURT: How do I have jurisdiction over the
12 entities that are not within this district?

13 MR. FARRELL: My colleague, Mr. Majestro, is here,
14 and I believe we have standing, and he'll address it.

15 MR. MAJESTRO: So, Your Honor, is your question about
16 personal jurisdiction or venue or --

17 THE COURT: I suppose venue.

18 MR. MAJESTRO: Okay. So it's a consolidated
19 complaint that under the venue statute you have jurisdiction
20 over defendant -- venue is a defendant question, so the
21 question is whether the defendants transacted business in this
22 county or in this district. And it's clear the answer is yes,
23 same reason you would have venue over City of Wheeling or Ohio
24 County.

25 THE COURT: The other side doesn't seem to agree with

1 you.

2 MR. MAJESTRO: And with respect to -- I would also
3 point out that venue is a use-it-or-lose-it. They filed a
4 motion to dismiss. To the extent they argued venue, they only
5 argued venue on behalf of the -- I think two of the plaintiffs.
6 I think it was Cabel and Huntington, maybe -- I don't remember
7 for sure -- and you denied that motion. With respect to the
8 other defendants, it would be waived.

9 THE COURT: How many entities are there actually in
10 the suit now?

11 MR. FARRELL: So, Your Honor, this is a complex
12 question that we have addressed at the MDL level with
13 voluminous reading, but for purposes of this particular
14 defendant, there is ESI, Express Scripts, Inc., and it has
15 multiple functions. One of those functions is pharmacy
16 dispensing. One of those functions is the traditional pharmacy
17 benefit manager.

18 What we have done in the MDL federal litigation is
19 entered into a stipulation where we agreed to dismiss certain
20 defendants with the understanding that the Express Scripts
21 parent company is going to answer and respond on their behalf.
22 So if ultimately your question is how many defendants are on
23 the verdict form --

24 THE COURT: Plaintiffs.

25 MR. FARRELL: Or how many plaintiffs -- from the

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1 plaintiffs' perspective, we have 52 of the 55 counties, for a
2 total of 120 plaintiffs. So between the counties and the
3 cities, 120; 52 of the 55 counties. In the first complaint
4 there's 77, and in the second there's 43.

5 THE COURT: The second.

6 MR. FARRELL: The amended complaint. I'm sorry.

7 THE COURT: Okay.

8 MR. MAJESTRO: Your Honor, I think we -- let's make
9 sure we're all talking about the same thing. So the case --
10 Ohio County Commission versus Express Scripts case was the
11 first case filed. Then last week we filed a second case.

12 THE COURT: City of Wellsburg.

13 MR. MAJESTRO: Yes. The numbers Mr. Farrell is
14 giving you is a combination of the all of the plaintiffs in
15 both case. We anticipate filing a motion. They've got to
16 answer and file whatever motions they're going to do, but we
17 believe that ultimately you'll see fit to consolidate those
18 cases.

19 THE COURT: I was going to ask you right now, do you
20 want them consolidated?

21 MR. MAJESTRO: Yes.

22 THE COURT: Objection?

23 MR. KING: Your Honor, Patrick King for Express
24 Scripts. We just -- we haven't even been served with this
25 lawsuit yet, so I think we need a little bit of time to

1 consider that. That very well may make sense, but haven't had
2 a chance to confer with my client on that yet.

3 THE COURT: When are you going to serve them?

4 MR. MAJESTRO: I believe we sent a request for them
5 to waive service, which is pending on them.

6 MR. KING: That's right. And I'm sure we'll be able
7 to work that out with Mr. Majestro.

8 THE COURT: Okay. So if we do this in a 120 or
9 whatever plaintiff case, it's your position that you're going
10 to try it just as the state of West Virginia -- anywhere in the
11 state of West Virginia. We're not going to call
12 representatives of 120 governmental entities to discuss their
13 individual problems.

14 MR. FARRELL: In general, that would be correct,
15 depending on how you bifurcate it. In the first phase, we
16 don't believe we would need to establish a statewide epidemic
17 by going county by county by county. Instead, we would
18 aggregate the proof. It would permeate all the corners of the
19 state.

20 Recall, this is a public nuisance case on behalf of
21 the general public. This isn't the Ohio County Commission's
22 case for a special injury for Ohio County's expenditures.

23 THE COURT: Until part two.

24 MR. FARRELL: Well, depending on your rulings. What
25 we have done in the past --

1 THE COURT: Assuming I go your way.

2 MR. FARRELL: Yes. Assuming you go our way, we would
3 end up, theoretically, without committing to it, dismissing the
4 private nuisance claims of the various plaintiffs and proceed
5 in abatement only. The reason is because we have been focused
6 for the past seven years of finding the solution to the opioid
7 epidemic in the state of West Virginia. All 55 counties and
8 every single municipality that has participated in this have
9 entered into a statewide MOU where they have all agreed that
10 every penny of any opioid settlement or judgment will go and be
11 divided in a certain way. Some of it goes pennies to the
12 state, more pennies go to the individual political
13 subdivisions, and the bolus of it goes into a public/private
14 foundation that has been ratified and signed into law by the
15 legislature and the governor on how to proceed. So every
16 dollar that comes in goes into this structure that we've built
17 for the past seven years.

18 So what we are anticipating is if we can show up and
19 meet our burden and get through phase one, then we can turn to
20 phase two and figure out what the abatement strategy would be,
21 with all the other factors that are in the order we discussed.

22 THE COURT: I think you said you had 52 of the 55
23 counties.

24 MR. FARRELL: Yes, Your Honor.

25 THE COURT: Who don't you have?

1 MR. FARRELL: Well, hopefully there will be a couple
2 more, but it's Wyoming, Pendleton, and Hampshire. Hampshire
3 has always been a different bird of a feather, for a variety of
4 reasons, and we believe that Wyoming and Pendleton will come to
5 the table hopefully soon.

6 But I would also like to say in each of those three
7 counties, while the county commission isn't representing the
8 general county, we do have municipalities within the county, so
9 in my mind, if you have a county commission, you're
10 representing the human lives within the geographic boundary of
11 that county. Or if you have every municipality within the
12 county, you're still having representatives of the individuals
13 living in those geographic boundaries, because this is a public
14 nuisance case on behalf of the general public. If it were a
15 private nuisance case, then you would be limited to the
16 economic losses of that governmental authority. We're taking
17 that and we're sticking that on a shelf, because the greater
18 good of what we're trying to serve is to fix an epidemic.

19 This has ravaged our state and we've been fairly
20 successful at not only addressing this with transparency, but
21 rather effectively, and this is just the next iteration of this
22 same story.

23 THE COURT: Let's hear from the defendants.

24 MR. BAILEY: Yes, Your Honor. Their legal position
25 is fundamentally flawed. First, they do not represent every

1 county and municipality in the state of West Virginia. There's
2 an RFP of the Attorney General of the State of West Virginia
3 soliciting lawyers to represent the State of West Virginia
4 against PBMMs like our client here today. So the Attorney
5 General -- I looked around today. I did not see him today here
6 supporting their position of this statewide litigation. And
7 again, there's an RFP, but he's soliciting lawyers to do so.

8 So they have not filed for class action status. They
9 did not file a petition to this Court to establish class action
10 status, which would obviously -- class action for every
11 municipality and for every county in the state of West Virginia
12 to do that, and they just filed an independent claim for the
13 City of Wellsburg, demonstrating and showing they don't have a
14 statewide claim or cause of action here.

15 They can speak, obviously, on behalf of the counties
16 and cities that they represent, but they cannot do this for a
17 statewide litigation.

18 Our proposition for this is pretty simple. And we
19 believe it's streamlined and will give the Court an opportunity
20 to listen to the evidence, and we believe that it is
21 appropriate. And they are involved in the bellwether cases in
22 New York and other places, so they know about this, so our
23 proposal is very simple. It's very simple.

24 We have bellwether cases, which I know the Court is
25 familiar with. We would pick two, county and city; they would

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1 pick a county and city, and we would strike them and end up
2 with two trials, two bellwether trials, after the striking
3 procedure. We would try liability on all claims that survive
4 summary judgment. We would try damages on any claims that
5 survive summary judgment. The only one that would be separated
6 would be the abatement claim, which is an equitable claim that
7 would be a different issue.

8 So our position is we have bellwether trials in 2027.
9 We do discovery in those cases and we'll pick a jury and we'll
10 litigate all of the claims. And two bellwether trials. That
11 will give each party an opportunity to see what a jury thinks
12 of their cases. And to the extent there could be some of those
13 claims that were only for the judge to decide, have to
14 articulate that, but the abatement does, as far as damages, as
15 I understand, would be as an equitable relief that the judge
16 would decide as to what the abatement would be.

17 So ours is very simple. We can try them in 2027
18 because they don't speak for the state. If they spoke for the
19 state, Your Honor, one of them would have, under their
20 pleadings, special attorney general appointed by John McCuskey,
21 Attorney General, because I've been appointed myself a few
22 times. So they don't have that appointment. They cannot speak
23 for the state.

24 Now, if they get every county -- if they end up
25 getting every county and city, that's another kettle of fish,

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1 but they don't, so they cannot -- that's right, Judge, you
2 asked the perfect question. What jurisdiction do I have. The
3 issue is you can't exert jurisdiction over parties not before
4 you, unless you would agree to class action status, which would
5 then start a whole new briefing process and arguments there.

6 So you're right, Your Honor. You do not have
7 jurisdiction over the nonparties not named in this case. And
8 they are involved with the bellwether cases. Ms. Miller here
9 is in depositions all the time in New York over claims against
10 Express Scripts. So we have -- in federal courts, have adopted
11 bellwether approach. They are accepting the bellwether
12 approach. I believe this Court has been involved in bellwether
13 litigation. Federal courts across the United States. So I
14 believe that -- we believe that that is the best and most
15 efficient way to litigate this case, Your Honor. Thank you.

16 MR. FARRELL: So I understand the argument my
17 colleague is making. The manufacturers made the same argument.
18 The distributors made the same argument. The dispensers made
19 the same argument. I want to make it -- I don't want to repeat
20 myself, but these aren't special injury cases. We're
21 representing the general public.

22 It just so happens that one of the ways -- or one of
23 the representatives of the general public, by statute, is the
24 county commission. There's another statute that gives
25 municipalities the right to bring a public nuisance case on

1 behalf of the general public. So we have to distinguish
2 between a public nuisance case on behalf of the general public
3 versus a private nuisance case that you have to have specific
4 standing for the Ohio County Commission for the Ohio County
5 Commission's private economic losses.

6 We represent the same human lives that the Attorney
7 General would be representing. He would just step in and say,
8 I too represent the general public. We know this because
9 Mr. Fitzsimmons and I spent years in front of Judge Moats in
10 the mass litigation panel with both the Attorney General and
11 the counties and the cities.

12 Now, it should be noted that in the mass litigation
13 panel that we presented to you, half of those cases of the
14 counties were filed in federal court with me up in Cleveland in
15 front of Judge Polster in the MDL. Other half of the cases
16 were in state court in front of Judge Moats. And despite
17 having fewer counties and fewer cities, Judge Moats determined
18 that the opioid epidemic was indivisible.

19 There's one epidemic permeating this state. And that
20 epidemic doesn't know geographic boundaries. It doesn't
21 discriminate on whether or not you're from Kanawha County or
22 Boone County or Berkeley County or Ohio County. And that the
23 conduct that we're talking about here extends through the
24 entirety of the state. So while we don't represent the
25 Attorney General and the Attorney General isn't here, the

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1 entities that are before you represent 97 percent of the human
2 lives in the state of West Virginia.

3 So we believe that these plaintiffs can present a
4 singular case to you and you can make singular findings in
5 phase one, and then address any specific causation or any
6 particularized abatement issues with the people in the cities
7 and counties in phase two. It's precisely what Judge Moats
8 did. This position that is espoused by the PBMs was rejected
9 by Judge Moats, taken on writ to the West Virginia Supreme
10 Court, and rejected as well.

11 MR. BAILEY: Two observations and I'm going to turn
12 it over to my colleague, Mr. King, on specific.

13 Again, Your Honor, I was involved in those cases for
14 a while. The State of West Virginia was a plaintiff. The
15 State of West Virginia had lawyers. So they were part of it.
16 So whatever Mr. Farrell wants to say, one thing he can't avoid
17 is, in the matters before Judge Moats, some of those decisions
18 were made because the State of West Virginia was a party to the
19 lawsuits representing the counties, and others, in all those
20 things. They are not. They have not been appointed that.

21 And again, why would the Attorney General be putting
22 in an RFP when all they could do is call them and tell them to
23 represent us, but he hasn't. That's his power.

24 So again, they're asking you to do something, Judge,
25 that is inappropriate, in my opinion. If they were here

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1 speaking on behalf of the Attorney General for the State of
2 West Virginia appointed different -- they didn't ask for class
3 action certification, Judge. They hadn't moved to that.

4 I'm going to let my colleague over here talk about
5 some more specifics, but as a West Virginia lawyer involved in
6 these cases before, that's how they work. The State of West
7 Virginia would be involved.

8 MR. FARRELL: Briefly, I don't mean to monopolize the
9 time. In the MLP, in the manufacturer case, it was the
10 Attorney General representing the entire state, and the cities
11 and counties sat on the sideline as the Attorney General
12 represented the entirety of the state. But the West Virginia
13 Attorney General was not a party to the distributor case, which
14 is what I'm holding here. Mr. Fitzsimmons and I represented
15 the state through the counties and cities, without the Attorney
16 General for this order.

17 There's a long history, and there's books written
18 about it. There's a documentary about it. But the Attorney
19 General settled his distributor cases back in 2017, which
20 caused this entire snowball to start. The counties and cities
21 in West Virginia were the first in the nation to file public
22 nuisance cases, and it did not involve the Attorney General.

23 Judge Moats found that the cities and counties that
24 Mr. Fitzsimmons and I represented could follow this trial plan
25 that I presented to you today in the absence of the State of

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1 West Virginia being a plaintiff.

2 MR. KING: Your Honor, once again, Patrick King for
3 Express Scripts. A few things.

4 Based on Mr. Farrell's argument, I now understand
5 that their proposal is that the first phase would be tried to
6 you on liability in a bench trial. We've heard a lot about
7 nuisance today. The problem is that the plaintiffs are also
8 bringing legal claims like RICO and negligence where we have a
9 jury trial right, and so I think that their proposal is a
10 nonstarter on that basis alone, unless the proposal here is to
11 dismiss or somehow sever those other claims and proceed on
12 nuisance, and that's not what I understood prior to today.

13 The other thing is, I haven't seen or heard a single
14 citation from the plaintiffs of any federal court in the United
15 States ever adopting a procedure like this in mass tort
16 litigation. In fact, the tried and true method in federal
17 courts across the country in mass tort litigation is a
18 bellwether process. And you can debate how many bellwethers
19 and how do you arrive at selections and we could discuss that,
20 but in point of fact, it is the tried and true method and it's
21 exactly what we've done with Mr. Farrell and Mr. Majestro up in
22 Ohio in the MDL.

23 The other thing related to the statements that the
24 plaintiffs essentially represent the whole state and that
25 they're seeking statewide liability, that's not in their

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1 complaint and that's not what they plead. They plead harm and
2 liability to the individual communities, in the individual
3 communities, and they seek damages and abatement in the
4 individual plaintiff communities.

5 I think this proposal -- we've heard a lot from
6 Mr. Bailey. I do think this runs afoul of the protections of
7 Rule 23 class action without pleading it. I also think it runs
8 afoul of the recent *Trump V. CASA* Supreme Court case, in that
9 it purports to grant relief to parties who are not before the
10 court.

11 And I think in point of fact, the plaintiffs' own
12 complaint disclaims they are seeking to proceed in a derivative
13 fashion on behalf of others. And so I think that the problem I
14 have with their proposal, just legally, it's a nonstarter. I
15 think it's inviting error by the Court, and I think the goal
16 here is to efficiently get into litigating these cases and get
17 these cases ready for trial.

18 There are then a lot of practical issues with their
19 proposal. As I understand it, they're proposing some sort of
20 aggregate statewide proof concept, but because the plaintiffs
21 here are individual counties and cities, I don't think we would
22 have a choice but to go in and seek discovery into each and
23 every one of these counties and cities and find out what is the
24 nature of the opioid crisis in this jurisdiction, what were the
25 causes, did that change over time, and that's going to be a

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1 different story in every case.

2 My colleague, Ms. Miller, can discuss exactly the
3 types of individualized discovery we're taking in, for example,
4 the city of Rochester, New York. And you have to get into the
5 facts of each of these jurisdictions to figure out really what
6 the story is, but also to get it ready for a jury trial so that
7 the jury can wrap their mind around something digestible.

8 That leads me to the bellwethers in general. The
9 reasons bellwethers work is because you're not dealing with all
10 of these extraneous issues of aggregate proof and standing, all
11 of these legal things. Instead, we're taking one jurisdiction
12 or two jurisdictions and we're testing the legal claims, we're
13 testing the legal defenses, and we're testing the facts in a
14 more cabined universe where we're not having to seek discovery
15 from all over the place. It's about a particular geography and
16 what's going on in that very specific region.

17 And so for that reason I just -- I can't really wrap
18 my mind around this concept, and I'm very wary of going down
19 this path, because we're going to be getting out of the gate
20 fighting about what the structure of the cases is as opposed
21 to, okay, we have two bellwethers, let's go litigate them and
22 get into discovery.

23 MR. FARRELL: Yes, Your Honor. If we take this
24 approach, we'll be trying cases in front of you until I retire.

25 THE COURT: I'll beat you to it.

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1 MR. FARRELL: So we have to prove that a public
2 nuisance exists in 97 percent of the state. We're simply
3 proposing that we do it by establishing a statewide public
4 nuisance. So I appreciate and understand the arguments that we
5 can get into the briefing on the legal basis for all of this,
6 but in general is that what is happening in the MDL is there's
7 a finite number of cases. There's not every county -- 97
8 percent of New York is not represented in the MDL. So we're
9 taking an individualized approach to the bellwether process.
10 And that discovery, if we were to replicate that here, we would
11 have to do individualized discovery and jury trials on 52
12 counties, one by one by one by one. Judge Moats didn't have
13 the patience for that, so what he decided was since there was a
14 large enough gathering of human lives covered by the public
15 nuisance doctrine, he was going to order a bifurcated statewide
16 trial.

17 So we believe we can meet the elements of proof to
18 sustain an appeal if we were to get favorable yeses on the
19 factual issues, and if we didn't believe that, we wouldn't have
20 brought it to you. We're not asking you to do anything new.
21 What we're asking you to do is to follow the model that we have
22 done over and over and over in this state. And the reason
23 we're able to do it is because everybody has come together and
24 decided to fight on the same team, an extraordinary event given
25 the political nature of our state, extraordinary.

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1 And so what we are asking you is to take that first
2 step and to say that you would like to consider taking a
3 statewide approach. We can have competing briefs and then you
4 can make your legal ruling. But this is the tipping point of a
5 fork in the road. We're either going to engage in massive
6 discovery on a county-by-county-by-county basis and try cases
7 for ten years here, or what we're going to do is we're going to
8 take the tried and true approach from the MLP and we'll see
9 what happens with the case.

10 MR. KING: Very briefly, Your Honor. I think the
11 problem with the way Mr. Farrell outlines things is that
12 bellwethers have worked in the opioids litigation. You see
13 that in the settlements that Mr. Farrell appropriately touted.
14 Most of those settlements within the MDL came as a result of
15 bellwether litigation and bellwether trials.

16 And it's not like just the bellwethers settled.
17 These defendants settled for things across the board, and it's
18 not just in this litigation. It's in mass tort litigation all
19 over the country. Even my firm, we were actually involved in
20 the plaintiffs' side of a mass tort against 3M related to
21 combat earplugs. We participated in bellwether trials. There
22 were something like 250,000 claims. We didn't try 250,000
23 cases.

24 Once you get to a point where there's enough
25 information to understand how viable are the legal claims and

1 defenses, how good or bad are the facts, how does a jury view
2 these issues, that gives the parties the information they need
3 to sit down and mediate and potentially resolve the cases. And
4 that's really what works in federal court mass tort litigation.

5 And I just don't understand why we would deviate from
6 that here, particularly where we have a model that we're
7 following with some of these very same lawyers up in Ohio.

8 MR. BAILEY: Your Honor, may I just add one thing,
9 please. Paragraph 909 of this extended complaint says, in
10 doing so, plaintiffs are asserting their own rights and
11 interests, which would be the plaintiffs named, not anybody
12 else, and plaintiffs' claims are not based upon or derivative
13 of the rights of others.

14 I don't see they filed a motion to leave to amend
15 their complaint to put forth this theory. Their theory is not
16 in this complaint. That's what's before the Court. So having
17 read about how many one night, we kind of underlined 909, so
18 that is not -- what Mr. Farrell is telling you is not what
19 they've asked for. They want specific relief for their
20 counties and cities no more than others. That's in their
21 pleadings, Your Honor.

22 MR. FARRELL: The complaint has multiple different
23 claims. What I'm representing to you is that the primary claim
24 that we're presenting to you is the same primary claim we
25 presented on behalf of the manufacturers, distributors, and

1 dispensers, and that is the equitable relief of abatement for a
2 public nuisance.

3 I'll represent to you that if you say out loud, in
4 writing, we are proceeding on Judge Moats's plan on public
5 nuisance, if and only if the plaintiffs agree to sever their
6 remaining claims or dismiss their remaining claims, you will
7 see a response for us. It's the same question Judge Polster
8 asked of me and Tony Majestro when we tried the CT2 case in
9 front of Judge Faber. We dismissed and severed all claims of a
10 public nuisance.

11 It's the same thing that happened in front of Judge
12 Moats, where Judge Moats said, you gave me five claims. Are
13 you telling me you want one, one and only public nuisance and
14 abatement, and that's a bench trial. I'll give to you, but you
15 have to sever and dismiss the others. The whole state did.

16 So what I'm representing to you is that we know how
17 to do this. This isn't our first opioid case. Hopefully, it's
18 our last. We've done it before for seven years. We don't need
19 to reinvent the entire wheel, and we don't need to do it
20 piecemeal anymore.

21 MR. BAILEY: But, Your Honor, that's not what they
22 pled. I understand Mr. Farrell --

23 THE COURT: I understand.

24 MR. BAILEY: He's not pled that.

25 THE COURT: Why are we looking at a trial 26 months

1 from now?

2 MR. FARRELL: If we have to go through the
3 individualized discovery.

4 THE COURT: Okay. Let me back up.

5 MR. FARRELL: Yes, sir.

6 THE COURT: If I were to accept the plan you've
7 promulgated, why are we having a trial in 26 months?

8 MR. FARRELL: We don't -- we can do it sooner.
9 You're nodding your head. Give me a date? If you tell me I
10 can have a trial in the summer of 2026, I'll have it ready.

11 THE COURT: Well, they have to be ready too.

12 MR. FARRELL: They'll have plenty of time. Like I
13 said, Mr. Fitzsimmons and I literally did this with the
14 distributors on a statewide basis. They're going to object.
15 They're going to file a bunch of individualized discovery.
16 We're going to go and file motions to compel. You're going to
17 make the determination and call balls and strikes, or your
18 discovery magistrate will call balls and strikes to define the
19 parameters.

20 And what we're going to do is the same thing we did
21 with our last statewide trial, is we're going to present the
22 evidence. They're going to respond. They're going to want to
23 do a bunch of more discovery. You're going to say yes or no.
24 And we can do all that and be ready for a 2026 bench trial
25 where we can present the case to you in -- I'm not going to say

1 sound bites, but in segments that the Court will tolerate.

2 We're conducting nationwide discovery against Express
3 Scripts. In fact, I'm leaving here and flying to St. Louis to
4 take my tenth or fifteenth deposition of witnesses from Express
5 Scripts, so we have 15 of them in the can already. Eventually,
6 we're going to have to take those, do depo designations and
7 present them either to a jury or a judge on videotaped
8 depositions of witnesses.

9 We're going to ask for probably some follow-up
10 depositions of some of the witnesses with West
11 Virginia-specific. We're going to ask for production of
12 documents that are West Virginia-specific and then we're going
13 to present our experts and you can take this case under
14 advisement by the end of summer 2026.

15 THE COURT: I'll come up with an order fairly soon.
16 Anything anybody else wants to say?

17 MR. BAILEY: I believe bellwether method is very
18 efficient. We're going to try two cases, bellwether. We can
19 do the deposition case-specific for those counties and cities
20 and move on. I think ours is just as efficient.

21 I just have to say, Your Honor, I know -- I don't
22 mean to belabor the point. Everything they argue here today is
23 not in their complaint, so it's like theoretical. They want to
24 file a motion to leave their complaint to do all that, then
25 that's something we can analyze.

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1 I think it's fair that we can analyze what they pled,
2 what they brought before us, individual counties and individual
3 cities. That's what they brought to this Court. This Court
4 set a status conference understandably because of competing
5 things, but they're asking the Court to rule on a theoretical
6 issue, in my opinion, Your Honor.

7 THE COURT: Anything else?

8 MR. FARRELL: We filed the individual public nuisance
9 cases. You can consolidate them. Once they're consolidated,
10 the issue is ripe for your consideration.

11 THE COURT: All right. Thank you.

12 (Proceedings concluded at 11:42 a.m.)
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CERTIFICATE

I, Cindy L. Knecht, Registered Professional Reporter and Official Reporter of the United States District Court for the Northern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on July 28, 2025, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 29th day of July 2025.

/s/Cindy L. Knecht

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