Appellate Division — Third Department Docket Nos. 530994, 531613

New York Supreme Court
Appellate Division—Third Department

BRENDA DAVIES and GREG DAVIES,
on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

– against –

S.A. DUNN & COMPANY, LLC,

Defendant-Appellant.

MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Elbert Lin
(to be admitted *pro hac vice*)
Trevor S. Cox
(to be admitted *pro hac vice*)
HUNTON ANDREWS KURTH LLP
951 East Byrd Street
Richmond, VA 23219
804-788-7221
elin@HuntonAK.com
tcox@HuntonAK.com

Jennifer L. Bloom
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
212-309-1314
jbloom@HuntonAK.com

Attorneys for Amicus Curiae

Rensselaer County Clerk's Index No. EF2019-262993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

BRENDA DAVIES and GREG DAVIES, on behalf of themselves and all others similarly situated,	:	
Plaintiffs-Respondents,	:	CASE NOS. 530994 531613
-against-	:	
S.A. DUNN & COMPANY, LLC,	:	
Defendant - Appellant.	:	

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

PLEASE TAKE NOTICE THAT, upon the annexed Affirmation of Jennifer L. Bloom, dated October 23, 2020, the Chamber of Commerce of the United States of America will move this Court, at a term of the Appellate Division of the Supreme Court, Third Department, at the Courthouse located at Robert Abrams Building for Law and Justice, State Street, Albany, New York 12223, on November 16, 2020 at 10:00 a.m., or as soon as thereafter as counsel may be heard, for an order granting leave to file a brief as *amicus curiae* in support of Defendant-Appellant S.A. Dunn & Company, LLC.

Dated: New York, New York
October 23, 2020

HUNTON ANDREWS KURTH LLP

By: _____

Jennifer L. Bloom
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
212-309-1314
jbloom@HuntonAK.com

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(to be admitted *pro hac vice*)
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HUNTON ANDREWS KURTH LLP
951 East Byrd Street
Richmond, VA 23219
804-788-7221
elin@HuntonAK.com
tcox@HuntonAK.com

Attorneys for Amicus Curiae the Chamber of Commerce of the United States of America

NOTICE TO:

MICHAELS & SMOLAK, P.C.
Jan M. Smolak, Esq.
17 East Genesee Street, Suite 401
Auburn, New York 13021
smolak@bdlaw.com

LIDDLE & DUBIN, P.C.
Nicholas Coulson, Esq.
975 East Jefferson Avenue
Detroit, Michigan 48208
ncoulson@ldclassaction.com

Attorneys for Plaintiffs-Respondents

Michael G. Murphy
John H. Paul
Megan R. Brillault
Katelyn E. Ciolino
Katrina M. Krebs
BEVERIDGE & DIAMOND, P.C.
477 Madison Ave., 15th Floor
New York, New York 10022
Tel.: (212) 702-5400
Fax: (212) 702-5450
mmurphy@bdlaw.com
jpaul@bdlaw.com
mbrillault@bdlaw.com
kciolino@bdlaw.com
kkrebs@bdlaw.com

James B. Slaughter (*pro hac vice* to be filed)
BEVERIDGE & DIAMOND, P.C.
1350 I. Street, N.W., Suite 700
Washington, D.C. 20005
Tel.: (202) 789-6000
Fax: (202) 789-6190
jslaughter@bdlaw.com

Attorneys for Defendant-Appellant

SUPREME COURT OF THE STATE OF NEW YORK
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Plaintiffs-Respondents,	:	CASE NOS. 530994 531613
-against-	:	
S.A. DUNN & COMPANY, LLC,	:	
Defendant - Appellant.	:	

AFFIRMATION OF JENNIFER L. BLOOM IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Jennifer L. Bloom, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney at the law firm Hunton Andrews Kurth LLP, counsel for the Chamber of Commerce of the United States of America (the "Chamber"). I submit this affirmation in support of the Chamber's motion for leave to file the accompanying brief as *amicus curiae* in support of Defendant-Appellant S.A. Dunn & Company, LLC.

2. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in

every industry sector, and from every region of the country, including New York. One of the Chamber's important functions is representing its members' interests before the federal and state courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the business community, including in cases in New York courts.

3. Attached hereto is a copy of the brief that proposed *amicus* wishes to submit to the Court. The Chamber has duly authorized me to submit this brief on its behalf.

4. This case presents important questions concerning the scope of private actions for public nuisance under New York law. Courts in New York, as well as courts across the country, have consistently recognized the historically limited scope of such actions, as enforced by the special injury rule. By concluding that Plaintiffs' claimed harm—which is shared by many thousands of others within a nine-square-mile area—was sufficiently "special" to satisfy the requirement, the trial court departed from this precedent.

5. The proposed *amicus* brief makes three points. It first discusses the historical development of the special injury rule. It then examines how New York state courts (as opposed to the federal courts on which Plaintiffs chiefly rely) have correctly applied New York's special injury requirement by strictly enforcing it. Finally, the brief explains the policy rationales that support rigid enforcement of

the special injury rule. These include the traditional concern for preventing a multiplicity of suits, as well as more modern considerations involving the separation of powers and the role of regulation.

6. Pursuant to Rule 1250.4(f) of the Rules of Practice of this Court, the Chamber seeks leave to file its brief because this appeal presents questions of law that are of great importance to its members. The Chamber and its members have a vital interest in ensuring that the use of public nuisance as a tort remains confined to its historically limited scope. Expansion of the availability of public nuisance to private plaintiffs would subject business defendants to a multiplicity of actions, defeating the central rationale for the special injury rule. Moreover, to operate properly and provide the critical services they do, businesses require a reliable legal regime, on which they develop settled expectations. Enhancing private plaintiffs' ability to bring public nuisance actions—alongside and despite New York's existing regulatory regime—would destroy businesses' ability to predict costs, and thereby reduce investment and quality of goods and services.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Chamber leave to submit its brief as *amicus curiae* in support of Defendant-Appellant S.A. Dunn & Company, LLC; (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 23, 2020

HUNTON ANDREWS KURTH LLP

By: _____

Jennifer L. Bloom
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
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jbloom@HuntonAK.com

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HUNTON ANDREWS KURTH LLP
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ATTACHMENT

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INTRODUCTION

At the core of this case is whether the "special injury" requirement on private actions raising public nuisance claims retains any force. Plaintiffs are private citizens who seek to bring a public nuisance claim to vindicate alleged harms shared by the residents of a nine-square-mile area surrounding a landfill. Despite asserting their claim on behalf of all residents of that community, *numbering in the thousands*, Plaintiffs assert that their injury is "special." In allowing their nuisance claim to proceed, the trial court deprived the special injury rule of meaning, essentially leaving it a hollow requirement. This Court should correct that error and restore this traditional limitation.

As the Court may be aware, and as *Amicus* has documented,[1] the backdrop to this case is an alarming trend in recent years, in which plaintiffs have sought to expand public nuisance beyond its historical reach. Regrettably, as well illustrated by the trial court's decision, plaintiffs are sometimes successful. To maintain the proper scope of public nuisance, courts must strictly adhere to traditional principles like the special injury rule. The Court should, here and in the companion case, *Duncan v. Capital Region*

[1] *See generally* U.S. Chamber Inst. for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* (2018), https://instituteforlegalreform.com/research/waking-the-litigation-monster-the-misuse-of-public-nuisance/ [hereinafter "*Waking the Litigation Monster*"].

Landfills (No. 531616) (which involves identical legal issues), ensure that requirement retains meaning.

This brief makes three points related to this dispositive issue.[2]

First, it demonstrates the historically limited scope of private actions for public nuisance, as enforced by the special injury rule. As the preeminent scholar of nuisance wrote a half-century ago—and which the trial court failed to appreciate—the limiting "line is drawn" when a special injury becomes "so general and widespread as to affect a whole community, *or a very wide area within it*." William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1015 (1966) (emphasis added).

Second, the brief examines how New York state courts (as opposed to the federal courts on which Plaintiffs chiefly rely) have correctly applied New York's special injury requirement by strictly enforcing it. In doing so, they share common ground with other state courts across the country.

Third, the brief explains the policy rationales that support rigid enforcement of the special injury rule. These include the traditional concern

[2] The Chamber also supports Defendant-Appellant's position regarding the appropriate boundaries of common law negligence, *see* Br. for Def.-Appellant at 24–41, but does not repeat those arguments, *see* 22 NYCRR § 1250.4(f).

for preventing a multiplicity of suits, as well as more modern considerations involving the separation of powers and the role of regulation.

For these reasons, and as explained further below, the Court should adhere to the traditional understanding of the special injury rule, reverse the trial court, and dismiss Plaintiffs' public nuisance claim.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including New York. One of the Chamber's important functions is representing its members' interests before the federal and state courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the business community, including in cases in New York courts.[3]

[3] *See, e.g.*, Br. of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Appellant, *Chavez v. Occidental Chem. Corp.*, No. CTQ-2019-00003 (N.Y.) (cross-jurisdictional tolling); *Amici Curiae* Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APL-2017-00114 (N.Y.) (punitive damages); Br. of *Amici Curiae* the United States Chamber of Commerce et al., *Verizon New York Inc. v. N.Y. State Pub. Serv. Comm'n*, No. 521107 (N.Y. App. 3d Dep't) (trade secrets).

The Chamber and its members have a vital interest in ensuring that the use of public nuisance as a tort remains confined to its historically limited scope. Expansion of the availability of public nuisance to private plaintiffs would subject business defendants to a multiplicity of actions, defeating the central rationale for the special injury rule. Moreover, to operate properly and provide the critical services they do, businesses require a reliable legal regime, on which they develop settled expectations. Enhancing private plaintiffs' ability to bring public nuisance actions—alongside and despite New York's existing regulatory regime—would destroy businesses' ability to predict costs, and thereby reduce investment and quality of goods and services. Accordingly, the Chamber respectfully urges the Court to reverse the trial court and enforce the historical rule that limits private plaintiffs to those with truly "special" injuries.

ARGUMENT

I. The special injury requirement has traditionally been a limited exception to the general rule barring private actions for public nuisance.

Unlike in the case of a private nuisance—a claim not made here[4]—only in limited circumstances may a private party bring a public nuisance action.

[4] *See* R. 32 ("[I]t is clear that the complaint sounds in public nuisance."). *See also Copart Indus. v. Consol. Edison Co.*, 41 N.Y.2d 564, 568 (1977) ("A private nuisance threatens one person or a relatively few.").

As the trial court correctly recognized, a "public nuisance is a violation against the State . . . subject to abatement or prosecution by the proper governmental authority." R. 16 (citing *Copart Indus.*, 41 N.Y.2d at 568). Thus, it "has long been settled . . . that '[a] public nuisance is actionable by private persons only if it is shown that the person suffered special injury beyond that suffered by the community at large.'" *Wheeler v. Lebanon Valley Auto Racing Corp.*, 303 A.D.2d 791, 793 (3d Dep't 2003) (citations omitted). *See also* Restatement (Second) of Torts § 821C. Private parties cannot simply aggregate numerous private nuisances under the banner of a public nuisance claim.[5]

The special injury rule has its origins in a 1535 King's Bench case holding that a private "action will *not* lie for a public nuisance, based on the concern that this would lead to duplicative recoveries." That case became notable for a dissenting opinion by Justice Fitzherbert musing that, in certain circumstances, private persons should "be allowed to sue for what would otherwise constitute a public nuisance." Thomas W. Merrill, *Is Public*

[5] *See* Restatement (Second) of Torts § 821B cmt. g (Am. Law Inst. 1975) ("Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons."). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (injury "is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public.").

Nuisance a Tort?, 4 J. TORT L. ii, 13 (2011) (discussing Y.B. Mich. 27 Hen. 8, f. 26, pl. 10 (1535)).[6] Justice Fitzherbert suggested that a private action might arise "where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt." *See* Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 796 (2003) (quoting Y.B. Mich, 27 Hen. 8, f. 27 pl. 10 (1535)). Professor Merrill has convincingly shown that Justice Fitzherbert's point was not that a private party might have an action for public nuisance, only that a "public nuisance action does not preempt private tort liability."[7] Nonetheless, the former interpretation was incorporated into

[6] *Compare id.* at 14 & n.58 (explaining that the "*Restatement* gives the wrong year for the decision (1536) and erroneously characterizes Fitzherbert's opinion as the holding of the court"), *with* Restatement (Second) of Torts § 821C cmt. a.

[7] Merrill, 4 J. TORT L. at 14 ("Correctly interpreted, what has come to be called private 'standing' to prosecute a public nuisance was therefore most likely an understanding about different causes of action. . . . English legal historians have recognized that this is the correct way to understand the point Fitzherbert was making. The most recent edition of Prosser's hornbook on Torts, edited by Page Keeton, also argues that this is the correct understanding."). *See also* 3 William Blackstone, *Commentaries on the Laws of England* 219–20 (1768) (explaining that "no person . . . can have an action for a public nuisance. . . . Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the

English law and passed into American common law as the "special injury" rule. *See generally* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755 (2001); Gifford, 71 U. CIN. L. REV. at 800–06.

As the Restatement acknowledges, the rule "has persisted"—and "it is uniformly agreed that a private individual has no tort action for the invasion of the purely public right, unless his damage is to be distinguished from that sustained by other members of the public." Restatement (Second) of Torts § 821C cmt. a. But according to Dean Prosser—the original reporter for the Restatement's sections on public nuisance—it is a very limited exception. More than fifty years ago, he explained that the special injury "must be particular to the plaintiff, or to a *limited* group in which he is included. When it becomes so general and widespread as to affect a whole community, *or a very wide area within it*, the line is drawn." *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1015 (1966) (emphasis added). *See also Burns Jackson Miller Summit & Spitzer v. Lindner*, 452 A.D.2d 50 (1982) (quoting *id.*), *aff'd*, 59 N.Y.2d 314 (1983); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d

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king's subjects, by a public nuisance: in which case he shall have a private satisfaction by action.").

435, 498 (E.D.N.Y. 2003) (same); *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 293 (2001) (same).

By concluding that Plaintiffs' claimed harm—admittedly shared by many thousands of others across their community—was sufficiently "special" to satisfy the requirement, the trial court departed from this historical limiting principle. Perhaps, given the oft-recognized confusion in this area of the law, that error is understandable.[8] Indeed, as Dean Prosser himself conceded, "The seeds of confusion were sown when courts began to hold that a tort action would lie even for a purely public nuisance if the plaintiff had suffered 'particular damage.'" 52 VA. L. REV. at 999. This Court should dispel any confusion and make clear that New York law adheres to the historical understanding of the special injury rule, lest it be rendered meaningless. *Cf. Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993) (noting that the expansion of the use of public nuisance would create "a monster that would devour in one gulp the entire law of tort").

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[8] *See, e.g.*, Horace G. Wood, 1 *A Practical Treatise on the Law of Nuisances* iii (3d ed. 1893) (referring to nuisance as a "wilderness" and "entangled mass"); *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 219 (3d Cir. 2020) (a "legal quagmire"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987) (an "impenetrable jungle") ((quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS 616 (5th ed. 1984)); William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (a "legal garbage can").

II. The trial court misinterpreted New York law in allowing Plaintiffs to bypass the special injury requirement.

In failing to adhere to the historical limitations on the special injury requirement, the trial court also departed from New York law, which is consistent with case law around the country. Plaintiffs' public nuisance claim crosses the "line" identified by Dean Prosser because it alleges a "special" injury shared by most—if not all—of the residents in a vast area encircling the Dunn Landfill. As shown below, New York law rejects private actions for public nuisance founded on such diffuse allegations of harm. And other States around the country agree.

Plaintiffs claim to have a special injury, but it is "so general and widespread," Prosser, 52 VA. L. REV. at 1015, that it affects the entire community surrounding the Dunn Landfill. Plaintiffs allege that odors from the landfill have diminished their property value and interfered with the use and enjoyment of their land. Compl. ¶¶ 20 (R. 49), 25 (R. 51). But instead of limiting these asserted injuries to those suffered on their own behalf, the Davies seek to represent a class encompassing "[a]ll owner/occupants and renters of residential property residing within one and one half (1.5) miles of the landfill's property boundary." Compl. ¶ 17 (R. 48). The geographic reach of this area is stunning, spanning roughly *nine square miles* (about 40% the size of the City of Albany) around the perimeter of the landfill. R. 12. And as

Plaintiffs themselves represent, the proposed class would embrace "thousands of members." Compl. ¶ 18 (R. 48–49). This massive group of homeowners and renters, stretching across several miles, comprises, at the very least, "a very wide area within" the affected community. *See* Prosser, 52 VA. L. REV. at 1015.[9]

Plaintiffs' expansive theory of special injury is contrary to New York law. New York's courts have taken to heart Dean Prosser's observation about "general and widespread" injury, applying it in case after case. In *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, for example, the Court of Appeals rejected a public nuisance claim, stressing that a "public nuisance is actionable by a private party only if it is shown that the person suffered special injury beyond that suffered by the community at large." 96 N.Y.2d 280, 292 (2001). The Court of Appeals considered a consolidated appeal brought by large proposed classes of retailers, residents, and professionals located along a city block that closed following the collapse of a midtown Manhattan building. *Id.* at 286, 291. Quoting Dean Prosser, the

[9] Plaintiffs cannot cure this fundamental defect in their pleading by stretching the scope of the relevant "community" to reach an even larger group of people. *See* Br. for Def.-Appellant at 14–18. Validating such a tactic would render the special injury requirement meaningless, and allow expansive nuisance liability so long as plaintiffs artfully plead that the community's boundary lies just beyond the affected group.

Court of Appeals concluded that the retailers alleged no special injury because "every person who maintained a business, profession or residence" in the area "was exposed to similar economic loss during the closure periods." *Id.* at 293. Any other result, it reasoned, would lead to a "multiplicity of lawsuits" by everyone conceivably suffering "a wrong common to the public." *Id.* at 292 (quoting Restatement (Second) of Torts § 821C).

In *Burns Jackson Miller Summit & Spitzer v. Lindner*, the Court of Appeals similarly refused to acknowledge a "general and widespread" special injury. 59 N.Y.2d 314, 334–35 (1983). There, a putative class of businesses alleged that lost profits and added expenses supported a private action for public nuisance following a city-wide transit strike. *Id.* But the Court of Appeals saw through the asserted special injury, noting that the alleged damages overlapped completely with those "suffered by every person, firm and corporation conducting his or its business or profession in the City of New York." *Id.* at 334. Thus, "the injury [was] not peculiar and the action [could not] be maintained." *Id.* at 335.

This Court, too, has embraced the principle that widespread injury cannot constitute the "special injury" needed to sustain a private action for public nuisance. In *Wheeler v. Lebanon Valley Auto Racing Corp.*, residents of the neighborhoods surrounding a speedway alleged a public nuisance

stemming from excessive noise. 303 A.D.2d 791, 793 (3d Dep't 2003). Reversing the trial court's order enjoining racing, the Court observed that "where the claimed injury is 'common to the entire community,' a private right of action is barred." *Id.* (citing *Burns Jackson*, 59 N.Y.2d at 334–35). Because every member of the "relevant community"—"those persons residing within a two-mile radius of the Speedway"—experienced the excessive noise in the same way, the *Wheeler* Court unanimously rejected plaintiffs' assertion of special injury. *Id.* at 793–94.

And New York courts are hardly alone in refusing private actions for public nuisance founded on general, widespread special injury. State courts around the country have followed a similar approach. In *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, for instance, the Iowa Supreme Court suggested that public nuisance class actions, by their very nature, fail the special injury requirement. 345 N.W.2d 124, 130 (Iowa 1984). In that case, employees at a restaurant-motel complex alleged a public nuisance claim against a steel contractor after an essential bridge failed, hindering commutes and customer patronage. *Id.* at 126–27. Like Plaintiffs here, instead of constraining the scope of their suit to their own injuries, the employees brought their nuisance action "on behalf of themselves and all other owners, operators and employees of restaurants, bars, motels and other

retail establishments" in the relevant community. *Id.* at 130. The court rejected that approach, reasoning that the plaintiffs' claim "on behalf of the entire retail business communities of South Sioux City, Nebraska, and Sioux City, Iowa, implie[d] that whatever damages . . . suffered by plaintiffs [had] also been suffered by the entire business community." *Id.* As a result, it held that the alleged damages were "*public* in nature rather than *special*." *Id.*

Likewise, in circumstances similar to those here, the Court of Appeals of Indiana held that a family could not maintain a public nuisance action against the operation of a sewage pumping station that emitted noises and odors allegedly interfering with the comfortable enjoyment of their property. *Town of Rome City v. King*, 450 N.E.2d 72, 78 (Ind. Ct. App. 1983). Even though the trial court found that the pumping station in fact interfered with plaintiffs' property, because "several . . . neighbors testified that they too noticed the noise and odor from the pumping station," the court explained that the family suffered "no particular injury" different from the general population of residents. *Id.* Thus, the pumping station failed to "constitute an actionable [public] nuisance." *Id.*

The trial court's denial of the Landfill's motion to dismiss plaintiffs' public nuisance claim is inconsistent with this settled authority. Plaintiffs assert special injury—property value diminution and loss of enjoyment—

common to *thousands* of owners and renters in a miles-wide geographic area. Compl. ¶¶ 17–18 (R. 48–49), 20 (R. 49–50), 25 (R. 51). As in *532 Madison Ave.*, *Burns Jackson*, and *Wheeler*, this injury cannot sustain a private action for public nuisance because it is "common to the entire community" of residents. These cases, together with others outside this jurisdiction, teach that Plaintiffs' alleged injury is, by its widespread nature, "public" rather than "special."

III. Sound policy considerations support rigid adherence to the special injury rule.

Strict enforcement of the special injury rule is grounded not only in history and case law, but also in sound public policy. As discussed below, numerous considerations support limiting the circumstances in which a public nuisance action is available to a private plaintiff—especially where, as here, the claimed harm is alleged to affect large numbers of people.

A. Enforcing the special injury rule prevents a multiplicity of actions.

First, allowing a "special injury" on the grand scale asserted by Plaintiffs would contradict the historical rationale for imposing the special injury requirement in the first place: "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times on the same case." *See* Donald

G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 796 (2003) (quoting Y.B. Mich, 27 Hen. 8, f. 27 pl. 10. (1535)). Such a sweeping form of special injury produces a "multiplicity of actions" that the special injury rule is designed to guard against. *See* Restatement (Second) of Torts § 821C cmt. a ("The reasons usually given for the rule are that it is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong; and that any harm or interference shared by the public at large will normally be, if not entirely theoretical or potential, at least minor, petty and trivial so far as the individual is concerned."). While the trial court acknowledged this principle, *see* R. 16, it neglected to apply it.

By contrast, courts across the country affirm the consensus view—that, in order to prevent runaway liability, private actions for public nuisance cannot rest on allegations of widespread special injury. *See, e.g.*, *S. Cal. Gas Leak Cases*, 441 P.3d 881, 892 (Cal. 2019) ("[P]ublic nuisance is usually not privately actionable because 'it would be unreasonable to multiply suits by giving every man a separate right of action.'" (quoting 4 Blackstone, *Commentaries* 167)); *Hale v. Ward Cty.*, 848 N.W.2d 245, 251–52 (N.D. 2014) ("[I]t is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong."

(quoting Restatement (Second) of Torts § 821C (1979))); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 712 P.2d 914, 918 (Ariz. 1985) (special injury is "meant to relieve defendants and the courts of the multiple actions that might follow if every member of the public were allowed to sue for a common wrong"); *Akau v. Olohana Corp.*, 652 P.2d 1130, 1133 (Haw. 1982) ("The purpose of the [special injury] rule is to prevent a multiplicity of actions and frivolous suits.").

Consistent with the reasoning of those courts, this Court should reject Plaintiffs' expansive theory of public nuisance liability and the multiplicity of actions it would allow.

B. Diffuse harms allegedly affecting large numbers of people should be resolved by the executive and legislative branches through public policy—not by the judicial branch through private actions for public nuisance.

The comments to the Restatement also acknowledge another salutary reason for strictly enforcing the special injury rule: "Redress of . . . wrong to the entire community is left to its duly appointed representatives." Restatement § 821C cmt. a. That is because large-scale issues "are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play." *Waking the Litigation Monster* 32. Weakening the special injury rule—and allowing thousands of private plaintiffs, *see* Compl. ¶ 18 (R. 48–

49), to use public nuisance to redress their alleged harms—violates that principle.

Recognizing the inherent separation-of-powers concerns, courts in other jurisdictions have refused plaintiffs' attempts to remake public policy through public nuisance actions. Air pollution is a frequent target of such suits, which, as here, involve large numbers of plaintiffs and diffuse harms. *See, e.g.*, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (affirming dismissal of public nuisance claims regarding greenhouse gases; noting that "the solution . . . must rest in the hands of the legislative and executive branches of our government, not the federal common law"); *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 383 (Div. 4, 1971) (rejecting public nuisance pollution claim because "[t]hese issues are debated in the political arena and are being resolved by the action of those elected to serve in the legislative and executive branches of government"). *Cf. City of New York v. BP P.L.C.,* 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018) ("To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government."), *appeal pending*, No. 18-2188 (2d Cir. argued Nov. 22, 2019).

Not only does judicial deference to the political branches respect the separation of powers, it appropriately recognizes the inherent limitations of courts. In matters of "policy, informed assessment of competing interests is required," and courts are ill-suited to striking the proper balance. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). Among other things, they lack administrative expertise. Agencies are simply "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to make policy judgments regarding diffuse harms. *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952). *See, e.g.*, *State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 510 P.2d 98, 105 (N.M. 1973) (rejecting a public nuisance claim against a power plant; noting that "nothing before us is made to appear that the trial court could solve the mercury problem either more quickly or better than the Agency"); Charles H. Moellenberg, Jr. et al., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 Expert Evidence Report (BNA) No. 18, at 483 (Sept. 24, 2007) ("The battle in the public nuisance courtroom resembles a public policy debate, not the traditional role of courts to mete out individualized justice.").

If upheld, the trial court's expansion of the availability of public nuisance actions—allowing private plaintiffs who lack a "special" injury to bring suit—would multiply these concerns.

C. Given New York's comprehensive regulation of landfills, allowing thousands of plaintiffs to bring a private action for public nuisance would be unnecessary, confusing, and costly.

Permitting Plaintiffs to sidestep the special injury requirement not only would raise theoretical separation-of-powers concerns, it would impose practical difficulties and real costs on industry as well.

As Defendant-Appellant has explained, the State of New York comprehensively and strictly regulates the Landfill's operations through its Department of Environmental Conservation. *See* Br. for Def.-Appellant at 7–8. That regulatory oversight—enforced through an on-site monitor, inspections, and the threat of penalties and punishment—ensures that the Landfill complies with the provisions of New York's Environmental Conservation Law, including a prohibition on the creation of nuisance odors. *See id.* (citing, inter alia, R. 58). *See also Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 327 (4th Dep't 1981) (New York landfills are regulated by a "comprehensive system of State law and regulations for solid waste"). It is "altogether fitting" that New York should look solely to its

"expert agency" to provide that oversight. *Am. Elec. Power Co.*, 564 U.S. at 428.

New York's comprehensive regulation precludes the need for public nuisance suits brought by public entities—let alone private actions unbounded by the special injury requirement. Public nuisance suits are simply "not needed to fill gaps where the legislative and executive branches have already balanced the relevant considerations and implemented comprehensive regulatory schemes." *Waking the Litigation Monster* 2. Nor would it be sensible public policy to allow nuisance litigation to play that role. That is because "an overlapping public nuisance regime in the administrative state creates potential for conflict and confusion." F. William Brownell, *Public Nuisance in the Modern Administrative State*, 24 NAT. RES. & ENV'T 34, 36 (2010). Rather, entrusting oversight to an administrative agency, as New York has done, ensures that "[u]niformity and consistency in the regulation of business . . . are secured." *Far East Conference*, 342 U.S. at 574–75. *Cf. In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) (rejecting a nuisance action for remediation of lead paint; noting that "were we to agree . . . that there is a basis sounding in public nuisance for plaintiffs' assertions, we would be creating a remedy entirely at odds with the pronouncements of our Legislature").

Allowing private plaintiffs who allege diffuse harms to remake policy through public nuisance actions—notwithstanding the existence of competing regulation, and despite the absence of a special injury—would generate "administrative costs . . . sufficiently large . . . that *all* persons may be worse off in differing degrees." Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 79 (1979). New York's reliance on comprehensive regulation instead of litigation reflects awareness that the latter is "so expensive as to be self-defeating" when it comes to addressing diffuse harms like those alleged by Plaintiffs. *Id.* The cost of such "large numbers" cases outstrips that of the average case (which itself can be quite steep, of course). Eliminating a meaningful special injury requirement would inevitably subject New York businesses to unpredictable, unnecessary, and exorbitant costs that may require, sometimes literally, betting the farm. Exposing businesses to potential liability to plaintiffs lacking a truly special injury will detract from businesses' ability to devote resources to regulatory compliance and remediation, making the public "worse off." *Id*.

CONCLUSION

The special injury rule is a critical and age-old limitation on the ability of private plaintiffs to bring an action for public nuisance. The trial court

eviscerated that requirement in concluding that Plaintiffs' claimed harm—shared with thousands of others comprising the community—was sufficiently "special." Because of that legal error, and because of the numerous policy reasons against expanding the availability of public nuisance actions, the Court should reverse the trial court and dismiss Plaintiffs' nuisance claim.

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Respectfully submitted,

HUNTON ANDREWS KURTH LLP

Jennifer L. Bloom
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
212-309-1314
jbloom@HuntonAK.com

Of counsel:

Elbert Lin
(to be admitted *pro hac vice*)
Trevor S. Cox
(to be admitted *pro hac vice*)
HUNTON ANDREWS KURTH LLP
951 East Byrd Street
Richmond, VA 23219
804-788-7221
elin@HuntonAK.com
tcox@HuntonAK.com

Counsel for Amicus Curiae

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By: 
Jennifer L. Bloom