IN THE SUPREME COURT

STATE OF ARIZONA

HOPI TRIBE, et al. Plaintiffs-Appellants, v. ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP Defendants-Appellees,	Supreme Court No. CV-18-0057-PR Court of Appeals, Division One Case No. 1-CA-CV 16-0521 Coconino County Superior Court Case No. S0300CV201100701

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, and policy briefings. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and participates as *amicus curiae* in this and other courts in cases involving those values. *See, e.g.*, *Arizona Public Integrity Alliance, et al. v. Maricopa Cnty. Special Health Care Dist., et al.*, No. CV-15-0336-PR; *Sedona Grand, LLC, v. City of Sedona*, No. CV-12-0080-PR; *Aspen 528, LLC v. City of Flagstaff*, No. CV-12-0422-PR. The Institute seeks to enforce the protections of our state constitution to secure individual rights, including the right to be free from unconstitutionally vague restrictions on economic freedom and property rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The concept of "public nuisance" is unconstitutionally vague and should, at a minimum, be confined to circumstances in which a purported nuisance interferes with the general public's right to access public property or to practice constitutional rights—and where, as in this case, the case is brought by a private party, that party should be required to show a special injury more direct and immediate than an offense to religious scruples. The

decision below demonstrates the dangers inherent in the excessively vague notion of public nuisance—a tort so broadly designated that no lawyer can state with confidence what it means. Such vagueness creates a risk—realized here—that bystanders can ask courts to shut down the lawful activities of others based solely on personal offense. That risk threatens legal predictability and economic stability in Arizona, as proven by the experiences of other states where this excessively vague legal theory has been exploited for illegitimate and socially harmful purposes.

ARGUMENT

I. PUBLIC NUISANCE IS DANGEROUSLY VAGUE AND SHOULD BE CAREFULLY LIMITED TO AVOID ABUSE.

A. Due Process Requires That The Law Be Clear Enough That People Can Know What Is Forbidden.

A basic element of the rule of law is that people must be able to know what the law proscribes. If a law "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *Hill v. Colorado*, 530 U.S. 703, 732 (2000), it violates the certainty requirement inherent in Due Process of Law. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018). The law must "convey a sufficiently definite warning as to proscribed conduct," *State v. Cota*, 99 Ariz. 233, 236 (1965), and this Court has emphasized that vague statutes violate Due

Process because the wording "'may not be generally understood'" and may lack "'a source of generally accepted construction.'" *Id*. at 237 (quoting *State v. Evans*, 245 P.2d 788, 791–92 (1952)). "[O]rdinary notions of fair play" prohibit states from enforcing laws that are written "in terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also State v. Singer*, 190 Ariz. 48, 50 (App. 1997) (lack of "definiteness" leads to "arbitrary and discriminatory enforcement.").

Although most cases involving the "constitutional requirement of definiteness," *U.S. v. Harriss*, 347 U.S. 612, 617 (1954), have dealt with criminal statutes, that requirement also applies to common-law causes of action, including anti-nuisance law . For example, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a protestor was convicted of violating a noise-abatement ordinance that prohibited a person from making "any noise or diversion which disturbs or tends to disturb the peace or good order" of a nearby school campus. *Id.* at 108. The protestor claimed the law was unconstitutionally vague. While rejecting this claim, Justice Marshall explained that "a basic principle of due process" requires that the law "clearly define[]" its "prohibitions." *Id.*

The same principle applies to civil matters as well.[1] Courts have applied the doctrine in cases involving "public nuisance" or similar causes of action, which might be described as civil, criminal, or both. *Veiga v. McGee*, 26 F.3d 1206, 1213 (1st Cir. 1994). For example, in *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969), the Third Circuit held that Pennsylvania authorities could not use public nuisance to prohibit an allegedly obscene film. The court acknowledged that the state could restrict obscenity, but the laws it employs in doing so may not "be so vague and indefinite 'that men of common intelligence must necessarily guess at [their] meaning.'" *Id.* at 87 (quoting *Connally*, 269 U.S. at 391). Terms like "injury to the public" and "unreasonableness" were "too elastic and amorphous" to satisfy the requirement of definiteness, the court said; in fact, the court described public nuisance as a "sprawling doctrine" that "sweep[s] in a great variety of conduct under a general and indefinite characterization." *Id.* at 88 (citation omitted).

Courts in several jurisdictions have applied a similar rule. In *Rubin v. City of Santa Monica*, 823 F. Supp. 709 (C.D. Cal. 1993), the plaintiffs

[1] Public nuisance law occupies a middle ground between civil and criminal law. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 745–46 (2003). But however characterized, it is subject to the clarity requirement.

challenged the constitutionality of an ordinance that required a permit whenever a group of 35 persons assembled in a city park. The ordinance declared that the license would not be granted if the assembly constituted a "public nuisance." *Id.* at 710. The court found this too ambiguous; it would allow officials arbitrary power to grant or deny permits. Because the statute did not define "public nuisance," it was "impermissibly vague." *Id.* at 713. Similarly, in *Connick v. Lucky Pierre's*, 331 So. 2d 431, 434-35 (La. 1976), the Louisiana Supreme Court held that the Due Process Clause prohibited state officials from using a nuisance cause of action to shut down a business where prostitution was alleged to occur. The court held that the statute was "so vague and indefinite that it does not give adequate notice of what action must be taken in order to avoid the issuance of an injunction or an order of abatement." *Id.* at 435. It was therefore "void for vagueness." *Id.*

Some jurisdictions have ruled that a greater degree of vagueness is tolerable in the realm of business regulations than in other areas of the law, but Arizona has not adopted this rule. *See, e.g., Verma v. Stuhr*, 223 Ariz. 144, 152 ¶¶ 27–33 (App. 2009) (applying vagueness analysis to business regulation); *State v. Walgreen Drug Co.*, 57 Ariz. 308, 316–17 (1941) (same); *City of Tucson v. Stewart*, 45 Ariz. 36, 58 (1935) (same); *Thrift Hardware & Supply Co. v. City of Phoenix*, 71 Ariz. 21, 24 (1950) (same).

Even if it had, courts have made clear that "fair warning should be given to the world in language that the common world will understand" of what regulations a business must comply with. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citations omitted). And as Justice Gorsuch recently noted, there is no justification for allowing vague civil laws—which carry severe penalties—while vigilantly policing against them in other realms. *Sessions*, 138 S. Ct. at 1231 (Gorsuch, J., concurring) (there is "no good [reason]" why "due process require[s] Congress to speak more clearly" in a criminal case "than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license … or confiscate his home[.]").

Also, the requirement of definiteness applies not just to statutes, but also common law causes of action, including public nuisance. In its opinions in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the U.S. Supreme Court held that due process limits the civil liability a state may impose on a defendant under a common law theory, because the fundamental requirement of clarity applies not only to the statutes, but also to the liability courts may impose under a common law cause of action.

Like statutes, common law claims must be guided by standards that allow a person to know what is and is not sanctioned by law.

B. Nobody Knows What A Public Nuisance Is.

"Commentators have long characterized the law of nuisance as a muddled and confusing doctrine." Louise A. Halper, *Untangling the Nuisance Knot,* 26 B.C. Envtl. Aff. L. Rev. 89, 89 (1998). Public nuisance "has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." *Prosser and Keeton on Torts* § 86 at 616 (5th ed. 1984).

Definitions in case law have often been unhelpful, often amounting to little more than a prohibition on bad conduct. *See, e.g., Donaldson v. Central Ill. Pub. Serv. Co.*, 767 N.E.2d 314, 337 (Ill. 2002) (defining public nuisance as "the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public." (citation omitted)). Thus the law of public nuisance has been described as a "'wildnerness,'" Horace G. Wood, The Law of Nuisances iii (3d ed. 1893); an "'impenetrable jungle,'" *Prosser and Keeton*, *supra*; a "mystery," Warren A. Seavey,

Nuisance: Contributory Negligence and Other Mysteries, 65 Harv. L. Rev. 984, 984 (1952); a "legal garbage can," William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942); a "mongrel" doctrine "intractable to definition," F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. Rev. 480, 480 (1949); and a "quagmire," John E. Bryson & Angus MacBeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972). The California Supreme Court said it "does not have a fixed content either at common law or at the present time," *People v. Lim*, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941), and Justice Blackmun said that courts have "searche[d] in vain" for "anything resembling a principle in the common law of nuisance." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

Simply put, no lawyer can define public nuisance with certainty.

As a result, the authors of the *Restatement (Second) of Torts* (1998) have struggled to limit the reach of this tort and formulate an objective definition. They defined public nuisance as "an unreasonable interference with a right common to the general public," which, while it remains a very broad definition, contains at least two relatively clear elements: *unreasonableness* and interference with a *common* right. They defined

unreasonableness as conduct "actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities." *Id.* at § 821B cmt. e. They further defined "common right" or "public right" as a right which is "common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be … injured." *Id.* cmt. g. They made clear that this does *not* mean an aggregate of the *private* rights of a large number of injured persons. *See id.* ("[T]he pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water … does not for that reason alone become a public nuisance."). *See also City of Chicago v. American Cyanamid Co.,* 823 N.E.2d 126, 131 (Ill. App. 2005) (public right is not "an assortment of claimed private individual rights."). Instead, "public rights" refers to the right to a public good—a nonrivalrous, common resource such as the air or ocean.

These limits are important because "[t]he handful of principles governing the tort of public nuisance were never intended to govern any unreasonable harm that might result from human interaction, nor are they adequate for such a daunting task." Gifford, *supra,* , at 833. And they are important to prevent public nuisance from being exploited as a legal weapon against any activity that a litigant finds personally offensive.

C. States Have Increasingly Abused Their Public Nuisance Authority Due To This Vagueness.

The danger of an overbroad definition of public nuisance is plain. This Court has held that even businesses that are not unlawful can constitute public nuisances, *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 10 (1985), and even a preexisting condition such as a cattle ranch can be enjoined by people who come to the nuisance. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 183–86 (1972). These boundaries are so broad that they run a risk of enabling parties to sue over virtually anything they disapprove of.

Recent years have seen several states willing to exploit the extreme breadth of their public nuisance authority to bring creative lawsuits, often for substantial gain. In *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003), the court allowed a public nuisance suit against gun manufacturers on the grounds that gun makers "foster[ed] an illegal secondary gun market," *id.* at 52, and that this caused the government to spend money to provide "governmental services associated with gun violence." *Id.* at 33. The court found that simply selling firearms which people later used to commit crimes made the manufacturers participants in "an illegal, secondary market" for guns that harmed the public generally, *id.* at 53 (citation omitted)—even though the gun makers violated no laws.

Four years later, the California attorney general sued General Motors on a public nuisance theory, arguing that selling cars contributed indirectly to environmental pollution and therefore constituted a public nuisance, despite the fact that cars are legal. That case was dismissed. *People v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal., Sep. 17, 2007). But a similar case in the Fifth Circuit, brought by landowners who claimed that oil companies contributed to global warming and thereby worsened the effects of hurricanes—and that this led to the damage of their properties—was allowed to proceed. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated* 598 F.3d 208 (5th Cir. 2010). And the California Court of Appeal allowed plaintiffs to sue paint companies on a public nuisance theory for having sold lead paint when that was legal, on the grounds that homes that were allowed to deteriorate now present environmental hazards. *People v. Conagra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (App. 2017).

In these and other cases, courts expanded the public nuisance theory to encompass activity that was not unreasonable—the lawful sale of legal products—and that did not injure a public right, but involved the expenditure of tax dollars by government entities, or injuries to private parties. There have even been efforts to sue McDonald's on the grounds that the sale of

fast food is a "public nuisance" because it leads to obesity. *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2nd Cir. 2005).

II. THIS COURT SHOULD NOT ALLOW SUBJECTIVE PERSONAL OFFENSE—WHATEVER ITS SOURCE—TO SATISFY THE STANDING REQUIREMENT FOR PUBLIC NUISANCE.

Given the vagueness of the public nuisance tort—and the danger of expanding it still further to encompass lawful activity—this Court should be wary of allowing parties to bring public nuisance lawsuits on the basis of their individual sensibilities. Indeed, permitting parties to bring public nuisance suits to enjoin lawful conduct on the grounds that it results in religious impurity would lead to the same "serious consequences" this Court warned of in *Quiroz v. Alcoa, Inc.*, No. CV-16-0248-PR, 416 P.3d 824, ___, 2018 WL 2170175 at *16 ¶ 80 (Ariz. May 11, 2018). It would essentially create a "limitless dut[y]" that would "expand tort liability beyond manageable bounds." *Id.*

The risk of subjective tort liability was well expressed in *City of Milwaukee v. Milbrew, Inc.*, 3 N.W.2d 386 (1942), which involved a public nuisance complaint against a brewery on the grounds that it emitted irritating odors. The court emphasized that subjective personal offense was insufficient to establish a public nuisance: "That some one is annoyed by what to him is a disagreeable smell or noise is not in and of itself such

evidence of a nuisance," it said, *id*. at 531, and "[t]o construe this ordinance as attempting to condemn as 'offensive' any odor that is merely disagreeable to, or disliked by, an indefinite number of persons…would render the legislation void as too vague." *Id*. at 538. *Accord*, *City of Festus v. Werner*, 656 S.W.2d 286, 287 (Mo. App. 1983).

True, some courts have held that an offense to the community's religious feelings can be a public nuisance, but that rule has been applied only where the conduct offends a large majority of the community, and where the conduct is otherwise unlawful or tortious. *See, e.g., Carpenter v. Boyles*, 196 S.E. 850, 861 (N.C. 1938). Neither is true here. Allowing plaintiffs to enjoin *lawful* activities based *exclusively* on their religious views regarding those activities risks stretching the public nuisance theory to allow lawsuits over virtually anything a religious sect holds to be offensive. One can easily imagine lawsuits to enjoin activities that involve animals that some sects consider impure, such as pigs or shellfish, or the sale of unblessed food or of alcohol, on the grounds that these activities require the religious observer to change his or her own behavior in order to comply with his or her faith. That has never been considered sufficient grounds for a

nuisance action.[2] *Cf. Falloon v. Schilling*, 29 Kan. 292 (1883) (no injunction based on a neighbor's offense at the way defendant was using property).

Lawful activities cannot be nuisances simply because they offend the plaintiff's religious sensibilities. *See Stevens v. Morenous*, 169 Ill. App. 282, 286 (1912); *In re King*, 46 F. 905, 916 (C.C. W.D. Tenn. 1891); *State v. Williams*, 26 N.C. 400, 406-07 (1844). Thus in *Taylor v. Seaboard Air Line Ry.*, 59 S.E. 129 (N.C. 1907), the court found that a railroad that conducted its business lawfully and with reasonable care was not committing a nuisance when its trains caused noise and smoke to damage the premises of a church and parsonage, even though this offended the religious beliefs of the congregation. And in *Sparhawk v. Union Passenger Ry. Co*., 54 Pa. 401 (1867), the court found that where operating railroads on Sundays was legal, it could not be deemed a public nuisance on the grounds that it offended the religious beliefs of members of the community. "Were we to extend equity jurisdiction to such cases as this," said the court, "we should soon probably be engaged in hearing cases against … every other case of threatened or alleged infraction of the Sunday law, and soon possess ourselves of a jurisdiction beneath the weight of which no court could stand." *Id.* at 432.

[2] The rule is different in Establishment Clause cases, where religious exclusion is inherent to the cause of action. *See, e.g., Harris v. City of Zion, Lake Cnty., Ill.*, 927 F.2d 1401, 1408–09 (7th Cir. 1991).

The court below relied on *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 580 (1829), to conclude that "emotional, cultural, and religious significance" can constitute a special injury, but *Beatty* was a property dispute brought by heirs of the conveyors of land to a church, who sought to exploit a technical error to reclaim the land. Hence Justice Story's reference to the "perpetual servitude or easement" that the plaintiffs sought to undo. That distinguished *Beatty* from *Price v. Methodist Episcopal Church*, 4 Ohio 515 (1831), which discussed at length the difference between *Beatty* and a case in which there was no such dedication or servitude. *Id.* at 545-46.

There is no dedication or servitude here. There is instead a cause of action to enjoin lawful activities on the basis that they cause the plaintiffs to experience what they consider religious impurity. To stretch public nuisance doctrine to such a length would open the door to litigation (motivated by sincerely held religious objections) "beneath the weight of which no court could stand." *Sparhawk*, 54 Pa. at 432.

CONCLUSION

The decision below should be *reversed*.

Respectfully submitted this 29th day of May, 2018 by:

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GOLDWATER INSTITUTE