IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Appeal No. 118,474

STATE OF OKLAHOMA,
ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,
Plaintiff/Appellee/Counter-Appellant,
vs.
JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ORTHO-McNEIL JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.,
Defendants/Appellants/Counter-Appellees,
and
PURDUE PHARMA L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS LLC; and ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,
Defendants.

APPELLANTS' BRIEF IN CHIEF

District Court of Cleveland County, Oklahoma
Honorable Thad Balkman, Trial Judge
District Court Case No. CJ-2017-816
Public Nuisance

Larry D. Ottaway
Amy Sherry Fischer
Andrew M. Bowman
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Ave., Ste. 1200
Oklahoma City, OK 73102

Benjamin H. Odom
John H. Sparks
Michael W. Ridgeway
ODOM & SPARKS, PLLC
HiPoint Office Building
2500 McGee Drive, Ste. 140
Norman, OK 73072

Andrew W. Lester
A.J. Ferate
SPENCER FANE LLP
Suite 600
9400 North Broadway Ext.
Oklahoma City, OK 73114

Charles C. Lifland
Jonathan P. Schneller
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Stephen D. Brody
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025-7019

Attorneys for Defendants/Appellants/Counter-Appellees

INDEX

Page(s)

INTRODUCTION

The products that drive our nation's economy are frequently associated with societal harms—from the health hazards of corn syrup and red meat to the environmental effects of hydrocarbons and automobiles. Federal and state authorities therefore regulate their production and use, and time-honored consumer-protection and tort rules allow injured individuals to recover damages from defendants responsible for harming them. When those tools periodically have proven outdated or ineffective, legislators have enacted new laws and policies to recalibrate the balance between productive commercial activity and individual health and safety—and, as necessary, to implement remedial government programs.

So too with prescription drugs like opioid pain medications. No one disputes that opioid abuse is a pressing public-health problem. Where an opioid medication's marketing has caused personal injuries or violated false-advertising laws, courts may adjudicate those claims. And to meet the broader challenges of opioid abuse, physicians, researchers, legislators, and regulators are mobilizing to craft new policies and programs to treat addiction, combat illicit diversion and trafficking, and develop medical best practices that balance the benefits and risks of opioid pain therapy.

In this case, the Attorney General of Oklahoma bypassed all these legal norms—especially those that distinguish litigation from policymaking. The State recognized that Defendant Janssen Pharmaceuticals, Inc. ("Janssen") could not be held liable for promoting its own rarely abused medications. Yet based on little more than donations and consulting arrangements, it invoked a novel and boundless theory of "nuisance" liability, asking a district court to make a single pharmaceutical manufacturer—whose specialized products made up a tiny fraction of opioid prescriptions in Oklahoma—shoulder the $465 million cost of 21 government programs purportedly necessary to tackle every aspect of opioid abuse.

The district court accepted that invitation. In so doing, it transformed a cause of action addressing property misuse into a boundless tool for courts to create and fund governmental programs for social problems. The district court then deemed Janssen liable for virtually every prominent pain doctor's and medical group's endorsement of opioid therapy for chronic pain. Without any explanation, it also made Janssen responsible for the actions of countless other wrongdoers, including criminal enterprises and individual doctors and patients who diverted opioids to addicts for profit.

That decision has no precedent in American legal history and, not surprisingly, rests on multiple fundamental errors of law and fact. Nuisance liability is limited to misuses of property; it does not apply to the marketing of products, and certainly does not authorize courts to mint government spending programs. In addition, claims for failure-to-warn or fraud have always required plaintiffs to show a concrete chain of causation—to establish that specific, actionable statements by the manufacturer led a doctor to prescribe the medicine that harmed the plaintiff. No court would allow an individual patient to recover damages with vague testimony that a pharmaceutical company's "influence" affected prescribing trends. But the district court jettisoned that bedrock principle as well: Accepting the Attorney General's nuisance theory, it relied on unsubstantiated allegations of influence that could not establish liability for ***a single*** Oklahoman's injuries to require Janssen to fund the State's response to ***all*** injuries from opioid abuse.

This radical reimagination of Oklahoma law cannot stand. It tramples over a century of nuisance jurisprudence; it contorts the related notion of "abatement" beyond recognition; it ignores settled and essential limitations on joint and several liability; and it denies trial by jury. For all of these reasons, the district court's decision should be reversed.

STANDARD OF REVIEW

In equitable actions, the Court "review[s] the entire record," *Taylor v. Willibey*, 1949 OK 272, ¶ 15, 212 P.2d 453, 454, reversing any factual findings "against [the] clear weight of the evidence," *Sears v. State*, 1976 OK 56, ¶ 25, 549 P.2d 1211, 1214, and directs "entry of such judgment as should have been rendered in the first instance," *Taylor*, 1949 OK 272, ¶ 15, 212 P.2d at 454. To determine whether liability rests on First Amendment protected activity, the Court "independent[ly] examin[es] the whole record." *Gaylord Ent. Co. v. Thompson*, 1998 OK 30, ¶ 19, 958 P.2d 128, 142. The Court reviews questions of law de novo, *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 OK 90, ¶ 9, 155 P.3d 16, 20, and applies a "stringent standard of review" to denials of jury trials, *Terry v. Gassett*, 1987 OK 60, ¶ 11, 740 P.2d 141, 145.

SUMMARY OF THE RECORD

I. THE OKLAHOMA OPIOID-ABUSE CRISIS AND OPIOID PAIN THERAPY

A. The opioid-abuse crisis

The Food and Drug and Administration ("FDA") has long supported opioid treatments, explaining that "opioids can effectively manage pain and alleviate suffering" when "prescribed and used properly." E.83, R.785, Def.Ex.1576 at 2.[1] All trial witnesses who treat pain in Oklahoma agreed that opioid therapy significantly improves their pain patients' lives. *See, e.g.*, E.45, R.684, Tr.191-192; E.48, R.688, Tr.50; E.51, R.722, Tr.36-40.

[1] In this brief, excerpts of record are cited as "E.#" with the number corresponding to the index number in the digitized excerpts. The appellate record is cited as "R.#" with the number corresponding to the instrument number in the Notice of Completion of Record. Depositions played into the record at trial are cited as court exhibits containing the relevant deposition transcript. An accompanying Appendix contains the district court's judgment, cited decisions not reported in the National Reporter System, and cited statutes and rules not promulgated in Oklahoma. *See* Okla. Sup. Ct. R. 1.11(j).

They explained that opioid therapy has helped their Oklahoma patients take care of their families, go to church, and continue to work in the face of conditions such as Paget's disease, Cushing syndrome, and sickle-cell disease. E.46, R.687, Tr.18-20.

Beginning in the mid-1990s, Oklahoma and the nation saw rapidly increasing opioid abuse. Many Oklahomans died of overdoses and many more struggled with addiction. E.98, R.784, Def.Ex.3928 at 8; E.65, R.785, Def.Ex.494; E.118, R.785, Pl.Ex.1569 at 1. Rogue doctors operating "pill mills" and drug dealers fueled substantial abuse. E.66, R.784, Def.Ex.624 at 12; E.75, R.785, Def.Ex.832 at 46. Oklahoma regulators recognized that pharmacy break-ins and employee theft diverted millions of opioid pills for sale on the black market. E.55, R.785, Ct.Ex.177 at 16, 19-22; E.50, R.690, Tr.73-76. That criminal diversion typically involved oxycodone and hydrocodone pills, which Janssen did not market. E.72, R.785, Def.Ex.802 at 78-82; E.60, R.785, Def.Ex.217 at 7. Hydrocodone, in particular, emerged as Oklahoma's most abused prescription medication, E.60, R.785, Def.Ex.217 at 7, and it was "not uncommon" for Oklahoma doctors "to come in on Monday and find out that … 30 [hydrocodone] scripts [had been] filled" in their names, "all fake call ins" to pharmacies, E.79, R.785, Def.Ex.939 at 12-13. Pills such as Purdue's OxyContin, which abusers "crushed and ingested, snorted, or injected to … obtain [the] full dose immediately," were likewise widely diverted. E.90, R.785, Def.Ex.2455 at 45-46. In a 2013 analysis, Oklahoma's State Board of Pharmacy found that 61 percent of overdose victims had no prescription and 18 percent were "doctor shopping"—i.e., had controlled-substance prescriptions from five or more doctors. E.68, R.784, Def.Ex.673 at 15.

Opioid-related overdose deaths in Oklahoma rose through the late 1990s and early 2000s before plateauing in 2007 and then beginning a 43 percent decline in 2013. E.118,

R.785, Pl.Ex.1569 at 2-3; E.99, R.784, Def.Ex.3929 at 1. By 2017, the Oklahoma Bureau of Narcotics rated methamphetamine—not opioids—as "the most significant illicit drug threat to the state." E.66, R.784, Def.Ex.624 at 7; E.35, R.706, Tr.166-67; E.39, R.680, Tr.85-87.

As opioid abuse drew public attention through the 2000s, regulators worked to balance the value of pain therapy against the need to curtail abuse. In 2009, the FDA reaffirmed that "properly managed medical use of opioid analgesic compounds (taken exactly as prescribed) is safe, can manage pain effectively, and rarely causes addiction"—a statement that remains on the agency's website today.[2] E.96, R.784, Def.Ex.3606 at 4. In 2013, the agency rejected a petition by Dr. Andrew Kolodny, the State's lead expert at trial, to place dosage and duration limits on the approved indication of extended-release opioids for chronic non-cancer pain. E.83, R.784, Def.Ex.1576 at 11-18.

The State of Oklahoma, too, recognized the medical value of prescription opioids and pursued policies to facilitate patient access. As early as 2001, the State recognized OxyContin's abuse potential, but for years chose not to impose preauthorization requirements or prescription-quantity limits out of concern they would "leave somebody hurting." E.82, R.785, Def.Ex.1522 at 14-15; E.70, R.785, Def.Ex.729 at 71-72; E.78, R.785, Def.Ex.895 at 38. The State also knew that hydrocodone was "the most abused pharmaceutical drug in Oklahoma" and diverted at alarming rates, E.60, R.785, Def.Ex.217 at 7; E.79, R.785, Def.Ex.939 at 9-12, yet encouraged physicians to prescribe hydrocodone products because they were cheaper than other opioid medications, E.81, R.785, Def.Ex.1514 at 51-53. The result: hydrocodone was the most frequently prescribed drug of any kind in the state's

[2] *See* https://www.fda.gov/consumers/consumer-updates/guide-safe-use-pain-medicine.

Medicaid program from 2001 to 2015. *See, e.g.*, E.71, R.785, Def.Ex.773 at 84; E.80, R.785, Def.Ex.1151 at 22; E.84, R.785, Def.Ex.1620 at 24; E.85, R.785, Def.Ex.1715 at 45.

B. Janssen's FDA-approved opioid medicines for chronic pain

Janssen, a wholly owned subsidiary of Defendant Johnson & Johnson ("J&J"),[3] marketed two FDA-approved Schedule II opioid medications: Duragesic and Nucynta. Their market shares were not significant, less than 1 percent of Oklahoma opioid prescriptions. E.49, R.721, Tr.34-37. Nor were they widely abused or misused.

Duragesic is a skin patch that delivers a controlled dose of pharmaceutical fentanyl over 72 hours. E.92, R.785, Def.Ex.2762 at 1.[4] Introduced in 1991, it has always been FDA-approved for chronic pain in opioid-tolerant patients. *Id.* at 5; E.94, R.785, Def.Ex.2776 at 1. Duragesic's FDA-approved labels have always prominently warned of the risk of addiction and abuse. *See, e.g.*, E.93, R.785, Def.Ex.2769 at 1-2. But unlike pills that abusers could crush and then snort or inject for a quick high, Duragesic's opioid content was suspended in a gel that made extracting a non-lethal dose difficult. E.42, R.713, Tr.84-85; E.90, R.785, Def.Ex.2455 at 45-46. Abusers recognized that danger, E.27, R.670, Tr.37-38, and surveillance networks reported far lower abuse and diversion rates for Duragesic patches than for pills such as OxyContin, E.77, R.784, Def.Ex.862 at 21; E.91, R.785, Def.Ex.2643 at 5; E.87, R.784, Def.Ex.1718 at 13; E.43, R.683, Tr.35-39, 71; E.63, R.785, Def.Ex.412 at 2, 19. In 2003, as OxyContin prescribing trends suggested widespread diversion and abuse, Oklahoma's Drug Utilization Review Board ("DURB") recognized that Duragesic

---

[3] All arguments in this brief are made on behalf of both Janssen and J&J.

[4] Fentanyl is a synthetic opioid commonly used as a surgical anesthetic and intravenous pain reliever for postoperative pain; the pharmaceutical product should not be confused with illicit street fentanyl, which is illegally made in criminal labs and laced into other illicit drugs, greatly increasing the risk of overdose. E.42, R.713, Tr.64-66.

prescribing "appear[ed] to be within acceptable parameters." E.73, R.785, Def.Ex.812 at 66-67, 75; E.74, R.785, Def.Ex.815 at 62-64; E.78, R.785, Def.Ex.895 at 38.

Only 0.13 percent of Oklahoma Medicaid patients diagnosed with opioid-use disorder[5] received a Duragesic prescription in the year before their diagnosis. E.49, R.721, Tr.77. Out of more than 6,000 opioid-related overdose deaths between 2000 and 2017, medical examiner reports identified Duragesic as a cause of death in just 48, and offered no evidence that any of them resulted from using the patch as prescribed. E.35, R.706, Tr.153-156; E.40, R.711, Tr.82-83.

Nucynta is an FDA-approved short-acting opioid tablet for acute pain. Nucynta's active ingredient, tapentadol, also acts on norepinephrine, a non-opioid pain-reduction pathway. E.23, R.667, Tr.48-49; E.43, R.683, Tr.131-133. Janssen introduced the product in 2009, then two years later introduced Nucynta ER, an extended-release version approved for chronic pain. E.42, R.713, Tr.22; E.95, R.785, Def.Ex.2783 at 1. Janssen delayed Nucynta ER to allow for a tamper-resistant coating that made the tablets extremely difficult to crush, chew, snort, or inject. E.44, R.714, Tr.12-14. It was the first opioid tablet to incorporate such a coating at launch. *Id.* It was also the first to be launched with a Risk Evaluation Mitigation Strategy, under which Janssen disseminated FDA-approved educational materials on risks, benefits, and safe-prescribing practices to physicians and patients. E.43, R.683, Tr.79-87; E.44, R.714, Tr.38-41; E.97, R.785, Def.Ex.3736 at 3.

Abuse and diversion rates for tapentadol were extremely low. E.87, R.784, Def.Ex.1718 at 13, 26, 58, 76; E.86, R.784, Def.Ex.1716 at 9; E.43, R.683, Tr.70. Only 1 in

[5] Opioid-use disorder is a "problematic pattern of opioid use leading to clinically significant impairment or distress." E.61, R.784, Def.Ex.338 at 3.

2,500 Oklahoma Medicaid patients diagnosed with opioid-use disorder had received a Nucynta or Nucynta ER prescription in the prior year. E.49, R.721, Tr.81-82. Overdoses were so rare that Oklahoma's Chief Medical Examiner never saw tapentadol in a post-mortem toxicology screen. E.35, R.706, Tr.149.

Janssen also marketed several medications containing tramadol, a weak prescription opioid that state regulators in 2012 assigned to Schedule IV—signifying lower abuse potential than Schedule II or III medications. E.21, R.696, Tr.111-112; E.30, R.673, Tr.38; E.42, R.713, Tr.57-58; 63 O.S. § 2-209. The State linked tramadol to just five overdose deaths over the 23 years at issue; it presented no evidence that any death attributed solely to tramadol involved a Janssen product. E.35, R.706, Tr.86-95, 103-106. Only 0.13 percent of Oklahoma Medicaid patients diagnosed with opioid-use disorder—one in 770—had received any kind of tramadol prescription in the prior year. E.49, R.721, Tr.79-81.

C. Janssen's branded marketing, unbranded materials, and third-party associations

Janssen stopped actively promoting Duragesic in 2007 and divested the U.S. Nucynta product line in 2015. E.23, R.667, Tr.45-46. During the years it marketed them, it did so primarily through "branded" promotion addressing their product-specific benefits and risks. Like marketing for most prescription drugs, Janssen's marketing focused on physicians considered likely to prescribe the medications (e.g., pain specialists, oncologists, and some primary care physicians). E.24, R.698, Tr.33-34, 49-50. As is also typical in prescription-drug marketing, Janssen employed sales representatives to call on physicians at their offices (interactions memorialized in "call notes"), and sponsored "speaker programs" in which experienced physicians received stipends to present about the medications to other doctors. E.19, R.695, Tr.61, 68; E.24, R.698, Tr.30, 33-34, 58-59, 67-68, 72-75.

In addition to its branded marketing, Janssen created some "unbranded" materials in connection with Nucynta's launch. *See, e.g.*, E.24, R.698, Tr.113-14. And as a pharmaceutical manufacturer, Janssen associated with many third parties in the pharmaceutical and medical community, some of whom expressed views regarding opioid therapy. Janssen donated to leading professional societies like the American Pain Society, patient advocacy groups like the American Pain Foundation, and public-policy groups like the Pain Care Forum. E.116, R.785, Pl.Ex.1349. It also retained established experts in pain medicine, known as "key opinion leaders," to consult on clinical-trial design, serve on advisory boards, and participate in speaker programs. *See, e.g.*, E.19, R.695, Tr.96-97; E.53, R.784, Ct.Ex.2 at 29-30.

II. THE PROCEEDINGS BELOW

The State sued three companies—Purdue, Teva, and Janssen—on claims that their marketing "downplay[ed] the risk of opioid addiction and overstate[d] the efficacy of opioids for … chronic non-cancer pain." E.1, R.1, Pet. ¶¶ 4-5. According to the State, this deceptive marketing caused increased prescribing, which, in turn, caused the opioid-abuse crisis. *Id.* The State's Petition included consumer-protection, fraud, and public-nuisance claims. *Id.* ¶¶ 73-133. After the district court dismissed the consumer-protection claim, E.2, R.22, Order at 1; E.15, R.730, 12/5/17 Hr'g Tr.148-149, the State continued to assert its false-marketing allegations as the basis for its public-nuisance claim.

The State originally focused on Purdue, alleging that "Purdue's fraudulent marketing scheme [for OxyContin] created the opioid epidemic." E.3, R.78, Pl. Opp. to Purdue Mot. Quash, at 2; *see* E.16, R.743, 8/30/18 Hr'g Tr.57-58. The State then settled with Purdue for $270 million, E.4, R.347, Purdue Consent J. at 10-11, dismissed all claims except public nuisance, and moved for a bench trial, E.5, R.369, Not. of Dismissal; E.17, R.725, 4/4/19

Hr'g Tr.4. Over Janssen's objection, the court ruled that "[t]he State's remaining cause of action for nuisance is an equitable claim, therefore there is no right to jury trial." E.6, R.382, Summ. Order at 1. The State then settled with Teva for $85 million, E.9, R.611, Teva Consent J. at 10, leaving Janssen as the sole defendant in a bench trial where the State sought $17.5 billion for new government programs it contended were necessary to "abate" the entirety of Oklahoma's opioid-abuse crisis, E.11, R.638, Pl.'s Proposed Findings of Fact & Concl. of Law ("Pl.'s FFCL") at 535 ¶ 1305.

A. The State's marketing-as-nuisance contentions

At trial, the State attacked both branded promotions of Janssen's opioid medications and unbranded materials discussing pain therapy and safe opioid prescribing. The State's main criticisms centered on a 2004 FDA Warning Letter about a branded informational pamphlet used in the early 2000s by Duragesic sales representatives. E.105, R.785, Pl.Ex.38. The letter asserted that data the pamphlet cited were insufficient, under FDA regulatory standards, to support promotional claims that Duragesic was less frequently abused than other opioid medications, had "[d]emonstrated effectiveness in chronic back pain," and improved patients' physical and social functioning. *Id.* at 2-3.[6] Janssen pointed FDA to multiple additional studies and data supporting the pamphlet's claims, but also agreed to discontinue its use and send a letter notifying prescribers of FDA's letter. E.76, R.784, Def.Ex.861; E.59, R.784, Def.Ex.129. FDA then closed the matter and took no formal action.

The State also condemned other promotional materials, including two Duragesic slide decks citing a medical-journal letter reporting low incidence of addiction among hospital

[6] FDA called the claims "false and misleading," a regulatory term of art denoting the absence of what the agency considers to be "adequate and well-controlled studies." *See* 21 C.F.R. § 202.1(e)(6) (a claim that lacks "substantial evidence" is "false or misleading"), *id.* § 314.126 ("substantial evidence" requires "adequate and well-controlled studies").

patients who received short-term opioid therapy. E.109, R.785, Pl.Ex.901; E.106, R.785, Pl.Ex.740 at 7; E.119, R.789, Pl.Ex.1706 at 45; E.20, R.664, Tr.96-97; E.30, R.673, Tr.6-19. In contrast to some manufacturers' aggressive use of the journal letter, Janssen's slides emphasized its limitations, citing it as a low-end estimate of addiction from "short-term exposure" in a hospital setting and noting higher rates in other contexts—especially among known substance abusers, E.106, R.785, Pl.Ex.740 at 7-9; E.119, R.789, Pl.Ex.1706 at 45. At any rate, the State presented no evidence either slide deck was ever used in Oklahoma.

As for Janssen's "unbranded" materials, the State introduced a 2009 brochure called *Finding Relief*, which Janssen co-sponsored with the American Academy of Pain Medicine ("AAPM") and American Geriatric Society. E.114, R.785, Pl.Ex.1247. The brochure generally discussed a range of pain treatments, including yoga, anti-inflammatories, and acupuncture; it discussed opioids on just one of its 36 pages. *Id.* at 10. Another of the State's targets, a website called "Prescribe Responsibly," provided "pain management resources" to help healthcare providers assess and manage pain with opioid medications. E.89, R.785, Def.Ex.2438 at 3; E.24, R.698, Tr.114-115; E.25, R.668, Tr.5-12. Among other things, the State criticized statements in these materials that addiction rates from proper medical use of opioid medications for chronic pain are low. E.114, R.785, Pl.Ex.1247 at 10; E.89, R.785, Def.Ex.2438 at 3; E.29, R.672, Tr.104-105.

Despite these criticisms, the State acknowledged at trial that the case "isn't about [Janssen's] drug[s]," E.22, R.697, Tr.53, tacitly conceding the lack of plausible evidence that Janssen's own rarely prescribed medications caused Oklahoma's opioid-abuse crisis. To compensate, the State also sought to hold Janssen liable for the positions of third parties with which it associated. According to the State, Janssen was legally responsible for virtually

every statement that any group or doctor it donated to or consulted with over the course of two decades ever made about opioid medications.[7] *E.g.*, E.54, R.784, Ct.Ex.58; E.30, R.673, Tr.157-58; E.29, R.672, Tr.40-44; E.31, R.703, Tr.31-32.

To support that claim, the State had to prove that the scattered third-party statements it chose to highlight in fact caused the opioid-abuse crisis. It offered that case chiefly through Kolodny, who asserted that a national "campaign"—allegedly carried out by pharmaceutical manufacturers, doctors, researchers, and nonprofits—caused opioid prescribing to rise starting in the mid-1990s. E.28, R.702, Tr.75-78; E.32, R.674, Tr.21-23. He made no attempt to measure the impact of this "campaign," much less Janssen's alleged part in it. He did not identify even one Oklahoma doctor whom Janssen, or anyone else, misled. E.33, R.675, Tr.94-96, 99. Nor did he rule out alternative causes of increased prescriptions, such as good-faith academic and regulatory interest in addressing inadequately treated pain. *See supra* at 3-4; E.53, R.784, Ct.Ex.2 at 6; E.108, R.785, Pl.Ex.878 at 10-31. Ignoring the impact of rampant criminal diversion, Kolodny simply declared that a "campaign" destroyed the "dam of narcotic conservatism" that restrained opioid prescribing before 1995, E.28, R.702, Tr.75, 77, 97, and that legitimate prescriptions—rather than widespread criminal conduct—caused

[7] The State also sought to label J&J an opioid "kingpin" because it formerly owned two companies, Tasmanian Alkaloids and Noramco, that produced and sold medical-grade opioid raw materials and active pharmaceutical ingredients ("APIs") used in opioid medications manufactured and marketed by other companies. E.21, R.696, Tr.10; E.103, R.786, Pl.Ex.6 at 1-3, E.56, R.784, Ct.Ex.193 at 4-5, 30. But the Drug Enforcement Agency ("DEA") authorized those raw material and API sales—down to the gram—under a federal regulatory scheme designed to ensure reliable medical supplies, and Tasmanian Alkaloids and Noramco did not manufacture, promote, or sell ***any*** company's finished opioid medications. *See id.* at 38; *infra* at 39. In the end, the State conceded that their federally controlled sales of opioid raw materials and APIs for approved opioid medications was "not a basis for imposing liability." E.11, R.638, Pl.'s FFCL at 579 ¶ 83; E.10, R.624, Pl.'s Resp. to Mot. for J. at 58-59.

the opioid-abuse crisis, *id.* at 75; E.32, R.674, Tr.16. The State's other experts echoed Kolodny's testimony and offered similarly speculative assertions of "influence." E.26, R.669, Tr.44-45, 70-71, 72; E.34, R.705, Tr.71, 79; E.40, R.711, Tr.62-63.

Oklahoma doctors who treated pain patients disagreed with those conclusory claims. These doctors testified that physicians read the strong FDA-approved warnings that accompany the medications and well understood their risks. E.51, R.722, Tr.27-28; E.48, R.688, Tr.29-30, 45-46; E.47, R.717, Tr.42. They also explained that Janssen sales representatives did not improperly influence their prescribing decisions. E.48, R.688, Tr.57; E.47, R.717, Tr.95-96; E.45, R.684, Tr.174. Dr. John Muchmore, who had chaired Oklahoma's DURB for twelve years, called the State's contrary assertion "utter nonsense." E.46, R.687, Tr.14, 16. Dr. Kyle Toal, an Oklahoma surgeon, deemed it "very offensive" and "embarrassing." E.47, R.717, Tr.45.

B. The State's proposed remedy

The State did not seek an injunction. Instead, it demanded that Janssen fund a decades-long monetary "abatement plan" addressing the entire "opioid crisis"—a plan that would create 36 new government programs and employ 1,734 new state workers. E.120, R.785, Pl.Ex.4734; E.39, R.680, Tr.22-28. These requested programs included treatment services, a new "academic addiction medicine department," family drug courts, and even salaries and benefits for state agencies including the Attorney General's office. E.120, R.785, Pl.Ex.4734 at 19, 24, 50, 69-70. The State calculated the plan would cost Janssen $12.8 billion over 20 years, $15.4 billion over 25 years, or $17.5 billion over 30 years, calling the timelines "options" for the court. E.120, R.785, Pl.Ex.4734 at 15; E.52, R.692, Tr.54.

The State's experts admitted there was "not an evaluation plan yet to accompany the abatement plan," E.37, R.709, Tr.64, 68, and they identified no objective metrics to measure

success or failure. They also conceded the State had not "done anything to set up the intervals of time by which any process or outcome measures would be assessed." *Id.* at 65-66; *see* E.36, R.679, Tr.9, 16; E.38, R.710, Tr.89. Some suggested that "abatement" would mean return to "pre-1996 levels" of certain metrics, but they could not identify those levels or explain why they were appropriate targets. E.34, R.705, Tr.82; E.38, R.710, Tr.86-87; E.39, R.680, Tr.90-91. And the State presented no evidence its plan would achieve them.

C. The district court's judgment

After trial, the court held Janssen liable under Oklahoma's public-nuisance statute, 50 O.S. §§ 1-2, for conducting "false, misleading, and dangerous marketing campaigns" about opioids. E.12, R.643, J. After Non-Jury Trial at 25 ¶ 9. It ruled that Oklahoma law does not "limit[] public nuisance to those that affect property," *id.* at 22 ¶ 2, but alternatively found that Janssen "used real and personal property" to create the nuisance, because sales representatives trained in their homes, traveled on state roads, and visited doctors' offices, *id.* at 24 ¶¶ 4-5.

The court also held that Janssen was the "cause-in-fact" and proximate cause of the nuisance. *Id.* at 29-30 ¶¶ 17-20. It found that Janssen, "acting in concert with others, embarked on a major campaign to disseminate the messages that pain was being undertreated and 'there was a low risk of abuse and a low danger' of prescribing opioids to treat chronic, non-malignant pain and overstating the efficacy of opioids as a class of drug." *Id.* at 9 ¶ 17. The court did not identify the "others" with whom Janssen allegedly acted in concert. And the court summarily rejected Janssen's contention that the First Amendment protected its scientific and policy advocacy. Without analyzing any particular statement, the court asserted that all "the speech at issue here was clearly commercial in nature," *id.* at 28 ¶ 15, and that all of it—speech spanning 20 years and many speakers—was false or misleading, *id.* at 17 ¶ 44.

Finally, the court endorsed "the contours" of the State's Abatement Plan, but ruled that "the State did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis." *Id.* at 30 ¶ 25, 41 ¶ 60. It thus required Janssen to fund the plan for one year at a cost of $572 million (later corrected to $465 million). *Id.* at 41 ¶ 59. The State then submitted a revised Proposed Judgment advocating for an annual "process" to review "whether Defendants are required to replenish the Abatement Fund." E.13, R.647, Def. Obj. to Proposed J., Ex. A at 4 ¶ 17. Janssen objected to that proposal and to the State's failure to offset the judgment amount by the $355 million the State received from Purdue and Teva. *Id.* at 2-6. Janssen had twice requested a settlement credit before trial, and the State had conceded that Oklahoma's settlement-credit statute entitled Janssen to it. *See id.* at 4-6. But the court denied the credit on the ground that "there has been no finding of fault entered against any other potential tortfeasor, nor was any such finding requested by Defendants before or during trial." E.14, R.654, Final J. After Non-Jury Trial ("Final J.") at 42 ¶ 64. Reiterating that the trial evidence supported only one year of abatement funding, *id.* at 30 ¶ 2, the court ordered Janssen to pay $465 million "to carry out the Abatement Plan," *id.* at 41 ¶ 63.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT IMPROPERLY EXPANDED NUISANCE LIABILITY AND REMEDIES

This Court always has limited public-nuisance liability to property disputes and a limited class of recognized nuisances "per se." Oklahoma law likewise always has allowed just one abatement remedy: an injunction against the act or omission constituting a nuisance. Disregarding these settled principles, the district court transformed this statutory cause of action into an all-purpose regulatory instrument—one that permits judges to singlehandedly

enact government programs to combat harms the State attributes to commercial activity. That transformation ignores a century of controlling precedents, violates constitutional norms, and threatens grave and unjust outcomes for companies that do business here.

A. As a matter of law, Janssen did not violate Oklahoma's nuisance statute

1. The statute does not regulate the marketing of goods

Oklahoma's nuisance statute defines a nuisance as "unlawfully doing an act, or omitting to perform a duty" that "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others." 50 O.S. § 1. That definition incorporates "the common law's private and public nuisance concepts." *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶ 8, 933 P.2d 272, 276; *see Ex parte Draughn*, 1933 OK CR 118, 26 P.2d 437, 438 ("This is a definition of nuisance as at the common law.").

Construing 50 O.S. § 1 in its common-law context, this Court has explained that a nuisance is "'an unreasonable, unwarranted, or unlawful use by a person or entity ***of property*** lawfully possessed, but which works an obstruction or injury to the right of another.'" *Morain v. City of Norman*, 1993 OK 149, ¶ 14, 863 P.2d 1246, 1250 (emphasis added) (quoting *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36); *see Nichols*, 1996 OK 118, ¶ 8, 933 P.2d at 276 (nuisance is "a field of tort-like liability which allows recovery of damages for wrongful interference with the use or enjoyment of ***rights or interests in land***." (emphasis added)). That definition applies to public and private nuisances alike. *See Morain*, 1993 OK 149, ¶¶ 12-14, 863 P.2d at 1249-50. And its focus on property aligns with "the language of the entire act," *Affiliated Mgmt. Corp. v. Okla. Tax Comm'n*, 1977 OK 183, ¶ 10, 570 P.2d 335, 337, which consistently references property relations.[8]

---

[8] *See, e.g.*, 50 O.S. § 5 ("Every successive ***owner of property*** who neglects to abate a continuing nuisance ***upon, or in the use of such property*** … is liable therefor…."); *id.* § 15

Since the statute's 1890 enactment, this Court has never deviated from this limited understanding of the unlawful acts and omitted duties actionable under 50 O.S. § 1. It has found nuisance liability only for acts or omissions traditionally recognized as nuisances, such as overgrown hedges, *Updegraff v. City of Norman*, 1955 OK 195, ¶ 16, 287 P.2d 909, 912, loud and polluting factories, *Epps v. Ellison*, 1921 OK 279, ¶ 1, 200 P. 160, 160, the dumping of untreated sewage, *Oklahoma City v. West*, 1931 OK 693, ¶ 5, 7 P.2d 888, 890, and road obstructions, *State ex rel. King v. Friar*, 1933 OK 501, ¶ 13, 25 P.2d 620, 622.[9]

Expanding the concept of public nuisance beyond property use, the district court observed that the statute "simply says, 'unlawfully doing an act, or omitting to perform a duty.'" E.14, R.654, Final J. at 22 ¶ 2. But this language does not make ***every*** allegedly harmful act or omission a nuisance. Rather, it defines a nuisance as "***unlawfully*** doing an act, or omitting to perform ***a duty***" that "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others." 50 O.S. § 1 (emphasis added). To avoid rendering the words "unlawfully" and "duty" "superfluous or useless," those terms must be given meaning. *Bed Bath & Beyond, Inc. v. Bonat*, 2008 OK 47, ¶ 11, 186 P.3d 952, 955 (quotation omitted). And

---

("Where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without ***entering upon his land***, reasonable notice must be given to him before entering to abate it."); *id.* § 16 ("Cities and towns ... shall have the right and power to determine what is and what shall constitute a nuisance... and ... the power summarily to abate any such nuisance ***after notice to the owner***...."); *id.* § 20 (authorizing certain counties to "declare what shall constitute a nuisance, and provide for the prevention, removal and abatement of nuisances ***for those properties*** acquired by the county .... or ***any property*** located within an unincorporated area of the county") (emphases added).

[9] Like the common law, Oklahoma also recognizes liability for certain nuisances per se—acts "which in their nature are nuisances ... or so denounced by the common law or by statute." *Marland Refining Co. v. City of Hobart*, 1925 OK 479, ¶ 10, 237 P. 857, 858. "The number of things which are nuisances per se is limited." *McPherson v. First Presbyterian Church of Woodward*, 1926 OK 214, ¶ 10, 248 P. 561, 564. Examples include a "disorderly house, an obstruction of a highway," and other traditionally recognized activities "prohibited by public morals and law." *Id.* ¶ 11, 248 P. at 564. The State has never claimed a nuisance per se here.

this Court has always made clear that the "unlawful" acts and omitted "dut[ies]" the statute prohibits are the property offenses and nuisances per se punishable under the common law of nuisance. *See supra* at 16; *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, 139 P.3d 897, 905 ("The statutes and the common law are to be read together as one harmonious whole.").

Further, the Court has squarely held that marketing of goods is ***not*** actionable under the statute. In *State ex rel. Wood v. State Capital Co.*, 1909 OK 200, 103 P. 1021, the Attorney General invoked the statute against illegal liquor advertising, arguing—as he does here—that unlawful marketing can "annoy[], injure[], and endanger[] the … health, and safety of the inhabitants of the state." *Id.* ¶ 0, 103 P. at 1022. The Court disagreed that the statute extended beyond offensive property use and nuisances per se, *id.* ¶ 6, 103 P. at 1025, holding that to treat illegal advertising as "a nuisance, within the purview of the foregoing statutes, would be tantamount to holding that every crime was a nuisance," *id.* ¶ 10, 103 P. at 1026. Other statutes, the Court noted, regulated liquor advertising. *Id.* ¶ 11, 103 P. at 1026. But in the nuisance statute, "[t]he Legislature of this state," had "not …. provided … that the powers of equity might be invoked … to restrain or abate such conduct." *Id.*

The Court has since cited *State Capital* to rebuff other expansive nuisance theories, reiterating that for courts to "sustain … broad findings" of public harm under the statute's vague language "would virtually sweep the entire spectrum of criminal activity within the purview of 50 O.S. [§§ 1, 2]." *State ex rel. Fallis v. Mike Kelly Constr. Co.*, 1981 OK 158, ¶ 16, 638 P.2d 455, 458. And because the Legislature has since repeatedly reenacted 50 O.S. § 1 "in the same or substantially the same terms," it "is presumed to have … adopted [*State Capital*'s] construction as an integral part of the statute." *Sudbury v. Deterding*, 2001 OK 10, ¶ 16, 19 P.3d 856, 859; *see, e.g.*, 1980 Okla. Sess. Laws c. 189 (HB 1707).

Other states, too, have declined "invitation[s] to expand a claim for public nuisance beyond its grounding in real property," *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997), refusing to extend identical nuisance statutes to the sale or marketing of opioid medications and other products, *see North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, No. 08-2018-cv-01300, 2019 WL 2245743, at *13 (N.D. Dist. Ct. May 10, 2019); *Tioga Pub. Sch. Dist. No. 15 of Williams Cty. v. U.S. Gypsum Co.*, 984 F.2d 915, 920-21 (8th Cir. 1993). Courts declining that invitation recognize that "the use of land by the one creating the nuisance" is "essential to the concept of a public nuisance tort," *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007), which "never before has been applied to products, however harmful," *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008). Unless Oklahoma wishes to become the focal point for an entirely new species of social-policy litigation, it should maintain consistency with other jurisdictions.

2. The district court's expansion of nuisance law threatens businesses with massive liability unconstrained by any limiting principles

There are "well-developed bodies of law covering strict products liability," as well as "negligence[] and warranty theories" for harmful marketing. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 744 (2003). Such law incorporates protections against arbitrary liability. Plaintiffs alleging that a manufacturer misrepresented a medicine's risks must prove causation, showing that the prescribing doctor relied on the alleged misrepresentation. *E.g.*, *Tortorelli v. Mercy Health Ctr., Inc.*, 2010 OK CIV APP 105, ¶¶ 22-27, 242 P.3d 549, 559-60. Consumer-protection claims exclude conduct regulated by FDA. *See* 15 O.S. § 754(2). Such protections ensure both fair and rational liability standards and respect for the policy goals of the civil justice and regulatory systems.

By contrast, using public nuisance to address marketing and product liability would

constitute a "blunt and capricious method of regulation." *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 682 (Ct. App. 2005). As the Eighth Circuit stated in rejecting a like attempt to expand North Dakota's identical statute: If nuisance encompassed ***any*** act or omission causing "annoy[ance]" or "injury," *see* E.14, R.654, Final J. at 22 ¶ 2—including the sale of goods—then "any injury … would give rise to a cause of action under [the statute], regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery," *Tioga Public Sch. Dist.*, 984 F.2d at 921. "Nuisance thus would become a monster that would devour in one gulp the entire law of tort[.]" *Id.*

Commercial activity often affects "the comfort, repose, health, or safety of others." 50 O.S. § 1. Imposing liability under a standardless statute, without reference to nuisance-law principles, would "significantly affect[] the risks" of commercial activity, creating "a form of regulation administered through the courts" at odds with "the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state." *In re Firearm Cases*, 24 Cal. Rptr. 3d at 682. The Attorney General himself, in another court, has said: "[c]ourts should not use public nuisance theories to confound state and federal political branches' legislative and administrative processes." Br. of Ind. & 17 Other States, *City of Oakland v. BP PLC*, No. 18-16663, 2019 WL 2250194 at *1, *28 (9th Cir. May 17, 2019).

Those scenarios are not speculative: Local governments have brought nuisance suits against Oklahoma energy companies for their alleged contributions to climate change. *See, e.g.*, *City of Oakland v. BP PLC*, 969 F.3d 895, 901-02 (9th Cir. 2020) (describing nuisance claim requiring "Energy Companies to fund a 'climate change adaptation program'"). Others have brought public-nuisance claims against consumer-products companies for oceanic

pollution from plastic packaging. *See* Complaint, *Earth Island Inst. v. Crystal Geyser Water Co.*, Case No. 20-CIV-01213 (Cal. Super. Ct. San Mateo Feb. 26, 2020).[10]

But those suits would be only the beginning. An avalanche of similar lawsuits making end-runs around traditional tort rules would become viable in Oklahoma. The Surgeon General describes obesity from processed and fast foods as a public health "epidemic."[11] Automobiles release particulate matter that some link to health hazards from lung disease to dementia.[12] The district court's reasoning would let the Attorney General—or even private plaintiffs—assert nuisance claims against Coca-Cola, General Motors, or Devon Energy for having "endanger[ed] the health" of a "considerable number of persons." E.14, R.654, Final J. at 21-22 ¶ 1. Those companies would then face astronomical monetary awards to fund judicial policymaking styled as nuisance "abatement." *See infra* at 27-29. And because public nuisances have no statute of limitations, *see* 50 O.S. § 7, no commercial activity—no matter how many decades distant, and no matter how uncontroversial at the time—would be safe from Oklahoma's new public-nuisance regime.

Until now, bright-line statutory and tort protections have precluded such open-ended liability. *See, e.g.*, *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003). But

---

[10] *See* https://www.earthisland.org/images/uploads/suits/2020-02-26_Earth_Island_Complaint _FILED.PDF.

[11] Office of the Surgeon General. The Surgeon General's Vision for a Healthy and Fit Nation 2010, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2882598/; *see* Mark A. Pereira et al., *Fast-food Habits, Weight Gain, and Insulin Resistance: 15-Year Prospective Analysis*, The Lancet, Jan. 1, 2005, at 36.

[12] *See* Penfei Fu, *et al.*, *The Association Between PM2.5 Exposure and Neurological Disorders: A Systematic Review and Meta-Analysis*, 655 Sci. Total Env. 1240 (2019); Iyad Kheirbek, *et al.*, *The Contribution of Motor Vehicle Emissions to Ambient Fine Particulate Matter Public Health Impacts in New York City: a Health Burden Assessment*, Env. Health, Aug. 26, 2016, at 1.

the judgment below demolishes those guardrails. "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry ... markets ... its non-defective, lawful product ... and a public nuisance claim would be conceived and a lawsuit born." *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003).

3. Absent common-law limitations, Oklahoma's nuisance statute violates the Due Process Clause's void-for-vagueness doctrine

The district court's all-encompassing reading of 50 O.S. § 1 raises yet another problem: By erasing traditional limits on nuisance liability, it leaves Oklahoma's nuisance statute hopelessly vague, in violation of due process under the U.S. and Oklahoma Constitutions.

The void-for-vagueness doctrine requires statutes to be clear enough to give ordinary people "'fair notice' of the conduct a statute proscribes" and to prevent "arbitrary or discriminatory law enforcement." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018); *see* U.S. Const. amend. XIV; Okla. Const. art. 2, § 7. It applies to criminal and civil statutes alike. *See, e.g., Dimaya*, 138 S. Ct. at 1223; *id.* at 1229 (Gorsuch, J., concurring in part and concurring in the judgment). The doctrine demands that a statute purporting to authorize massive cash extractions offer meaningful standards to define the conduct it prohibits.

This Court should construe the nuisance statute—as it has always done—to avoid violating that requirement. *See Williams v. Bailey*, 1954 OK 19, ¶ 25, 268 P.2d 868, 871. The concept of nuisance is elusive even in the context of property use—a "sort of legal garbage can"[13] that "has meant all things to all people."[14] Still, the common law's property limitation

---

[13] *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 219 (3d Cir. 2020).

[14] Keeton & Prosser, *Prosser and Keeton on the Law of Torts* § 90 at 616 (5th ed. 1984).

has—until now—shaped Oklahoma's statute and given basic notice of the conduct that might trigger liability. *See supra* at 16-19. Abandonment of those principles creates a statute with no discernable limitations. *See, e.g.*, *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating prohibition on "annoying" conduct under vagueness doctrine). Businesses have no way to know whether they might face liability for marketing sugar (obesity), alcohol (psychological and physical harms), or cars (personal injuries and air pollution).

Certainly Janssen received no such notice. *See Rabe v. Washington*, 405 U.S. 313, 315-316 (1972) (recognizing as-applied vagueness challenges). Ignoring a century of limiting caselaw, the district court imposed "an unforeseeable and retroactive judicial expansion" of liability that amplified the "deprivation of the right of fair warning." *Bouie v. City of Columbia*, 378 U.S. 347, 350-55 (1964). Worse yet, the court's abrupt expansion of statutory liability targeted speech, association, and petitioning activities, "threaten[ing] to inhibit the exercise of constitutionally protected rights." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *see infra* at 32-39.

4. The district court's alternative property-use rationale nullifies the controlling limits on nuisance liability

The district court's reliance on incidental connections between Janssen employees and real property in Oklahoma cannot cure its error. E.14, R.654, Final J. at 23-24 ¶¶ 4-5. Those connections—that employees, for example, "trained in their Oklahoma homes" and marketed to doctors in local offices and hospitals, *id.*—do not supply the requirement of property misuse. The State alleged a "false, misleading, and deceptive marketing campaign," not the misuse of in-state homes or medical facilities. *Id.* at 24 ¶ 6. And the district court held Janssen liable not for local property use, but for statements about prescription medications, many of them by third parties in other states. *Id.* at 9-10 ¶¶ 18, 24-25 ¶¶ 6-7.

At any rate, no Oklahoma case has ever suggested that the nuisance statute covers every allegedly harmful act taking place on land. *State Capital* refutes the notion: Even though the defendant operated its "printing, publishing, and book-selling business" on Oklahoma property, this Court ruled that its liquor advertisements could not give rise to nuisance liability. 1909 OK 200, ¶ 0, 103 P. at 1021. So too here. An incidental connection to Oklahoma land cannot sustain nuisance liability for an alleged marketing campaign.

B. The district court's "abatement" remedy violates the Oklahoma nuisance statute and the Oklahoma Constitution

The district court also exceeded its authority by ordering an "abatement" remedy without precedent in American legal history. The plain terms of the nuisance statute limit "abatement" to an order stopping the act or omission that constitutes a nuisance; they do not authorize a court to engineer policy solutions for the alleged ***consequences*** of the act or omission. The Oklahoma Constitution's separation of powers likewise forbids courts from creating and funding new government programs. And even if these problems could be surmounted, the remedy here still exceeds any semblance of calibration or proportionality.

1. The nuisance statute does not authorize the court to create and fund government public-health programs

While the nuisance statute lets certain private plaintiffs seek public-nuisance damages, it affords the Attorney General only one civil remedy: the power to "abate[]" a "public nuisance." *See* 50 O.S. § 11. The nuisance statute expressly defines the scope of the public nuisance the Attorney General may abate. A "nuisance consists in unlawfully doing an act, or omitting to perform a duty," with one of several enumerated consequences. 50 O.S. § 1. Taking these definitions together, the Attorney General's power to "abate" a public nuisance confers authority only to eliminate the "act or omission" constituting the nuisance—that is, to "***prevent any [unlawful] act or omission*** of any duty" that "annoys, injures, or

endangers the comfort, lives, health, or safety" of a "considerable number" of Oklahomans. *Magnolia Petroleum Co. v. Wright*, 1926 OK 196, ¶ 2, 254 P. 41, 42 (emphasis added).

Recognizing these statutory limits, for over a century, the Attorney General and other government plaintiffs have never requested, and Oklahoma courts have never granted, more than injunctive relief against the acts or omissions constituting a public nuisance. *See, e.g.*, *State ex rel. King v. Friar*, 1933 OK 501, ¶ 17, 25 P.2d 620, 623 (halting construction encroaching on public highway); *Mackey v. State ex rel. Harris*, 1972 OK 37, ¶¶ 10-15, 495 P.2d 105, 107-08 (padlocking rowdy saloon); *see also* Restatement (Second) of Torts § 821C(2) (remedies for "public official" limited to "proceeding to enjoin to abate a public nuisance").

Indeed, in awarding injunctive relief, this Court has scrupulously distinguished between the ***acts or omissions*** constituting a nuisance, and the ***damages or injuries*** resulting from those acts. *See Oklahoma City v. Page*, 1931 OK 764, ¶ 10, 6 P.2d 1033, 1036 ("[N]uisance is a wrong, and damage is the result."); *Briscoe*, 1985 OK 43, ¶ 13, 702 P.2d at 37 ("'Damage' or 'injury,' as ordinarily used in nuisance cases, is the ***result*** of the nuisance...."). The costs of remedying such injuries are recoverable not as "abatement," but damages. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Kelly*, 1928 OK 256, ¶ 10, 266 P. 775, 776 ("The defendant might abate its nuisance, but could not, by so doing, restore plaintiff's premises.").[15]

[15] *See Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1029 (10th Cir. 2007) ("one aspect of damages the victim of a temporary nuisance can recover is the cost of restoring the land to its former condition") (internal quotation marks omitted); Dobbs, 1 Law of Remedies § 5.7(3) ("Damages might be based on ... the cost of eliminating the nuisance effects....").

The nuisance statute's structure confirms this dichotomy. "[T]he entire statute must be read as a whole, and the meaning given to one section should be determined by considering the other sections." *In re Holt*, 1997 OK 12, ¶ 30, 932 P.2d 1130, 1135. The statute empowers not just the Attorney General but also local officials—and even injured private citizens—to seek abatement of public nuisances. *See* 50 O.S. §§ 10, 11; *Smicklas v. Spitz*, 1992 OK 145, ¶¶ 1, 8, 846 P.2d 362, 364, 366. Under the district court's construction of the power to "abate," almost any public official, countless local organizations or interest groups, and any individual Oklahoman could enlist the courts to address any social condition that the plaintiff and court find to be a source of widespread annoyance, injury, or offense. That is not the law.

In light of these principles, it is clear that the district court's remedy does not abate any such act or omission. E.14, R.654, Final J. at 30-41 ¶¶ 1-63; E.58, R.784, Ct.Ex.217 at 1. The court found Janssen liable for supposedly "false and misleading marketing." E.14, R.654, Final J. at 25 ¶ 9. Yet Janssen no longer promotes any opioid medications and has not done so for years, and the district court did not order Janssen to take any marketing-related action. *See supra* at 8, 13-15. Accordingly, Janssen is entitled to judgment.

Even if Janssen still marketed opioids, the remedy still would be impermissible. The $465 million award requires Janssen to fund 21 government initiatives—from addiction-treatment services to staffing for the Attorney General's office and medical licensure boards. *See supra* at 13-15. By the State's own admission, the funding is to "clean up" alleged consequences of Janssen's actions. E.18, R.693, Tr.11, 44, 76. But not one word in Oklahoma's nuisance statute authorizes such remedial funding. To the contrary, Oklahoma law makes clear that awards to redress the ***effects*** of a nuisance are ***damages***, not abatement.

See, e.g., *Briscoe*, 1985 OK 43, ¶¶ 9, 13, 702 P.2d at 36-37.

Perhaps attempting to sidestep these defects, the district court suggested later in its opinion that "[t]he public nuisance is the State's opioid crisis." E.14, R.654, Final J. at 29 ¶ 20. But that assertion, too, collides with the statute, which defines a "nuisance" as an "unlawful[] act, or omi[ssion]"—not the ills allegedly arising from such acts or omissions. *See* 50 O.S. § 1. The court did not, and could not, square its unprecedented remedy with this controlling statutory text.

2. The remedy violates the separation of powers

The district court's judgment also violates constitutional limits on judicial power. The judgment enacts a public-policy agenda and orders a private actor to fund it. The Oklahoma Constitution, however, commits policymaking and fiscal authority to the Legislature. Article V, Section 36 vests the Legislature with authority to "exercise the police power," *Cities Serv. Gas Co. v. Witt*, 1972 OK 100 ¶ 9, 500 P.2d 288, 290—i.e., "to enact laws to promote the order, safety, health, morals, and general welfare of society," *Jack Lincoln Shops v. State Dry Cleaners' Bd.*, 1943 OK 28, ¶ 5, 135 P.2d 332, 334. The Constitution likewise gives the Legislature "the right and the responsibility to declare the fiscal policy of Oklahoma." *In re Application of Okla. Capitol Imp. Auth.*, 1998 OK 25, ¶ 9, 958 P.2d 759, 763. "Making policy decisions as to the specific sum and object of ... state funds is at the very heart of the legislative appropriation function." *In re Initiative Petition No. 332*, 1989 OK 93, ¶ 6, 776 P.2d 556, 559.

The Legislature's policymaking and fiscal authority are exclusive. *See, e.g.*, *CompSource Mut. Ins. Co. v. State ex rel. Oklahoma Tax Comm'n*, 2018 OK 54, ¶ 46, 435 P.3d 90, 106. Courts are therefore "constitutionally prohibited" from "invad[ing] the Legislature's power to determine policy." *Okla. Educ. Ass'n v. State ex rel. Okla.*

Legislature, 2007 OK 30, ¶ 25, 158 P.3d 1058, 1066 ("*OEA*"). In *OEA*, this Court rejected a bid to make the Legislature implement an adequate school funding system. *Id.* ¶¶ 3-5, 158 P.3d at 1061-62. That remedy, the Court explained, would "override the constitutional restrictions placed on ... judicial authority" by requiring courts to "interfere with ... the Legislature's domain of making ... policy." *Id.* ¶¶ 25-27, 158 P.3d at 1066.

Here, the district court exercised policymaking and fiscal authority reserved for the Legislature by ordering nearly half a billion dollars in targeted government spending. *Id.* The "wisdom" of the investments the district court ordered is an inherently legislative judgment. *In re Application of Okla. Capitol Improvement Auth.*, 1998 OK 25, ¶ 9, 958 P.2d at 763. And the separation-of-powers violation is even more egregious than in *OEA*, where the plaintiffs sought only to ***direct the Legislature*** to enact a remedial program. *See* 2007 OK 30, ¶ 5, 158 P.3d at 1062. The judgment below cut out the Legislature entirely. It formulated and funded a government initiative on its own. As the Attorney General himself put it in a federal nuisance action about climate change, such "[p]olicy responses to massive problems ... inevitably require decision-makers to balance competing interests," and so are "precisely the sort of question the Constitution reserves to the political branches." Br. of Ind. & 17 Other States, *supra*, 2019 WL 2250194 at *3.

3. The remedy constitutes an unconstitutionally excessive fine

The remedy is impermissible for another reason. Nuisance remedies must be "necessary" to abate the nuisance, *Oklahoma City v. Hoke*, 1919 OK 244, ¶ 0, 182 P. 692, 692, yet the district court required Janssen to pay money that is unnecessary to address the opioid-abuse crisis. In particular, large parts of the award are earmarked for services that are already provided in Oklahoma—covered by state, federal, and private insurers. E.39, R.680, Tr.77-80; E.37, R.709, Tr.77-80. The court also directed huge amounts to services for people

who have never abused any opioid—for example, $57 million to screen Medicaid users for all substances regardless of prior opioid use. E.14, R.654, Final J. at 33-34 ¶¶ 17-18.

It is no answer to say, as the State's witness did, that "Janssen should be responsible" for these costs, "not the taxpayers." E.38, R.710, Tr.44; E.39, R.680, Tr.37. A monetary award violates the U.S. and Oklahoma Constitutions' excessive-fines prohibitions when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving ... retributive ... purposes." *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 447 (1989)); *see also See* U.S. Const. Amend. VIII; Okla. Const. art. II, § 9. And an ostensibly "compensatory sanction that is unrelated to and unsupported by any evidence" is a "punitive sanction," *State ex rel. Oklahoma Bar Ass'n v. Leigh*, 1996 OK 37, ¶ 20, 914 P.2d 661, 668-69, "grossly disproportionate to the gravity" of Janssen's marketing of its rarely prescribed medications, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *see supra* at 6.

II. THE DISTRICT COURT'S PROXIMATE CAUSE FINDING CANNOT STAND

The district court's causation holding is equally infirm. E.14, R.654, Final J. at 29 ¶¶ 17-19. The State presented no competent evidence that Janssen—as opposed to other actors—caused Oklahoma's opioid-abuse crisis, and the court's finding to the contrary impermissibly rested on activity protected under federal constitutional and statutory law.

A. The State presented no evidence that Janssen's conduct caused the opioid-abuse crisis

The district court required Janssen to fund remediation of the opioid-abuse crisis—a complex and multi-faceted problem. If the Attorney General were indeed entitled to collect remedial expenses under the public-nuisance statute (which, as explained above, he is not), he would of course have had to prove that Janssen caused the injuries he seeks to remediate.

See Atchison, T. & S. F. Ry. Co., 1928 OK 256, ¶ 6, 266 P. at 776; *accord City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-14 (Mo. 2007). What is more, because the State purported to seek equitable relief, it had to prove causation by clear and convincing evidence. *Simons v. Fahnestock*, 1938 OK 264, ¶ 12, 78 P.2d 388, 389. And the public-nuisance claim would have required the State to prove that Janssen's conduct caused consequences that affected not just individual Oklahomans but "an entire community or neighborhood, or" a "considerable number of persons." 50 O.S. § 2.

A "defendant's conduct is a cause of the event if the event would not have occurred but for that conduct." *Rowell v. El Reno Junior Coll. Found., Inc.*, 1993 OK 170, ¶ 14, 910 P.2d 962, 965 (citation omitted). And here, the crisis stemmed from multiple potential causes, starting with economic and social changes that triggered an upswing in drug abuse in general. *See* E.69, R.789, Def.Ex.685. There were also criminal black markets, as well as the rampant diversion and abuse of hydrocodone and OxyContin. *See supra* at 4-6. The State's claim that the crisis its remedy targets would not have occurred but for Janssen's alleged conduct therefore needed to be substantiated with rigorous evidence—including "technical and scientific testimony." *See Boxberger v. Martin*, 1976 OK 78, ¶ 14, 552 P.2d 370, 373.[16]

Yet the State offered no evidence that the branded medications Janssen promoted

---

[16] The State also urged below that, under *Lee v. Volkswagen of Am., Inc.*, 1984 OK 48, 688 P.2d 1283, it needed to show only that Janssen's conduct was a "contributing factor" in producing the crisis. E.10, R.624, Resp. to Mot. for J. at 24. But *Lee* expressly limited its holding to certain "single and indivisible" injuries. 1984 OK 48, ¶¶ 26-27, 688 P.2d at 1288. The district court did not (and could not) find that the opioid-abuse crisis was a single, indivisible injury. *See infra* at 40-44. And even under *Lee*, plaintiffs bore the burden of "presenting sufficient evidence to prove ... that each defendant's act was a contributing factor in producing the plaintiff's injuries," *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 14, 45 P.3d 86, 91, in this case Oklahoma's opioid-abuse crisis. The State's failure to introduce such evidence requires judgment for Janssen under any causation standard.

caused the opioid-abuse crisis. On the contrary, the State pointedly conceded that the case "isn't about their drug[s]," E.22, R.697, Tr.53, precisely because Janssen's medications—the Duragesic patch, Nucynta tapentadol tablets, and low-potency tramadol products—were infrequently prescribed, rarely diverted or abused, and played no material role at all in the crisis, *see supra* at 5-8. To be sure, the State insinuated that Janssen's product-specific promotions somehow boosted sales of other manufacturers' products. But its experts offered nothing but speculation for that counterintuitive claim. And "the mere possibility that [the challenged conduct] might have caused the injury is not enough." *Kirkland v. Gen. Motors Corp.*, 1974 OK 52, ¶ 45, 521 P.2d 1353, 1363.

The State likewise offered only conjecture that Janssen's unbranded materials—principally a brochure and website created in 2009 as part of Nucynta's launch, *see supra* at 11—played any causal role. The State offered no evidence that a single Oklahoma physician or patient saw these materials—much less explained how general-information materials created in the late 2000s could have caused or materially impacted a drug-abuse crisis that, by the State's account, began more than a decade earlier.

The State pledged it would "put a number of doctors on the stand to show how they were lied to," and introduce a "statistical" model proving "how many doctors bought into" Janssen's marketing. E.15, R.730, 12/5/17 Hr'g Tr.136-137. It did neither. Oklahoma pain doctors uniformly testified that Janssen did not mislead them about opioid therapy. *See supra* at 13. Nor did the State introduce any model—only conclusory assertions by experts who offered no basis to conclude any Janssen statement caused any injury at all. *See, e.g.*, E.34, R.705, Tr.68-73; E.32, R.674, Tr.19-23; E.40, R.711, Tr.62-63. Such causation expert testimony—"devoid of sufficient indicia of a reliable methodological basis"—cannot sustain

a verdict. *See Worsham v. Nix*, 2006 OK 67, ¶¶ 40–47, 145 P.3d 1055, 1069-70.

Consequently, the State sought to hold Janssen liable for things other than its own marketing. The State pointed to speech of doctors or organizations who endorsed or supported opioid therapy, arguing that Janssen "influenced" them through financial relationships. The State offered no evidence that Janssen in fact influenced any third party's views—much less that any such influence caused the opioid-abuse crisis. It offered only conclusory speculation from its experts, E.26, R.669, Tr.44-45; E.34, R.705, Tr. 128-129, 131-32; E.31, R.675, Tr.31-32, testimony insufficient to establish causation for any tort, *see Christian v. Gray*, 2003 OK 10, ¶ 36, 65 P.3d 591, 607.

B. The district court impermissibly predicated liability on legally protected conduct

Beyond failing to cite evidence satisfying Oklahoma law causation principles, the district court's finding that Janssen caused the opioid-abuse crisis impermissibly rested on constitutionally protected speech and association and federally immunized raw-material and active-ingredient sales. It is well settled that "the State … may not award compensation" based on "protected activity." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982); *see also Gaylord Ent.*, 1998 OK 30, ¶ 21, 958 P.2d at 142 (protected speech "impervious to civil liability"). And when protected conduct is stripped away from the district court's analysis, no evidence supports liability. Janssen therefore is entitled to judgment—or, at the very least, a remand requiring the district court to honor the legal protections it violated.

1. Protected scientific speech and association

The district court imposed liability for an alleged "marketing campaign," E.14, R.654, Final J. at 24 ¶ 6, which it described as including:

"education" from Defendants' sales representatives, literature funded by Defendants

> in medical journals and publications, materials from professional societies/patient advocacy groups, continuing medical education funded by Defendants, unbranded marketing materials, … Defendants' paid speakers[,] … dinners and presentations where doctors spoke to other doctors, [and] partnering with third-party advocacy groups or academic groups to hold seminars, symposiums and conferences.

Id. at 9 ¶ 18; *see id.* at 10 ¶ 19, 24-25 ¶¶ 6-7. This supposed "campaign" takes in scientific and medical expression by countless individuals over two decades.

When liability rests on speech and related conduct, the First Amendment requires a statement-by-statement evaluation to ensure that the judgment is not based on protected activity. *See, e.g.*, *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65-75 (1983). Yet in two perfunctory paragraphs, the court short-circuited this inquiry, holding that the First Amendment was satisfied because (a) all "the speech at issue" was "commercial in nature," E.14, R.654, Final J. at 28 ¶ 14, and (b) Janssen's "marketing, in its multitude of forms, was false, deceptive, and misleading," *id.* at 16 ¶ 43. Those indiscriminate and conclusory rulings cannot withstand the independent scrutiny this Court is required to give them.

a. The First Amendment's Free Speech Clause forbids states from restricting expression "because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also* Okla. Const. art. II, § 22. That protection applies fully to scientific speech and precludes liability for expression "about unsettled matters of scientific debate." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 492 (2d Cir. 2013). The First Amendment likewise protects "[a]dvocacy for or against … proposed law[s]," which is the "purest form of political speech," and also a core exercise of the freedom of petition. *Brock v. Thompson*, 1997 OK 127, ¶¶ 16, 18, 948 P.2d 279, 288-89; *see* U.S. Const. amend. I; Okla. Const. art. II, § 3. These protections extend even to claims that a court later deems incorrect. *See, e.g.*, *ONY, Inc.*, 720 F.3d at 497-98.

The commercial-speech doctrine is a narrow exception. But, as its name indicates,

that doctrine covers only speech that "proposes a commercial transaction." *Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 482 (1989). Courts must assess whether the speech in question (1) is an "advertisement[]," (2) makes "reference to a specific product," or (3) serves "an economic motivation." *Bolger*, 463 U.S. at 66-67. None of the above factors—including "an economic motivation"—is alone enough to make speech commercial. *Id.*

Substantial evidence on which the court relied falls outside this narrow category:

- Much of the alleged "marketing" the district court relied on was independent scientific expression by doctors, scientists, and advocacy organizations. Such speech is not commercial—even if a company donates to, consults with, or sponsors the speaker. *See, e.g.*, *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 456 (D.N.J. 2009) (scientific journal article sponsored by corporate defendant not commercial speech).

For example, the court defined Janssen's "marketing" to include Janssen-funded continuing medical education seminars ("CMEs") that taught information the court found misleading. *See* E.14, R.654, Final J. at 9-10 ¶ 18, 15-16 ¶¶ 39-41, 24-25 ¶ 7. Unlike product-specific "speaker programs," it was undisputed that Janssen could not and did not influence the contents of CMEs, select their speakers, or use them to advertise products. E.24, R.698, Tr.95-97, 99-100; E.26, R.669, Tr.107-108; E.64, R.784, Def.Ex.490.

Another example is the American Pain Society ("APS") and AAPM's 1996 Consensus Statement. *See* E.14, R.654, Final J. at 14-15 ¶¶ 35-36. The court classified this speech as commercial because Janssen had donated to those professional medical societies or had consulting relationships with some of their members. E.14, R.654, Final J. at 9 ¶ 18; *see id.* at 14-17 ¶¶ 35-37, 43. But no evidence suggested Janssen influenced the Consensus Statement's contents, and the State's lead expert conceded that the organizations were not

fronts for pharmaceutical companies. E.31, R.703, Tr.11. The First Amendment strictly protects doctors' and nonprofit societies' independent expression about medicine and health policy. *See, e.g.*, *ONY, Inc.*, 720 F.3d at 492-94, 498.

- The court further violated the First Amendment by faulting Janssen for "employ[ing] strategies to influence … governmental agencies, through messages ... optimizing the benefits [of opioids]… [and] minimizing their risks." E.14, R.654, Final J. at 11 ¶ 24. Such lobbying and advocacy represents "genuine attempt[s] to influence governmental action"—meaning it is insulated from liability by the U.S. and Oklahoma Constitutions, *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 382 (1991); *see Brock*, 1997 OK 127, ¶ 16, 948 P.2d at 288, 296-97.

- The court also singled out a "Media-Response Document" and a "Duragesic … press kit." *See* E.14, R.654, Final J. at 16 ¶ 43 (citing E.104, R.785, Pl.Ex.37; E.107, R.785, Pl.Ex.760). Both documents on their face addressed the news media. Statements "contribut[ing] to reporters' discussion[s] of … issue[s] of public importance" are "not commercial speech." *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003); *see also Bracco Diagnostics, Inc*, 627 F. Supp. 2d at 459 (documents "not disseminated to consumers" do "not constitute 'commercial advertising or promotion'").

- Finally, the district court relied on Janssen's donations, memberships, and consulting arrangements. Those are not commercial speech; instead, they are protected under the First Amendment right of association. *See, e.g.*, E.14, R.654, Final J. at 9-10 ¶ 18, 14-15 ¶ 35, 16-17 ¶ 43. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994). The First

Amendment forbids liability for such association unless "the group itself possessed unlawful goals." *Claiborne Hardware Co.*, 458 U.S. at 920. The organizations and doctors at issue here did not "possess[] unlawful goals," *id.* at 920; they engaged in protected scientific speech and policy advocacy, *supra* at 34-35; *see Claiborne Hardware*, 458 U.S. at 920; *Gaylord Ent.*, 1998 OK 30, ¶ 42, 958 P.2d at 149.[17]

b. Even where the court cited specific branded promotions and unbranded materials, it failed to apply controlling First Amendment principles. Such a review would have made clear that those materials, too, encompassed a wealth of protected speech. Much of Janssen's speech was not commercial—it included general-information materials that did not propose any commercial transaction. *See, e.g.*, E.114, R.785, Pl.Ex.1247. But even where the commercial-speech exception might apply, it permits liability for commercial speech "in aid of pharmaceutical marketing," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011), only if it is "actually or inherently misleading," *Peel v. Att'y Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990). Commercial speech is "actually" misleading only if some "potential [consumer] or person was actually misled or deceived by" it. *Id.* at 101. A scientific claim is "inherently misleading" only if it is unsupported by "any 'credible evidence'"—not "simply because the scientific literature is inconclusive." *Pearson v. Shalala*, 130 F. Supp. 2d 105, 118 (D.D.C. 2001). "Expressions of opinion or scientific judgments about which reasonable minds may differ cannot be 'false.'" *United States ex rel.*

[17] The district court could not discard these protections by holding that Janssen "ratified" or "disseminated" third-party statements like the Consensus Statement. The State identified only a handful of instances in which Janssen repeated any third-party organization's position. E.114, R.785, Pl.Ex.1227 at 1; E.113, R.785, Pl.Ex.1246 at 1; E.115, R.785, Pl.Ex.1249 at 1; E.30, R.673, Tr.73-86; E.117, R.785, Pl.Ex.1364 at 5, 16. The court nowhere explained how scattered statements over two decades could support liability for "dissemination" or "ratification."

Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 376 (5th Cir. 2004).

The district court criticized numerous claims that had credible evidentiary support and misled nobody:

- It found that a "key element" of Janssen's "opioid marketing strategy" was "its promotion of the concept that chronic pain was undertreated." E.14, R.654, Final J. at 10 ¶ 19, 11 ¶ 23. But it is undisputed that undertreated chronic pain afflicts tens of millions of Americans—the State's own expert agreed chronic pain is undertreated, E.26, R.669, Tr.25-26, as did Oklahoma physicians, E.51, R.722, Tr.30-31; E.48, R.688, Tr.17. And federal authorities explain that 20 million Americans suffer "high-impact chronic pain," which is "inadequately treated in many patients" and contributes "greatly to national rates of morbidity, mortality, and disability." *See* E.83, R.785, Def.Ex.1576 at 2; E.88, R.785, Def.Ex.1971 at 1-2; E.100, R.784, Def.Ex.3931 at 7.

- The court also criticized Janssen for the "message[] that … 'there was a low risk of abuse and a low danger' of prescribing opioids to treat chronic, non-malignant pain." E.14, R.654, Final J. at 9 ¶ 17. But while the State challenged Janssen's statement that addiction rates from long-term opioid therapy are low, that claim, too, has abundant scientific support. Multiple studies report low-single-digit incidence rates of addiction from medical opioid use for chronic pain. *See* E.62, R.784, Def.Ex.400 at 3-5; E.67, R.785, Def.Ex.672 at 1; E.101, R.785, Def.Ex.3938 at 1, 5-6; E.102, R.785, Def.Ex.3948 at 1, 9. Indeed, the statement in the Janssen-sponsored *Finding Relief* brochure that "[m]any studies show that opioids are rarely addictive when used properly for the management of chronic pain," E.114, R.785, Pl.Ex.1247 at 10, is virtually identical to FDA's statement the same year, *see supra* at 5.

- The same is true of the court's criticism of promotions claiming Duragesic was less abuse-prone than other opioid medications, such as OxyContin. E.14, R.654, Final J. at 17-19 ¶¶ 45-49. The court cited FDA's Warning Letter stating that the data Janssen cited for that claim in promotional materials from the early 2000s did not meet regulatory standards. *See* E.14, R.654, Final J. at 13-14 ¶ 31; *see also supra* at 10. But the FDA letter, first, was inadmissible hearsay on which the court could not properly rely. *See* 12 O.S. § 2803(8)(d); *Ortho-McNeil-Janssen Pharms. v. State*, 432 S.W.3d 563, 574-80 (Ark. 2014) (reversing judgment based on hearsay FDA Warning Letter). And more fundamentally, regardless of whether the specific data Janssen cited at the time passed regulatory muster, at trial Janssen introduced extensive additional data confirming that Duragesic is associated with lower rates of diversion, addiction, and overdose than oxycodone and hydrocodone, *see supra* at 6-7. The State could not and did not rebut that evidence.

- Similarly, the court criticized Janssen for a handful of materials describing the concept of "pseudoaddiction"—a term for drug-seeking behavior that arises from inadequately treated pain rather than addiction. *See* E.14, R.654, Final J. at 9-10 ¶ 21; *see also* E.89, R.785, Def.Ex.2438 at 22. But to this day, the FDA-approved labels for opioid medications counsel doctors on this concept, cautioning that "[p]reoccupation with achieving adequate pain relief can be appropriate behavior in a patient with poor pain control." E.94, R.785, Def.Ex.2776 at 31; E.57, R.784, Ct.Ex.197 at 31-32.

In short, the district court's holding that ***all*** of the evidence in this case on which the State's causation theory rested involved ***only*** false and misleading commercial speech is patently incorrect. The First Amendment was violated over and over.

2. Raw materials and active ingredients

Although the State conceded that Tasmanian Alkaloids' and Noramco's federally controlled sales of raw materials and APIs for approved opioid pain medications were "not" a valid "basis for imposing liability," E.11, R.638, Pl.'s FFCL at 579 ¶¶ 83-84, the district court nevertheless spent several paragraphs discussing those sales, *see* E.14, R.654, Final J. at 5-8 ¶¶ 6-15. To the extent the court ignored the State's concession and based liability on such sales, its judgment contravened federal and Oklahoma law.

Federal law preempts state civil liability that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). And here, DEA regulators affirmatively authorized the sales under federal statutes designed to meet the nation's medical needs. *See* 21 U.S.C. § 826(a)(1), (c); *id.* § 952(a)(1); 21 C.F.R. §§ 1312.11-1312.13, 1303.11-1303.27; E.56, R.784, Ct.Ex.193 at 35. Because state-law liability would "effectively challenge" that federal authorization and interfere with DEA's statutory duties, federal law preempts any attempt to impose tort liability for those sales. *See Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (finding preemption of state law prohibiting federally authorized insurance sales). Oklahoma law likewise foreclosed nuisance liability for statutorily authorized raw material and ingredient sales. *See Swift v. Serv. Chem., Inc.*, 2013 OK CIV APP 88, ¶¶ 19-22, 310 P.3d 1127, 1132-33; 50 O.S. § 4.

III. THE DISTRICT COURT IMPROPERLY HELD JANSSEN LIABLE FOR THE ENTIRE OPIOID-ABUSE CRISIS

Even if the State had shown that Janssen engaged in legally unprotected conduct that caused actionable harm in Oklahoma (which it did not), there was no basis to hold Janssen jointly and severally liable for remediating harms inflicted by others, including criminal

enterprises—let alone for the amounts the State had already recovered from Purdue and Teva.

A. The district court improperly imposed joint and several liability

The district court held Janssen liable for the cost of remediating the opioid-abuse crisis as a whole. E.14, R.654, Final J. at 29-30 ¶¶ 20-30, 30 ¶ 1. Yet the State never suggested—and the district court did not find—that Janssen caused the entire opioid-abuse crisis. Instead, the court held Jansen jointly and severally liable for harms caused by third parties. Such liability is permissible only if: (1) Janssen acted in concert with those third parties to cause all of those harms; or (2) all of those harms were a single "indivisible" injury that could not be reasonably apportioned. *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126 (citation omitted); *see also Phillips Petroleum Co. v. Vandergriff*, 1942 OK 94, ¶¶ 14-19, 122 P.2d 1020, 1023 (applying those requirements to nuisance). Neither criterion is met here.

1. The district court appeared to rest joint and several liability solely on its finding that Janssen "act[ed] in concert with others." E.14, R.654, Final J. at 9 ¶ 17 (emphasis added). Concerted action is conduct under "an agreement" or "a common design or plan" akin to a "conspiracy." Restatement (Second) Torts § 876 & cmts. a, b. And even where it exists, it does not automatically justify liability for ***all*** of a plaintiff's injuries, but only for the "result or damage done" "in pursuit of [the] common design." *Kirkpatrick*, 1996 OK 136, ¶ 10, 920 P.2d at 126.

Here, the evidence did not establish concerted action at all—and certainly did not demonstrate that concerted action by Janssen and others caused the entirety of Oklahoma's opioid-abuse crisis. To begin, pharmaceutical marketing did not cause the whole opioid-abuse crisis. Criminal behavior—including pill-mill operators, fentanyl traffickers, or

individuals who diverted pharmacy supplies or legitimate prescriptions—caused extensive injuries in Oklahoma. *See supra* at 4. And the State did not (and could not) suggest Janssen acted in concert with those criminal actors. The injuries those wrongdoers inflicted were not part of the "damage done" by any concerted conduct involving Janssen, and a concerted action theory therefore could not justify holding Janssen jointly and severally liable for them. *See Kirkpatrick*, 1996 OK 136, ¶ 10, 920 P.2d at 126.

Even as to pharmaceutical companies, the court's finding that Janssen "act[ed] in concert with others … on a major marketing campaign," E.14, R.654, Final J. at 9 ¶ 17, falls short. The district court mainly cited asserted parallels between Janssen's and other manufacturers' marketing, *e.g.*, that Janssen "d[id] exactly what Purdue … [was] doing." E.32, R.674, Tr.21-22 (cited by E.14, R.654, Final J. at 9 ¶ 17). Even if true (which the evidence belies), it is hornbook law that "[p]arallel behavior … is a common occurrence in industry" and does not "establish the agreement element necessary to maintain a concerted action claim." *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1074-1076 (N.Y. 1989); *accord Red Hed Oil, Inc. v. H.T. Hackney Co.*, 292 F. Supp. 3d 764, 776 (E.D. Ky. 2017). The court also pointed to testimony about Janssen's attorney-client relationship with one drafter of the 1996 APS and AAPM Consensus Statement, a full six years earlier. E.14, R.654, Final J. at 9 ¶ 17 (citing E.41, R.682, Tr.29-31). That prior legal relationship is not evidence of a conspiracy. And basing a concerted-action finding on membership in third-party organizations is "clearly wrong." *In re Asbestos Sch. Litig.*, 46 F.3d at 1289-1294.

The State's remaining concerted-action arguments focused on episodes with no plausible link to the opioid-abuse crisis. *See* E.11, R.638, Pl.'s FFCL at 622-25 ¶ 170. The State pointed to a 2011 presentation referring to Purdue as an advocacy and policy "Partner."

Id. But the only agreement it identified with Purdue was a contract to pay royalties on the tramadol medication Ultram ER. *Id.* The State also relied on a 2011 slide calling the APF a "Go-To Partner," but its evidence about coordination with the APF was trivial. E.111, R.785, Pl.Ex.1191 at 1; E.110, R.785, Pl.Ex.973 at 1-2; E.112, R.785, Pl.Ex.1227; E.115, R.785, Pl.Ex.1249; E.25 R.668, Tr.11. No evidence suggested these dealings had causal significance at all.

2. The district court did not premise liability on a "single injury" theory, and for good reason. Traditional examples of "single" injuries giving rise to joint liability are inherently indivisible injuries like a death or a broken arm. Dobbs, *et al.*, The Law of Torts § 488 (2d ed). Where there are multiple separate harms, each defendant can be held responsible only for those harms it actually caused. *See Delaney v. Morris*, 1944 OK 51, ¶ 8, 145 P.2d 936, 939 (reversing joint and several liability where "the injury complained of" was "not single"). Where injuries are distinct, the plaintiff "must offer sufficient proof to prove which of the injuries are attributable to" the defendant, "as distinguished from the injuries flowing from a third party's acts." *Johnson*, 2002 OK 24, ¶ 13, 45 P.3d 86 at 91. That hornbook rule applies to public-nuisance cases, limiting governmental plaintiffs to recover only for those injuries a defendant caused. *See, e.g.*, *In re MTBE Prods. Liab. Litg.*, 447 F. Supp. 2d 289, 293, 302-03 (S.D.N.Y. 2006) ("*MTBE*"); *Benjamin Moore & Co.*, 226 S.W.3d at 115-16.

The State's asserted injury, the opioid-abuse crisis, *see* E.14, R.654, Final J. at 29 ¶ 20, is not a single, indivisible injury in any sense. It encompasses individual cases of addiction, abuse, and overdose—each with its own causes—that occurred in different places and involved different actors over more than two decades. *See, e.g.*, E.27, R.670, Tr.5-40. Courts routinely subject such injuries to individualized causation analysis. *See, e.g.*, *Kelley v.*

Insys Therapeutics, Inc., 2019 WL 329600, *1 (N.D. Ohio Jan. 25, 2019); *Tavilla v. Cephalon, Inc.*, 870 F. Supp. 2d 759, 773-76 (D. Ariz. 2012). As this Court held in an asbestos case:

> Although plaintiffs in asbestos related injury cases may not be able in all cases to identify potential defendants, the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries where there is a lack of circumstances which would insure that there was a significant probability that those acts were related to the injury.

Case v. Fibreboard Corp., 1987 OK 79, ¶ 12, 743 P.2d 1062, 1067. The plaintiff there could not have avoided this rule by declaring an "asbestos crisis" to be a public nuisance and demanding that one manufacturer remediate all harms caused by asbestos. So too here. Lumping separate injuries together under a single label cannot justify joint and several liability against Janssen. Because the State's asserted injuries are divisible, its failure "to prove which of the injuries are attributable to" Janssen entitles Janssen to judgment. *Johnson*, 2002 OK 24, ¶ 13, 45 P.3d 86 at 91; *accord Benjamin Moore & Co.*, 226 S.W.3d at 115-17. At minimum, the case should be remanded for apportionment of liability for the State's distinct injuries.

3. If Oklahoma law were nevertheless construed to make Janssen liable for all opioid abuse in the state, it would violate fundamental fairness and due process. This Court has cautioned that common-law joint and several liability "ought not to be extended to the point of working injustice." *Walters v. Prairie Oil & Gas Co.*, 1922 OK 52, ¶ 6, 204 P. 906, 908. In Oklahoma as elsewhere, cases applying that common-law rule "typically involve a small number of tortfeasors, such that the imposition … does not cause disproportionate hardship to any defendant." *MTBE*, 447 F. Supp. 2d at 298-99 (citing *Union Texas Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, 909 P.2d 131). Courts confronted with similar suits have

recognized that "it would be fundamentally unfair to hold ... defendants jointly and severally liable" for large public injuries to which they made "very small" contributions. *MTBE*, 447 F. Supp. 2d at 303; *see id.* at 298-99 & n.35. That principle applies here. Common-law precedents about polluted streams cannot support joint and several liability for a vast public-health crisis with a confounding range of causes.

The Due Process Clauses of the Fourteenth Amendment and the Oklahoma Constitution also "prohibit[] the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *see* U.S. Const. Amend XIV; Okla. Const. art. II, § 7. Imposing liability on Janssen for harms caused by a multitude of third parties would be not only punitive but "wholly disproportioned" to Janssen's allegedly tortious conduct. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (2015).

B. The district court improperly denied Janssen a credit for the State's recoveries from Purdue and Teva

The district court erred again in refusing to credit the State's $355 million settlements with Purdue and Teva against its judgment. A plaintiff's settlement with a third party "liable in tort for the same injury as the defendant ... reduces the claim against [the defendant] to the extent of ... the consideration paid for it." 12 O.S. § 832(H). Recognizing the applicability of that statute, the State conceded that if Janssen were held jointly and severally liable then it would be entitled to a credit. *See* E.11, R.638, Pl.'s FFCL, Proposed Final J. ¶ 23. But the court refused to give it one, asserting that Janssen had not asked for a "finding of fault ... against any other potential tortfeasor ... before or during trial." E.14, R.654, Final J. at 42 ¶ 64. That ruling ignored three timely requests for the credit and the court's equitable duties.

1. In *Nichols v. Mid-Continent Pipe Line Co.*, this Court held that a party claiming a settlement credit must "press for a jury assessment of [the settling party's] ... liability.'"

1996 OK 118, ¶ 18, 933 P.2d 272, 280 (emphasis omitted). *Nichols* held that a defendant can seek that assessment ***either*** before ***or*** after the jury finds liability, through "either (1) a pre-submission objection to the trial court's form of verdict … or (2) a post-submission objection—before the jury's discharge—when the verdict [is] brought into the courtroom but before its acceptance by the trial judge." *Id.* ¶ 19, 933 P.2d at 280. Janssen properly raised the question in both ways.

First, Janssen's pre-trial requests for the credit directly raised Purdue's and Teva's liability. In the joint Pretrial Conference Order, Janssen cited § 832(H) and requested a credit "for all sums of money received … from … any other parties liable for the same alleged injury … [s]hould [it] be held liable." E.7, R.546, Pretrial Conf. Order at 52. Days before trial, Janssen's Trial Brief again argued that Janssen "would be entitled to a settlement credit … against any joint and several award to account for the State's settlement with Purdue." E.8, R.556, Janssen Trial Br. at 104. Those requests called on the court to decide Purdue's and Teva's liability; under Oklahoma's contribution statute, the court could not adjudicate them without addressing that question. *See Nichols*, 1996 OK 118, ¶ 19, 933 P.2d at 280.

Second, Janssen requested findings on the settling parties' liability after the initial liability ruling, but before factfinding had concluded, *see Lee v. Epperson*, 1934 OK 229, ¶ 0, 32 P.2d 309, 309 ("findings of fact and conclusions of law by a trial court … are subject to modification or change until embodied in a judgment…."); E.13, R.647, Def. Obj. to Proposed J. at 4-6. That request was the bench-trial equivalent of the procedure *Nichols* authorized. *See* 1996 OK 118, ¶ 19, 933 P.3d at 280. The district court's unwillingness to adjudicate an issue repeatedly raised in conformity with Oklahoma law deprived Janssen of its statutory entitlement to an offset.

2. In any event, the doctrine of complete relief required the district court to award an offset. By taking the mantle of a court in equity, the court assumed a duty to "administer complete relief on all questions properly raised by the evidence, regardless of whether … such questions … are specifically raised by the pleadings." *Snakard v. McLaughlin*, 1960 OK 86, ¶ 13, 351 P.2d 1013, 1016. That rule imposed a "duty" to "render such judgment as on the whole record the law requires, ***without regard to any request or want of request therefor.***" *Fox v. Fox*, 1926 OK 245, ¶ 27, 245 P. 641, 645 (emphasis added). Applying the rule, this Court has repeatedly reversed equity courts for failing to resolve issues presented by the evidence—even when the parties failed to raise them. *See, e.g.*, *Easterling v. Ferris*, 1982 OK 99, ¶¶ 25-26, 651 P.2d 677, 683; *Allison v. Allen*, 1958 OK 125, ¶¶ 4-8, 12-13, 326 P.2d 1059, 1061-63; *Sandpiper N. Apartments, Ltd. v. Am. Nat'l Bank & Trust Co. of Shawnee*, 1984 OK 13, ¶¶ 15-17, 680 P.2d 983, 988-90 & n.18. The district court's duty to administer complete relief gave it no discretion to avoid the parties' requests for an offset with a novel waiver ruling. At a minimum this Court should instruct the district court to credit the Purdue and Teva settlements against the judgment.

IV. THE DISTRICT COURT VIOLATED JANSSEN'S JURY-TRIAL RIGHTS

Lastly, the district court reversibly erred by refusing to empanel a jury, both because juries must decide disputes about public-nuisance liability, and because the cash award the State sought independently triggered the right to jury trial.

The Oklahoma Constitution enshrines the common-law jury-trial right. Okla. Const., art. 2 § 19. That is, the civil jury right in Oklahoma is "'frozen' as it stood in 1787 English jurisprudence," extending to all "cases where it existed at common law." *A.E. v. State*, 1987 OK 76, ¶ 4, 743 P.2d 1041, 1049-50. Furthermore, Oklahoma's "policy favoring jury trials," *Seymour v. Swart*, 1985 OK 9, ¶ 5, 695 P.2d 509, 511-12, requires "all doubt" to be

"resolv[ed] ... in favor of the right," *In re H.M.W.*, 2013 OK 44, ¶ 13, 304 P.3d 738, 741. The policy carries special force in actions allocating blame for problems of public concern. In such cases, a "jury is likely to enhance the sense of parties and public that justice has been served—providing the litigation with greater moral as well as legal force." *City of New York v. Beretta, U.S.A., Corp.*, 312 F. Supp. 2d 411, 414 (E.D.N.Y. 2004).

1. These principles required a jury here on the question of liability. English and American common law required juries to resolve fact disputes on public-nuisance liability ***before*** a court could exercise its equitable power to enjoin the nuisance. English treatises taught that "whether [conduct] be a nuisance or not is a quæstio facti, and to be determined by a jury upon evidence, and not a quæstio juris." Hale, L.C.J., De Jure Maris, *in* 1 Hargrave, *A Collection of Tracts* 85 (1787). American cases agreed: "A court of equity never grants an injunction against a public nuisance, without a previous trial by jury, as it would, in effect, be tantamount to the conviction of a public offense." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 650 (1837) (Baldwin, J., concurring).[18] The common law noted two "very confined and rare" exceptions, *Att'y Gen. v. Cleaver* (1811) 34 Eng. Rep. 297, 299-300 (Ch.): (1) "preventive relief" to avoid irreparable harm, *id.*, and (2) injunctions against conduct "in itself noxious," now known as nuisance per se, *Earl of Ripon v. Hobart* (1834), 40 Eng. Rep. 65, 69 (Ch.); *accord Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 98-99 (1838). But a jury was always required for what is now known as a

[18] *See also, e.g.*, *Com. of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 567-68 (1851) (consensus that "the question of nuisance, or not," requires "a trial at law" "by a jury") (quotation omitted); *Appeal of McClain*, 18 A. 1066, 1067 (Pa. 1890) (jury must "decide disputed questions of fact, and pass upon conflicting evidence"); *State ex rel. Blanpied v. Currier*, 19 A. 1000, 1000 (N.H. 1890) ("the suppression of public nuisances ... is restrained until the question of nuisance or not is determined at law" "by the verdict of a jury").

nuisance per accidens—conduct that "may, according to circumstances, prove [to be a nuisance]." *Hobart*, 40 Eng. Rep. at 68-70.

This Court has always honored this common-law jury requirement. In *West v. Ponca City Milling Co.*, 1904 OK 128, 79 P. 100, the Court affirmed the denial of an injunction to bar construction of an alleged fire hazard, *id.* ¶¶ 6-10, 79 P. at 100, explaining that "[w]here the injury complained of is not per se a nuisance, but may … become so, according to the circumstances … a court of equity will not interfere," *id.* ¶ 0, 79 P. at 100. The Court quoted the decision in *Georgetown*, *supra*, that absent a "clear[] public nuisance" (i.e., nuisance per se) or "extreme probability of irreparable injury," a court would not "interpose by injunction until [the public nuisance] had been tried at law." *Id.* ¶ 6, 79 P. at 101; *see Texas Co. v. Brandt*, 1920 OK 233, ¶ 25, 191 P. 166, 167, 169 (equity "will not … restrain an act … unless the act is a nuisance per se or operates to cause an irreparable injury to property or rights of a pecuniary nature").

To be sure, Oklahoma cases have sometimes broadly stated that a "trial by jury is not required in suits in equity brought for an injunction to suppress and abate a public nuisance." *Reaves v. Territory*, 1903 OK 92, ¶ 28, 74 P. 951, 954. But those "exceptional cases," *id.* ¶ 25, 74 P. at 953, all involve nuisances per se or threats of irreparable harm, *see, e.g.*, *id.* ¶ 26, 74 P. at 954 (injunction against "disorderly house" recognized as nuisance per se); *Balch v. State ex rel. Grigsby*, 1917 OK 142, ¶ 6, 164 P. 776, 777 (injunction under "statute[] provid[ing] that a place where intoxicating liquors are sold … is a public nuisance"); *Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶ 1, 263 P.456, 456 (injunction against ongoing discharge of untreated sewage onto plaintiff's property "of such extent that it was practically impossible to live upon"). None purported to overrule *West* or *Brandt*, nor to dispense with

the common law's requirement that a jury decide liability for a nuisance per accidens.

2. The nature of the remedy the State sought (and received) here—a multi-million dollar cash award to remediate injuries Janssen allegedly caused—also triggered the right to jury trial. Oklahoma law has always treated nuisance-remediation costs as damages, which only a jury can award. When assessing civil jury rights, this Court looks to the "nature of the issues … and remedies," not the "form in which the action is brought." *Newbern v. Farris*, 1931 OK 121, ¶ 0, 299 P. 192, 192. The Court has long recognized that suits seeking cash to remedy the effects of a nuisance are damages actions triable to a jury. *See, e.g.*, *Oklahoma City v. Page*, 1931 OK 764, ¶10, 6 P.2d 1033, 1036 ("Nuisance is a wrong, and damage is the result."); *Estrada v. Port City Properties, Inc.*, 2011 OK 30, ¶ 35, 258 P.3d 495, 508 ("The recovery of damages is a jury question."); *Smicklas*, 1992 OK 145, ¶ 9, 846 P.2d at 367 (public-nuisance damages triable to jury); *Tenneco Oil Co. v. Allen*, 1973 OK 129, ¶ 0, ¶ 47, 515 P.2d 1391, 1392 ("clean-up costs" awarded to remove structures obstructing plaintiffs' land constituted nuisance "[d]amages" "triable by a jury").

Here, the Attorney General sought cash to "clean up" injuries pharmaceutical manufacturers allegedly caused. *E.g.*, E.18, R.693, Tr.11, 44, 76. As the court put it, the State "requires" $465 million to "eliminate the negative impact [of Janssen's actions]." E.14, R.654, Final J. at 28-29 ¶ 17, 31-32 ¶ 7. The court's judgment denied Janssen its right to a jury trial and must be reversed. *See Smicklas*, 1992 OK 145, ¶ 9, 846 P.2d at 367; 12 O.S. § 556.[19]

[19] A New York court recently held the demand for "an abatement fund with sufficient capital to eliminate the public nuisance," was a request "for money, however denominated," triable to a jury. *In re Opioid Litig.*, No. 400000/2017, 2020 WL 2576313, *1 (N.Y. Sup. Ct. May 19, 2020).

3. The denial of a jury trial also violated the U.S. Constitution's Seventh Amendment. Although the U.S. Supreme Court held in 1916 that the Due Process Clause does not apply the Seventh Amendment to the states, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, the Court has since adopted the doctrine of selective incorporation, which asks whether "a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice." *McDonald v. City of Chicago*, 561 U.S. 742, 758, 763-64, 765 n.13 (2010). A civil jury was a fundamental right at the time of the founding and the Fourteenth Amendment's ratification. *See, e.g.*, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) (collecting authorities). Under modern incorporation principles, the Due Process Clause requires state civil trials to adhere to the Seventh Amendment. So too does the Privileges and Immunities Clause, which was originally understood "to protect constitutionally enumerated rights against interference by the States." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1423-24 (2020) (Thomas, J., concurring in the judgment); *accord Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring).

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Date: October 8, 2020

Respectfully submitted,

FOLIART, HUFF, OTTAWAY & BOTTOM

Larry D. Ottaway, Esq., OBA #6816
Amy Sherry Fischer, Esq., OBA #16651
Andrew M. Bowman, Esq., OBA #22071
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, Oklahoma 73102

(405) 232-4633
(405) 232-3462 Facsimile
Email: larryottaway@oklahomacounsel.com
Email: amyfischer@oklahomacounsel.com
Email: andrewbowman@oklahomacounsel.com

Andrew W. Lester, OBA No. 5388
A.J. Ferate, OBA No. 21171
SPENCER FANE LLP
Suite 600
9400 North Broadway Extension
Oklahoma City, OK 73114
Telephone: (405) 844-9900
Facsimile: (405) 844-9958
Email: alester@spencerfane.com
Email: aiferate@spencerfane.com

Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
Michael W. Ridgeway, OBA No. 15657
ODOM & SPARKS, PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Norman, OK 73072
Telephone: (405) 701-1863
Facsimile: (405) 310-5394
Email: odomb@odomsparks.com
Email: sparksj@odomsparks.com
Email: ridgewaym@odomsparks.com

Charles C. Lifland
Jonathan P. Schneller
O'MELVENY & MYERS, LLP
400 S. Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: clifland@omm.com
Email: jschneller@omm.com

Stephen D. Brody
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Email: sbrody@omm.com

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road, Menlo Park
County of San Mateo, CA 94025-7019
Telephone: (650) 473-2633
Facsimile: (650) 473-2601
Email: jlfisher@omm.com

Attorneys for Defendants/Appellants/Counter-Appellees Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc.

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the foregoing instrument was hand-delivered for filing to the Supreme Court of Oklahoma on this 8th day of October, 2020. I also certify that a true and correct copy of the foregoing instrument was mailed via U.S. Mail, postage prepaid or by electronic mail to the following:

Michael Burrage, OBA #1350 Reggie Whitten, OBA #9576 WHITTEN BURRAGE 512 North Broadway, Suite 300 Oklahoma City, OK 73102 Tel: 405-516-7800 Fax: 405-516-7859 mburrage@whittenburragelaw.com rwhitten@whittenburragelaw.com *Attorneys for Plaintiff*	Mike Hunter, OBA #4503 Abby Dillsaver, OBA #20675 Ethan A. Shaner, OBA #3091 OFFICE OF ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA 313 N.E. 21st Street Oklahoma City, OK 73105 Tel: 405-521-3921 Fax: 405-521-6246 mike.hunter@oag.ok.gov abby.dillsaver@oag.ok.gov ethan.shaner@oag.ok.gov *Attorneys for Plaintiff*
Bradley E. Beckworth, OBA #19982 Nathan B. Hall, OBA #32790 Lisa Baldwin, OBA #32947 NIX, PATTERSON & ROACH, LLP 512 North Broadway, Suite 200 Oklahoma City, OK 73102 Tel: 405-516-7800 Fax: 405-516-7859 bbeckworth@nixlaw.com lbaldwin@nixlaw.com nhall@nixlaw.com *Attorneys for Plaintiff*	Ross Elliot Leonoudakis Robert Winn Cutler Nix Patterson, LLP 3600 N. Capital of Texas Highway, Suite B350 Austin, TX 78746 Tel: 512-328-5333 Fax: 512-328-5335 rossl@nixlaw.com winncutler@nixlaw.com *Attorneys for Plaintiff*

I further certify that a copy of the forgoing document was delivered to the Court Clerk's Office of the Cleveland County District Court on the 8th day of October, 2020.

Larry D. Ottaway