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 PHARMACETUCIA, 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.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

Appeal from the District Court of Cleveland County, Oklahoma
CJ-2017-816, The Honorable Thad Balkman

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AMICI CURIAE'S STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the Chamber) and the American Tort Reform Association (ATRA) submit this amici brief in accordance with Oklahoma Supreme Court Rule 1.12(b).[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country, including Oklahoma. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases involving issues of national concern to the business community.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

This is one of those cases. The Chamber and ATRA have an interest in ensuring that, contrary to the decision below, Oklahoma's tort system is predictable and does not punish businesses for harms that they did not cause.

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[1] On September 28, 2020, the Chamber and ATRA filed an application to file an amici brief. On October 1, 2020, this Court granted the application.

Since its inception, public nuisance has played a circumscribed role in Oklahoma—indeed, American—jurisprudence. It originated as a property-based tort used to remedy invasions of public lands or shared resources like highways and waterways. The trial court ignored that history, transforming public nuisance into a super tort that exposes Oklahoma businesses to unlimited liability for a broad array of public issues that are far removed from traditional public nuisances. Compounding its error, the trial court pinned 100 percent of the State's opioid-related costs on a single defendant that sold less than three percent of all opioids statewide—a troubling extension of tort liability in its own right.

The trial court's expansion of public nuisance finds no basis in Oklahoma law and promises trouble for businesses in the State. Armed with the decision below, the State or its localities may use the public nuisance statute to sue a fast food restaurant for an alleged obesity epidemic or to pressure an energy company to cover the costs of climate change. Obesity and climate change, like opioid abuse, are complicated public issues that demand policy-driven solutions by elected officials. Instead of calling for a legislative solution to a legislative problem, the trial court circumvented the democratic process and arrogated policymaking power to the judicial branch so that it could create its own solution to the opioid crisis.

That transfer of legislative power to the judiciary—under the guise of public-nuisance law—has already emboldened plaintiffs' counsel. Just last month, the Cherokee Nation sued companies in the e-cigarette industry for public

nuisance to recover money damages for alleged harms from the "vaping epidemic." *The Cherokee Nation v. Juul Labs, Inc.*, No. CJ–20–114 (Sequoyah Cty. Sept. 3, 2020). If the decision below stands, similar types of public-nuisance lawsuits will multiply in Oklahoma.

The decision will also chill business activity throughout the state for fear that any product linked to a perceived social problem may lead to astronomical and disproportionate liability. It is not the judiciary's role to create a new tort to address social problems. That job belongs to the legislature, which can weigh competing policy factors and study the possible consequences of expanding traditional nuisance law.

ARGUMENT AND AUTHORITIES

Opioid addiction is a serious problem that demands serious policy-based solutions. It calls for a legislative response, not a judicial one. *Fent v. Okla. Capitol Improvement Auth.*, 1999 OK 64, ¶ 4, 984 P.2d 200, 204 ("Respect for the integrity of our tripartite scheme for distribution of governmental powers commands that the judiciary abstain from intrusion into legislative policymaking."). What happened in the trial court represents the worst possible outcome: a verdict that is judicial in form but legislative in substance.

The trial court gave the State of Oklahoma license to blame a complex health crisis on a single defendant (Janssen). That ruling was wrong as to Janssen, but the fallout from the decision will extend beyond the pharmaceutical industry and one wronged defendant.

Although the State purported to sue for "public nuisance" (50 O.S. §§ 1, 2), in reality it advocated a new species of super tort. That new super tort is not limited to abating invasions of the public's use of shared resources like highways and waterways. It bears no resemblance to the public nuisances that courts have recognized in the eight centuries since the claim emerged in the common law. It is impervious to traditional legal hurdles like statutes of limitations and causation principles. It is, in a word, unprecedented.

The new species of public nuisance will devour all of Oklahoma tort law and, with it, who knows how many businesses. It is no answer to the opioid crisis.

I. THE TRIAL COURT JETTISONED TRADITIONAL LIMITATIONS ON NUISANCE LAW AND ENDORSED A PUBLIC-NUISANCE THEORY THAT WOULD VIRTUALLY GUARANTEE LIMITLESS LIABILITY FOR OKLAHOMA BUSINESSES.

Before the decision below, traditional limits on public nuisance had relegated the tort to a cameo role in the state's legal system. The trial court removed those traditional limits. If its decision stands, public nuisance will soon play a starring role in tort cases throughout the State.

A. Public nuisance has always been limited to conduct that interfered with the use of real property.

The public-nuisance claim articulated below is different in kind from the public-nuisance tort that developed in the American legal system.

Originally a mechanism for the English Crown to abate conditions that impeded royal property or public roads and waterways (Restatement (Second) of Torts § 821B cmt. a (Am. Law Inst. 1979)), public-nuisance law found its way into American courts during the early days of the Republic. Donald G. Gifford, *Public*

Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 793, 800 (2003). From its early appearances in American jurisprudence, the tort was limited to conduct that interfered with a "public right"—that is, the right to access shared resources like public roads and waterways. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455 (R.I. 2008) (describing the "long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way"). It existed primarily as an injunctive remedy that allowed the government to abate restrictions on those resources. Over time, the liability theory evolved to allow individuals to press private claims for nuisance only if their harm was "special" or different in kind than the injury to the public. Gifford, 71 U. Cin. L. Rev. at 800.

Public nuisance remained snug in that box for hundreds of years. But in the late twentieth century, private plaintiffs' counsel formed alliances with state and local governments and began trying to expand nuisance law. *See* Victor E. Schwartz et al., *Can Governments Impose A New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. Rev. 923, 931 (2009); *see also* Gifford, 71 U. Cin. L. Rev. at 748–749. They canvassed the nation looking for courts willing to move public nuisance beyond its historical limits.

Those early attempts failed. In the 1980s, plaintiffs pressed public-nuisance claims (along with other types of claims) against manufacturers of building materials containing asbestos. Although courts sustained asbestos claims on

alternative theories, "[a]ll of the courts that . . . considered the issue . . . rejected nuisance as a theory of recovery." *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). In assessing whether nuisance laws provided a remedy, many courts looked to the "limitations of traditional common law nuisance doctrine," including that, as a general matter, nuisance claims "arise in the classic context of a landowner or other person *in control of property* conducting an activity *on his land* in such a manner as to interfere with the property rights of a neighbor." *Id.* (emphasis added). Without precedent supporting a broader application, courts refused to expand the doctrine beyond its traditional foundations. *See id.* ("When one considers the fact that the [nuisance] statute is over a hundred years old, the absence of analogous cases supports an inference that the statute was neither intended nor has it been understood to extend to cases such as [those involving asbestos products].").

Other courts saw nuisance claims as a ploy to sidestep traditional legal requirements (like the statute of limitations and causation principles). *See Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("[T]he public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim."). As the Eighth Circuit explained, without those traditional limits, "[n]uisance . . . would become a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch.*, 984 F.2d at 921; *see also Celotex Corp.*, 493 N.W.2d at 521 (holding that allowing a nuisance claim in asbestos cases "would significantly expand, with unpredictable consequences,

the remedies already available to persons injured by products, and not merely asbestos products").

Courts' refusal to entertain public-nuisance claims did not stop plaintiffs from trying. Plaintiffs next advanced public-nuisance theories against the tobacco industry. The tobacco litigation eventually produced the largest settlement in American history, but no appellate court issued an opinion approving nuisance as a basis for recovery. On the contrary, the lone court to publish an opinion before the settlement rejected the nuisance claim and explained that it was "unwilling to accept the State's invitation to expand a claim for public nuisance beyond its grounding in real property." *Texas v. Am. Tobacco Co.*, 14 Supp. 2d 956, 973 (E.D. Tex. 1997).

Undeterred, plaintiffs next pressed public-nuisance claims against lead paint manufacturers. But every state supreme court to assess those claims refused to expand nuisance liability beyond its historical roots.[2] The New Jersey Supreme Court, for instance, "examin[ed] the historical antecedents of public nuisance and . . . trac[ed] its development through the centuries," and concluded that

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[2] In *City of Milwaukee v. NL Industries*, 691 N.W.2d 888, 890 (Wis. Ct. App. 2004), an intermediate Wisconsin appellate court reversed a trial court's dismissal of public nuisance claims against two lead paint manufacturers. The Wisconsin Supreme Court never weighed in on the propriety of the nuisance claim. *City of Milwaukee v. NL Indus.*, 2005 WI 136 (Wis. 2005) (review dismissed); *City of Milwaukee v. NL Indus.*, 2009 WI 34 (Wis. 2009) (review denied). Likewise, in another outlier decision, the California Court of Appeal ruled that lead paint manufacturers could be held liable for public nuisance. *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Ct. App. 2017). The Supreme Court of California declined to hear the case. *People v. Conagra Grocery Prods. Co.*, No. S246102, 2018 Cal. LEXIS 1277 (Cal. 2018).

"permit[ing] these complaints to proceed . . . would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 494–95 (N.J. 2007); *see id.* (explaining that "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance"). The Rhode Island Supreme Court likewise observed that "[a] common feature of public nuisance is the occurrence of a dangerous condition at a specific location" and that all nuisance actions in Rhode Island were "related to *land*." *Lead Indus. Ass'n*, 951 A.2d at 452 (emphasis in original). The Rhode Island Supreme Court refused to recognize "a new and entirely unbounded tort" that ignored the "inherent theoretical limitations of the tort of public nuisance." *Id.* at 455; *see also City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. banc 2007) (affirming summary judgment in favor of lead paint manufacturers on public-nuisance claim and rejecting the city's attempt to sidestep traditional causation standards under the guise of a "uniquely public" and "widespread health hazard").

The Supreme Court of Illinois reached the same conclusion when municipal governments and private plaintiffs' counsel teamed up against gunmakers. After exploring the historical underpinnings of the "public right" requirement—an essential element of a public-nuisance claim—the Court held that "there is [no] public right to be free from the threat that some individuals may use an otherwise

legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004). Applying traditional public-nuisance principles, the Court held that product manufacturers could not face liability for nuisance when others misused their products. *Id.*[3]

Oklahoma largely avoided those legal clashes over asbestos, tobacco, lead paint, and firearms. That is perhaps because this Court has held time and again that Oklahoma's nuisance statute (50 O.S. § 1) codifies the common law (*Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶ 8, 933 P.2d 272, 276) and covers "a class of wrongs which arises from an unreasonable, unwarranted, or unlawful *use* by a person or entity *of property* lawfully possessed." *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36 (emphasis added). In Oklahoma, nuisance claims "demand[] evidence of substantial interference with the use and enjoyment of property." *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶ 12, 392 P.3d 706, 710. The only *potential* exception to that rule are those few disturbances that, because of their nature, "at all times and under all circumstances, irrespective of [their] location and environment," constitute a "nuisance per se." *McPherson v. First Presbyterian Church*, 1926 OK 214, ¶ 11, 248 P. 561, 564. And even then,

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[3] Two courts tried to extend public nuisance to reach gunmakers (*City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1235 (Ind. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143–44 (Ohio 2002)), but Congress responded with a statute foreclosing the theory. *See* Sarah L. Swan, *Plaintiff Cities*, 71 Vand. L. Rev. 1227, 1236 (2018) (the 2005 Protection of Lawful Commerce in Arms Act "effectively foreclosed nearly all municipal civil suits against the gun industry").

most nuisances per se are also connected to real property. Examples include "[a] disorderly house, an obstruction of a highway," or other things "prohibited by public morals and law" (*id.*) like maintaining a gambling establishment. *Miller v. State*, 1942 OK CR 43, 123 P.2d 699, 701. No one contends that marketing FDA-approved prescription opioids—an appropriate therapeutic treatment in various circumstances—constitutes a nuisance per se.

* * *

Oklahoma law mirrors the law of its sister states that have concluded that an "essential" component of every nuisance case "is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.*, 924 A.2d at 495. Amici have not located a single published case in which an Oklahoma court recognized a public-nuisance claim involving something other than real property or public spaces. Even *Reaves v. Territory*, 1903 OK 92, ¶ 14, 74 P. 951, 953—the lone case that the trial court cited (Final J. After Non-Jury Trial (Final J.) at 23, ¶ 3)—involved real property. The nuisance in that case—the "running [of] a disorderly and disreputable theatre"—involved "lewd, lascivious or indecent shows and entertainments *in a building*." *Reaves*, 1903 OK 92, ¶ 1, 74 P. at 951 (emphasis added). The "noise and boisterousness" persisted past midnight, six nights a week, "to the disturbance of the neighbors." *Id.* ¶ 8, 74 P. at 952.

B. The decision below contravenes settled nuisance law and will wreak havoc on Oklahoma businesses.

The decision below represents a clean break from Oklahoma nuisance law. The trial court ignored nuisance law's common-law, property-based foundation

and instead read Oklahoma's nuisance statute in a manner that would eliminate all other torts. According to the trial court, Janssen's "false, misleading, and dangerous marketing campaigns" fit the statutory definition of public nuisance because the campaigns could be said to "annoy[], injure[], and endanger[] the comfort, repose, health, and safety of others." Final J. at 25, ¶ 8 (quoting 50 O.S. § 1). But as this Court has recognized, expansive statutory terms like "annoy," "injure," and "endanger" must find their meaning in the common law understanding of nuisance. *Nichols*, 1996 OK 118, ¶ 8, 933 P.2d at 276. Otherwise, the statute could cover anything that the State might find "annoy[ing]" or "danger[ous]." Nothing suggests that the legislature intended the statute to override common-law limiting principles or to expose businesses to outsized monetary liability for conduct untethered to Oklahoma's developed body of nuisance law. *See Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 28 n.8, 139 P.3d 897, 905 n.8 ("The statutes and the common law are to be read together as one harmonious whole.").

Concern over runaway nuisance liability of that sort has led appellate courts in other states to reject nuisance theories like those embraced below:

> [G]iving a green light to a common-law public nuisance cause of action today will . . . likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities. 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 makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

People v. Sturm, Ruger & Co., 309 A.D.2d 91, 96–97 (N.Y. App. Div. 2003).

Judges may have a righteous desire to do something about the opioid crisis. But courts must resist the urge to accomplish that goal by redefining public nuisance to swallow the whole of tort law. *Tioga Pub. Sch.*, 984 F.2d at 921. The trial court brushed aside that concern, and now every business operating in the State is in the crosshairs. Oklahoma energy companies may soon face nuisance claims seeking to extract compensation for the effects of climate change.[4] Or the State may sue smartphone manufacturers, alleging that their devices created a generation of distracted drivers who drove up the need for emergency services.[5] Plaintiffs are already pressing similar claims throughout the country. This Court should not invite that type of mischief in Oklahoma.

Instead, the Court should heed the warnings from state supreme courts that have faced similar claims. If it doesn't, Oklahoma will become ground zero for every breed of public-nuisance claim imaginable. California is already emerging as a cautionary tale.[6] Following the trial court's ruling here, Oklahoma is not far behind: Those seeking to capitalize on the trial court's decision have already filed a public-nuisance claim against e-cigarette manufacturers to recover

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[4] *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (remanding public-nuisance action against energy companies "seek[ing] the abatement of greenhouse gas emissions").

[5] *See Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 141–42 (Cal. Ct. App. 2018).

[6] Lawyers emboldened by the California Court of Appeal's decision allowing nuisance claims against lead paint manufacturers (*see supra* n.2) have since filed public-nuisance lawsuits against energy companies relating to climate change. *City of Oakland v. BP PLC*, 969 F.3d 895, 901–02 (9th Cir. 2020).

"retrospective and prospective" costs allegedly caused by the "vaping epidemic," including costs for programs to "reduc[e] and prevent[] youth addition." *The Cherokee Nation v. Juul Labs, Inc.*, No. CJ–20–114 (Sequoyah Cty. Sept. 3, 2020); *id.* ¶ 232. And that is just the beginning. There is no telling what other theories "creative mind[s]" will devise. *Sturm, Ruger & Co.*, 309 A.D.2d at 96. This Court should confirm that nuisance law is not a universal salve for complex social problems. It was never meant to be.

The problems with the trial court's decision run deeper still. Under the regime established below, Oklahoma courts will also supplant the legislature as the lawmaking arm in the state. Without the traditional limitations on liability, public-nuisance law will empower a single judge or jury to set public policy for the State. Public policy decisions about climate change, obesity, cell phones, and opioids should not be left to the judicial branch:

> [J]udges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order . . . [including] commission[ing] scientific studies or conven[ing] groups of experts for advice, or issu[ing] rules under notice-and-comment procedures inviting input by any interested person, or seek[ing] the counsel of regulators in the States where the defendants are located.

Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011).

It is neither fair nor reasonable to expect one trial judge to make policy choices governing all Oklahomans. That job belongs to the other branches of government, which can balance the many competing policy factors and study the consequences of remaking nuisance law.

Greenlighting a public-nuisance tort unbounded by traditional limitations will wreak havoc on Oklahoma businesses. As reimagined below, public-nuisance law offers businesses no way to predict when they may face liability in Oklahoma. Whatever benefit the State realizes from a single nuisance judgment will pale in comparison to the long-term economic effects of businesses fleeing the State for fear of encountering the public-nuisance monster that the trial court unleashed.

II. THE TRIAL COURT UNFAIRLY AND UNCONSTITUTIONALLY PINNED THE CLAIMED FINANCIAL COSTS OF THE OPIOID CRISIS ON A SINGLE DEFENDANT.

Janssen sold less than three percent of the opioids distributed in Oklahoma, but the trial court tagged Janssen with 100 percent of the statewide abatement costs for the period in question. That disproportionate verdict violates Oklahoma law and the U.S. Constitution.

The Oklahoma legislature has not barred courts from imposing joint-and-several liability in actions by the State (23 OK § 15), but that does not mean that the State is entitled to joint-and-several damages every time it wins at trial. No, joint and several liability applies in only two limited circumstances: (1) when multiple tortfeasors engaged in "concerted action" to cause the plaintiffs' injury; or (2) when multiple independent tortfeasors caused a single or indivisible injury. *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126. Neither applies here.

The trial court did not describe any evidence of concerted misconduct among opioid manufacturers. The only other opioid manufacturers even mentioned in the

final judgment are Purdue and Teva, which both purchased an active pharmaceutical ingredient (API) from a non-defendant Johnson & Johnson subsidiary. Final J. at 8, ¶ 14. A lawful buyer-seller commercial relationship cannot constitute concerted action giving rise to joint-and-several liability. *Cf. United States v. Walker*, 746 F.3d 300, 307 (7th Cir. 2014) ("To prove a conspiracy, the government must prove more than a buyer-seller agreement.").

The indivisible-injury exception also does not apply because the State did not identify "a single injury which is not apportionable among the joint tort-feasors." *Delaney v. Morris*, 1944 OK 51, ¶ 7, 145 P.2d 936, 938. Instead, the State tried to evade that requirement by labeling discrete instances of opioid misuse and abuse as an overarching "opioid crisis." Final J. at 29, ¶ 20. But there could never be an opioid crisis without many individual instances of opioid abuse or misuse. Bundling a group of separate injuries together under one moniker—the "opioid crisis" or the "opioid epidemic"—does not transform otherwise divisible harms into an indivisible one.

Plaintiffs have tried the same argument elsewhere and failed. In *Benjamin Moore*, for instance, the City of St. Louis filed a public-nuisance claim against multiple paint manufacturers to recover the costs of a city-sponsored lead paint abatement program. 226 S.W.3d at 112–13. The city argued that each defendant caused the city's abatement costs because each had substantially contributed to a public "widespread health hazard" through "community wide marketing and sales of lead paint." *Id.* at 115–16. The Supreme Court of Missouri saw through the

ruse. The Court recognized that, even though the city characterized the nuisance as a widespread health hazard, it was still seeking damages for multiple distinct harms and thus was required to "connect a[] specific defendant to a[] specific abatement project." *Id.* at 113; *see also id.* at 116 ("Although the city characterizes its suit as one for an injury to the public health . . . [t]he damages it seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties."). A contrary result "risk[ed] exposing the[] defendants to liability greater than their responsibility and may [have] allow[ed] the actual wrongdoer to escape liability entirely." *Id.*

The *Benjamin Moore* Court's fears were realized below. The trial court made a conclusory finding that "[t]he public nuisance is the State's opioid crisis and [Janssen was] a direct and proximate cause of it" (Final J. at 29, ¶ 20), but it did not recognize that the "opioid crisis" label comprises multiple claimed injuries. When, as here, a plaintiff (like the State) sues to recover for multiple distinct harms, Oklahoma law requires the plaintiff to prove which "injuries are attributable to" the alleged tortfeasor (Janssen). *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 13, 45 P.3d 86, 91. The State never offered that proof, and the trial court never required it. By holding the State to a lower burden, the trial court exposed Janssen "to liability [far] greater than [its] responsibility." *Benjamin Moore*, 226 S.W.3d at 116.

That is not just a concern under Oklahoma law. It is a matter of due process. "The Due Process Clause of the Fourteenth Amendment prohibits 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). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996). The trial court's judgment makes a hash of those constitutional protections. No Oklahoma or federal statute or precedent puts businesses in Oklahoma on notice that participating in commercial activity on a small scale could leave them solely responsible for the alleged costs of remediating a statewide health crisis.

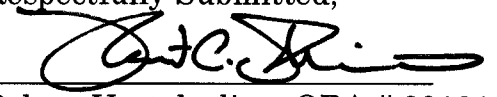
Causation requirements "limit a person's responsibility [to] the consequences of that person's own acts." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Our justice system depends on that basic notion of fairness. There is nothing just or fair about punishing one company for harms resulting from many other factors. The trial court's misapplication of joint-and-several liability demands reversal.

CONCLUSION

Public nuisance law is not a panacea for every societal problem. The trial court's expansion of Oklahoma public nuisance law and application of joint-and-several liability promises devastating consequences for the Oklahoma business

community. This Court should reverse the decision below and hold that the traditional limits on public-nuisance claims still apply in Oklahoma.

Respectfully Submitted,

By: 

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I hereby certify that a true and correct copy of this filing was mailed on this 19th day of October, 2020 by depositing it in the U.S. Mail, postage prepaid and/or by electronic mail to the following:

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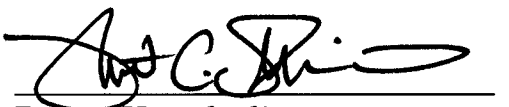

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