Appeal No. 118,474

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA
ex rel. MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,
Plaintiff/Appellee/Counter-Appellant
vs.
JOHNSON & JOHNSON PHARMACEUTICALS, INC.; ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEAUTICA, 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 ALABAMA, WASHINGTON, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH DAKOTA, VERMONT, VIRGINIA, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF OKLAHOMA

On Appeal from the District Court of Cleveland County, Oklahoma
No. CJ-2017-816, The Honorable Thad Balkman

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AMICI CURIAE'S STATEMENT OF INTEREST[1]

States are unique litigants because they represent not only their own interests as sovereigns, but also the quasi-sovereign interests of their residents' health and well-being—"both physical and economic." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). And State Attorneys General are unique because they have long shouldered this responsibility of protecting the public interest through litigation. *See generally State of Fla. ex rel. Shevin v. Exxon Corp*, 526 F.2d 266, 271 (5th Cir. 1976). Public nuisance lawsuits are one tool that Attorneys General use to do that.

Like Oklahoma's Attorney General, State Attorneys General across the nation have brought suit against various entities responsible for the opioid epidemic that is harming each State's residents. Through these suits, the State Attorneys General represent communities with some of the highest opioid abuse rates in the country, whose citizens have suffered catastrophic injury to their health and welfare. In each of these actions, the State Attorneys General seek to address the ongoing harms caused by opioid manufacturers and distributors.

In urging this Court to reject the Oklahoma Attorney General's public nuisance theory and reverse the district court's decision, Defendants-Appellants Johnson & Johnson and Janssen Pharmaceuticals (J&J) fail to acknowledge the unique role that State Attorneys General play in seeking relief for their citizens from public harms. They further fail to acknowledge the unprecedented scale of harm borne by the public as the result of the opioid epidemic—a harm which led President Donald J. Trump to declare the opioid crisis a "national public health emergency," and which resulted in the death of more than 2,100 Oklahomans in just four years. They also ignore that state courts from across the country have overwhelmingly

[1] This *amicus* brief is submitted pursuant to Oklahoma Supreme Court Rule 1.12(a)(1) and the "Joint Statement Regarding the Filing of Briefs by Amicus Curiae" filed by the parties on October 7, 2020.

agreed that State Attorneys General may bring public nuisance claims to seek abatement of the horrific harms inflicted on the public by opioid manufacturers and distributors.

Accordingly, amici State Attorneys General urge affirmance of the district court's judgment. The district court properly concluded, based on the extensive evidence presented at trial, that J&J's false, misleading, and dangerous marketing campaigns caused exponentially increasing rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome in Oklahoma, and that this conduct constituted a public nuisance under Oklahoma's nuisance statutes, 50 O.S. §§ 1, 2. This holding is consistent with the plain language of Oklahoma's nuisance statutes, caselaw on the issue, and long-recognized nuisance principles permitting the government to abate nuisances injurious to public health.

The district court's judgment furthers the ongoing litigation interests of the amici State Attorneys General, all of whom are currently litigating against or investigating J&J and/or other prescription opioid manufacturers, distributors, pharmacies, or other persons or entities involved in the opioid industry in other fora. In those actions, J&J and other manufacturers have raised arguments similar to those J&J raises here. For that reason too, the State Attorneys General have a significant interest in ensuring that the district court's judgment is affirmed.

ARGUMENT

I. State Attorneys General Have Long Been Responsible for Protecting the Public's Health and Safety.

As in most States, the office of Attorney General in Oklahoma developed from "the original nature of the office in England, where the Attorney General was the chief legal adviser of the Crown and was entrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested." *State ex rel. Cartwright v. Georgia-Pac. Corp.*, 1982 OK 148, 663 P.2d 718, 721 (citing 7 Am. Jur. 2d *Attorney General*

§ 9). "In the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government." *State ex rel. Derryberry v. Kerr-McGee Corp.*, 1973 OK 132, 516 P.2d 813, 818–19.

In England, the nature of the Attorney General's office evolved from doing the king's bidding to defending the public good more generally. *See generally* Emily Myers, *Common Law Powers*, in State Attorneys General: Powers and Responsibilities 44 (Emily Myers 3rd ed., 2013). That evolution came in America, too, though for a different reason: State Attorneys General had a new sovereign to serve—the People. *See State v. Gleason*, 12 Fla. 190, 212 (Fla. 1868) ("The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government.").

Protecting "the public's legal interest" has thus long been a core responsibility of State Attorneys General. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607; *see also People ex rel. Devine v. Time Consumer Mktg., Inc.*, 782 N.E.2d 761, 767–68 (Ill. App. 2002) ("[T]he common law powers of the office of attorney general are as broad as the protection and defense of the property and revenue of the state, and, indeed, the public interest requires" (cleaned up and citations omitted)); *Berger v. State Dep't of Revenue*, 910 P.2d 581, 585 (Alaska 1996) ("[T]he Attorney General has the common law power to bring any action which he thinks necessary to protect the public interest." (citation omitted)); *Shevin*, 526 F.2d at 268–69 (State Attorneys General have "wide discretion in making the determination as to the public interest"). Indeed, unlike ordinary citizens, State Attorneys General have standing to seek the public's good by acting in *parens patriae*—as "parent of the country." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 592. In that way, they can bring claims defending the State's "quasi-

sovereign" interests "in the health and well-being—both physical and economic—of its residents in general." *Id.*; *cf. Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."). A private party ordinarily does not have that authority.[2] And it's significant that in these actions the State is not simply "stepping in to represent the interests of particular citizens," but rather asserting the interest of the public *as* the public. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 600.

This historical context is important because it underscores just how well public nuisance actions fit the unique need for which they are used: vindicating quasi-sovereign interests in defending the health and safety of the public. *See id.* at 603 (recognizing "a line of cases . . . in which States successfully sought to represent the interests of their citizens in enjoining public nuisances"). Indeed, "[t]he suppression of nuisances injurious to public health and morals is among the most important duties of government." *Reaves v. Territory*, 1903 OK 92, 74 P. 951, 953–54; *see also Georgia-Pac. Corp.*, 1982 OK 148, 663 P.2d at 721 (recognizing that at common law Attorneys General "could institute equitable proceedings for the abatement of public nuisances which affected or endangered the public safety or convenience"); Myers, *Common Law Powers*, *supra*, at 43 (noting that "common law powers of the attorney general that have been recognized by courts in various states include the power to seek abatement of a public nuisance").

Despite this history, J&J and its amici contend that modern State Attorneys General

[2] Exceptions would be relator actions or public nuisance claims, for example, where—in the latter case—the private party is also distinctly and individually harmed.

can abate only minor nuisances—road obstructions and the like—but must wait for legislation or federal agency action to abate the more severe harms at issue in this case. *See* Defs.-Apps.' Br. at 16, 20, 27–28; Amicus. Br. of Profs. John Baker and Michael Krauss at 13–14. But this false limitation undermines the important historical role that States and their Attorneys General have always played in our federal system. The authority to bring public nuisance suits has long resided with Attorneys General at common law, and Oklahoma has likewise long recognized that authority by statute.[3] If the federal government wishes to preempt state action, it knows how to do that. But the Court should not assume that a federal regulatory agency has silently subsumed the historical role of State Attorneys General. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (noting that "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States." (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

II. Public Nuisance Actions Are One Important Way Attorneys General Protect the Public.

A. Public nuisance exists to protect the health and safety of the public.

Public nuisance actions have been around in one form or another since the thirteenth century in England. *See generally* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance*, 54 Alb. L. Rev. 359, 361–63 (1990). In its earliest forms, the action was criminal in nature, and most often involved obstructions to the use of land in some way connected to the Crown or available to the public. *Id.* But it did not remain so limited for long. The action soon came to cover offenses against the community more generally, hence its alternative moniker "common nuisance"—the phrase referring to "the community," not to

[3] In one state, the State Attorney General has the power to protect the public's interest and bring many types of claims to do so, but the State Attorneys' Office has the common law authority to bring public nuisance actions.

something ordinary. *See* J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 Cambridge L.J. 55, 58 (1989). By the 18th century, "public nuisance" in England had expanded to mean something akin to "public mischief," and included all sorts of harms against the public that didn't fit neatly within another category of offense. *Id.* at 61–63.[4] Notably, much of the work that public nuisance evolved to do was in protecting the public's health and safety, not simply its right to access property. Indeed, "public nuisance was the only offence for which it was possible to prosecute those who stank out the neighbourhood with fumes from glass-works, tanneries and smalters, or who kept pigs in the streets, or kept explosives in dangerous places, or spread infectious diseases, or sold unwholesome food and drink, or left the corpses of their relatives unburied, or made the public highway dangerous or impassable, or created other danger to public safety and health." *Id.* at 76.[5] Thus, when William Hawkins wrote his *Pleas of the Crown* in 1716, he broadly defined a "common nuisance" to "be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 692 (8th ed., John Curwood ed., London, S. Sweet 1824) (1716).

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[4] During this same time, Parliament also took to "deeming things it particularly disliked to be common nuisances," in large part to protect against the King's use of the dispensing power to license the doing of that which Parliament prohibited. Spencer, *supra*, at 64–65. Because the dispensing power did not apply to public nuisances, "by Act of Parliament it became a common nuisance to make or sell fireworks; to run a lottery; as a reaction to the South Sea Bubble, to run a joint-stock company without a charter of incorporation; and following the great fire there, to build a house with a thatched roof in the borough of Blandford Forum." *Id.* at 64.

[5] *See also* Restatement (Second) of Torts § 821B, cmt. b (1979) (noting that public nuisances "included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind"); Abrams & Washington, *supra*, at 362 (explaining that the tort's "flexibility became apparent in the varied activities prosecuted under its name over the years: digging up a wall of a church, helping a 'homicidal maniac' to escape, being a common scold, keeping a tiger in a pen next to a highway, leaving a mutilated corpse on a doorstep, selling rotten meat, embezzling public funds, [and] keeping treasure trove" (citations omitted)).

This classification of "public nuisance," or one close to it, has long been the working definition in American common law.[6] Horace Wood's 1875 nuisance treatise—a leading authority on which this Court has repeatedly relied[7]—expressly adopted Hawkins's definition. *See* Horace Gay Wood, *A Practical Treatise on the Law of Nuisance in Their Various Forms* 25–26 (1875). The 1906 Joyce treatise—again, a go-to authority for this Court[8]—offered a similarly broad definition: "A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, *or the public right to life, health*, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property" of the community. Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* 10 (1906) (emphasis added).

Nor has the common law definition constricted over time. Black's Law Dictionary still

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[6] *See, e.g.*, *Garfield Twp. v. Young*, 82 N.W.2d 876, 878 (Mich. 1957) ("No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." (citation omitted)); *City of Selma v. Jones*, 79 So. 476, 477–78 (Ala. 1918) ("'Nuisance' signifies 'anything that worketh inconvenience,' and a common or public nuisance is defined to be an offense against the public, either by doing a thing which tends to the annoyance of all persons, or by neglecting to do a thing which the common good requires." (citation omitted)); *State v. Godwinsville & Paterson Macadamized Rd. Co.*, 10 A. 666, 668 (N.J. Sup. Ct. 1887) ("A common nuisance, says Hawkins, seems to be an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." (citation omitted)); *State v. Taylor*, 29 Ind. 517, 518 (Ind. 1868) ("Our statute, perhaps, gives as accurate a definition of the term nuisance, as understood at common law, as can be found elsewhere: 'Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property.'" (citation omitted)); *Lancaster Tpk. Co. v. Rogers*, 2 Pa. 114, 115 (Penn. 1845) ("A common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." (citation omitted)); *People v. Corp. of Albany*, 11 End. 539, 543 (N.Y. Sup. Ct. 1834) ("A common nuisance, says Hawkins, seems to be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." (citation omitted)).

[7] *See, e.g.*, *Oklahoma City v. Eylar*, 1936 OK 614, 61 P.2d 649, 653 (relying on "Wood on Nuisances" to interpret Oklahoma's statutory nuisance provisions); *Kenyon v. Edmundson*, 1920 OK 351, 193 P. 739, 741 (same); *Revard v. Hunt*, 1911 OK 425, 119 P. 589, 591 (same); *Reaves*, 1903 OK 92, 74 P. at 954 (same).

[8] *E.g.*, *Cummings v. Lobsitz*, 1914 OK 382, 142 P. 993, 994; *McPherson v. First Presbyterian Church of Woodward*, 1926 OK 214, 248 P. 561, 565; *Jordan v. Nesmith*, 1928 OK 99, 269 P. 1096, 1098; *Kenyon*, 1920 OK 351, 193 P. at 741; *Oklahoma City v. Hoke*, 1919 OK 244, 182 P. 692, 695; *Revard*, 1911 OK 425, 119 P. at 591.

defines a "public nuisance" as "[a]n unreasonable interference with a right common to the general public, *such as a condition dangerous to health*, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." *Nuisance*, Black's Law Dictionary (11th ed. 2019) (emphasis added). And the Restatement (Second) on Torts summarizes the logic of the common law tort this way: "A public nuisance is an unreasonable interference with a right common to the general public." Restatement, *supra*, § 821B(1); *see also* 7 *Public Nuisance*, American Law of Torts § 20:5 (Stuart M. Speiser et al., eds., Mar. 2020 Update) (collecting cases using similar definitions).

Oklahoma's nuisance statutes thus fit comfortably within this tradition. *See Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, 933 P.2d 272, 276 (noting that the statutory definitions "encompass[] the common law's private and public nuisance concepts"). Under Oklahoma law, "[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission"—among other things—"[a]nnoys, injures or endangers the comfort, repose, health, or safety of other," or "[i]n any way renders other persons insecure in life." 50 O.S. § 1. And a "*public* nuisance," the statute explains, "is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Id.* § 2 (emphasis added); *see also Finkelstein v. City of Sapulpa*, 1925 OK 40, 234 P. 187, 188 (noting that "[a] 'public nuisance' is not necessarily one affecting the government or the entire community of the state, but it is public if it affects the surrounding community generally or the people of some local neighborhood" (quoting *Calkins v. Ponca City*, 89 Okl. 100, 214 P. 188)).

B. Public nuisance, unlike private nuisance, does not require harm to property.

J&J and its amici spend much of their briefing arguing that the district court erred by

expanding public nuisance to encompass actions that do not directly affect individual property rights. But as the above history makes clear, the court's interpretation of Oklahoma's public nuisance statute did not go beyond what common nuisance principles have long afforded.

Indeed, much of J&J's argument seems to blend the requirements for a *public* nuisance with those of a *private* nuisance. But "[i]t is generally agreed . . . that public nuisance differs from private nuisance" in that "[p]ublic nuisance does not necessarily involve an interference with the private enjoyment of private property." Abrams & Washington, *supra*, at 364. Instead, "the interference" in a public nuisance action "is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public." *Id.*; *see also* Restatement (Second) of Torts, *supra*, cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."); 7 American Law of Torts, *supra*, § 20:5 (public nuisance "does not necessarily involve interference with the use and enjoyment of land").[9] In fact, this difference between private and public nuisance explains

[9] *See also, e.g.*, *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 67 (Iowa 2014) ("The common law distinguishes between private and public nuisances. A private nuisance is a tort arising from the unreasonable invasion of another's interest in the private use and enjoyment of land. A public nuisance arises from an unreasonable interference with a public right. A public nuisance does not necessarily involve interference with the use and enjoyment of land." (cleaned up and citations omitted)); *Borough of Upper Saddle River, N.J. v. Rockland Cty. Sewer Dist. #1*, 16 F. Supp. 3d 294, 336 (S.D.N.Y. 2014) ("As distinguished from private nuisance, public nuisance does not necessarily center on interference in the use and enjoyment of land; rather, a public nuisance may exist when the complained of activity constitutes a continuing course of conduct that is calculated to result in physical harm or economic loss to so many persons as to become a matter of serious concern." (cleaned up and citation omitted)); *MPM Silicones, LLC v. Union Carbide Corp.*, 931 F. Supp. 2d 387, 408 (N.D.N.Y. 2013) ("[A] public-nuisance plaintiff seeks to vindicate a public right that does not depend on the exercise of private property rights." (citation and quotation marks omitted)); *Butler v. Advanced Drainage Sys., Inc.*, 717 N.W.2d 760, 769 (Wis. 2006) ("A public nuisance is an unreasonable interference with a right common to the general public, and does not necessarily involve the interference with the use or enjoyment of land." (cleaned up and citation omitted)); *City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 536 (Mo. Ct. App. 2001) ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with the use and enjoyment of land." (citation omitted)); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 917 (Ariz. 1985) ("A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public."); *Raymond v. S. Pac. Co.*, 488 P.2d 460, 462–63 (Or. 1971) ("A public nuisance does not necessarily have anything to do with the use and enjoyment of land."); *McDonell v. Brozo*, 280 N.W. 100, 102 (Mich. 1938) ("We are of the opinion that a nuisance involves, not only a defect, but threatening or impending danger to the public, *or*, if a

much of the work that the latter kind of action did at common law in protecting the health and safety of the public. As the Wood treatise explained, for example, at common law it was a public nuisance "for a person afflicted with an infectious or contagious disease, to expose himself in a public place, whereby the health of others is jeopardized," "to expose one afflicted with such a disease in a public place," "to take a horse afflicted with glanders or other infectious diseases into a public place, particularly to water it at a public watering place," and "to sell diseased or corrupted meat, or unwholesome or adulterated foods or drinks of any kind deleterious to health." Wood, *supra*, at 72–73 (collecting cases). Yet under J&J's property-bound nuisance theory, none of those harms would have constituted public nuisances.

Oklahoma law is not to the contrary. First, as the district court properly found, the "plain text" of Oklahoma's nuisance statute "does not limit public nuisances to those that affect property."[10] [DC22.] Instead, the statute provides that an act that constitutes a nuisance is one that "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others," "[o]ffends decency," "interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway," or "[i]n any way renders other persons insecure in life, or in the use of property." 50 O.S. § 1. And "[a] public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Id.* § 2. While Defendants-Appellants and their amici urge this court to read a "property relations" requirement into the statute, Defs.-Apps.' Br. at 16, the language of the statute itself simply does not impose such

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private nuisance, to the property rights or health of persons sustaining peculiar relations to the same." (emphasis added)).

[10] Although Oklahoma law provides both a statutory and a common law claim for nuisance, *see Nichols*, 1996 OK 118, 933 P.2d at 276, the district court's decision was based only on the statutory definition.

a requirement. And under this Court's "well established" rule of statutory construction, "statutes are to be construed according to the plain and ordinary meaning of their language." *Wallace v. State*, 1997 OK CR 18, 935 P.2d 366, 369 (citing 25 O.S. 1991, § 1). Accordingly, the district court properly declined to impose such a requirement here.

Second, a review of Oklahoma caselaw simply does not support Defendants-Appellants' contention that a public nuisance requires interference with real property. *See, e.g.*, *State ex rel. Field v. Hess*, 1975 OK 123, 540 P.2d 1165, 1169 ("finding the exhibiting, selling, bartering or trafficking in obscene works to be an unlawful act, which act offends decency," satisfying "[t]he statutory definition of 'nuisance'"); *Peerson v. Mitchell*, 1950 OK 329, 532, 239 P.2d 1028, 1030 ("The harboring of a vicious dog with knowledge of its vicious propensities constitutes a nuisance."); *see also, e.g.*, *Laner v. State*, 1963 OK CR 49, 381 P.2d 905, 908 (considering whether the running of wolf hounds was a public nuisance but concluding that it was not where "the public was [not] annoyed, injured or damaged in any way by the running of these dogs"). While Plaintiffs-Appellants cite a string of cases containing the word "property" in this Court's description of what constitutes a nuisance (Br. at 16), the use of the word "property" is unsurprising—and unhelpful—given that those cases deal with property-related claims. *See, e.g.*, *Morain v. City of Norman*, 1993 OK 149, 863 P.2d 1246, 1247 (case involving flooding that occurred on the plaintiffs' respective properties); *Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33, 35 (case involving oil and gas operations on the plaintiffs' farmland); *Nichols*, 1996 OK 118, 933 P.2d at 275 (similar; involving cattle ranch). Although nuisance cases often involve controversies between two landowners, this is because it is the norm, not because the law requires either party to be a landowner. *See generally* Restatement (Second) of Torts § 821B, *supra*, cmt. h (defining public nuisance as

"an unreasonable interference with a right common to the general public," which does not require interference with land).

In an attempt to convince this Court otherwise, Defendants-Appellants focus on *State ex rel. Wood v. State Capital Co.*, 1909 OK 200, 103 P. 1021, which involved an action to enjoin as a public nuisance the publication of advertisements for the sale and purchase of intoxicating liquor in violation of constitutional and statutory prohibitions. This Court declined to issue an injunction, explaining that criminal prosecution—not an injunction—was the proper remedy. *Id.*; *see also State ex rel. Fallis v. Mike Kelly Constr. Co.*, 1981 OK 158, 638 P.2d 455, 458 (discussing *State Capital* and "[t]reating the nuisance issue as a question of whether injunction was a proper remedy to restrain such advertisements"). But *State Capital* does not impose a bar to public nuisance actions where the elements of a statutory nuisance action are met. In *Mike Kelly Construction*, for instance, another case relied upon by Defendants-Appellants, in which this Court "reaffirm[ed] our view in *State Capital*, every crime is not a nuisance within the purview of our nuisance statutes," this Court made clear that an action for nuisance would lie if "[t]he manner in which appellants operate[d] their business" rendered "its operation a public or private nuisance." 1981 OK 158, 638 P.2d at 458; *id.* at 457 (noting that "the manner in which appellants operate their business does not render it a public or private nuisance under 50 O.S. 1971, §§ 1 and 2"). And that was precisely what the district court found here.

Specifically, the district court determined at the conclusion of trial that "Defendants' false, misleading, and dangerous marketing campaigns have caused exponentially increasing rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome," and therefore "are unlawful acts which 'annoy[s], injure[s] [and] endanger[s] the comfort, repose, health, [and]

safety of others." [DC25 ¶ 8.] Because the State made a clear showing of the public interest that was "imperiled by appellants' business operations," *Mike Kelly Constr.*, 1981 OK 158, 638 P.2d at 458, the district court properly concluded that Defendants-Appellants' conduct satisfied Oklahoma's public nuisance statute. Indeed, finding a nuisance where a business's operations resulted in drug addiction, overdose deaths, and the birth of drug-addicted babies, is a far cry from those cases declining to recognize a nuisance based on the "general public's interest that the general laws of the state be obeyed." *Id.*; *State Capital*, 1909 OK 200, 103 P. 1021.

Moreover, "'[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government.'" *Reaves*, 1903 OK 92, 74 P. at 953 (quoting *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850)). While cases in which "'a nuisance affects the health, morals, or safety of the community'" may not be frequently presented, "'the power undoubtedly exists in courts of equity thus to protect the public against injury.'" *Id.* As the *Reaves* Court made clear in sustaining the finding of a public nuisance based on a theater's harmful impact on the local community: "It is not the sale of intoxicating liquors in a lawful manner, which is authorized by their license, nor the conducting of a theater in a lawful and peaceful manner, that is complained of, *but it is the manner of running the business, the permitting of unlawful practices, and violations of law and the obligation to the public, that are complained of.* Therefore a license or licenses to operate and engage in a business so long as conducted in a lawful manner would not protect them in maintaining a public nuisance which is in violation of the laws of the territory." *Id.* at 954 (emphasis added). The same is true here.

In any event, even if Oklahoma's nuisance statutes require a connection with real

property, the district court found one. The court concluded that "the State had sufficiently shown that Defendants pervasively, systemically and substantially used real and personal property, private and public, including the public roads, buildings and land of the State of Oklahoma, to create th[e] nuisance." [DC23 ¶ 4.] Specifically, the district court found, among other things, that J&J trained their Oklahoma sales representatives "in their Oklahoma homes with regard to how spread Defendants' marketing messages," "paid speakers to deliver Defendants' messages to doctors in their Oklahoma offices," and "sent their messages into the homes of thousands of Oklahomans via computers, smart phones [and] other devices." [DC23-24 ¶ 5; *see also, e.g.*, DC4 ¶ 4; DC 9 ¶¶18-19; DC12 ¶¶ 25-27; DC13 ¶¶29-30; DC14 ¶¶ 33-34; DC16 ¶42; DC18-19 ¶¶ 49, 51, 53; DC20-21 ¶¶ 54, 56, 57.] Similar conduct occurred in other States where the State Attorneys General opioid-related actions are pending. In addition, many States, including Oklahoma, have had their public spaces, quasi-public spaces, and homes transformed by the opioid epidemic. Locations such as the offices of high-prescribing healthcare practitioners and the pharmacies at which their patients fill opioid prescriptions have attracted drug dealers and addicts. So have locations such as abandoned homes and public parks, rendering them and the surrounding private property less safe or unsafe. Likewise, family medicine cabinets have become outlets for diversion and abuse due to over-prescribing and the foreseeable failure to safely dispose of opioids. For these reasons as well, the district court's finding of a public nuisance should be affirmed.

C. Public nuisance allows abatement as a remedy.

The district court was also right to recognize that equitable abatement forms the proper remedy for the public nuisance J&J caused. Abatement, of course, is one of the listed remedies provided by statute. 50 O.S. § 8. "As to the right and jurisdiction of the courts to suppress and abate the keeping and maintaining of a common nuisance by injunction, there can be no

question . . . for the authority is expressly given there by the Legislature." *Reaves*, 1903 OK 92, 74 P. at 952.

Abatement's purpose is to "eliminat[e] or nullify[]" the nuisance. *Abatement*, Black's Law Dictionary (11th ed. 2019). And in *public* nuisance actions, abatement forms the primary means of relief, for a State "is not lightly to be required to give up quasi-sovereign rights for pay." *Tenn. Copper Co.*, 206 U.S. at 237. Thus, unlike in claims between private parties, the costs to a defendant of abating the nuisance (as opposed to paying a private plaintiff so that the conduct complained of can continue) are largely irrelevant. *Id.* at 237–38. What matters instead is that the nuisance be stopped and its effects nullified. *Id.* at 239 (noting that Georgia's right to seek the abatement of noxious fumes emanating from a copper plant in Tennessee was absolute; "[t]he possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights"). Simply put, J&J must clean up the mess it created. *See Meinders v. Johnson*, 2006 OK CIV APP 35, ¶ 42, 134 P.3d 858, 870 (affirming trial court's abatement plan requiring defendants to restore property they polluted as a result of mineral exploration).

Here, the trial court heard extensive evidence about Oklahoma's abatement plan and reasonably determined that the initial, first-year costs of abating the nuisance caused by J&J would cost approximately $465 million. That decision is consistent with the court's traditional equitable powers to fashion a remedy that abates the harm, and to retain jurisdiction to oversee the implementation of that remedy until the harm is nullified. There was no error here. *See Haenchen v. Sand Prod. Co.*, 1981 OK CIV APP 6, 626 P.2d 332, 337 (explaining that once a court finds that a nuisance is abatable, "it becomes the trial court's duty, under its equitable powers, to order it removed, prescribing the method, timing and procedure").

III. Public Nuisance Is an Important Tool in Opioid Litigation and Has Been Used by State Attorneys General Across the Country.

This history explains why public nuisance is such an important tool for State Attorneys General in the context of opioids litigation. While J&J attempts to depict the district court's approach to public nuisance as an outlier, state courts across the country have reached similar conclusions in similar cases and overwhelmingly allowed State Attorneys General to proceed with public nuisance claims against opioid manufacturers and distributors. Indeed, as detailed below, state courts in Alabama, Alaska, Arkansas, Florida, Kentucky, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and West Virginia have all allowed State Attorneys General to pursue public nuisance claims to address the devastating harms caused by various opioid manufacturers and distributors.

In Washington, for instance, which has nuisance statutes with virtually identical language to Oklahoma's statutes, *see* RCW 7.48.120-.130, three different trial courts have allowed public nuisance claims to proceed in opioid-related litigation brought by the Washington Attorney General, including in a case brought against J&J, and each has rejected the same property-based objections made here. *See, e.g.*, *State of Washington v. Purdue Pharma, LP*, No. 17-2-25505-0 SEA, 2018 WL 7892618, at *2–3 (Wash. Super. Ct. May 14, 2018) (concluding that Washington's nuisance "statute is quite clear that it applies to interference with life ***or*** property, and that interference with real property is not required"; denying motion to dismiss); *State of Washington v. McKesson Corp.*, No. 19-2-06975-9 SEA, Tr. of Mot. to Dismiss Hr'g, at 111 (Wash. Super. Ct. July 26, 2019) (finding no authority "for the proposition [] that there has to be interference with real property" in order to be a public

nuisance; denying motion to dismiss); *State of Washington v. Johnson & Johnson*, No. 20-2-00184-8SEA, slip op. at 2 (Wash. Super. Ct. June 5, 2020) (same).

The same is true across the country. Over the last several years, state courts have overwhelmingly allowed State Attorneys General and municipal governments to pursue opioid-related litigation under a public nuisance theory. *See, e.g.*, *State of South Carolina v. McKesson Corp.*, No. 2019-CP-40-04521, slip op. at 2-4 (S.C.C.P. Sept. 18, 2020) (denying motions to dismiss public nuisance claim of opioid distributors); *State of Tennessee ex rel. Slatery v. AmerisourceBergen Drug Corp.*, No. 1-345-19, slip op. at 7–9 (Tenn. Cir. Ct. July 14, 2020) (same; rejecting argument that the state was "seek[ing] to expand the doctrine" and finding that the complaint stated a claim for public nuisance based on allegations that unlawful opioid distribution resulted in the "endangerment of the health and safety of the citizens of Tennessee"); *State of Vermont v. Cardinal Health, Inc.*, No. 279-3-19, slip op. at 5–10 (Vt. Sup. Ct. May 12, 2020) (same; explaining that although nuisance began "'as a tort against land,'" "authorities make clear that 'a public nuisance does not necessarily involve interference with use and enjoyment of land'" (citations omitted)); *State of Missouri v. Purdue Pharma*, No. 1722-CC10626, slip op. at 6–13 (Mo. Cir. Ct. Apr. 6, 2020) (denying motion to dismiss public nuisance claim of opioid manufacturers, including J&J, based on "Missouri residents' right to an honest marketplace for healthcare treatment, right to public safety and order unburdened by the introduction of foreseeable dangers, such as the over-prescription and over-supply of opioids"); *In re Opioid Litig.*, No. 400000/2017, Doc. No. 3499, slip op. at 4–5 (N.Y. Super. Ct. Feb. 3, 2020) (declining to dismiss New York's public nuisance claim against opioid distributors; explaining that "[a] public nuisance need not relate to land, as [the opioid distributors] claim, but is an unreasonable interference with a public right" and also

rejecting as "unpersuasive" the argument that the action sought "to expand the doctrine of public nuisance beyond its traditional limits"); *In re Opioid Litig.*, No. 400000/2017, Doc. No. 3498, slip op. at 2–3 (N.Y. Super. Ct. Feb. 3, 2020) (declining to dismiss public nuisance claim against opioid manufacturers, including J&J); *City of Boston, et al. v. Purdue Pharma, L.P. et al (and a companion case)*, Nos. 1884-CV-2860, 1984-CV-1733, 2020 WL 977056, at *5 (Mass. Super. Ct. Jan. 31, 2020) (rejecting arguments from Janssen and others "that public nuisance is limited to property or land-based claims, and that the Complaints fail to allege a significant interference with a public right"; denying motion to dismiss public nuisance claim); *Nevada v. McKesson Corp.*, A-19-796755-B, slip op. at 2 (Nev. Dist. Ct. Jan. 8, 2020) (denying motions to dismiss public nuisance claim); *Alabama v. Endo Health Sols., Inc.*, No. 03-CV-2019-901174.00, slip op. at 11–13 (Ala. Cir. Ct. Montgomery Cty. Nov. 13, 2019) (denying motion to dismiss public nuisance claim and noting that "[t]he fact that the act done may otherwise be lawful does not keep it from being a nuisance" and that "[a] public nuisance does not necessarily involve interference with use and enjoyment of land" (citations omitted)); *Kentucky ex rel. Beshear v. Cardinal Health 5, LLC*, No. 18-CI-001013, slip op. at 24–28 (Ky. Cir. Ct. Sept. 12, 2019) (same; rejecting the argument that the state's claim was "an unprecedented attempt to regulate prescription opioids through a 'rarely-invoked common law doctrine' typically used to remedy interferences with public rights involving land use"); *New Mexico ex rel. Balderas v. Purdue Pharma L.P. et al.*, No. D-101-CV-2017-02541, slip op. at 4 (N.M. Dist. Ct. Sept. 10, 2019) (denying motions to dismiss public nuisance claim); *Alaska v. McKesson Corp., et al.*, No. 3AN-18-10023Cl, slip op. at 4–7 (Alaska Super. Ct. Aug. 28, 2019) (same where the state alleged Alaska was "facing a health and safety crisis in response to an epidemic of opioid use, overuse, and abuse" and that the distributors contributed

to "by knowingly oversupplying opioids into Alaska"); *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 3991963, at *9–12 (R.I. Super. Aug. 19, 2019) (refusing to dismiss public nuisance claim because "the State has properly identified the opioid crisis as a public right under Rhode Island law, and more specifically, the Court agrees that freedom from an overabundance of prescription opioids is a public right"); *Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.*, No. 18-CI-00846, slip op. at 2–4 (Ky. Cir. Ct. July 18, 2019) (denying motion to dismiss public nuisance claim; rejecting the defendants' "floodgate" argument that the Attorney General's action would "convert into public nuisance virtually any societal ill that affects a substantial number of people"); *Kentucky ex rel. Beshear v. Teva Pharmaceuticals, USA, Inc.*, No. 18-CI-3763, slip op. at 4–5 (Ky. Cir. Ct. July 16, 2019) (same); *Commonwealth of Massachusetts v. Purdue Pharma, L.P.*, Civil Action No. 1884-CV-01808, slip op. at 9–10 (Mass. Super. Ct. May 30, 2019) (denying motion to dismiss public nuisance claim of opioid manufacturer where the manufacturer's alleged conduct interfered with "public health and safety"; rejecting argument that the State's public nuisance claim was "simply a repackaged product liability claim"); *Kentucky ex rel. Beshear v. McKesson Corp.*, No. 18-CI-56, slip op. at 2-5, 6–10 (Ky. Cir. Ct. May 21, 2019) (denying motions to dismiss public nuisance claim of opioid distributors; observing that "citizens share the right to be free from the adverse implications of drug abuse, diversion, and overdose" and rejecting the argument that "the Attorney General seeks to expand public nuisance law beyond the scope of Kentucky case law"); *Ohio ex rel. DeWine v. McKesson Corp. et al.*, No. CVH20180055, slip op. at 1 (Ohio C.P. Madison May 20, 2019) (denying motions to dismiss public nuisance claim of opioid distributors); *State of Florida v. Purdue Pharma L.P.*, Case No. 2018-CA-001438, slip op. at 1–2 (Fla. Cir. Ct. Apr. 11, 2019) (denying motions to dismiss public nuisance claim

of opioid manufacturers including J&J); *Arkansas v. Purdue Pharma L.P., et al.*, No. CV-2018-2018., 2019 WL 1590064, at *3 (Ark. Cir. Ct., Apr. 5, 2019) (rejecting public right argument, noting "Defendants cannot seriously contend that the impacts of opiate addiction in Arkansas have not affected the general public"); *State of Vermont v. Purdue Pharma L.P.*, No. 757-9-18, slip op. at 4–6 (Vt. Sup. Ct. March 18, 2019) (denying motion to dismiss public nuisance claim against opioid manufacturer; explaining that Vermont has not limited public nuisance claims to those relating to land use issues and explaining that "the Restatement expressly says that 'a public nuisance does not necessarily involve interference with use and enjoyment of land'" (quoting Restatement (Second) of Torts § 821B cmt. h))); *Tennessee v. Purdue Pharma L.P.*, No. 1-173-18, 2019 WL 2331282, at *6 (Tenn. Cir. Ct. Feb. 22, 2019) (finding the state's complaint "adequately states a claim for public nuisance" by alleging defendant "engaged in misleading and deceptive marketing practices for the purpose of increasing opioid prescriptions and that, as a result . . . created an opioid epidemic that has endangered the health and safety of the citizens of Tennessee and has resulted in financial loss to the State"); *Kentucky ex rel. Beshear v. Mallinckrodt PLC*, No. 18-CI-00846, slip op. at 2 (Ky. Cir. Ct. Jan. 22, 2019) (denying motion to dismiss public nuisance claim); *State of Minnesota v. Purdue Pharma, L.P.*, Court File No. 27-CV-18-10788, slip op. at 9–10 (Minn. Dist. Ct. Jan. 4, 2019) (denying motion to dismiss public nuisance claim against opioid manufacturer where the state alleged the manufacturer's "marketing deceived health care providers and patients about the dangers associated with opioids and was a 'substantial factor in opioids becoming widely available and widely used in Minnesota'" and the "marketing 'misconduct' impacted opioid overdose deaths [and] increases in hospitalization" among other harms); *State v. Purdue Pharma Inc.*, No. 217-2017-CV-00402, 2018 WL 4566129, at *13

(N.H. Super. Ct. Sept. 18, 2018) (denying motion to dismiss public nuisance claim in opioid lawsuit; rejecting claim that public nuisance must be related to private property); *Alaska v. Purdue Pharma L.P.*, No. 3AN-17-09966CI, 2018 WL 4468439, at *4 (Alaska Super. Ct. Jul. 12, 2018) (denying opioid manufacturer's motion to dismiss public nuisance claim where the State of Alaska alleged the manufacturer had been a substantial factor "in creating a public health crisis and state of emergency in Alaska"); *Commonwealth v. Endo Health Sols. Inc.*, No. 17-CI-1147, 2018 WL 3635765, at *6 (Ky. Cir. Ct. Jul. 10, 2018) (denying motion to dismiss public nuisance claim where the Attorney General alleged "[t]he opioid crisis in Kentucky has caused a public health crisis and crime crisis throughout the Commonwealth"); *State, ex rel. Dewine v. Purdue Pharma L.P.*, No. 17 CI 261, 2018 WL 4080052, at *4 (Ohio Ct. Com. Pl. Aug. 22, 2018) (holding that Ohio "adequately pled public nuisance" based on allegation that opioids "unnecessarily interfere[d] with a right common to the general public") (quotation omitted); *State of South Carolina v. Purdue Pharma L.P.*, No. 2017-CP-40-04872, slip op. at 1 (S.C.C.P. Apr. 12, 2018) (denying motion for judgment on the pleadings of opioid manufacturer); *California v. Purdue Pharma L.P.*, No. 30-2014-00725287, slip op. at 1–2 (Cal. Super. Ct. Feb. 13, 2018) (denying opioid manufacturers' motion to dismiss public nuisance claim); *West Virginia ex rel. Morrisey v. Cardinal Health, Inc.*, Civ. Action No. 12-C-140, slip op. at 27 (W. Va. Cir. Ct. Feb. 19, 2016) (denying motion to dismiss public nuisance claim of opioid manufacturer); *West Virginia ex rel. Morrisey v. Cardinal Health, Inc.*, Civ. Action No. 12-C-140, slip op. at 14–19 (W. Va. Cir. Ct. Apr. 17, 2015) (denying motion to dismiss where "the state's public nuisance claim sufficiently allege[d] the safety and health and morals of the people of West Virginia ha[d] been compromised due to Defendants' alleged influx of addictive, controlled substances into West Virginia, thereby causing substantial injury");

West Virginia ex rel. Morrisey v. AmerisourceBergen Drug Corp., No. 12-C-141, 2014 WL 12814021, at *10 (W. Va. Cir. Ct. Dec. 12, 2014) ("[T]he State's public nuisance claim sufficiently alleges the safety and health and morals of the people of West Virginia has been compromised due to Defendants' alleged wrongful influx of addictive, controlled substances into West Virginia[.]"); *see also, e.g.*, *In re Nat'l Prescription Opiate Litig.*, No. 18- OP-45332, 2020 WL 1986589, at *7–8 (N.D. Ohio Apr. 27, 2020) (denying motion to dismiss public nuisance claim under Florida law; rejecting argument that "Florida does not recognize nuisance claims not tied to the use and enjoyment of property"); *In re Nat'l Prescription Opiate Litig.*, No. 17-MD-2804, 2020 WL 1669655 (N.D. Ohio Apr. 3, 2020) (same).[11]

And this is not surprising. As the evidence introduced at trial before the district court below clearly demonstrated, there can be no doubt that certain opioid manufacturers and distributors have created a crisis affecting the public at large both in Oklahoma and across the country. The effects of opioid use and abuse reach far beyond those suffering from addiction. They affect the communities whose residents are dying or debilitated by drugs; whose public and quasi-public spaces have become magnets for drug dealers and users; whose hospitals, police departments, emergency services, addiction treatment centers, and foster care providers are overwhelmed; whose children have ready access to drugs in their communities and homes; and who face criminal trafficking spurred by Defendants' conduct.

Thus, contrary to J&J's assertions, suits by State Attorneys General challenging the misconduct of opioid manufacturers and distributors are not the product of a "creative mind"

[11] *But see Delaware ex rel. Jennings v. Purdue Pharma, L.P.*, No. N-18C-01-223 MMJ, 2019 WL 446382, at *11–12 (Del. Sup. Ct. Feb. 4, 2019) (dismissing public nuisance claim); *New Jersey ex rel. Grewal v. Purdue Pharma L.P.*, No. ESX-C-245-17, 2018 WL 4829660, at *17–18 (N.J. Super. Ct. Oct. 2, 2018) (same); *North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, No. 08-2018-CV-01300, 2019 WL 2245743 (N.D. Dist. Ct. May 10, 2019) (same).

constructing a scenario "that can somehow be said to relate back" to a company's product. *Id.* at 22. Instead, these lawsuits are an attempt to abate a very real public health emergency caused by the unlawful business operations of specific operators in the prescription opioid industry, which has resulted in high rates of death and addiction, blighted public and quasi-public spaces, overwhelmed public services, and drug-addicted newborn babies. Because the opioid epidemic broadly impairs the comfort, safety, health, and security of entire communities, it is a public nuisance under Oklahoma law as well as under the law of many other states across the country.

In sum, the district court's determination that J&J violated Oklahoma's nuisance statute based on the extensive evidence presented at trial in this case, does not make Oklahoma an outlier. Far from it. Instead, the district court's decision is consistent with the majority of state courts from across the country that have overwhelmingly recognized that State Attorneys General may bring public nuisance actions to abate the catastrophic harms to the health and welfare of their States' residents caused by the actions of J&J and other prescription opioid manufacturers and distributors. Because "the power undoubtedly exists in courts of equity [] to protect the public against injury," this Court should affirm the district court's judgment in this case. *Reaves*, 74 P. at 953.

CONCLUSION

The Court should affirm the judgment below.

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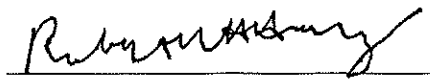

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