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Public Nuisance & the First Amendment: Free-Speech Defenses to an Expanding Tort

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PUBLIC NUISANCE & THE FIRST AMENDMENT: FREE-SPEECH DEFENSES TO AN EXPANDING TORT

Public nuisance—an ancient, common-law catch-all tort reserved for discrete, localized interferences with shared rights—is enjoying a renaissance. The doctrine sat quietly at the margins of the law for most of its long history, but has recently “awakened from a centuries-long slumber.” See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 743 (2003). Blocked highways, fouled waterways, disorderly houses that disturbed an entire neighborhood: the classic public nuisance was tied to land or to quasi-criminal conduct, controlled by the defendant, and remedied by abatement rather than open-ended damages. But now the tort is being transformed into something far more ambitious.

In the past two decades, private plaintiffs and state-and-local governments began claiming that a manufacturer creates a public nuisance not only by making or selling a lawful product (bad enough), but by *speaking* about it—through advertising, sales representatives, scientific communications, and even policy advocacy—in ways said to encourage harmful use or play down risk. With billions of dollars and nationwide policy in the balance, that move puts public nuisance on a collision course with the First Amendment.

The collision is not incidental. It is structural, and it recurs across the many forms these claims take. Sometimes the alleged nuisance is a product advertisement; sometimes it is a company’s scientific or policy advocacy, recast as a “disinformation” campaign; and, most recently, it is a social-media platform’s algorithmic design—which is inseparable from how it arranges its users’ speech. These suits also rarely travel alone. They are pleaded alongside, and folded together with, failure-to-warn claims and allegations about a defendant’s lobbying and petitioning—each of which carries its own free-speech problem.

What unites the enterprise is a single move: the plaintiff recharacterizes protected expression as conduct the law may freely abate, simply by calling it a “nuisance.” Courts have begun to recognize the mismatch, rejecting these theories on traditional tort grounds and refusing to let an amorphous nuisance standard swallow protected expression. This trend is welcome but unfinished. Wherever the liability theory reaches speech, the First Amendment answers with a defense—the commercial-speech doctrine, the rule against compelled speech, the right to petition, the protection of editorial judgment, and the bedrock prohibition on prior restraints. What remains is to make these limits more explicit, consistent, and durable—through doctrine and, where courts hesitate or err, through legislation.

I. PUBLIC NUISANCE WAS NEVER A LICENSE TO POLICE SPEECH

For centuries, public nuisance addressed concrete interferences with rights common to the public—obstruction of a highway, contamination of a common waterway, a bawdy house that fouled the peace of those around it. The defendant controlled the instrumentality of harm; the remedy was injunction or abatement; the wrong was local and ongoing. *See Gifford, supra*, at 743. The Restatement later recast the tort in sweeping terms, defining it as “an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B(1) (Am. L. Inst. 1979). But the drafters conceded the price of that generality, for where a defendant’s interference falls outside a traditional category and violates no statute, a court enforcing the tort “is acting without an established and recognized standard.” *Id.* § 821B cmt. e. If the Restatement’s version of public nuisance were a statute, it would be struck down as void for vagueness. A cause of action with no fixed boundaries is an open invitation to creative pleading—and a standing temptation to recast disfavored speech as actionable harm.

Three limits follow from that history. First, public nuisance is not a roving commission to redress every social ill. Second, it is not a substitute for product-liability law, consumer-protection statutes, or the regulatory regimes that already weigh a product's risks against its benefits. And third, it does not reach a manufacturer for harms inflicted by third parties who misuse a lawful product long after sale, when the manufacturer controls nothing. The Oklahoma Supreme Court drew precisely those lines in setting aside a \$465 million opioid judgment, holding that the State's public nuisance statute "does not extend to the manufacturing, marketing, and selling" of lawful products and that a manufacturer lacks the post-sale control the tort has always demanded. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724, 728–30 (Okla. 2021).

Plaintiffs have nonetheless tried to stretch the tort to reach how companies promote their products, and the pattern repeats across industries. In firearms litigation, cities alleged that manufacturers' marketing and distribution practices fed an illegal secondary market. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002). In lead-paint litigation, California ordered manufacturers to pay \$1.15 billion to abate a nuisance traced to their decades-old *promotion* of a then-lawful product. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 79, 91–95 (Cal. Ct. App. 2017). In opioid litigation, States claimed that "false, misleading, and dangerous" marketing created a public-health crisis. *See Johnson & Johnson*, 499 P.3d at 723. In climate litigation, localities contend that fossil-fuel producers' promotion of their products, coupled with alleged disinformation, is a public nuisance contributing to global harm. *See Mayor & City Council of Baltimore v. BP p.l.c.*, 493 Md. 427, 444, 449 (2026). Parallel theories target vaping, *see In re Juul Labs, Inc., Mktg., Sales Practices & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 645 (N.D. Cal. 2020), and, most recently, social-media platforms, *see Commonwealth v. Meta Platforms, Inc.*, 497 Mass. 384, 411–13 (2026). Each iteration makes the same essential claim: the nuisance lies in how the

defendant *spoke* about—or encouraged the use of—its lawful product.

This collision between public nuisance and the First Amendment is not new, and the Supreme Court’s answer has been consistent. On rare occasions when governments have tried to abate speech itself as a “public nuisance,” the Court has refused to let the label do the work. In *Near v. Minnesota*, a Minnesota statute branded a “malicious, scandalous and defamatory” newspaper a public nuisance and authorized its suppression by injunction; the Court struck the scheme down as a prior restraint, holding that “characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.” 283 U.S. 697, 720 (1931). Half a century later, in *Vance v. Universal Amusement Co.*, the Court held that a Texas public-nuisance statute used to enjoin the future exhibition of films was an invalid prior restraint, because the regulation of expression “must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance.” 445 U.S. 308, 315–16 (1980) (per curiam).

The lessons of these cases endure. The word “nuisance” is not an incantation that causes the First Amendment to vanish. And the tort’s signature remedy—an injunction abating the offending activity—becomes a prior restraint the instant the activity is speech. The modern suits are the same impulse in a new register; they merely reach the speech indirectly, through the labels of “marketing,” “promotion,” and “disinformation.”

II. MARKETING AND PROMOTION: CONTENT- AND SPEAKER-BASED LIABILITY

The First Amendment forbids the government from singling out speech for its content or its speaker. “[R]estrictions distinguishing among different speakers” are prohibited, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), and a law is content-based—and presumptively invalid—if it reaches particular speech “because of the topic discussed or the idea or message expressed,” *Reed v. Town of Gilbert*, 576 U.S. 155, 163

(2015). A liability theory that does the same work is no less suspect for arriving dressed as a tort. Damages and costly abatement, after all, deter as surely as a fine or an injunction; a jury verdict keyed to the content of a company’s speech is a content-based penalty by another name.

Promotion-based nuisance claims do exactly that. By design, they fasten on the content of a manufacturer’s expression—whether an advertisement stressed a benefit, a sales presentation minimized a risk, or a scientific or policy statement took a contested position on the very questions that regulators and legislatures exist to resolve. And they single out particular speakers—the maker of a disfavored product—for liability no one would dream of imposing on a journalist, an academic, or an advocacy group voicing the identical view.

The selectivity is the tell. A climate suit that targets an energy company’s advertisements and op-eds leaves untouched the newspapers that printed them, the commentators who echoed them, and the trade associations that amplified them—even though all advanced the same ideas. What separates the defendant is not a different act but a disfavored identity. The Supreme Court confronted a close analog in *Sorrell v. IMS Health Inc.*, where Vermont restricted pharmaceutical marketers’ use of prescriber data. Because the law imposed content- and speaker-based burdens on protected expression, it triggered heightened scrutiny—which the law flunked. 564 U.S. 552, 565 (2011). Liability that turns on the content of a company’s promotion, and that falls only on the disfavored speaker, demands the same exacting review.

Plaintiffs (and some judges) resist that conclusion by recharacterizing speech as something else—“marketing conduct,” or a defective attribute of the “product” itself. *Sorrell* forecloses that gambit, recognizing that speech in aid of marketing is protected expression and that the creation and dissemination of information does not forfeit its protection because some litigant would prefer to call it conduct. *See id.* at 557, 570. The burden here is direct, not incidental; imposing damages for truthful promotion is not

regulating inert behavior but penalizing expression. *Cf. Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461, 484 (2025) (recognizing that even an age-verification requirement “is a burden on the exercise of” First Amendment rights). And the form of the speech cannot be cordoned off from its substance. A risk discussed in a detailing visit, a benefit touted in an advertisement, and a scientific claim advanced in a white paper are expressive choices inseparable from the messages they carry. To punish the manner of the speaking is to punish the speech.

There is a deeper objection still. Public nuisance asks a court or jury to decide, after the fact, whether a defendant’s conduct “unreasonably” interfered with the public welfare—an open-ended weighing of a course of conduct’s social costs against its benefits. That may be a serviceable way to police a clogged culvert or a blocked road. It is a forbidden way to police speech. The Supreme Court has rejected the premise that the First Amendment protects only expression that survives “an ad hoc balancing of relative social costs and benefits.” *United States v. Stevens*, 559 U.S. 460, 470 (2010).

A nuisance standard that lets a jury brand a marketing campaign “unreasonable,” and thus actionable, is exactly that forbidden balance—and a standardless one besides. The defect is compounded when the standard governs speech. A rule offends due process when it is “unclear as to what fact must be proved.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A rational speaker who cannot know in advance which advertisement, study, or public statement may later be deemed a “nuisance” will simply stop speaking (or say less). Vagueness becomes a censor when the conduct it sweeps in is expression.

III. INTERMEDIATE SCRUTINY PRECEDENTS DO NOT APPLY

Defending these claims, plaintiffs sometimes reach for recent First Amendment decisions that applied less than strict scrutiny to speech-adjacent regulation. None rescues a promotion-based nuisance theory. Each rested on a narrow premise that has nothing to do with penalizing a manufacturer for what it said about a lawful product.

Free Speech Coalition upheld a Texas law requiring age verification on commercial websites composed largely of material obscene to minors. The Court treated obscenity as unprotected for minors and the verification requirement as akin to a regulation of expressive conduct in that narrow setting. 606 U.S. at 482, 485. The opinion says nothing about fully protected speech—product marketing, scientific debate, or advocacy about health, energy, or public policy. As *Brown v. Entertainment Merchants Ass’n* holds, the government may not conjure new categories of disfavored speech merely because it deems the message harmful, even to children. 564 U.S. 786, 794 (2011). Stretching *Free Speech Coalition* to cover ordinary commercial and scientific promotion would do exactly what *Brown* forbids.

TikTok Inc. v. Garland is equally inapposite. That per curiam opinion stressed the “inherent narrowness” of its holding, which turned on a foreign-adversary-controlled platform, vast data collection, acute national-security concerns, and an emergency posture; the Court warned that a law aimed at any other speaker would require a wholly distinct inquiry. 604 U.S. 56, 73 (2025). A nuisance suit aimed at a domestic manufacturer’s marketing, or at a producer’s participation in public debate, bears no resemblance to that singular national-security judgment.

Lower courts that have read these decisions more broadly are unpersuasive. The Eleventh Circuit’s divided stay order in *Computer & Communications Industry Ass’n v. Uthmeier*, 2025 WL 3458571 (11th Cir. Nov. 25, 2025), treated a focus on “social media platforms” as a neutral regulation of format rather than a content-based choice to burden particular speech. That redescription cannot launder a content- and speaker-based restriction into a neutral one—and it is the very same maneuver at the heart of promotion-based nuisance theory. As *Brown* put it, the basic principles of free speech “do not vary” when a new medium appears. 564 U.S. at 790. Calling speech a “product,” a “marketing practice,” or a “nuisance” does not change those principles either.

IV. BEYOND ADVERTISEMENTS: COMPELLED WARNINGS, PETITIONING, AND CURATED PLATFORMS

Marketing is only the most visible front. These litigation campaigns reach other kinds of speech as well, and each carries its own First Amendment defense. Consider first the mirror image of the marketing claim: liability for *failing to speak*. Public nuisance is routinely pleaded alongside failure-to-warn counts—the climate cases are an example—that fault a company not for what it said but for what it didn’t say. And these suits would remedy the silence by forcing the disclosure the plaintiff prefers. Compelling speech, however, is itself a First Amendment burden. The government may require only “purely factual and uncontroversial information” to “dissipate the possibility of consumer confusion or deception.” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

A disclosure that takes sides in a genuine scientific or policy debate is not uncontroversial and thus may not be forced. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768–69 (2018). That is why the Ninth Circuit struck California’s compelled cancer warning for glyphosate: because the chemical’s carcinogenicity is fiercely contested, the warning was neither factual nor uncontroversial. *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1279 (9th Cir. 2023). That case involved a compelled-disclosure statute rather than a nuisance suit, but the principle is the same, and it answers any tort—whether labeled failure to warn or nuisance—that would punish a manufacturer for declining to brand its own product dangerous on a question science has not resolved. Forcing a speaker to carry the government’s disputed message is no less a First Amendment injury than forbidding it to speak its own; the State as ventriloquist is no better than the State as censor.

A second front is the defendant’s dealings with government itself. The opioid, tobacco, and climate suits often fold a company’s lobbying, its funding of research and advocacy, and its participation in rulemaking into the alleged “campaign.” But

“[I]obbying is of course a pejorative term,” and “another name for it is petitioning for the redress of grievances. It is under the express protection of the First Amendment.” *United States v. Fin. Comm. to Re-Elect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974). And so the Petition Clause forbids tort liability premised on it. That is the constitutional root of the *Noerr-Pennington* doctrine, under which efforts to influence legislative, executive, or administrative action are immune from liability even when undertaken for frankly self-interested ends. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The immunity is not unlimited—“sham” petitioning that is a mere cover for harassment lies outside it—but a company cannot be made to pay damages, or to abate a “nuisance,” for having asked its government to act. If some portion of a nuisance claim rests on protected petitioning, that part of it fails at the threshold.

A third front has opened most recently against social-media platforms—and it is the least settled of the three. Plaintiffs have been careful to frame the nuisance as the platforms’ *design*: engagement-maximizing features such as infinite scroll, autoplay, and relentless notifications, pleaded as defects in a “product” rather than as the content of the user’s post. On that framing, courts have allowed the claims to proceed, while largely leaving any free-speech defense for another day. See *Meta Platforms, Inc.*, 497 Mass. at 413 n.33 (sustaining public nuisance and related claims under Section 230 without reaching the First Amendment). But the framing is contestable, and the platforms should contest it. How a feed is composed, sequenced, and served is the very editorial activity the First Amendment protects—the discretion it secures to a newspaper deciding what to run. See *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024). Where a challenged “feature” is in substance the platform’s curation of its users’ speech, calling it “product design” is the same wordplay that runs through all these suits—relabeling protected expression to slip it into a box the law may freely abate. True, the line between genuinely non-expressive design and protected editorial

judgment is real and must be drawn with care. But it is a First Amendment line, and the label a plaintiff chooses to slap on its tort claim cannot erase it.

Across all these fronts the plaintiff's move is identical, and identically flawed: to recast protected expression—an advertisement, a contested warning, a petition, an editorial judgment—as conduct the law may freely abate, by affixing the word “nuisance.” In *Near*, the Supreme Court settled nearly a century ago that the label cannot bear that weight. Neither the antiquity of the tort nor the breadth of its modern definition changes the answer today.

V. COURTS HAVE BEGUN TO PUSH BACK—AND LEGISLATURES SHOULD FINISH THE JOB

The correction is already underway. When the Ohio Supreme Court allowed a marketing-based nuisance claim to proceed against firearms manufacturers, the legislature answered by amending the State's product-liability act to abrogate such common-law claims. *See Beretta*, 768 N.E.2d at 1143; Ohio Rev. Code Ann. § 2307.71(B). The Oklahoma Supreme Court, by a 5–1 vote, set aside the opioid verdict rather than convert a routine product-liability case into a nuisance suit. *Johnson & Johnson*, 499 P.3d at 724. Other courts have reached the same result on familiar tort-law grounds—the absence of control after sale, the lack of a genuine land-based public right, or the failure to trace a particularized harm to the defendant's own speech.

Climate plaintiffs have fared no better. In March 2026, the Maryland Supreme Court threw out Baltimore's promotion-and-deception theory, holding the claims preempted and, in any event, not cognizable under state law. The court refused to accept the plaintiffs' recharacterization of an emissions-regulation suit as a deceptive-marketing case, branding a public nuisance claim premised on worldwide emissions “so far afield from any area of traditional state or local responsibility that it cannot be seriously contemplated.” *Baltimore*, 493 Md. at 500. A companion decision rejected an opioid public-nuisance theory against pharmacy intermediaries, declining to

recognize a free-floating public “right” to be spared product-related harm. *See Express Scripts, Inc. v. Anne Arundel County*, 493 Md. 329, 413–14 (2026). The throughline is unmistakable: when plaintiffs must prove that specific promotional speech created a localized, abatable nuisance under historic standards, the theory collapses; when they ask a court to treat promotion itself as the nuisance, they ask for far too much.

But much work remains to be done. Despite reaching the right result, Oklahoma also lays bare the constitutional stakes the courts so far have managed to avoid. The trial court there brushed aside the manufacturer’s First Amendment defense by deeming all its challenged communications—scientific and policy statements included—commercial in nature and therefore freely regulable. That move is the heart of the problem. Whether speech is commercial turns on its content and character, not on the speaker’s economic interest. Under *Bolger v. Youngs Drug Prods. Corp.*, neither a profit motive nor a reference to one’s own product is enough, standing alone, to convert scientific or policy speech into commercial speech. 463 U.S. 60, 66–67 (1983). A court that reflexively brands a manufacturer’s every statement “commercial” has not answered the constitutional question; it has assumed it away. The Oklahoma Supreme Court reversed on state-law grounds and never reached that question. *See Johnson & Johnson*, 499 P.3d at 724. That the half-billion-dollar judgment was undone is reassuring; that a trial court could impose it on two decades of speech without serious First Amendment scrutiny is not. The next such case may not unravel so conveniently on other grounds.

The First Amendment supplies an independent reason for restraint, quite apart from the tort’s own limits—and the protection a claim must overcome depends on which speech it actually targets. To the extent that a suit reaches genuine product marketing, the governing framework is the commercial-speech doctrine of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and *Sorrell*: truthful, non-misleading promotion may be burdened only to directly advance

a substantial interest, and only by narrowly tailored means. Even there, penalizing the speech deprives the public of information it has its own First Amendment right to receive. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

But these claims rarely stop at the advertisement. When the alleged nuisance is a producer’s scientific claims, its statements in public debate, or its advocacy before legislatures and agencies, the suit reaches speech on matters of public concern that stands “at the heart of the First Amendment’s protection.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). And when tort liability implicates the right to petition, it offends the core of the Amendment, not its commercial periphery. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 405–07 (2011) (Scalia, J., concurring). False or misleading commercial speech, to be sure, enjoys no protection. But proving knowing falsity across decades of advertising, detailing, and public advocacy is a demanding task that must be carried with particularity. A vague nuisance standard cannot be deployed to shortcut that proof, to shift the burden onto speakers to establish the innocence of their marketing, or to chill the very debate the Constitution protects. Least of all may it be used to declare one side of a live scientific or policy dispute false—and punishable—by the verdict of a single jury.

Legislatures can and should reinforce these limits. States that have expanded public nuisance—by statute or by slow judicial drift—can restore its traditional contours, making plain that the tort does not reach the marketing or sale of lawful products absent the classic elements of control, a genuine common public right, and a particularized, abatable harm. Several States have already shown the way. *See* 2026 Kan. Sess. Laws ch. 148 (S.B. 462) (enacted over gubernatorial veto Apr. 8, 2026; eff. July 1, 2026); Mont. Code Ann. §§ 27-30-101 to -204 (2025) (enacted by H.B. 791, 2025 Mont. Laws ch. 531, eff. for causes of action accruing on or after Oct. 1, 2025); Ohio Rev. Code Ann. § 2307.71(A)(13) (2025); Utah Code Ann. §§ 78B-6-1101 to -1115 (2026)

(as amended by H.B. 591, 2026 Utah Laws ch. 362, eff. May 6, 2026). Reforms of that kind leave the balancing of a product’s risks and benefits where it belongs: with product-liability law, with consumer-protection statutes, and with the expert agencies that Congress and the States have empowered to do exactly that work.

CONCLUSION

Public nuisance has a legitimate, if modest, place in American law. It is not a roving license to regulate how companies speak about lawful goods, how they take part in public debate, or how consumers use lawful products the government has already approved for sale. When plaintiffs try to make it one, they distort an ancient doctrine, imperil protected speech, and ask courts to perform regulatory work the Constitution assigns to the political branches.

The First Amendment stands in the way—and it should. Whether the speech is an advertisement, a contested warning, a petition, or a platform’s editorial judgment, a liability theory triggered by its content must run the gauntlet the Constitution erects—strict scrutiny for content- and speaker-based burdens, the compelled-speech and prior-restraint doctrines, the right to petition—and most such theories will not survive the trip. The courts that have begun to cabin these claims are on firm ground. The task now is to make those limits explicit and lasting, in steady recognition that the persuasive power of speech is not a defect for the law to cure but a feature of the constitutional order to be safeguarded.

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