

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF RENO,

Appellant,

vs.

TEVA PHARMACEUTICALS USA,
INC.; CEPHALON, INC.; ENDO
HEALTH SOLUTIONS, INC.; ENDO
PHARMACEUTICALS INC.;
ALLERGAN USA, INC.; ALLERGAN
FINANCE, LLC F/K/A ACTAVIS,
INC. F/K/A WATSON
PHARMACEUTICALS, INC.;
ACTAVIS PHARMACY, INC. F/K/A
WATSON PHARMA, INC.; AND
ACTAVIS LLC,

Respondents.

Supreme Court No. 85412

District Court Case No.
CV18-01895

Electronically Filed
Apr 15 2023 02:46 PM
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX VOLUME 8

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of April 2023, I served a true and correct copy of the foregoing **APPELLANT'S APPENDIX VOLUME 8** upon each of the parties by electronic service through the E-Flex rules of service.

By: /s/ Jennifer Lopez
An Employee of EGLET ADAMS

In the Matter Of:

Endo Health Solutions vs City of Reno

ORAL ARGUMENT TRANSCRIPTION

January 05, 2021

Job Number: 716340

1	IN THE SUPREME COURT OF THE STATE OF NEVADA	
2		
3		
4	ENDO HEALTH SOLUTIONS, INC.; ENDO) CASE NO. 81121
	PHARMACEUTICALS INC.; TEVA)
5	PHARMACEUTICALS USA, INC.; MCKESSON)
	CORPORATION; AMERISOURCEBERGEN DRUG)
6	CORPORATION; CARDINAL HEALTH, INC.;)
	CARDINAL HEALTH 6 INC.; CARDINAL)
7	HEALTH TECHNOLOGIES LLC; CARDINAL)
	HEALTH 108 LLC, D/B/A METRO MEDICAL)
8	SUPPLY; CEPHALON, INC.; ALLERGAN USA,)
	INC.; ALLERGAN FINANCE, LLC, F/K/A)
9	ACTAVIS, INC., F/K/A WATSON)
	PHARMACEUTICALS, INC.; WATSON)
10	LABORATORIES, INC.; ACTAVIS PHARMA,) ORAL ARGUMENT
	INC., F/K/A WATSON PHARMA, INC.; AND) BEFORE THE
11	ACTAVIS LLC;) SUPREME COURT OF
) THE STATE OF
12	Petitioners,) NEVADA
)
13	v.) JANUARY 5, 2021
)
14	THE SECOND JUDICIAL DISTRICT COURT OF)
	THE STATE OF NEVADA, IN AND FOR THE)
15	COUNTY OF WASHOE; AND THE HONORABLE)
	BARRY L. BRESLOW, DISTRICT JUDGE,)
16)
	Respondents.)
17)
	and)
18)
	CITY OF RENO,)
19)
	Real Party in Interest.))
20	_____)
21		
22	Reported By Kele R. Smith, NV CCR No. 672, CA CSR No. 13405	
23	Job No. 716340	
24		
25		

1 ORAL ARGUMENT,
2 Before the Supreme Court of the State of Nevada, Reno,
3 Nevada, on January 5, 2021, at 10:03 a.m., before Kele
4 R. Smith, Certified Court Reporter, in and for the State
5 of Nevada.

6

7 APPEARANCES:

8 The Supreme Court En Banc Court:

9 CHIEF JUSTICE JAMES W. HARDESTY
10 JUSTICE ELISSA F. CADISH
11 JUSTICE DOUGLAS HERNDON
12 JUSTICE SILVER
13 JUSTICE STIGLICH

14 For the Petitioners:

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I N D E X

ARGUMENT

PAGE

By Ms. Lundvall

4, 38

By Mr. Eglet

19

1 RENO, NEVADA; JANUARY 5, 2021

2 10:03 A.M.

3 -oOo-

10:28:57

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10:28:57

5

CHIEF JUSTICE HARDESTY: Good morning, Counsel.

10:29:11

6

This case -- the first case on the oral argument

10:29:14

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calendar in the En Banc Court on January 5th is Endo

10:29:20

8

Health Solutions, Inc. v. District Court, Real Party in

10:29:27

9

Interest City of Reno, Case No. 81121.

10:29:31

10

I'd like to acknowledge and welcome newly sworn

10:29:39

11

in Justice Douglas Herndon. From a historical

10:29:46

12

standpoint, this will be the Justice's first oral

10:29:51

13

argument as a Justice on the Court.

10:29:56

14

JUSTICE HERNDON: Thank you, Justice Hardesty.

10:29:59

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Chief Justice Hardesty. Sorry. I apologize.

10:30:02

16

CHIEF JUSTICE HARDESTY: Are counsel ready to

10:30:04

17

proceed?

10:30:05

18

MS. LUNDVALL: We are, Your Honor.

10:30:06

19

MR. EGLET: We are, Your Honor.

10:30:08

20

CHIEF JUSTICE HARDESTY: All right. Mr.

10:30:09

21

Polsenberg or Ms. Lundvall, if you're ready to proceed,

10:30:09

22

let's get started.

10:30:13

23

ARGUMENT

10:30:13

24

MS. LUNDVALL: May it please the Court, my name

10:30:15

25

is Pat Lundvall, and I present on behalf of all

10:30:19 1 Petitioners who manufacture and distribute lawful,
10:30:23 2 FDA-approved prescription medications through licensed
10:30:25 3 physicians and pharmacies throughout our nation,
10:30:28 4 including the state of Nevada. I intend to reserve ten
10:30:32 5 minutes of my time for rebuttal.

10:30:35 6 Nevada has 16 counties and 19 incorporated
10:30:40 7 municipalities or cities. At present, of those 35
10:30:44 8 counties and cities, 24 have brought separate lawsuits
10:30:49 9 in separate jurisdictions. All lawsuits, with minor
10:30:53 10 exception, have been filed against these Petitioners or
10:30:56 11 their corporate affiliates. All of these separate
10:30:59 12 lawsuits make the exact same material allegations
10:31:03 13 concerning the marketing and distribution of opioid
10:31:07 14 prescription medications. All suits seek the exact same
10:31:11 15 perspective in injunctive and declaratory, in punitive
11:56:37 16 and medical monitoring relief and the exact same type of
11:56:37 17 damages. In fact, the Prayers For Relief on 21 of those
11:56:37 18 lawsuits are verbatim. While the language on three of
11:56:37 19 them are different, they ask for the same essential
11:56:37 20 relief, and that relief is not limited to compensatory
11:56:38 21 damages.

11:56:38 22 Each may require a separate trial. Given the
11:56:38 23 separateness of each lawsuit, there's a substantial risk
11:56:38 24 of disparate results. Disparate results may lead to a
11:56:38 25 patchwork of relief or no relief for Nevadans.

11:56:38 1 Consider: What if Nye County is successful but the City
11:56:38 2 of Las Vegas is not? All of these lawsuits seek
11:56:38 3 statewide injunctive relief to stop the promotion and
11:56:38 4 marketing of opioids in Nevada. What the if the City of
11:56:38 5 Reno loses but the city of Wendover prevails? Whose
11:56:38 6 injunction is going to apply? Moreover, why do the
11:56:38 7 cities and counties get multiple opportunities to
11:56:38 8 request the same relief? With 24 separate lawsuits, the
11:56:38 9 risk of disparate results is real. All of these
11:56:38 10 separate lawsuits have been filed by a private law firm,
11:56:38 11 and all 24 echo the material allegations found in the
11:56:38 12 Complaint filed by the State of Nevada, also against
11:56:38 13 these Petitioners, and also filed by this same private
11:56:38 14 law firm.

11:56:38 15 The single issue before this Court does not
11:56:38 16 address the legal liability of any of these Petitioners.
11:56:38 17 Those are issues for another day. Instead this writ
11:56:38 18 examines whether Nevada law grants the City of Reno, as
11:56:38 19 a political subdivision of the state of Nevada, the
11:56:38 20 power to bring its lawsuit.

11:56:38 21 The answer to that question requires a
11:56:38 22 straightforward application of the plain meaning of a
11:56:38 23 simple language of a statute that was enacted by our
11:56:38 24 legislature in 2015. The statute is found in
11:56:38 25 Chapter 268. It is specific to cities who has a

11:56:38 1 counterpart specific to counties, and that's found in
11:56:38 2 Chapter 244.

11:56:38 3 Rarely has our legislature been given a more
11:56:39 4 clear road map for this Court to follow, and rarely has
11:56:39 5 a litigant like the City of Reno made this Court's job
11:56:39 6 easier in applying that statute, given the allegations
11:56:39 7 found within the four corners of the City's Complaint.
11:56:39 8 The analysis under the statute is pretty simple. Has
11:56:39 9 Nevada's legislature granted an express or an implied
11:56:39 10 power to the City of Reno to file the lawsuit at issue?

11:56:39 11 If the answer to that is no, the second question
11:56:39 12 is: Does the filing of the lawsuit fit the single
11:56:39 13 exception found within the statute for a very
11:56:39 14 specifically and very uniquely defined matter of local
11:56:39 15 concern?

11:56:39 16 And if the answer to that question is no, then
11:56:39 17 the City did not have the power to file its lawsuit and
11:56:39 18 it must be dismissed as ultra vires.

11:56:39 19 Let me turn to the details of the statute, but
11:56:39 20 even those details aren't particularly difficult. As to
11:56:39 21 the legislature's specific road map, NRS 268.001
11:56:39 22 Subsection 3 is the starting point. That starting point
11:56:39 23 asked this Court to first determine whether Nevada's
11:56:39 24 constitution or Nevada's legislature expressly granted
11:56:39 25 power to the City of Reno to file its lawsuit. We

11:56:39 1 pointed out in our petition that there was no express
11:56:39 2 grant of power. There's nothing within Nevada's
11:56:39 3 constitution, the City's charter, or any statute that's
11:56:39 4 been enacted by our legislature that expressly granted
11:56:39 5 power to the City to file its lawsuit advancing the
11:56:39 6 claims that it did. In its answer in brief, the City of
11:56:39 7 Reno did not contend that they possessed any express
11:56:39 8 power.

11:56:39 9 Chapter 268 also speaks to implied powers, but
11:56:39 10 those powers are only to be found as necessary to
11:56:39 11 protect or further an express power. In other words,
11:56:39 12 implied powers are derivative of express powers --

11:56:39 13 JUSTICE STIGLICH: Ms. Lundvall --

11:56:39 14 MS. LUNDVALL: -- but without an express power --

11:56:39 15 JUSTICE STIGLICH: Ms. Lundvall, may I ask you a
11:56:39 16 quick question before we move forward? Can you point to
11:56:39 17 any case law from any jurisdiction that suggests
11:56:40 18 Dillon's Rule limits a city's ability to sue for damages
11:56:40 19 as opposed to limiting a city's ability to pass law or
11:56:40 20 an ordinance or a legislative function? Do you have any
11:56:40 21 case from anywhere where Dillon's Rule has been implied
11:56:40 22 to prohibit a city from suing or being sued?

11:56:40 23 MS. LUNDVALL: In essence, what you're getting to
11:56:40 24 is whether or not there's a lawsuit exception to
11:56:40 25 Dillon's Rule found within the statute.

11:56:40 1 JUSTICE STIGLICH: Or whether Dillon's Rule even
11:56:40 2 applies to suing or being sued.

11:56:40 3 MS. LUNDVALL: Understood, Your Honor. And
11:56:40 4 that's one of the things that, you know, the City
11:56:40 5 contends and the District Court agreed, that somehow
11:56:40 6 that there was this lawsuit exception.

11:56:40 7 Five reasons why, in fact, the lawsuit exception
11:56:40 8 does not exist. If you look at the controlling text of
11:56:40 9 the statute, case law from this Court, case law from
11:56:40 10 other jurisdictions, the City's concession that it made
11:56:40 11 below that it could not accomplish by an ordinance what
11:56:40 12 it is seeking to accomplish by its lawsuit in a pretty
11:56:40 13 real and practical application.

11:56:40 14 First, if you turn to 268.001 Subsection 3, it
11:56:40 15 expressly states that "cities possess and may exercise
11:56:40 16 only the following powers and no others." The language
11:56:40 17 "and no others" clearly encompasses making a decision
11:56:40 18 and acting on a decision to litigate. There's no
11:56:40 19 general exception to -- in the statute for litigating.
11:56:40 20 When you look at other statutes, Your Honor, that
11:56:40 21 specifically define a city's power, you find very
11:56:40 22 specific express grants of power to litigate. It's in
11:56:40 23 the form of hospital liens or inmate reimbursement.

11:56:40 24 Those express grants of power also include
11:56:40 25 certain procedural requirements. If there was some type

11:56:40 1 of a general lawsuit exception to Dillon's Rule or to
11:56:40 2 the statute, then those specific grants of power would
11:56:40 3 be superfluous. And this Court has been loathe to find
11:56:40 4 language within statutes to be superfluous, especially
11:56:40 5 when, in fact, that you find express language to the
11:56:40 6 contrary.

11:56:40 7 Next, when you look at this Court's decision in
11:56:40 8 Rona, it made clear that all acts beyond the scope of
11:56:40 9 the powers granted are void. Certainly all acts by a
11:56:41 10 city must include making a decision to litigate and then
11:56:41 11 acting on that decision --

11:56:41 12 JUSTICE SILVER: Ms. Lundvall, what about --

11:56:41 13 MS. LUNDVALL: -- specifically for --

11:56:41 14 JUSTICE SILVER: Excuse me. Ms. Lundvall?

11:56:41 15 MS. LUNDVALL: Yes?

11:56:41 16 JUSTICE SILVER: What about NRS 268.4124
11:56:41 17 regarding abatement of chronic nuisances and the civil
11:56:41 18 penalties for failure to abate, with recovery of money
11:56:41 19 expended by the city? How do you distinguish that
11:56:41 20 particular specialized statute from perhaps what
11:56:41 21 plaintiff is trying to allege in the First Amended
11:56:41 22 Complaint here with the nuisance?

11:56:41 23 MS. LUNDVALL: One of the things, Your Honor, if
11:56:41 24 you look at that statute as well, it has certain
11:56:41 25 procedural requirements. None of those procedural

11:56:41 1 requirements were met. And, in fact, the City
11:56:41 2 acknowledged that it was not seeking as far as damages
11:56:41 3 pursuant to that particular statute. It acknowledged
11:56:41 4 that it had no express power, then, that was set forth
11:56:41 5 within any statute or its charter.

11:56:41 6 But to go back to Justice Stiglich's question,
11:56:41 7 one of the things that I think that you can look at in
11:56:41 8 the converse, and that is this: That there is no case
11:56:41 9 law that was brought by the City of Reno that
11:56:41 10 specifically permitted litigation as some type of an
11:56:41 11 exception then to the application of Dillon's Rule.

11:56:41 12 In contrast, the highest courts in Colorado and
11:56:41 13 in Missouri -- and we brought you those cases -- applied
11:56:41 14 Dillon's Rule to bar lawsuits as being ultra vires. We
11:56:41 15 also brought you case law, then, from the United States
11:56:41 16 Supreme Court and throughout the U.S. identifying that
11:56:42 17 there's no real meaningful difference between regulation
11:56:42 18 through litigation or regulation through ordinance or
11:56:42 19 legislation. On the record the City admitted that it
11:56:42 20 could not seek via ordinance the same relief that it is
11:56:42 21 seeking in this litigation.

11:56:42 22 But lastly, let's be practical. The City engaged
11:56:42 23 in many acts of governance or decision making before it
11:56:42 24 chose to litigate. The City had to agendize and discuss
11:56:42 25 publicly whether or not it was going to litigate. It

11:56:42 1 heard presentation on that item. City councilmen voted
11:56:42 2 on that agenda item. The city councilmen directed the
11:56:42 3 private law firm to act on its behalf. Each one of
11:56:42 4 those acts was an act on governance, and the statute
11:56:42 5 that this Court is being asked to apply is founded upon
11:56:42 6 Dillon's Rule in it forbids any act or exercise of power
11:56:42 7 that's not affirmatively granted by the legislature.

11:56:42 8 JUSTICE STIGLICH: But, Ms. Lundvall, how is the
11:56:42 9 city initiating a tort lawsuit an exercise of
11:56:42 10 governmental power? Once the City files a lawsuit, it's
11:56:42 11 a litigant like any other person. It's bringing a
11:56:42 12 lawsuit pursuant to the same laws that govern everyone.
11:56:42 13 If the Court hears a case on its merits, it will treat
11:56:42 14 Reno as it would any private litigant. If Reno wins,
11:56:42 15 then the Court will exercise course of power to enforce
11:56:42 16 the law, not Reno. So how is that -- if you can just
11:56:42 17 work with my premise there, how does this -- how do you
11:56:42 18 square that?

11:56:42 19 MS. LUNDVALL: Oh, I square that, Your Honor, I
11:56:42 20 guess, with an example. Right now, as far as the City
11:56:42 21 is contending that somehow because it fits within the
11:56:42 22 health and safety and welfare of either its city
11:56:42 23 residents or the county residents, that they have the
11:56:42 24 power then by which to protect that. We are now still
11:56:42 25 in a pandemic. Let's say that the city council chose to

11:56:42 1 bring a lawsuit that said, "I want a declaration from
11:56:42 2 the Court that says my stores can open in my
11:56:42 3 jurisdiction and that I don't have to follow any
11:56:42 4 governors's mandate.

11:56:42 5 JUSTICE STIGLICH: Right.

11:56:42 6 MS. LUNDVALL: Or let's say that it wants to
11:56:42 7 bring some type of litigation in that regard. Those
11:56:43 8 types of acts are acts of governance, and the statute is
11:56:43 9 clear that any act that is not expressly or impliedly
11:56:43 10 delegated to the City is not permitted, unless it falls
11:56:43 11 within a matter of local concern --

11:56:43 12 JUSTICE CADISH: Ms. Lundvall, I apologize. Ms.
11:56:43 13 Lundvall, aren't the claims that are being asserted, the
11:56:43 14 tort claims that are being asserted generally applicable
11:56:43 15 common law claims that are not unique to a city as a
11:56:43 16 litigant? Like, aren't they just seeking to apply state
11:56:43 17 common law that governs different kinds of tort claims,
11:56:43 18 fraud, or, you know, whatever the claims are that
11:56:43 19 they've asserted? So aren't they just applying
11:56:43 20 generally applicable law?

11:56:43 21 MS. LUNDVALL: Respectfully, Your Honor, they are
11:56:43 22 not. When you look at the Prayers For Relief, what
11:56:43 23 you'll see is this: They're asking for injunctive,
11:56:43 24 perspective, declaratory relief, medical monitoring,
11:56:43 25 punitive damages statewide. Each one of these lawsuits

11:56:43 1 goes beyond the four corners of its geographic location,
11:56:43 2 and it impacts, then, residents in other counties and in
11:56:43 3 other cities. And the fact that it does do that
11:56:43 4 demonstrates that they are not seeking to address a
11:56:43 5 matter of local concern, and, therefore, the issue, it
11:56:43 6 does not singularly affect either the City of Reno or
11:56:43 7 any of the other individual counties or any of the other
11:56:43 8 cities. Without an express --

11:56:43 9 CHIEF JUSTICE HARDESTY: Ms. Lundvall, this is
11:56:43 10 Justice Hardesty. On the issue of local concern, I
11:56:43 11 wanted to ask you -- and I'll ask Mr. Eglet the same --
11:56:43 12 it does not appear from the Judge's order that the Judge
11:56:43 13 applied the definition -- statutory definition governing
11:56:43 14 a matter of local concern, but rather substituted a
11:56:43 15 health/safety explanation for what is a local concern.
11:56:43 16 Could you comment on that and its consequence if that's
11:56:43 17 the case?

11:56:43 18 MS. LUNDVALL: Yes, Your Honor. One of the
11:56:43 19 things that the findings that were made by the District
11:56:43 20 Court expressly found, that in fact that the City's
11:56:43 21 Complaint sought to impact others beyond its four
11:56:44 22 corners. And it also recognized that the conduct that
11:56:44 23 was at issue was substantially regulated by federal
11:56:44 24 agencies.

11:56:44 25 Those are the two definitions that fit within a

11:56:44 1 matter of local concern. Once those findings were made,
11:56:44 2 it put it outside of a matter of local concern. The
11:56:44 3 subset then to that section, which is NRS 268.003, makes
11:56:44 4 clear that the examples in the subset cannot expand or
11:56:44 5 change the specific definition that is found under the
11:56:44 6 first clause, then, of that particular statute.

11:56:44 7 And, therefore, we believe that that was error.
11:56:44 8 Without an express or implied power or a matter of local
11:56:44 9 concern power, the City was without power to litigate,
11:56:44 10 and, therefore, we would ask this Court to find this
11:56:44 11 lawsuit then as ultra vires and dismiss.

11:56:44 12 CHIEF JUSTICE HARDESTY: I'd like to circle back
11:56:44 13 and give you some additional time because we've asked
11:56:44 14 you some questions -- and we'll do the same for Mr.
11:56:44 15 Eglet -- but I'd like to circle back to some questions
11:56:44 16 that Justice Stiglich asked, and it relates to
11:56:44 17 Subsection 1(a) of the statute regarding express powers.
11:56:44 18 Um, it was -- I'll be frank to say that in reading the
11:56:44 19 statute, it seemed to me of interest to note that the
11:56:44 20 preface goes into whether or not the powers are
11:56:44 21 expressed either by the Constitution, the statute, or
11:56:44 22 city charter. In looking at -- I'm trying to clarify
11:56:44 23 the argument here. Is it your position that the City
11:56:44 24 charter does not contain any express delegation of
11:56:44 25 powers to sue, or is it your argument that the City of

11:56:44 1 Reno didn't argue that? Or both? Or something else?

11:56:44 2 MS. LUNDVALL: It is both. It's both, Your
11:56:44 3 Honor. There was no express power that was articulated
11:56:44 4 by the City of Reno in its Complaint. As when you look
11:56:44 5 at the Reno city charter, what you're referring to is
11:56:44 6 there's a general provision that identifies the capacity
11:56:44 7 of a city, an incorporated municipality, or a county
11:56:44 8 then to sue or be sued.

11:56:45 9 CHIEF JUSTICE HARDESTY: Right.

11:56:45 10 MS. LUNDVALL: That language has been
11:56:45 11 specifically defined by other jurisdictions,
11:56:45 12 particularly Colorado and Missouri, then, as not being a
11:56:45 13 specific identification of a power, but it's akin to a
11:56:45 14 capacity argument. And, therefore, when you look at the
11:56:45 15 specific express authorizations, examples of which that
11:56:45 16 we brought to you in our reply brief, that expressly
11:56:45 17 identify when a city has the power to litigate, our
11:56:45 18 legislature has been quite clear when they have that
11:56:45 19 power, and there is no articulated specific power to
11:56:45 20 bring the lawsuits that are at issue here.

11:56:45 21 And I use this as an example in the sense of the
11:56:45 22 inmate litigation, the hospital liens. There are
11:56:45 23 express direct statutes on point identifying that a
11:56:45 24 city, if damaged, make seek compensatory damages for
11:56:45 25 that kind of relief. It also has certain procedural

11:56:45 1 requirements expressed within there. If the city
11:56:45 2 charter were enough -- which we submit that it is not,
11:56:45 3 and -- because it just simply lays out a general
11:56:45 4 capacity argument -- then you would find those express
11:56:45 5 grants of power to litigate as nothing but superfluous;
11:56:45 6 that the legislature is somehow wasting its time and
11:56:45 7 wasting its energy enacting statutes that identify
11:56:45 8 express powers if, in fact, it already had those powers,
11:56:45 9 and we submit that it does not.

11:56:45 10 CHIEF JUSTICE HARDESTY: I'm sorry for
11:56:45 11 interrupting you, Ms. Lundvall, but I wanted to cover
11:56:45 12 one more question in this area. Under Subsection 3(b) I
11:56:45 13 understand your argument that the charter language "sue
11:56:45 14 or be sued" is characterized in some jurisdictions in
11:56:45 15 cases as capacity arguments, but from that language,
11:56:45 16 what's your position with respect to whether Subsection
11:56:45 17 3(b), implied powers, can nevertheless be drawn from
11:56:45 18 that language in the statute, and did the City of Reno
11:56:46 19 make that argument in this case?

11:56:46 20 MS. LUNDVALL: No. 1, they have not made that
11:56:46 21 argument in this case. In fact, they were entirely
11:56:46 22 silent on any type of an express power. Their only
11:56:46 23 argument on an implied power was somehow that it was
11:56:46 24 derivative of health, safety, and welfare.

11:56:46 25 And so let me see if I can't address, then, the

11:56:46 1 Court's question. Once again, if you look at the City's
11:56:46 2 charter, it identified different capacities. In other
11:56:46 3 words, trying to define what the capacities are. It is
11:56:46 4 not specific as to being able to bring certain
11:56:46 5 litigation. And if you looked at an example -- I go
11:56:46 6 back to the same example that I used with Justice
11:56:46 7 Stiglich. If, in fact, cities or counties, under its
11:56:46 8 own statutes then, had the power to litigate, then it
11:56:46 9 would have had power by which to litigate, to seek
11:56:46 10 declaratory relief, suggesting that somehow that they
11:56:46 11 could deviate then from either the state's or the
11:56:46 12 nation's position on our COVID pandemic issues. And the
11:56:46 13 issue, I think, demonstrates how disparate and how
11:56:46 14 erratic and how harmful that type of issue is.

11:56:46 15 Moreover, when you look at then the Complaints
11:56:46 16 that have been brought, they are duplicative then of the
11:56:46 17 Complaint that was brought by the State of Nevada, and
11:56:46 18 the State of Nevada Complaint is no different than every
11:56:46 19 other instance where our state has thought that all
11:56:46 20 Nevadan's deserves some form of compensation for
11:56:46 21 allegedly wrongful conduct.

11:56:46 22 And the example that I give for that is the most
11:56:46 23 recent Volkswagen case that the State joined in on
11:56:46 24 behalf of all Nevadans and for which then it received
11:56:46 25 certain funds, and it allowed compensation then to be

11:56:46 1 made then to cities and states who made application

11:56:46 2 against that fund.

11:56:46 3 And so that is a classic way for which litigation
11:56:47 4 to be advanced, as has been empowered then pursuant to
11:56:47 5 statute. And because the City of Reno did not have the
11:56:47 6 power, that's why we submit then that this lawsuit is
11:56:47 7 ultra vires.

11:56:47 8 CHIEF JUSTICE HARDESTY: All right. Thank you,
11:56:47 9 Ms. Lundvall. Given the questions that we've asked and
11:56:47 10 the interactions, I'll provide you with eight minutes of
11:56:47 11 rebuttal time. We'll add eight minutes to Mr. Eglet's
11:56:47 12 argument.

11:56:47 13 Mr. Eglet, are you ready to proceed?

11:56:47 14 MR. EGLET: I am. Thank you, Your Honor.

11:56:47 15 ARGUMENT

11:56:47 16 MR. EGLET: Good morning, Your Honors. I'm
11:56:47 17 Robert Eglet, and I have the privilege of representing
11:56:47 18 the City of Reno.

11:56:47 19 Petitioners are asking this Court to interpret or
11:56:47 20 more accurately expand Dillon's Rule in a way that no
11:56:47 21 court in the country has never done in the 150 years
11:56:47 22 since Dillon's Rule was created. There are thousands of
11:56:47 23 local government opiate suits being pursued across the
11:56:47 24 country, and Petitioners can cite to no other court in
11:56:47 25 America that has dismissed a local government's opiate

11:56:47 1 case based upon Dillon's Rule.

11:56:47 2 Dillon's Rule was not created, nor has it ever
11:56:47 3 been interpreted to deny a local government's ability to
11:56:47 4 sue to recover damages caused to that local government
11:56:47 5 by third parties. In every case Petitioners cite in
11:56:47 6 their argument that Dillon's Rule prevents local
11:56:47 7 governments from suing to recover damages, either, one,
11:56:47 8 doesn't address or even mentions that -- Dillon's Rule;
11:56:47 9 two, involves a local government's board suing a state
11:56:47 10 agency where the state laws established that the board
11:56:47 11 did not have standing to sue the state agency, not that
11:56:48 12 Dillon's Rule precluded the local government from suing
11:56:48 13 for damages; or three, involved a local government
11:56:48 14 passing a regulation which it had no power to do under
11:56:48 15 Dillon's Rule and either sued or countersued to enforce
11:56:48 16 the invalid regulation, and the case was dismissed
11:56:48 17 because the regulation itself was invalid and thus
11:56:48 18 unenforceable, not that Dillon's Rule was expanded or
11:56:48 19 interpreted to deny a local government from suing for
11:56:48 20 damages.

11:56:48 21 Which makes sense, because the ability to sue for
11:56:48 22 damages is not now and never has been limited by
11:56:48 23 Dillon's Rule. It is not a lawsuit exception to
11:56:48 24 Dillon's Rule as Petitioners claim because there has
11:56:48 25 never been a lawsuit inclusion in Dillon's Rule.

11:56:48 1 In looking through the history of the rule and
11:56:48 2 the reasons for its creation, it was not intended to
11:56:48 3 stop a local government from suing to recover damages.
11:56:48 4 Dillon's Rule was enacted in 1870 to stop local
11:56:48 5 governments from creating ordinances, regulations, laws,
11:56:48 6 taxes, and fees that would infringe upon the state,
11:56:48 7 therefore costing the state and taxpayers money.

11:56:48 8 So there's a great deal of information available
11:56:48 9 regarding the reason the rule was created, how the rule
11:56:48 10 has evolved since its creation, and how it has been
11:56:48 11 applied by the courts nationwide. And every article and
11:56:48 12 every case addressing Dillon's Rule discusses local
11:56:48 13 governments' creation and enforcement of regulations,
11:56:48 14 taxes, fees, and ordinances, not their ability to sue
11:56:48 15 for damages.

11:56:48 16 Many states have adopted Dillon's Rule, but as
11:56:48 17 time has gone by and the country has changed, so has the
11:56:48 18 rule. The Hutchison case from Utah addresses this
11:56:48 19 change and provides this Court with guidance on how to
11:56:48 20 proceed here. In Hutchison, the Utah Supreme Court
11:56:48 21 walked through the history of Dillon's Rule and how the
11:56:48 22 strict construction of the rule has become problematic
11:56:48 23 as governments changed. The Courts feel that local
11:56:48 24 governments need to be able to take actions necessary to
11:56:49 25 address local concerns. And so long as local

11:56:49 1 governments are not interfering with state or federal
11:56:49 2 law, they're not engaging in conduct explicitly
11:56:49 3 prohibited by statute, courts should not interfere.

11:56:49 4 The Hutchison court also discussed the general
11:56:49 5 welfare clause present in Utah's statute. Reno's
11:56:49 6 charter, which was approved by the Nevada legislature in
11:56:49 7 1971, includes a similar general welfare clause. Reno's
11:56:49 8 charter was created to secure and preserve the health,
11:56:49 9 safety, general welfare, and property of the residents
11:56:49 10 of the city. Reno's charter also includes language
11:56:49 11 explicitly stating that it is to be literally construed,
11:56:49 12 and Nevada's constitution empowers cities to create
11:56:49 13 charters for the city's own government.

11:56:49 14 In Hutchison the Court stated that there was an
11:56:49 15 increasing judicial inclination under a general welfare
11:56:49 16 clause to grant municipal authorities wider discretion
11:56:49 17 in the reasonable and nondiscriminatory exercise of
11:56:49 18 police power in the public interest. And just like in
11:56:49 19 Hutchison, Nevada's constitution grants cities the power
11:56:49 20 to create charters or city governance. And where the
11:56:49 21 state has granted such general welfare powers, as Nevada
11:56:49 22 did when the legislature approved Reno's charter, those
11:56:49 23 local governments have authority independent of and in
11:56:49 24 addition to any specific powers granted by the statute,
11:56:49 25 so long as the City's actions are appropriately related

11:56:49 1 to the general welfare, which includes public safety and
11:56:49 2 health.

11:56:49 3 Nevada's legislature recognized the problems with
11:56:49 4 the strict application of Dillon's Rule when enacting
11:56:49 5 NRS 268.001, specifically stating that the strict
11:56:49 6 application of the rule is unnecessarily restrictive.
11:56:49 7 The legislature drafted a statute that reverses the
11:56:50 8 rebuttable presumption from the original Dillon's Rule.
11:56:50 9 Now, if there is any fair or reasonable doubt concerning
11:56:50 10 the existence of the City's power to address a matter of
11:56:50 11 local concern, it must be presumed that the City has the
11:56:50 12 power unless the presumption can be rebutted by evidence
11:56:50 13 of a contrary intent by the legislature.

11:56:50 14 And NRS 268.0035.3 sets out an enumerated list of
11:56:50 15 five things that a city government shall not do. The
11:56:50 16 ability to bring a lawsuit is not included in this list.
11:56:50 17 Reno has not enacted an ordinance, imposed a fine, or
11:56:50 18 otherwise created regulations related to opiate
11:56:50 19 marketing sales and distribution within the City. It
11:56:50 20 sued to recover the cost it has incurred as a result of
11:56:50 21 the epidemic. This lawsuit is not an attempt to create
11:56:50 22 this regulation.

11:56:50 23 A civil lawsuit in which a city seeks damages
11:56:50 24 (audio distortion) is not the equivalent of an act of
11:56:50 25 ordinance or regulation. It is a lawsuit intended to

11:56:50 1 reimburse the City for the damages caused by the
11:56:50 2 defendants. Additionally --

11:56:50 3 JUSTICE SILVER: Mr. Eglet. I apologize. Mr.
11:56:50 4 Eglet, my question is can you just clarify the nature of
11:56:50 5 the damages that Reno is seeking to recover in the case?
11:56:50 6 Like, is it actual damage to the City itself? Damage to
11:56:50 7 its residents? And also clarify the injunctive relief
11:56:50 8 you're seeking, please.

11:56:50 9 MR. EGLET: Absolutely, Your Honor.

11:56:50 10 So the damages that Reno is seeking to recover is
11:56:50 11 for -- is to recover damages it and its agencies have
11:56:50 12 incurred as a result of the opiate epidemic and an
11:56:50 13 injunction to prevent Petitioners from engaging in their
11:56:50 14 negligent and wrongful marketing activities within the
11:56:51 15 City of Reno under current Nevada law. It is not
11:56:51 16 intended to limit any of petitioner's legal activities
11:56:51 17 within the city.

11:56:51 18 And the injunctive relief is requested by --
11:56:51 19 requested by this lawsuit is simply asking the
11:56:51 20 Petitioners be required to follow existing Nevada law.
11:56:51 21 It is not an attempt to enforce a Reno-specific or
11:56:51 22 Reno-created law and thus is neither making regulation
11:56:51 23 nor regulating petitioner's businesses.

11:56:51 24 And the damages are basically damages to their
11:56:51 25 agencies like their court services, their social

11:56:51 1 services, their hospital services, their coroner and
11:56:51 2 medical examiner services. All the different services
11:56:51 3 that cities provide there -- and some cities provide
11:56:51 4 different types of services -- but all the cities --
11:56:51 5 services that their cities provide their residents. And
11:56:51 6 in Reno's case includes human services, social services,
11:56:51 7 court services, law enforcement services, coroner and
11:56:51 8 medical examiner and health services in the City, which
11:56:51 9 have all been impacted by the epidemic. These damages
11:56:51 10 are unique to Reno and cannot be recovered by any other
11:56:51 11 city government.

11:56:51 12 JUSTICE SILVER: Thank you.

11:56:51 13 MR. EGLET: So additionally, neither the Premium
11:56:51 14 Standard Farms case nor Board of Commissioners v. Love
11:56:51 15 support petitioner's position here. Premium Standard
11:56:51 16 Farms involves a township passing a regulation it had no
11:56:51 17 power to do under Dillon's Rule, and countersued to
11:56:51 18 enforce the regulations, as well as for public nuisance.
11:56:51 19 The case was dismissed because the regulation itself was
11:56:51 20 unenforceable, not because the township cannot file any
11:56:51 21 lawsuit.

11:56:51 22 Additionally, the Missouri Supreme Court ruled
11:56:51 23 that the township's nuisance claim could not be
11:56:51 24 maintained because Missouri's statute specifically
11:56:51 25 outlined which governmental entities can sue for public

11:56:51 1 nuisance and did not include townships. So the township
11:56:52 2 would not have been able to file a nuisance cause of
11:56:52 3 action with or without a discussion of Dillon's Rule.
11:56:52 4 The decision does not support a finding that a local
11:56:52 5 government is prevented from filing any lawsuit to
11:56:52 6 recover damages under Dillon's Rule.

11:56:52 7 And in Love, the Court looked at a county board's
11:56:52 8 ability to challenge the decision of a state tax
11:56:52 9 commission in the courts. It -- having nothing to do
11:56:52 10 with Dillon's Rule. Had to do with the interpretation
11:56:52 11 of the State's statutes and the fact that the county
11:56:52 12 board and members of the county board didn't have
11:56:52 13 standing to sue and they didn't exhaust their remedies
11:56:52 14 before taking the loss. And even if they had standing,
11:56:52 15 they didn't exhaust their remedies before seeking an
11:56:52 16 appeal.

11:56:52 17 JUSTICE SILVER: Mr. Eglet, I'm sorry to
11:56:52 18 interrupt but you brought up Premium Standard Farms and
11:56:52 19 that did involve a nuisance cause of action. How do you
11:56:52 20 distinguish in this case the legislature did give an
11:56:52 21 express grant of the city to prosecute nuisance actions?
11:56:52 22 I asked the same thing of Ms. Lundvall under NRS
11:56:52 23 268.4124, and under that, it's an abatement of a chronic
11:56:52 24 nuisance. There are specific steps that must be taken
11:56:52 25 as far as the city attorney and the municipal courts and

11:56:52 1 what can be recovered. That's a specific statute on
11:56:52 2 nuisance.

11:56:52 3 Here in your Complaint -- First Amended
11:56:52 4 Complaint, you talk about absolute nuisance and
11:56:52 5 qualified nuisance. These things that are not listed in
11:56:52 6 the statute. How do you distinguish that --

11:56:52 7 MR. EGLET: The power --

11:56:52 8 JUSTICE SILVER: -- with the statute?

11:56:52 9 MR. EGLET: Yes, Your Honor. The powers to enact
11:56:52 10 ordinances to address nuisances are in addition to the
11:56:52 11 power to enforce existing state law. Those power
11:56:52 12 evidence of legislative intent to give local governments
11:56:52 13 broad powers to address nuisances. And compared to NRS
11:56:52 14 268.418, which confirms that state control over
11:56:53 15 regulation of firearms declares exclusive state
11:56:53 16 jurisdiction, there is no similar provision related to
11:56:53 17 nuances or other common law claims such as negligence.

11:56:53 18 And the other provisions in NRS 268 support our
11:56:53 19 argument. It has never been disputed that a city has
11:56:53 20 the power to file lawsuits regarding violations of state
11:56:53 21 law committed within the city. Dillon's Rule only
11:56:53 22 applies when a city tries to enact and enforce its own
11:56:53 23 ordinances and regulations without authority.

11:56:53 24 The provision cited by Petitioners give
11:56:53 25 legislative authority to cities to enact additional

11:56:53 1 ordinances that the cities can enact and enforce on
11:56:53 2 their own, even if those ordinances differ from city to
11:56:53 3 city. These provisions do not take away or eliminate a
11:56:53 4 city's underlying ability to sue for violation of
11:56:53 5 existing state law.

11:56:53 6 So neither the Premium Farms nor the Love case
11:56:53 7 involves local government's ability to sue to recover
11:56:53 8 damages caused by third parties. Now --

11:56:53 9 CHIEF JUSTICE HARDESTY: Mr. Eglet, this is
11:56:53 10 Justice Hardesty, if I could follow up. I appreciate
11:56:53 11 your explanation for Justice Silver's question, but that
11:56:53 12 explanation seems to me to render the statute she cited
11:56:53 13 superfluous.

11:56:53 14 MR. EGLET: Well, I don't agree with that, Your
11:56:53 15 Honor. I think -- we just don't agree with that, that
11:56:53 16 it makes the statute superfluous because it says "in
11:56:53 17 addition to." The powers to enact ordinances, address
11:56:53 18 nuisances are in addition to the power to enforce
11:56:53 19 existing state law, Your Honor.

11:56:53 20 CHIEF JUSTICE HARDESTY: Okay. Okay.

11:56:53 21 MR. EGLET: The Renown case relied upon by the
11:56:53 22 Petitioners was not only decided 78 years before the
11:56:53 23 creation of NRS 268.001, it also does not discuss
11:56:53 24 anywhere in the opinion the power of the City to file a
11:56:54 25 lawsuit. This Court should decline to expand Dillon's

11:56:54 1 Rule as requested by Petitioners as it is inconsistent
11:56:54 2 with the history of the rule and contradictory to
11:56:54 3 Nevada's codification of the rule.

11:56:54 4 But even if Dillon's Rule could be interpreted to
11:56:54 5 deny a city's ability to sue -- which it can't without
11:56:54 6 significantly expanding the rule in a way that has never
11:56:54 7 been done -- Reno's lawsuit meets the definition of
11:56:54 8 local concern, and thus it is within the City's power to
11:56:54 9 pursue the claims against Petitioners.

11:56:54 10 The legislature took a rare step in 2015 by not
11:56:54 11 only codifying the modified Dillon's Rule, but also
11:56:54 12 including its reasoning for doing so within the statute.
11:56:54 13 The legislature clearly intended to expand the powers of
11:56:54 14 city governments who address matters of local concern
11:56:54 15 and forward the effective operation of city government.
11:56:54 16 In fact, NRS 268.003 supports Reno's ability to continue
11:56:54 17 with this lawsuit. It specifically defines local
11:56:54 18 concern as including without limitation matters
11:56:54 19 involving public health, safety, welfare, and nuisances
11:56:54 20 in the City, which undeniably includes the opiate
11:56:54 21 epidemic.

11:56:54 22 CHIEF JUSTICE HARDESTY: Mr. Eglet -- Mr. Eglet,
11:56:54 23 if I could interrupt you there. I had raised this
11:56:54 24 question with Ms. Lundvall. It does not appear -- I may
11:56:54 25 be mistaken, but it does not appear that the District

11:56:54 1 Court used that statutory definition in its analysis.

11:56:54 2 What's your view on that?

11:56:55 3 MR. EGLET: Well, the District Court judge ruled
11:56:55 4 and said that Dillon's Rule does not apply if -- and if
11:56:55 5 that's the case, you don't need to look at local
11:56:55 6 concern. But if -- the District Court judge said
11:56:55 7 consider local concern. He felt public health is local
11:56:55 8 concern specifically is what he found, Your Honor.

11:56:55 9 CHIEF JUSTICE HARDESTY: Uh-huh.

11:56:55 10 MR. EGLET: So, in fact, NRS 268.003 supports
11:56:55 11 Reno's ability to continue with its lawsuit. It
11:56:55 12 specifically defines local concern as including, without
11:56:55 13 limitations, matters involving public health, safety,
11:56:55 14 welfare, and nuisances in the City, which undeniably, as
11:56:55 15 I said, includes the opiate epidemic. And not only
11:56:55 16 does -- sorry, Justice Stiglich.

11:56:55 17 CHIEF JUSTICE STIGLICH: Before you continue
11:56:55 18 local concern, I just want to go back to something
11:56:55 19 Ms. Lundvall was referring to. Why doesn't
11:56:55 20 Section 1.020 of the city charter which says it may sue
11:56:55 21 and be sued in all courts constitute an express grant of
11:56:55 22 power? Why isn't this a 3(a) situation instead of even
11:56:55 23 going into local concern? I appreciate there might be
11:56:55 24 a -- the Missouri case we talked about. Why isn't that
11:56:55 25 an express grant?

11:56:55 1 MR. EGLET: I believe it is an express grant,
11:56:55 2 Your Honor, and that's one of the reasons -- and if I
11:56:55 3 didn't articulate that well enough, I apologize. The
11:56:55 4 first half of my argument here was Dillon's Rule just
11:56:55 5 doesn't apply here, period. It's never applied. In
11:56:55 6 150 years of the rule, there has never been a case --
11:56:55 7 never -- or even an article that says a local government
11:56:55 8 cannot sue for damages it has incurred from a third
11:56:55 9 party.

11:56:55 10 CHIEF JUSTICE HARDESTY: Mr. Eglet, did you argue
11:56:55 11 that in District Court?

11:56:55 12 MR. EGLET: We certainly -- it was certainly part
11:56:55 13 of our briefing, Your Honor. I believe it was part of
11:56:55 14 the argument. You know, a lot of times, the arguments,
11:56:55 15 we respond to what the arguments are on the other side,
11:56:55 16 and I don't believe that defendants have ever spent much
11:56:55 17 time on that argument in the courts below because they
11:56:56 18 just made the assumption -- they made the assumption
11:56:56 19 that it applied and they just went right to whether it's
11:56:56 20 a matter of local concern. Well, it doesn't apply, Your
11:56:56 21 Honor.

11:56:56 22 JUSTICE SILVER: Mr. Eglet, I have a question.
11:56:56 23 If that's true, what cases from Nevada or anywhere show
11:56:56 24 that a city has sued for nuisance and negligence?

11:56:56 25 MR. EGLET: Your Honor, I mean, I don't have a

11:56:56 1 list of all the cases, but nuisance is -- nuisance law
11:56:56 2 has been part of the American jurisprudence -- part of
11:56:56 3 our American jurisprudence since our country has been
11:56:56 4 around.

11:56:56 5 JUSTICE SILVER: Well, Mr. Eglet, I was a
11:56:56 6 municipal court judge and I presided over hundreds of
11:56:56 7 nuisance cases. And that's why I keep going back to --

11:56:56 8 MR. EGLET: That's my point, Your Honor.

11:56:56 9 JUSTICE: -- because I did preside over nuisance
11:56:56 10 cases. So I'm asking you, as a result of that, what can
11:56:56 11 you point to -- any case that goes back to common law
11:56:56 12 negligence or common law nuisance that the City has
11:56:56 13 prosecuted?

11:56:56 14 MR. EGLET: The City of Reno?

11:56:56 15 JUSTICE: Or City of Las Vegas. We're in the
11:56:56 16 same state.

11:56:56 17 MR. EGLET: Well, I -- yes. I don't have those
11:56:56 18 cases off the top of my head. All I would say is
11:56:56 19 there's just no doubt that local governments have been
11:56:56 20 allowed to pursue nuisance claims in the United States
11:56:56 21 unabated or since our country has been around, and if
11:56:56 22 there hasn't been at least hundreds, there's been
11:56:56 23 thousands of nuisance claims across the country. And so
11:56:56 24 if one of these nuisance claims had been dismissed based
11:56:56 25 on Dillon's Rule, defense counsel would have found that

11:56:56 1 case. There is no case where that's ever happened, Your
11:56:56 2 Honor.

11:56:56 3 Not only does NRS 268 focus on a city's ability
11:56:56 4 to address matters of local concern, so does the Reno
11:56:56 5 charter, which is to be liberally construed. The
11:56:56 6 charter approved by the Nevada legislature states that
11:56:56 7 it was created to preserve the health and safety of the
11:56:56 8 residents and there must not be construed to limit the
11:56:56 9 general powers necessary for Reno to carry out the
11:56:56 10 purposes of the charter.

11:56:56 11 Damages Reno has incurred because of the opiate
11:56:57 12 epidemic are matters of local concern because they
11:56:57 13 impact only Reno, only Reno's residents, only Reno's
11:56:57 14 programs, and only the functionality of Reno. They are
11:56:57 15 the City's damages and the City's alone.

11:56:57 16 Now, of course the opiate epidemic has impacted
11:56:57 17 the entire nation, but the impact of the opiate epidemic
11:56:57 18 in other cities, counties, and states is not the same as
11:56:57 19 the impact on Reno. As to the state, the damages it
11:56:57 20 seeks are entirely different than those Reno is
11:56:57 21 claiming. The State's damages are forward-looking
11:56:57 22 abatement damages and damages only available to the
11:56:57 23 state, such as Medicaid reimbursement and the Deceptive
11:56:57 24 Claims Practices Act.

11:56:57 25 Reno's lawsuit does not interfere with or

11:56:57 1 contradict the State's lawsuit, and General Ford has
11:56:57 2 spoken in favor of local governments' ability to pursue
11:56:57 3 their distinct damages in separate lawsuits.

11:56:57 4 But while the opioid epidemic is nationwide, the
11:56:57 5 damages suffered by each jurisdiction are unique. The
11:56:57 6 existence of other lawsuits should not prevent Reno from
11:56:57 7 seeking to recover its unique damages. Reno's claims do
11:56:57 8 not fall into any areas excluded from matters of local
11:56:57 9 concern within NRS 268. Reno's requested damages are
11:56:57 10 unique to Reno and cannot be addressed through
11:56:57 11 uniformity and regulation or damages across the state.

11:56:57 12 CHIEF JUSTICE HARDESTY: Mr. Eglet --

11:56:58 13 MR. EGLET: The City -- yes, sir?

11:56:58 14 CHIEF JUSTICE HARDESTY: This is Justice
11:56:58 15 Hardesty. I appreciate your argument about cabining the
11:56:58 16 damages the way you've articulated. What concerns me,
11:56:58 17 and it relates to a question earlier asked by Justice
11:56:58 18 Cadish, is the request for injunctive relief.

11:56:58 19 In other contexts we have had arguments involving
11:56:58 20 whether or not these are preempted or whether even the
11:56:58 21 award of damages can be preempted by federal law
11:56:58 22 relating to the labeling or the governance of drug
11:56:58 23 distributions, and so I don't know whether that was
11:56:58 24 vetted very well in the District Court. I'm not
11:56:58 25 criticizing counsel. I'm just saying in the order

11:56:58 1 disposing of this issue. But it does seem like
11:56:58 2 injunctive relief could be problematic and it could vary
11:56:58 3 from jurisdiction to jurisdiction, where setting aside
11:56:58 4 the preemption questions could, among various state
11:56:58 5 courts hearing these cases, have varying outcomes in
11:56:58 6 their injunctive relief that they order.

11:56:58 7 Is the -- are the Complaints cabined in the same
11:56:58 8 way you attempt to cabin the damages for an injunctive
11:56:58 9 relief?

11:56:58 10 MR. EGLET: Well, that's a long question and let
11:56:58 11 me take it in parts, Your Honor.

11:56:58 12 CHIEF JUSTICE HARDESTY: Uh-huh, sure.

11:56:58 13 MR. EGLET: First, the federal regulations do not
11:56:58 14 encompass the areas addressed in Reno's Complaint. And
11:56:58 15 if they did, Petitioners surely would have moved to
11:56:58 16 dismiss based on federal preemption, which they did not.
11:56:58 17 The City's Complaint includes state tort causes of
11:56:58 18 action against petitioners based upon petitioner's
11:56:58 19 wrongdoing in marketing opiates and filling suspicious
11:56:58 20 orders and not issues with labeling or product defect.

11:56:58 21 Further, Petitioners' claim that Reno's lawsuit
11:56:58 22 is too entangled with federal regulations to be a matter
11:56:58 23 of local concern is belied by the federal court
11:56:58 24 remanding this case within 48 hours of oral argument
11:56:59 25 after Petitioners had removed the case based upon their

11:56:59 1 claim that Reno raised federal questions in their
11:56:59 2 Complaint.

11:56:59 3 Injunctive relief is requested -- is requesting
11:56:59 4 by way of this lawsuit is simply asking the petitioners
11:56:59 5 be required to follow already existing law. It is not
11:56:59 6 an attempt to enforce a Reno-specific or Reno-created
11:56:59 7 law, and thus is neither making regulation nor
11:56:59 8 regulating Petitioners' business activities.

11:56:59 9 It is always possible for different courts and
11:56:59 10 different juries to reach different conclusions;
11:56:59 11 however, I want to make clear that the injunctive relief
11:56:59 12 sought here only requires Petitioners to comply with
11:56:59 13 Nevada law. It is not a case where Reno is trying to
11:56:59 14 impose its own local laws on Petitioners. And I would
11:56:59 15 also note that Petitioners have not demonstrated how the
11:56:59 16 injunctive relief sought in this case would necessarily
11:56:59 17 conflict with the state or federal.

11:56:59 18 And also, you know, Petitioners are aware that
11:56:59 19 the City is not seeking -- they're aware of this, that
11:56:59 20 the City is not seeking injunctive relief as Petitioners
11:56:59 21 actions in the entire state, nor is any other
11:56:59 22 jurisdiction, because this issue arose at oral argument
11:56:59 23 on the Motions to Dismiss. And beginning at Line 24 of
11:56:59 24 Petitioners' Appendix 02731 through Line 6 of
11:56:59 25 Petitioners' Appendix, 02372, I explained to the Court

11:56:59 1 that it should read that any injunction relief is
11:56:59 2 limited to Petitioners' actions in Reno, Your Honor.

11:56:59 3 So the City is not regulating business activity
11:56:59 4 or infringing upon federal opiate regulation, and
11:57:00 5 there's no state statute preventing Reno's lawsuit.
11:57:00 6 Reno's lawsuit addresses matters of local concern, and
11:57:00 7 thus there is a presumption in favor of Reno's ability
11:57:00 8 to file its lawsuit, and Petitioners have offered no
11:57:00 9 evidence of a contrary legislative intent to rebut the
11:57:00 10 presumption.

11:57:00 11 Therefore, this Court should not expand Dillon's
11:57:00 12 Rule to deny a local government the ability to sue for
11:57:00 13 damages because Petitioners have not provided you with
11:57:00 14 any case where local government was blocked from suing a
11:57:00 15 third party under similar facts. And with the army of
11:57:00 16 qualified lawyers on the other side, if such a case
11:57:00 17 existed, they would have found it.

11:57:00 18 So even if this Court is inclined to expand
11:57:00 19 Dillon's Rule, which it should not, particularly
11:57:00 20 considering the legislature in 2015 clearly indicated in
11:57:00 21 the statute and the legislative's history that they were
11:57:00 22 not making Dillon's Rule more expansive but contracting
11:57:00 23 it and making it less restrictive because it was too
11:57:00 24 restrictive.

11:57:00 25 Reno's allegations fall within the definition of

11:57:00 1 matter of local concern and the petition should be
 11:57:00 2 denied and the decision of the District Court affirmed.

11:57:00 3 Thank you for your time this morning, Your
 11:57:00 4 Honors.

11:57:00 5 CHIEF JUSTICE HARDESTY: Thank you, Mr. Eglet.

11:57:00 6 Do the Justices have any additional questions for
 11:57:00 7 Mr. Eglet.

11:57:00 8 JUSTICE HERNDON: No, sir.

11:57:00 9 CHIEF JUSTICE HARDESTY: All right.

11:57:00 10 Ms. Lundvall, you may proceed.

11:57:00 11 MS. LUNDVALL: Thank you, Your Honor.

11:57:00 12 REBUTTAL ARGUMENT

11:57:00 13 MS. LUNDVALL: I hope to make four quick points.

11:57:00 14 The first point I want to address that was made by
 11:57:00 15 counsel for the City of Reno addressed a question that
 11:57:00 16 was posed by Justice Cadish and that was echoed then by
 11:57:00 17 Chief Justice Hardesty, and it dealt with the relief
 11:57:00 18 that was being sought.

11:57:00 19 You have before you the Prayers For Relief in the
 11:57:00 20 City of Reno case and you also have before you multiple
 11:57:00 21 Prayers For Relief from the other city and county cases
 11:57:01 22 that have been brought. In addition, you have the
 11:57:01 23 Prayer For Relief in the record before you, as well as
 11:57:01 24 the entirety of the Complaint that was brought by the
 11:57:01 25 State of Nevada.

11:57:01 1 First and foremost, the injunctive relief, the
11:57:01 2 medical monitoring relief, the punitive damage relief is
11:57:01 3 not limited to the four corners of each respective city
11:57:01 4 or county. And so, therefore, that's a simple matter of
11:57:01 5 reviewing those Prayers For Relief.

11:57:01 6 If you look at the State's Complaint, at the end
11:57:01 7 of each Cause of Action, the State asks for actual
11:57:01 8 damages, compensatory damages. It is not limited to
11:57:01 9 prospective abatement relief. At the end of each Cause
11:57:01 10 of Action it is quite clear when they make the request
11:57:01 11 then for actual compensatory damages. That's Point 1.

11:57:01 12 But one of the things that I think that is
11:57:01 13 important to look at is that through these 24 separate
11:57:01 14 lawsuits, the injunctive relief that is being sought is
11:57:01 15 not simply saying, Oh, comply with existing law. It
11:57:01 16 asks for relief that goes beyond existing law, and it
11:57:01 17 claims that it should then -- each one of these cities
11:57:01 18 and counties should be entitled to injunctive relief
11:57:01 19 that prohibits certain types of marketing of
11:57:01 20 FDA-regulated medication.

11:57:01 21 This private law firm, through 24 separate bites
11:57:01 22 of the apple, they seek to reshape a highly regulated
11:57:01 23 business conduct to surpass the balance of powers that
11:57:01 24 have been set forth both at the state level as well as
11:57:01 25 at the federal level, and so to suggest that somehow

11:57:01 1 that these damages have been cabined, to use the
11:57:01 2 language then of the Justice, it belied them by the
11:57:01 3 record.

11:57:01 4 Point No. 2, and that is this: Once again, the
11:57:01 5 City seeks to bypass the very specific and unique
11:57:01 6 definition that has been given to a matter of local
11:57:01 7 concern. It seeks to suggest that somehow compensatory
11:57:01 8 damages make this a matter of local concern. But that
11:57:02 9 bypasses the definition that was given by the
11:57:02 10 legislature. The legislature gave a very unique and a
11:57:02 11 very specific definition of what was a matter of local
11:57:02 12 concern, and so to suggest that somehow that the
11:57:02 13 presumption applies to find power because it deals with
11:57:02 14 a matter of local concern doesn't apply.

11:57:02 15 Unless you first find that that unique,
11:57:02 16 specifically defined definition of a matter of local
11:57:02 17 concern applies, you don't get to that presumption. And
11:57:02 18 instead what you are left with is the first presumption
11:57:02 19 that is found within the statute, and that first
11:57:02 20 presumption states that unless there's an express or an
11:57:02 21 implied power, then it is presumed that that power does
11:57:02 22 not exist, and if the power has been exercised, it is
11:57:02 23 ultra vires and it is to be denied.

11:57:02 24 The third point --

11:57:02 25 JUSTICE SILVER: Ms. Lundvall, I apologize. I

11:57:02 1 know you're trying to get to your four points, but
11:57:02 2 doesn't that prove too much in terms of matters of local
11:57:02 3 concern? I mean, isn't anything that a city deals with
11:57:02 4 or regulates something that happens in other cities as
11:57:02 5 well? You know, if they were trying to regulate
11:57:03 6 graffiti or vandalism or anything else, certainly those
11:57:03 7 are things that happen in cities other than the City of
11:57:03 8 Reno. Does that mean nothing is a matter of local
11:57:03 9 concern?

11:57:03 10 MS. LUNDVALL: No. No, Your Honor, not at all.
11:57:03 11 The statute has very -- three distinct subparts. Those
11:57:03 12 distinct subparts have specific definitions, and those
11:57:03 13 specific definitions then were to be demonstrated then
11:57:03 14 by the City of Reno to prove that it was addressing only
11:57:03 15 a matter of local concern.

11:57:03 16 Subsection A spoke to the fact that if it was
11:57:03 17 going to impact the residents outside of the four
11:57:03 18 corners of that geographic area, then it was not a
11:57:03 19 matter of local concern. If you look at their
11:57:03 20 injunctive relief, their prospective relief, the
11:57:03 21 punitive damages they seek, then, in fact, it is clearly
11:57:03 22 outside the four corners of the City of Reno.

11:57:03 23 Moreover, the District Court made a finding that
11:57:03 24 in fact that the litigation impacted and the subject
11:57:03 25 matter of the litigation impacted those beyond the four

11:57:03 1 corners of the City of Reno. Moreover, the District
11:57:03 2 Court also made a finding that Subsection C then would
11:57:03 3 apply. Subsection C is when the conduct that is at
11:57:03 4 issue is substantially regulated by either state or
11:57:03 5 federal agencies.

11:57:03 6 In this circumstance what you have is state
11:57:03 7 regulation of pharmacies. What you have is federal
11:57:03 8 regulation of prescription medications. The District
11:57:03 9 Court made that express finding, and so, therefore,
11:57:03 10 Subsection C cannot apply, and therefore the presumption
11:57:03 11 that is being urged by the City of Reno cannot apply.

11:57:03 12 JUSTICE SILVER: Thank you.

11:57:03 13 MS. LUNDVALL: The last argument -- let me see if
11:57:03 14 I can't consolidate this. And that being this: It's
11:57:03 15 not often that we brief an issue to this Court for which
11:57:04 16 there has been no appellate review in any other
11:57:04 17 jurisdiction. But in this particular case, that's what
11:57:04 18 we're dealing with.

11:57:04 19 It was suggested by counsel for the City of Reno
11:57:04 20 that somehow Dillon's Rule had been looked at or
11:57:04 21 examined by other appellate courts. That is not
11:57:04 22 accurate. There is not a single appellate review by any
11:57:04 23 other jurisdiction. Moreover, Dillon's Rule is not
11:57:04 24 technically the argument that is being made. It's the
11:57:04 25 legislature that embraced Dillon's Rule. It's the

11:57:04 1 legislature that defined Dillon's Rule. It's the
11:57:04 2 legislature that stated how Dillon's Rule was supposed
11:57:04 3 to be applied in the state of Nevada.

11:57:04 4 Each state has the opportunity to determine what
11:57:04 5 powers and how those powers are going to be delegated to
11:57:04 6 its subdivisions. The State of Nevada made those policy
11:57:04 7 decisions. It reduced those policy decisions to a
11:57:04 8 statute. And that statute is what is before the Court.

11:57:04 9 That statute has plain meaning to its language.
11:57:04 10 It has simple language to be applied, and we urge this
11:57:04 11 Court to apply the plain meaning of that simple language
11:57:04 12 to find that there is no express or implied or matter of
11:57:04 13 local concern power that has been delegated.

11:57:04 14 I suppose related to this last point I would
11:57:04 15 address then Justice Silver's point. There is multiple
11:57:04 16 public nuisance cases that have been litigated across
11:57:04 17 our state, but those fall within the specific parameters
11:57:04 18 with procedural requirements that have been expressly
11:57:04 19 authorized by our legislature. There is no general
11:57:04 20 express authorization to bring a common law case,
11:57:04 21 particularly one that addresses nuisance or negligence
11:57:04 22 to a city or to a state, and, therefore, we would ask
11:57:05 23 this Court to apply the simple language that is found
11:57:05 24 within the statute and to find that the City of Reno's
11:57:05 25 case is ultra vires and, therefore, it must be

11:57:05

1 dismissed.

11:57:05

2 With that, we submit and we thank the Court for

11:57:05

3 the opportunity to present argument.

11:57:05

4 CHIEF JUSTICE HARDESTY: Do the Justices have any

11:57:05

5 questions for Ms. Lundvall?

11:57:05

6 JUSTICE HERNDON: No, sir.

11:57:05

7 CHIEF JUSTICE HARDESTY: All right. Seeing none,

11:57:05

8 once again, I'd like to express my appreciation to

11:57:05

9 counsel and to -- for your excellent arguments today and

11:57:05

10 your briefs in this case, and the matter will stand

11:57:05

11 submitted.

11:57:05

12 We will be in recess until 11:30 a.m. for the

11:57:05

13 next oral argument case.

14 (The proceedings concluded at 11:02 a.m.)

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3 SS:
4 COUNTY OF CLARK)

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11 and the foregoing transcript constitutes a full, true,
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13 IN WITNESS WHEREOF, I have hereunto affixed
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