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.	)	Case No. 118,474
JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC; ORTHO-McNEIL-JANSSEN PHARMACUETICALS, INC.; and JANSSEN PHARMACEUTICA, INC., n/k/a/ JANSSEN PI-LARMACEUTICALS, INC., Defendants / Appellants	)	
And	)	
PURDUE PHARMA L.P.; PURDUE PHARMAC, INC.; THE PURDUE FREDERCK 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 LABORATORORIS, INC.; ACTAVIS LLC; ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.; Defendants.	)	

BRIEF *AMICI CURIAE* OF THE 1889 INSTITUTE, ANDREW C. SPIROPOULOS, AND THE OKLAHOMA COUNCIL OF PUBLIC AFFAIRS IN SUPPORT OF DEFENDANT-APPELLANT

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The 1889 Institute is a nonpartisan think tank that advances public policy ideas to promote the flourishing of all Oklahomans through limited, responsible government, robust civil society, and free enterprise. As an independent group of scholars, 1889 Institute publishes analyses and recommendations for policymakers, the courts, and the general public, and is especially concerned when opportunity is blocked and privilege is created illegitimately by government. The Institute is not affiliated with any political party, does not receive any funding from any government entity, and does not engage in grassroots advocacy. The Institute is a nonprofit entity organized under Section 501(c)(3) of the Internal Revenue Code.

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The Oklahoma Council of Public Affairs ("OCPA") has been a trusted source for fact-based public policy analysis in Oklahoma since its founding in 1993. Its mission is to promote the flourishing of the people of Oklahoma by advancing principles and policies that support free enterprise, limited government, individual initiative, and personal responsibility. OCPA is a nonprofit entity organized under Section 501(c)(3) of the Internal Revenue Code.

INTRODUCTION AND SUMMARY OF ARGUMENT

> The Oklahoma constitution is an attempt to grasp from the judiciary the power which it has either usurped or been permitted to absorb through the combined weakness and venality of the legislative branches.
>
> Frederick Upham Adams, The Saturday Evening Post (1906).[1]

The "Abatement Plan" ordered by the court below is materially indistinguishable from legislation one might see enacted during a session of the Oklahoma Legislature. In substance, the trial court's judgment (1) identifies a broad, complex societal problem facing the state, (2) levies a tax on the industry alleged to have contributed to the problem (or that is in the best financial position to weather the tax), and (3) appropriates the proceeds of the tax to a cornucopia of government agencies and programs in an attempt to ameliorate the problem.

The term for this is "legislating." Like the federal constitution and all other state constitutions, Oklahoma's constitution commits such policymaking to its elected legislature. *See* Okla. Const. art. V, § 1; *id.* art. IV, § 1. Outside of the governor's power to veto legislation, the Constitution gives executive branch officers like the Attorney General no role in the lawmaking process. *See id.* art. IV, § 1; *id.* art. VI, § 1, *et seq.* Even administrative rulemaking is permitted only to the extent authority to do so is delegated by the legislature and conforms with the Constitution.

Likewise, the courts are purposely shielded from the messy legislative process not only because they are ill-suited to lawmaking, but also to preserve their

[1] *As reprinted in* IRVIN HURST, THE 46TH STAR: A HISTORY OF OKLAHOMA'S CONSTITUTIONAL CONVENTION AND EARLY STATEHOOD 19-20 (1957)

independence from the hurly burly of politics. When courts are dragged into the policymaking process by lawsuits seeking to regulate entire industries, the judiciary is damaged. And when courts assent to being dragged in, like the court below did, they ought to be reversed by this Court on appeal.

The judgment of the court below construes Oklahoma's public nuisance statute so broadly as to leave no limits to future policymaking by litigation. Permitting lawsuits that attempt to comprehensively resolve complex societal challenges, like the opioid epidemic, allows litigants to inject courts into what is—and should be—a democratic policymaking task. Allowing Oklahoma's public nuisance statute to be weaponized into a catchall vehicle for involving courts in matters the Constitution commits to the elected legislature undermines the separation of powers in Oklahoma government, lacks democratic legitimacy, results in poorly-crafted public policy, and invites ever more policymaking by litigation. The decision below should be reversed.

ARGUMENT

I. POLICYMAKING THROUGH PUBLIC NUISANCE LITIGATION VIOLATES BEDROCK SEPARATION OF POWERS PRINCIPLES

Permitting activist litigants (even when they are attorneys general) and courts to make public policy through public nuisance litigation is improper under our system of separated powers. Courts are ill-suited for policymaking and the players involved—the litigants and judges—lack the democratic legitimacy of elected legislatures and the regulatory agencies they create and task with rulemaking and enforcement. Oklahoma's constitution, in particular, embodies a structure and history that strongly favors popular sovereignty and democratic policymaking over judicial

resolution of public policy questions. This Court's precedents have hewn most closely to the framers' constitutional vision when they have affirmed these principles, keeping the courts out of the policymaking process. The Court should do so here.

A. COURTS ARE IMPROPER FORUMS—AND ILL-SUITED—FOR POLICYMAKING

The judiciary is unique among the three branches of the American System in that it is the judge of its own power. As Justice Stone described it, "the only check upon our own exercise of power is our own sense of self-restraint." *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting)The judiciary is an independent branch of government, purposefully insulated from direct popular pressure. *See* THE FEDERALIST NO. 78 (Alexander Hamilton). The reason the courts were set up to be insulated from popular pressure, however, was precisely because their function was not conceived to embrace policymaking. *Id.*[2]

Responsibility for policymaking must reside in those directly accountable to the electorate in order to maintain popular legitimacy. *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, 65 U. COLO. L. REV. 749, 749 (1993) ("In a Republican Government, the people rule. [Republican Government] require[s] that the structure of day-to-day government—the Constitution—be derived from "the People" and be legally alterable by a 'majority' of them."). Courts are independent so

[2] "The executive . . . holds the sword of the community[, t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated[; t]he judiciary, on the contrary, has no influence over either the sword or the purse . . . and can take no active resolution whatever. It may truly be said to have neither Force nor Will." THE FEDERALIST NO. 78 (Alexander Hamilton).

that they may apply the law fearlessly, without regard to popular sentiment. *See* THE FEDERALIST NO. 78 (Alexander Hamilton). By the same token, this independence is dangerous if misapplied and unchecked because when the judicial process is played out, high court decisions are unreviewable. *Id.* By definition, then, this independent branch of government is unaccountable to the sovereign people.

In addition to being (rightly) unresponsive to popular opinion, the judiciary is also ill-equipped for the policymaking function. Courts decide particularized controversies between individual litigants, making them necessarily limited to the facts relevant to a case as presented to them by the interested parties. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow interests advanced by the parties to a discrete lawsuit. Properly functioning courts seek to interpret the law to arrive at the correct legal result determining the rights of one party vis-à-vis another party or remedying harm done to one party at the hands of the other.

Legislatures, in contrast, are free to devise comprehensive solutions to societal challenges, taking into account the interests of the broad society. "Legislators . . . labor in protester-filled hallways, lobbyist-filled offices, and legislator-filled chamber floors, where often and by design it is hard-fought compromise, not cold logic, that supplies the solvent needed for a bill to survive the legislative process." *McIntosh v. Watkins*, 2019 OK 6, ¶ 21, 441 P.3d 1094 (2019) (Wyrick, J., dissenting) (*citing New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (alteration in original) (*quoting Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986))).

Courts, unlike legislatures, do not engage in the back and forth horse-trading and compromise that promote broad popular acceptance of policies, but rather operate in an intentionally cloistered environment where a decision is handed down as final, regardless of the "buy-in" of the parties, let alone the public. These are features, not bugs, of the judicial system. Courts perform a fundamentally different function from legislatures; one that is particularly good at saying what the law means and resolving individual disputes, but is particularly *not* well-suited to broad policymaking.

Pragmatic considerations also counsel restraint from policymaking. The greatest political threats to judicial independence arise when courts flout the basis for that independence, exceeding their constitutionally limited role and the bounds of their expertise. When courts fail to exercise self-restraint and instead enter the realm reserved to the political branches, they subject themselves to the political pressure endemic to that arena and invite popular attack. It is precisely *because* of the importance of an independent judiciary that avoidance of policymaking is imperative.

Therefore, this Court strengthens, not weakens, the independent judiciary and the rule of law when it prevents lower courts from wading into policymaking. This Court's appellate jurisdiction should be exercised with an eye toward upholding separation of powers principles. The best way for this Court to keep the courts out of politics is to keep the courts out of politics.

B. THE TEXT, STRUCTURE, AND HISTORY OF THE OKLAHOMA CONSTITUTION REQUIRE COURTS TO AVOID POLICYMAKING

The text, structure, and history of the Oklahoma Constitution reveal a governing document that strongly favors popular sovereignty and democratic

policymaking over judicial and executive branch resolution of policy questions. To balance the judicial independence that comes with life tenure, the framers of the American constitution placed the power to appoint judges with the elected branches and gave the judiciary no role in the lawmaking process. The delegates to Oklahoma's constitutional convention went much further and were even more explicit. Not only did Oklahoma's framers provide a direct check on the judiciary by subjecting it to partisan elections, Okla. Const. art. VII, § 3 (1907), they drew up a governing document that explicitly favored direct democracy and legislative supremacy. *See* Okla. Const. art. V, § 1, *et seq.* (1907); JAMES R. SCALES & DANNEY GOBLE, OKLAHOMA POLITICS: A HISTORY 25 (University of Oklahoma Press 1982) (noting "the document included most of the instruments of direct democracy that spoke to the delegates' faith in popular government"). If anything, the framers of Oklahoma's constitution envisioned a state government in which the center of gravity leaned *more* toward the democratic process than the federal constitution, not less. *See id.* pp.20-40;. Partisan judicial elections were later amended out of the Constitution, but the broad grant of authority to the legislature and the people, and the mandate for corresponding judicial modesty, remains.

The framers built several important features into the constitution reflecting their preference for maximum popular sovereignty and distrust of concentrated power. While it has been frequently noted that the framers' suspicion of concentrated authority caused them to constitutionalize matters that might normally be the subject of legislation, less frequently noted is that the framers cast an equally, if not

more skeptical eye to concentrations of power in judicial and executive branch officers. *See, e.g.*, DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE p.xxxi, *foreward* by W.A. Drew Edmondson (Greenwood Press 2001) (noting that the Oklahoma Constitution "weakens" the executive, and was drafted to "protect our citizens from [powerful industrial] forces while simultaneously protecting them from the government itself"); Consistent with these Prairie Progressive views, the framers drafted a constitution that strictly compartmentalizes the courts to their law-interpreting function and gave the executive branch vanishingly little involvement in policymaking. Outside of the governor's power to approve or veto legislation, the constitution gives the executive branch no role in lawmaking. *See* Okla. Const. art. V, § 1, *et seq.* (1907); *id.* art. VI, § 1, *et seq.*; Moreover, fear of an overly powerful executive led the framers to divide the executive branch rather than adopt the federal constitution's unitary head. These siloed executive branch officials were then subjected to direct partisan election. *See* SCALES & GOBLE, OKLAHOMA POLITICS: A HISTORY at 25 ("Perhaps the clearest sign of the delegates' passion for direct democracy was their insistence upon making nearly every state office, including assistant mining inspector and clerk of the supreme court, subject to popular election.").

Likewise, the Oklahoma Constitution, unlike the federal document, contains an explicit separation of powers clause rather than requiring the inference of such from its structure. Okla. Const. art. IV, § 1. While it also contains an explicit power of judicial review, this Court has consistently articulated that this power is to be

wielded with caution. Orienting itself vis-à-vis the legislature, this Court has repeatedly held that it will not disturb an enactment of the legislature unless the enactment is "clearly, palpably, and plainly inconsistent with the terms and provisions of the Constitution." *E.g.*, *LaFalier v. Lead-Impacted Comtys. Relocation Assistance Trus*t, 2010 OK 48, ¶ 15 (2010); *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶18 (2006); *Jackson v. Freeman*, 1995 OK 100 (Okla. 1995) (the Court does not seek to "determine whether the Legislature is authorized to do an act, but rather, to see if the act is prohibited."); *Adwon v. Oklahoma Retail Grocers Ass'n*, 1951 OK 43, ¶ 13 (1951) ("It is only where an act of the Legislature is clearly, palpably, and plainly inconsistent with the terms and provisions of the Constitution that the courts will interfere and declare such act invalid and void."). Moreover, "the Legislature is primarily the judge of the necessity of [public policy], every possible presumption is in favor of [an enactment's] validity, and though the court may hold views inconsistent with the wisdom of the law, it may not annul the law unless palpably in excess of legislative power." *Herrin v. Arnold*, 1938 OK 440 (1938).

As such, the "state's policy-making power is vested exclusively in the Legislature." *Okla. Educ. Ass 'n v. State ex rel. Okla. Legislature*, 2007 OK 30, 120, 158 P.3d 1058, 1065. That authority extends to "all rightful subjects of legislation," Okla. Const. art. V, § 36, including programs "to protect and serve the public health." *Cryan v. State*, 1978 OK CR 91, ¶ 15, 583 P.2d 1122, 1125. It also includes the authority to set "fiscal policy, [which] is exclusively within the Legislature's power." *Okla. Educ. Ass'n*, 2007 OK 30, ¶ 23, 158 P.3d at 1066. These separation of powers

principles are so well-established as to be axiomatic. *See, e.g., id.*; *Calvey v. Daxon*, 2000 OK 1, 20-21, 997 P.2d 164, 171-72; Dixon v. Shaw, 1927 OK 24, 1-2, 253 P. 500, 501.

Further indicating the framers' preference for democratic policymaking over judicial activity, the Oklahoma Constitution provides some of the most expansive initiative and referendum provisions in the United States. At the time of ratification, Oklahoma was only the second state, after Oregon, to permit amendment of its constitution by popular initiative. ADKISON & PALMER, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE at 9. This Court has called the Constitution's right to petition for a vote of the people "a sacred right, to be carefully preserved," *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, ¶5, 820 P.2d 772, and has rightly noted its "duty to protect this right as a function of the people of Oklahoma's right to govern themselves." *Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶ 7.

Dating to statehood, this Court has exercised remarkable restraint, by *refusing* powers the Legislature attempts to assign to it. Just a few years after ratification, for example, the original justices of this Court—3 out of 5 of whom were also framers of the Oklahoma Constitution—denied a request from the governor to issue an advisory opinion pursuant to a somewhat unusual holdover law from the territorial legislature. *See In re Opinion of the Judges*, 1909 OK 227 (1909). The statute required that when a defendant was sentenced to death, the case would be forwarded to the governor who was permitted to require an opinion from the Supreme Court or any

justice on the Court as to the propriety of the trial court proceedings. *Id.* This was thought to aid the governor in determining whether he should issue a pardon, and placed significant influence over the process in the hands of the justices. In 1909, the governor made what, in Territorial days, would have been a routine request to the Court. *Id.*

In a unanimous opinion, the Court explained that the new state constitution, gave it no authority to weigh in on the matter. The Court's respect for the separation of powers is apparent:

> The powers of the state government are, under the Constitution, divided into three distinct departments—legislative, executive, and judicial—and the duties of each department are distinctly defined. These departments are independent of each other and sovereign within their respective spheres. Neither can exercise the powers properly belonging to the other, and it is the duty of each to abstain from and oppose encroachments on another. . . . the statute [requiring the Court's opinion] *purports to impose on this court a duty which, if discharged, would amount neither to a judicial act, nor one to be performed in a judicial manner, but one which, in effect, would make the judges of this court, or some one of them, advisers of the Governor*. Such is manifestly inconsistent with judicial duties and repugnant to the Constitution, and for that reason we refrain from acting pursuant thereto.

Id. at ¶ 3-4 (emphasis added). The original Oklahoma Supreme Court, therefore, struck down a statute that gave it *additional* authority beyond that found in the constitution. Importantly, the justices also marked the new paradigm ushered in with the ratification of the state constitution, holding that "[w]hether, under the territorial organization, said statute would have been sustained, we need not consider, but think it sufficient to say that only such territorial laws as are not repugnant to the

Constitution are extended to and remain in force in the state by the schedule to that instrument." *Id.* at ¶ 5. The justices at the time undoubtedly considered the imposition of the death penalty a serious matter, but they construed the new Oklahoma Constitution as precluding them from engaging in advice and counsel to the policy decisions of the political branches the way the Court had done prior to ratification.

Taken together, this Court's separation of powers, initiative and referendum, and legislative deference jurisprudence reveals an inescapable recognition that courts are fundamentally not policymakers. Throughout its history, this Court has hewn most closely to the framers' vision when it has taken a modest view of its own power and has carefully policed lower courts engaged in judicial policymaking. An ideological commitment to judicial restraint is not required for this conclusion; rather, simple observation of what is plainly true about the Oklahoma Constitution—that it makes the people the supreme sovereign, free, with little limitation, to make policy directly at the ballot box or through their elected legislators—makes it so. The emphasis on popular sovereignty that runs through the Oklahoma Constitution is inconsistent with courts playing an active role in policymaking.

II. THE JUDGMENT BELOW ILLUSTRATES WHY POLICYMAKING BY LITIGATION IS IMPROPER

A. THE ABATEMENT PLAN IS VIRTUALLY INDISTINGUISHABLE FROM LEGISLATION

The judgment of the court below reads much more like a public policy document than a court order applying Oklahoma law to the facts of a dispute. The Abatement

Plan adopted by the court, in particular, closely resembles the type of public policy that is normally (and properly) implemented through legislation. Fundamentally, the judgment (1) diagnoses a broad societal problem, an epidemic of drug abuse, (2) identifies a deep-pocketed industry that the policymaker believes should pay to remediate the societal problem, with little attention paid to causation, (3) levies a fee or tax on the identified culprit, and (4) appropriates the proceeds to a wide variety of government programs and agencies that will supposedly ameliorate the problem. *See* R.654, Final Judgment After Nonjury Trial (the "Judgment").

To arrive at this result, the court hosted what amounted to a legislative committee hearing, receiving testimony from a parade of experts providing their opinions as to the causes and extent of opioid abuse in Oklahoma and Defendants' culpability. *See* Judgment, "Findings of Fact," ¶¶ 1-57. The court relied heavily on the testimony of a state agency head, entered the findings of the President's opioid taskforce into evidence, and even consulted a marketing and communications expert on what type of public information campaign would be required to combat illegal opioid use. *Id.* In other words, the court undertook—in a manner necessarily limited by the forum—aspects of the policymaking process.

Having heard from the stakeholders, the court dictated the State of Oklahoma's policy agenda for tackling the opioid epidemic. The Abatement Plan, among other things:

- Creates and funds programs (well in excess of $100 million) at state agencies dealing with everything from prenatal screening and treatment for opioids to public medication disposal programs;
- Funds licensing boards to hire additional personnel, including the state's veterinary, dentistry, nursing, and medical licensure boards;
- Funds law enforcement agencies;
- Funds programs at the OU Health Sciences Center;
- Contains a specific line item (more than $11 million) to fund the Attorney General's office for, among other things, the AG's "Policy and Legislative Development Tracking division."

Id., "Abatement of Nuisance." Moreover, the court indicated that the more than $465 million Abatement Plan—equal to nearly ten percent of the total discretionary appropriations made by the Legislature that year—covers only the first year of abatement costs. The Attorney General sought far more—asserting the "nuisance" will take more than twenty years to abate—but was unable to prove these speculative costs. Shall the citizens of Oklahoma expect this litigious tax and appropriation exercise to be pursued annually by the Attorney General?

We elect legislators to perform this type of function, not judges and attorneys general. This litigation featured the wrong branch of government (an executive branch official) using the wrong vehicle (a lawsuit) to lobby another wrong branch of government (the judiciary) to impose a tax, appropriation, and regulatory scheme.

B. THE JUDGMENT BELOW DISREGARDS EXTENSIVE STATE AND FEDERAL REGULATION OF OPIOIDS, ACHIEVED THROUGH DEMOCRATIC PROCESSES

In imposing its opioid remediation public policy, the court below ignored the comprehensive federal and state statutory schemes already put into place by Congress and the Oklahoma Legislature to regulate the use and abuse of prescription drugs. These statutory regimes are implemented by a "complex and pervasive regulatory framework overseen and enforced by numerous agencies and boards controlling the development, testing, production, manufacturing, distribution, labeling, advertising, prescribing, sale, possession, use, misuse, abuse, theft, resale, and inter-state transportation of opioid drugs." Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 SC. L. REV. 517 (2019).

This regime reflects "extensive legislative deliberation balancing the good, legitimate, and helpful uses of various conduct or products against the dangers of their use and misuse." *Id.* This is, by definition, a policymaking calculus, and the imposition of civil liability on a manufacturer whose conduct and product complied with these regulatory requirements—and with regard to the FDA, was expressly reviewed and authorized by the supervising agency—effectively replaces these policy decisions with more onerous requirements or more restrictive controls. Accordingly, this litigation has inserted Oklahoma courts into a "policymaking role for which they are ill-suited," and gives the Attorney General an "outsized policy-shaping role for which he has no constitutional or electoral claim." *Id.*

Moreover, it is not apparent that the additional policymaking imposed by this litigation will improve the situation. In fact, such judicial policymaking is "far less likely to solve the problem and, indeed, could interfere with [a solution]." *City of Oakland v. BP, PLC*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018). Indeed, regulation by litigation has led to just such unforeseen consequences in recent history. Economists have noted that one of the most salient impacts on the tobacco industry as a result of the extensive litigation of the 1990s has been the cartelization—that is, *strengthening*—of large tobacco companies. *See, e.g.*, Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 580-81 (2000). ("In effect, the MSA transforms a competitive industry into a cartel, then guards against destabilization of the cartel by erecting barriers to entry that preserve the 99, percent market dominance of the tobacco giants.").

Perhaps a clue to the as-yet-unknown consequences of litigation policymaking regarding drug abuse can be seen in the City of Seattle's similar opioid lawsuit, where the plaintiffs are now seeking to make manufacturers responsible for a heroin epidemic they claim has been *caused by the manufacturers changing their opioid formula to make abuse more difficult*. A policy that punishes opioid manufacturers for making their product safer is the definition of an unintended consequence, and is just the type of perverse outcome to be expected when such questions are resolved by courts and litigants instead of legislators.

C. PERMITTING THE JUDGMENT BELOW TO STAND WILL INVITE FURTHER POLICYMAKING LITIGATION

The judgment below construes Oklahoma's public nuisance statute so broadly as to eliminate virtually any limit on courts' authority to impose regulation, *ex post facto*, on disfavored individuals or industries. If allowed to stand, a new precedent in Oklahoma will be established: regulation by litigation will be bounded only by the creativity of plaintiffs and district judges. Would-be social engineers inside and outside of government will take away a simple, but dangerous, lesson: the difficult, democratically legitimate policymaking process is unnecessary because social designs will be attainable in courts. Nothing could be less consistent with the populist framers' Constitution, reverence for the democratic process, and distrust of concentrated authority. If this Court does not draw a line in the case of prescription drug abuse, it will only find it more difficult in coming years to find a logically consistent way to resist policymaking lawsuits seeking to address climate change, race relations, housing, income inequality, gun violence, manufacturing, or any other political question litigants smuggle into the courts via the Trojan Horse of an unbounded public nuisance statute. If the judgment below stands, those lawsuits are coming.

Indeed, they are already here. Earlier this year, a lawsuit was filed in Tulsa County seeking to abate the "public nuisance" of the last 100 years of race relations in the city. *See Randle, et al. v. City of Tulsa*, CV-2020-01179, District Court of Tulsa County,. The plaintiffs in that case—African-American citizens and two nonprofits in Tulsa—seek redress in the courts for no less than the entire racial history of the city,

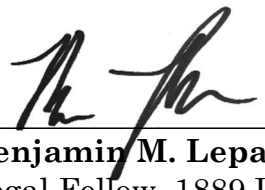
including everything from decades of alleged discrimination in housing and economic development policy to failures by public officials to adequately atone for (universally acknowledged as horrific) racial violence that occurred in 1921. *See id.*, Petition. In effect, the plaintiffs in that suit seek to put society on trial—in a court of law—to remedy historical racism and what they conclude are its modern-day aftereffects. As in need of redress as this history may be, it is obviously a question for politics, not the adversarial system. The plaintiffs in that case were no doubt inspired by—and saw the opportunity for success only after—witnessing what was done to the defendants in this case.

CONCLUSION

Allowing Oklahoma's public nuisance statute to be weaponized into policymaking litigation undermines the separation of powers in Oklahoma government, lacks democratic legitimacy, results in poorly-crafted public policy, and invites ever more policymaking by litigation.

The decision below should be reversed.

Respectfully Submitted,



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