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IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE, )  
Tulsa Race Massacre Survivor, )  
et al., )

PLAINTIFFS, )

VS. )

CASE NO. CV-2020-1179

CITY OF TULSA, a municipal )  
corporation, et al., )

DEFENDANTS. )

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CAROLINE WALL

JUDGE OF THE DISTRICT COURT

TULSA COUNTY COURTHOUSE

TULSA, OKLAHOMA

SEPTEMBER 28, 2021

A P P E A R A N C E S:

MR. DAMARIO SOLOMON-SIMMONS and MS. KYMBERLI J.M. HECKENKEMPER, Attorneys at Law, 601 South Boulder, Suite 600, Tulsa, Oklahoma 74119, appears on behalf of the Plaintiffs.

MR. ERIC J. MILLER, Attorney at Law, 919 Albany Street, Los Angeles, California 90015, appears on behalf of the Plaintiffs.

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A P P E A R A N C E S:

MR. MICHAEL E. SWARTZ, MS. ANGELA A. GARCIA,  
MS. SARA E. SOLFANELLI, and MR. RANDALL T. ADAMS,  
Attorneys at Law, 919 Third Avenue, New York, New York  
10022, appears on behalf of the Plaintiffs.

MS. MCKENZIE E. HAYNES, Attorney at Law, 901  
Fifteenth Street, NW, Suite 800, Washington, DC 20005,  
appears on behalf of the Plaintiffs.

MS. LASHANDRA PEOPLES-JOHNSON and MR. CORDAL  
CEPHAS, Attorneys at Law, 3939 South Harvard Avenue,  
Suite 238, Tulsa, Oklahoma 74135, appears on behalf of  
the Plaintiffs.

MR. STEVEN J. TERRILL, Attorney at Law, 3015 East  
Skelly Drive, Suite 400, Tulsa, Oklahoma 74105, appears  
on behalf of the Plaintiffs.

MR. JOHN H. TUCKER and COLIN H. TUCKER, Attorneys  
at Law, Two West Second Street, Tenth Floor, Tulsa,  
Oklahoma 74103, appears on behalf of the Defendant  
Tulsa Regional Chamber.

MR. KEITH A. WILKES, Attorney at Law, 320 South  
Boston Avenue, Suite 200, Tulsa, Oklahoma 74103,  
appears on behalf of the Defendants Board of County  
Commissioners for Tulsa County and Vic Regalado, in his  
official capacity as Sheriff of Tulsa County.

MR. KEVIN L. MCCLURE, Attorney at Law, 313 NE 21st  
Street, Oklahoma City, Oklahoma 73105, appears on  
behalf of the Defendant Oklahoma Military Department.

MR. GERALD M. BENDER and MS. KRISTINA L. GRAY,  
Attorneys at Law, One Technology Center, 175 East  
Second Street, Suite 685, Tulsa, Oklahoma 74103,  
appears on behalf of the Defendants City of Tulsa and  
TMAPC.

REPORTER: BRENDA EL HASSAN, CSR, RMR, CRR  
Official Court Reporter

I N D E X

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PAGE

REPORTER'S CERTIFICATE

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COURT'S EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>OFFERED</u>	<u>RECEIVED</u>
1 -	Plaintiffs' Presentation Booklet	208	--	--

P R O C E E D I N G S

(TUESDAY, SEPTEMBER 28, 2021)

1  
2  
3 THE COURT: Ladies and gentlemen, have a  
4 seat, please. Thank you for standing. I appreciate  
5 it. I'm going to stand.

6 Counsel, you may continue setting up. I wanted  
7 to open the record without -- I'll take announcement of  
8 counsel in a moment.

9 So I'm opening the record, ladies and gentlemen,  
10 of the gallery to advise you that there is no  
11 electronic recording of any kind. There's no  
12 photographing, videotaping of any sort with any device.  
13 My bailiff is directed, as well as officers of law  
14 enforcement, to monitor the courtroom to make sure that  
15 my orders are complied with.

16 And I will also give you an admonishment that --  
17 I understand this is a very sensitive matter to many  
18 people and people may get emotional from time to time.  
19 It is not appropriate in the courtroom proceeding to  
20 express any kind of outburst of any kind. And I would  
21 caution you, if you feel that you're getting -- if  
22 anyone feels that they're about to have an emotional  
23 outburst or say something, you need to excuse yourself  
24 to the hallway and remain quiet. If you cannot remain  
25 quiet, you must leave the floor. I will give everyone

1 | this warning. Any violation of the court orders is  
2 | punishable -- can be punishable by a finding of  
3 | contempt which can be punishable by six months in jail  
4 | and/or a \$500 fine.

5 |         So I'm advising everyone, including counsel,  
6 | there is no recordings of any type. The only person  
7 | recording this proceeding is our Oklahoma court  
8 | certified court reporter.

9 |         If anyone has already taken pictures of inside  
10 | the proceedings of the courtroom, those are not to be  
11 | published in any form or fashion. So if you have  
12 | already done so prior to receiving any admonishment  
13 | from the Court or direction from my court bailiff, you  
14 | may keep those for your personal use only but you may  
15 | not publish them anywhere.

16 |         And if anything is published outside of this  
17 | courtroom by anyone that -- that took the recording  
18 | here, whether you passed it along to someone else, I'm  
19 | ordering everyone here and I'm advising you, that can  
20 | be a finding of indirect contempt. It is still  
21 | punishable by a finding of indirect contempt by  
22 | imprisonment up to six months in the Tulsa County Jail  
23 | and/or a fine of up to \$500.

24 |         So there is no publication in any form or  
25 | fashion of anything in this courtroom. And if anyone

1 has a question about that, please stand and address the  
2 Court.

3 Having no questions, I will also advise you this  
4 is my bailiff, Mr. Jack Davis. He has full authority  
5 of the Court to enforce the decorum of the court and  
6 the orders of the Court, not only within this courtroom  
7 but also in the hallways. So I just ask that everyone  
8 abide by the direction given by my bailiff. That is  
9 the direction of the Court. And he will advise me if  
10 anything -- if there is a violation or suspected  
11 violation of my court rules that does not happen within  
12 my presence, whether it's reported to me by my bailiff  
13 or someone else, that would be the subject matter,  
14 possibly, of an action for indirect contempt.

15 All right. Now, I'm going to take a brief  
16 recess before we start and then we will start  
17 officially.

18 But I will ask, are the audio -- do you have  
19 your equipment ready, Plaintiff?

20 MR. SOLOMON-SIMMONS: We're 95 percent  
21 there, Your Honor.

22 THE COURT: Okay. So I'm going to take a  
23 recess, let everyone get their equipment ready, and  
24 then -- and I'm going to let you know also, ladies and  
25 gentlemen - this is standard procedure in any courtroom

1 proceeding - you should turn your phones in the off  
2 position when you're in court. And it is standard  
3 procedure that my bailiff or any law enforcement  
4 employed by the court staff -- let me rephrase that.  
5 Tulsa County Sheriff's Office, City of Tulsa Police  
6 Department, anyone who's here in their official  
7 capacity, if they see a phone, they have full authority  
8 by me to request that you hand your phone over, and  
9 then it will be kept by the Court in a safe place up  
10 here on the bench until the end of the proceedings or  
11 until you leave the courtroom. So turn your phones in  
12 the off position, please, and stow them away so that we  
13 don't have any kind of misunderstanding.

14 And there is no food or beverages into the  
15 courtroom. I do allow water up in the counsel area.  
16 And there's restrooms right here in the hallway and  
17 then on every floor.

18 So we'll take a brief recess.

19 And then counsel, when you're ready  
20 logistically, let my bailiff know and he'll come get  
21 me. Thank you.

22 We'll go off the record.

23 (A recess was taken after which time the  
24 following proceedings were had:)

25 THE COURT: We'll be on the record.

1 Can you hear me in the back? Yes. Thank you.

2 All right. We'll be on the record in the  
3 District Court of Tulsa County, Case No. CV-2020-1179.  
4 The matter comes before the Court today on Defendants'  
5 Motions to Dismiss, Plaintiffs' responses, and  
6 Defendants' replies.

7 At this time, if you will announce your  
8 appearance for the record for the court reporter,  
9 starting with Plaintiff.

10 MR. SOLOMON-SIMMONS: Good morning, Your  
11 Honor. Attorney Damario Solomon-Simmons for the  
12 Plaintiffs.

13 MR. SWARTZ: Good morning, Your Honor.  
14 Michael Swartz for the Plaintiffs.

15 MR. MILLER: Good morning, Your Honor.  
16 Eric Miller for the Plaintiffs.

17 MS. HECKENKEMPER: Kymberli Heckenkemper  
18 for the Plaintiffs.

19 MS. HAYNES: McKenzie Haynes, Your Honor,  
20 for the Plaintiffs.

21 MS. GARCIA: Angela Garcia for the  
22 Plaintiffs.

23 MS. SOLFANELLI: Sara Solfanelli for the  
24 Plaintiffs, Your Honor.

25 MS. PEOPLES-JOHNSON: Lashandra



1 Peoples-Johnson for the Plaintiffs.

2 MR. CEPHAS: Cordal Cephas for the  
3 Plaintiffs.

4 MR. ADAMS: Your Honor, my name is Randall  
5 Adams, Schulte, Roth & Zabel. We're withdrawing our  
6 request to argue.

7 THE COURT: Very well.

8 And Counsel Solomon-Simmons, will you please  
9 announce for the record which of your individual  
10 clients are here today, the Plaintiffs, individuals.

11 MR. SOLOMON-SIMMONS: Yes. We have Viola  
12 Floyd Fletcher, Lessie Benningfield Randle, Hughes Van  
13 Elliss, Stephen Williams. That's all of the individual  
14 Plaintiffs today, Your Honor.

15 THE COURT: Are there any representatives,  
16 the entities, named as Plaintiffs?

17 MR. SOLOMON-SIMMONS: Yes. Stephen --  
18 Stephen Williams for The Tulsa African Ancestral  
19 Society and -- I don't see anyone from Vernon.

20 THE COURT: And if you'll -- and if you'll  
21 address the court reporter. We couldn't hear you.

22 MR. SOLOMON-SIMMONS: I'm sorry. I saw  
23 another one of our attorneys back there when I was  
24 looking in the audience.

25 THE COURT: Are there any attorneys for

1 Plaintiff, whether you're sitting this side of the bar  
2 or in the gallery, that you would like your name to  
3 appear on the record as being a participant today?

4 MR. TERRILL: Steven Terrill on behalf of  
5 the Plaintiffs.

6 THE COURT: All right. And I greatly  
7 apologize, but I'm going to have to ask you to state  
8 and spell your name.

9 MR. TERRILL: S-T-E-V-E-N, last name is  
10 T-E-R-R-I-L-L.

11 THE COURT: And what law firm are you with?

12 MR. TERRILL: Bryan & Terrill Law.

13 THE COURT: Thank you.

14 Anyone else for the Plaintiffs? Very well.  
15 Thank you.

16 MR. SOLOMON-SIMMONS: Thank you, Your  
17 Honor.

18 THE COURT: Defendants, you may start with  
19 Mr. Tucker and we'll just go around the room.

20 MR. JOHN TUCKER: Your Honor, John Tucker  
21 for the Tulsa Regional Chamber of Commerce.

22 MR. BENDER: Good morning, Your Honor.  
23 Gerald Bender for the City of Tulsa and TMAPC.

24 MS. GRAY: Good morning, Your Honor.  
25 Kristina Gray for the City of Tulsa and TMAPC.

1 MR. COLIN TUCKER: Colin Tucker for the  
2 Tulsa Regional Chamber.

3 MR. MCCLURE: Kevin McClure with the State  
4 of Oklahoma, Oklahoma Military Department.

5 MR. WILKES: Keith Wilkes for the Board of  
6 County Commissioners for Tulsa County, and for Vic  
7 Regalado in his official capacity as the sheriff of  
8 Tulsa County.

9 THE COURT: Very well.

10 Now, as we go forward, I do have the informal  
11 list. Thank you, Counsel, for providing me a copy of  
12 the issues in which the Court will hear the arguments  
13 today, so I have that.

14 And for purposes of the record, because there  
15 are a lot of attorneys here and many of you are wearing  
16 masks, when you make an argument, will you please state  
17 your name for our court reporter. Thank you.

18 All right. So we will start with standing to  
19 sue.

20 And you can rearrange the podium however it  
21 works for you.

22 MR. JOHN TUCKER: Thank you, Your Honor.  
23 I'll just angle it a little bit if that's all right  
24 with you.

25 THE COURT: You can put it wherever.

1 MR. JOHN TUCKER: These folks won't be  
2 looking at the back of my head.

3 THE COURT: And for the record, and for the  
4 ladies and gentlemen in the gallery, the Court is very  
5 appreciative, not only on behalf of the District Court  
6 but on behalf of all of the members of our community  
7 for the new audio that's provided by Tulsa County  
8 Commissioners through the Cares Act. But I will advise  
9 you that we're all adjusting to learning how to use it,  
10 so please bear with us. We may need to make some  
11 adjustments during this proceeding as well.

12 So -- and if any of the counsel, no matter what  
13 side we're on, if you cannot see or hear, either raise  
14 your hand or say something and we'll get going as best  
15 that we can.

16 So we have Mr. John Tucker.

17 MR. JOHN TUCKER: Your Honor, may it please  
18 the Court, John Tucker for the Tulsa Regional Chamber.

19 I would be remiss if I didn't observe, as the  
20 Court has already, that there's a substantial public  
21 interest in this hearing as evidenced by the large  
22 number of folks that are here in the courtroom. And  
23 they are here, I believe, because of the issues  
24 underlying this lawsuit which are the issues in which  
25 the Plaintiff discusses in their Petition; racial

1 discrimination, economic, educational disparity,  
2 geographic disparity here in Tulsa.

3 THE COURT: Mr. Tucker, I'm going to have  
4 to interrupt you. It's hard to hear so I'm going to  
5 ask my bailiff to please, if you can adjust the  
6 speakers. I have seen some ladies and gentlemen in the  
7 gallery indicate they cannot hear, and it's also a bit  
8 faint up here at the bench.

9 MR. JOHN TUCKER: Here's the problem, Your  
10 Honor, we're not plugged in. There's no green light on  
11 this microphone.

12 THE COURT: Thank you.

13 And this does not have to be on the record.

14 (A discussion was had off the record after which  
15 time the following proceedings were had:)

16 THE COURT: We'll reopen the record.

17 And we have Mr. Tucker at the podium relocated.  
18 Thank you for your patience.

19 And whenever you're ready, Counsel.

20 MR. JOHN TUCKER: The Court please, John  
21 Tucker for the Tulsa Regional Chamber.

22 I would be remiss if I didn't observe, as the  
23 Court had, the significant public interest in this  
24 matter which is evidenced by all the folks that are  
25 attending here today and why we moved to this larger

1 courtroom. I would suspect that they are here because  
2 they are concerned, as many people in Tulsa are, about  
3 some of the issues that underlie the concerns of  
4 Plaintiffs expressed in this lawsuit which have to do  
5 with the racial and economic disparities and  
6 discrimination that exist in Tulsa, and with the  
7 geographic disparities that exist in Tulsa.

8 For the benefit of those who are hearing our  
9 arguments today on our Motions to Dismiss, I would just  
10 simply state that our Motions to Dismiss are not about  
11 any of those things. Those are not things that are  
12 involved in what we're doing here today. Those are  
13 things about which everybody at the Defendants' table  
14 share the concerns of the people in the audience as not  
15 a stain which Tulsa should be embarrassed about,  
16 specifically the great massacre of 1921, and the fact  
17 that we have disparities between multiple different  
18 racial groups in Tulsa today.

19 But the Motion to Dismiss is not about that.  
20 What we're here today is to determine whether these  
21 Plaintiffs in their Amended Petition, which is what  
22 we're -- which is what we're looking at today, that's  
23 the box in which we're confined to look, whether these  
24 Plaintiffs in their Amended Petition, first of all,  
25 demonstrate that they have standing so as to give this

1 Court subject matter jurisdiction of the claim they  
2 want to make; and secondly, whether the allegations of  
3 their Amended Petition meet the requirements to  
4 establish a claim. That's all we're doing today. We  
5 are not in any way dealing with any of the underlying  
6 issues in Plaintiffs' allegations in its Petition. It  
7 is: What does the Petition allege? What does it not  
8 allege? And whether the Petition, as written, states a  
9 cause of action.

10 We know that this Court has read the very  
11 extensive briefs that have been submitted in this  
12 matter. And I know that the Court, as you expressed  
13 today, recognizes the seriousness and importance of  
14 what's at stake here, whether it's decided here today  
15 or ultimately decided by an appellate court. The  
16 issues at stake are significant.

17 We're not going to belabor the Court with an  
18 extensive presentation. We're going to simply bring  
19 forth our basic reasons why we believe that Plaintiffs:  
20 One, are not -- this Court does not have jurisdiction  
21 of the Plaintiffs' claim; and second, why these  
22 Plaintiffs' allegations do not state a cause of action.

23 The first issue on our list -- the first  
24 category on our list is standing, standing to sue. It  
25 is our position that this Court does not have

1 jurisdiction over the claims that the Plaintiffs want  
2 to make because none of these Plaintiffs has standing  
3 to bring the claims they seek to bring. To say it  
4 another way, these Plaintiffs lack standing to sue for  
5 the wrongs that occurred in 1921, or for the wrongs  
6 that resulted from Urban Renewal in the 1960s and the  
7 1970s.

8 And standing is not an abstract concept. We  
9 know on the news that the Supreme Court has twice in  
10 the last few months dismissed very important social  
11 issue cases that were brought before it for appeal,  
12 United States Supreme Court. The parties who sought to  
13 bring those issues to the court lacked proper standing  
14 to sue. A plaintiff must have legal standing to bring  
15 a claim for any court to have subject matter  
16 jurisdiction. And the fact that these Plaintiffs lack  
17 standing in no way judges whether what they seek, what  
18 they ultimately seek is good or not good. It simply  
19 means this Court lacks subject matter jurisdiction of  
20 the claim.

21 To have standing to sue, first, a plaintiff --  
22 each Plaintiff must have a personal stake in the claim.

23 Did I break something?

24 Each Plaintiff must have a personal stake in the  
25 claim, not a vague conjectural connection to a



1 historical injury or the consequences of a historical  
2 injury, but that the injury sued about is peculiar to  
3 that Plaintiff. None of these Plaintiffs allege that  
4 personal stake in this claim.

5 The Plaintiffs' response brief concedes that  
6 Plaintiffs-Descendants, the descendants of Plaintiffs,  
7 did not suffer any concrete direct injuries or damage  
8 for any conduct by our client, the Chamber of Commerce,  
9 Regional Chamber, or for that matter, the conduct of  
10 any Defendant. None of these Plaintiffs allege a  
11 personal stake in the lawsuit which is required.

12 Plaintiffs' lawsuit seeks a long list of  
13 economic and social remedies that are all to take place  
14 in Tulsa. Tulsa is where the supposed equitable relief  
15 would be imposed by the Court.

16 The zone of interest is Tulsa. The zone of  
17 interest requires a showing that these Plaintiffs have  
18 a cognizable interest in the remedies sought to be  
19 implemented. All Plaintiffs but one does not even live  
20 in Tulsa. Most do not live in Oklahoma. All but one  
21 is far outside the zone of interest. These Plaintiffs  
22 are excluded from having standing because they are from  
23 elsewhere and they cannot allege a direct personal  
24 stake in the claim that they seek to pursue to be  
25 effected in Tulsa.

1           The church is an individual -- is a different  
2 Plaintiff with a different set of circumstances. The  
3 church lacks standing for a different reason. The  
4 church is not an individual and it's admitted as a  
5 legal entity, and only recently came into existence.  
6 The Plaintiff church did not exist in 1921. The church  
7 that was in Tulsa then is long gone. The building  
8 remains, but not the church. The church entity suing  
9 here is a new entity as Plaintiffs conceded in their  
10 response. It has no stake in what happened as a result  
11 of 1921.

12           The church alleges it lost permanent members and  
13 contributors, but the Plaintiff admits in its response  
14 that those members and contributors were part of that  
15 prior congregation, that prior entity that no longer  
16 exists. They are not members of the church that is the  
17 Plaintiff in this lawsuit. This entity, this new  
18 entity church, does not have standing to sue for  
19 possible claims of the former church organization with  
20 which this Plaintiff does not allege any legal  
21 connection.

22           Likewise, another named Plaintiff, The Tulsa  
23 African Ancestral Society, did not exist and has not  
24 alleged any direct loss or damage caused by the Chamber  
25 or other Defendants. It also cannot have standing to

1 sue as it has no stake in the matter.

2 Plaintiff Fletcher does allege that she lives in  
3 Tulsa. However, she and the other Plaintiffs lack  
4 standing to sue for other reasons beyond the fact that  
5 they have no direct connection to Tulsa. Their  
6 allegations do not satisfy the other requirements to  
7 have standing to sue. Those other elements are  
8 causation and redressability. And we have identified  
9 causation in our list for the Court as a separate  
10 category, but it really isn't a separate category. It  
11 really fits right here under standing to sue because  
12 causation is the required allegation to have standing  
13 to sue.

14 Plaintiffs' allegations do not satisfy the  
15 requirement that they have standing. They must allege  
16 facts that they suffered direct injury from specific  
17 acts by Defendants, not blanket allegations that  
18 Defendants plural did certain things. The Petition is  
19 replete with allegations about Defendants plural, but  
20 the paucity of allegations about individual Defendants  
21 is stark. No specific acts are alleged that would  
22 satisfy the requirement for standing.

23 Also, no Plaintiff alleges any concrete,  
24 physical, economic harm caused to them by the Chamber  
25 or any other Defendant. Alleging an injury to another

1 in the past is not sufficient to establish standing.  
2 The standing on this nuisance claim, each Plaintiff  
3 must show a real and a repeated threat of injury, that  
4 threat of injury to that Plaintiff -- that the threat  
5 of injury to that Plaintiff is ongoing. No Plaintiff  
6 has made that allegation and we are limited to what's  
7 in the box of the Plaintiffs' Third Amended Petition.  
8 No Plaintiff alleges more than the discrimination of  
9 economic disadvantage has occurred as a consequence of  
10 the 1921 Race Massacre, and that it continues to this  
11 day. Nothing about that is unique to these Plaintiffs,  
12 and no allegation shows any continuing threat to any  
13 Plaintiff from the 1921 assault or following events.

14 Plaintiffs concede in their response brief that  
15 their claims derive, if at all, from their ancestors.  
16 That's all of those that are named as having been  
17 survivors of the massacre in 1921 which is the majority  
18 of the Plaintiffs. No Plaintiff, not even the ones  
19 that were here in 1921, allege any injury in fact to  
20 them. Injuries that are alleged are to the black  
21 community itself and they're alleged in various ways,  
22 very descriptive ways, ways that make compelling  
23 reading, ways that have appeared in historical studies  
24 about the 1921 Race Massacre, but not in ways that  
25 establish a cause of action that has been alleged.

1 Plaintiffs' allegations do not satisfy that  
2 second element because they don't allege facts which  
3 support causation. What they allege is that they  
4 suffered derivative impacts of events that occurred 100  
5 years ago. Plaintiffs do not allege any specific fact  
6 of an action by the Chamber in 1921 or following that  
7 caused them, individually, an injury.

8 To establish causation, Plaintiffs must allege  
9 specific facts of acts by the Chamber and the other  
10 Defendants that connect each individual Plaintiff to  
11 the Chamber and to the other Defendants. Plaintiffs  
12 have not done that. Rather, they say that Defendants'  
13 collective actions caused their injury and created a  
14 nuisance. But the thing is, the nuisance that they  
15 allege is, at its heart, the nuisance of systemic  
16 racism which is not within something this Court has  
17 jurisdiction to overcome. No Plaintiff has alleged  
18 specific acts that cause specific injury to them as  
19 Plaintiffs.

20 Throughout the Amended Petition, Plaintiff cite  
21 the impact of racial discrimination on their ancestors;  
22 however, the U.S. Supreme Court has repeatedly held  
23 that the causation requirement for standing, standing  
24 to sue, is not satisfied if the Plaintiffs themselves  
25 did not experience the discriminatory practice about

1 | which they complained. The Plaintiffs have not alleged  
2 | any Plaintiff has experienced direct personal  
3 | discrimination by the Plaintiff [verbatim] or any other  
4 | Defendant.

5 |           The third requirement for standing to sue is  
6 | redressability, and that's a very important one. The  
7 | third requirement is that to have standing, the  
8 | relief -- the relief that's requested by the Plaintiffs  
9 | will redress the injury that's claimed.

10 |           This Court has read the very long list of  
11 | damages Plaintiff want this Court to impose. Now, they  
12 | labeled these as actions in abatement, but the list is  
13 | all based on money, it's all based on money being  
14 | spent, and it's simply damages under another name.

15 |           Plaintiffs' goal, which is an economic wish  
16 | list, is not within the power of any court to  
17 | accomplish. These are a wish list for a legislative  
18 | petition but not a lawsuit. And these Plaintiffs have  
19 | no individual standing to sue for the sins imposed on  
20 | their ancestors.

21 |           The lack of standing to sue is not unique to  
22 | this lawsuit. These Plaintiffs here today are seeking  
23 | court action for continuing racial disparities,  
24 | economic equalities, insecurity, and trauma caused in  
25 | 1921, and continuing 100 years later. This is

1 allegation -- this is an allegation specifically  
2 paraphrased, but generally quoted from page 3 of the  
3 Amended Petition. These allegations of generalized  
4 wrongs do not establish standing, nor are they being  
5 made in this lawsuit newly brought for the first time.

6 In our briefing we cite Cato versus U.S. which  
7 is a Court of Appeals case where the plaintiffs sued  
8 the United States for damages resulting from  
9 enslavement and continued discrimination against  
10 African-Americans. Damages sought included disparities  
11 in employment, income, and education. The court held  
12 that these allegations do not establish an injury  
13 personal to the plaintiffs or establish standing. Such  
14 injuries are a class-based grievance and those claims  
15 were found to lack standing as well.

16 Standing requires that the Court have the  
17 ability to redress the grievance. And Plaintiffs  
18 broadly request this Court to abate the public nuisance  
19 of racial disparities here, economic inequalities,  
20 insecurity, and trauma here. That's Paragraph 1 of the  
21 Amended Petition. And those remedies have remained  
22 even beyond the reach of Congress despite multiple  
23 legislative efforts. And they, like other societal  
24 ills, are clearly beyond what this Court could possibly  
25 do.

1           As the U.S. Supreme Court held in Valley Forge  
2 Christian College case in 1982, Courts should refrain  
3 from adjudicating abstract questions of wide public  
4 significance which amount to generalized grievances  
5 pervasively shared and most appropriately addressed in  
6 the legislative branches. The bottom line is:  
7 Plaintiffs lack standing to bring this lawsuit and  
8 therefore, this Court lacks subject matter  
9 jurisdiction.

10           Thank you, Your Honor.

11           THE COURT: Who will be giving the  
12 response?

13           MR. SOLOMON-SIMMONS: Your Honor, as we  
14 discussed yesterday, I'm going to do just a brief open  
15 for our team and then Professor Eric Miller will be  
16 providing our specific response.

17           THE COURT: Very well.

18           MR. SOLOMON-SIMMONS: Can you hear me well,  
19 Your Honor?

20           THE COURT: Yes.

21           MR. SOLOMON-SIMMONS: Thank you so much for  
22 this opportunity, and I'm so excited to be here with my  
23 co-counsel as we represent our Plaintiffs, three of the  
24 last known living survivors who are all three here;  
25 107-year-old Viola Floyd Fletcher, 106-year-old Mother



1 | Lessie Benningfield Randle, and 100-plus-year-old  
2 | Hughes Van Elliss. And this case is about them and  
3 | this community.

4 |           And I just want to highlight that this is an  
5 | issue, a Motion to Dismiss, but it's not just about  
6 | what's on the paper. It's what people are living each  
7 | and every day. It's about this Tulsa County court  
8 | system for the first time giving survivors in the  
9 | Greenwood community an opportunity to have a day in  
10 | court, an opportunity to move forward after 100 years  
11 | of this court system keeping the Defendants from  
12 | liability and accountability. Essentially, that is  
13 | what the Defendants are hoping happens this time, this  
14 | court system will once again give them a pass and allow  
15 | this to move forward without any redress.

16 |           But they fundamentally misunderstand our case.  
17 | This is not just about what happened in 1921. We know  
18 | that the Defendants murdered hundreds of blacks. We  
19 | know that the Defendants dropped bombs on the black  
20 | community. We know that they destroyed over 1,500  
21 | homes. We know that they displaced and had 6,000  
22 | people -- 6,000 people homeless.

23 |           You can turn it off.

24 |           We know --

25 |           THE COURT: We have to -- you have to turn

1 | it off up here.

2 |           MR. SOLOMON-SIMMONS: We understand that  
3 | this nuisance started when they invaded Greenwood, when  
4 | they unlawfully dispossessed people of property, when  
5 | they --

6 |           THE COURT: I'm sorry.

7 |           All right. Bailiff, we're getting some  
8 | feedback. We can plug it in, if necessary, for the  
9 | next speaker, but in order to unplug it on the bottom  
10 | of this, you have to --

11 |           BAILIFF: It is unplugged.

12 |           THE COURT: Okay.

13 |           BAILIFF: The feedback is from something  
14 | else.

15 |           THE COURT: We'll try again. I apologize.

16 |           MR. SOLOMON-SIMMONS: No problem, Your  
17 | Honor. No problem at all. Just thank you for this  
18 | opportunity. First time in 100 years that this  
19 | community has had an opportunity to talk about this  
20 | case in a Tulsa County Courthouse.

21 |           And again, what the Defendants essentially want  
22 | you to do is to give them another pass. But what we  
23 | want you to understand is this case is not just about  
24 | what happened in 1921. I'm going to talk about that in  
25 | more detail later in this presentation, but it's the

1 fact that they created a public nuisance and the  
2 nuisance is ongoing as this photo right here shows  
3 (indicating). This is a current day photo of an  
4 example of the nuisance that is ongoing as this highway  
5 that the Defendants purposely put right in the middle  
6 of Greenwood for the expressed reason to unlawfully  
7 take the land of Greenwood citizens, to break up the  
8 citizenship and send it further north and starve them  
9 of resources unlawfully. That is happening today.  
10 That started in 1921. That is what this case is about.  
11 That is what we intend to prove if we get the  
12 opportunity to go through discovery, have a trial. We  
13 can prove that. But at this stage of the proceeding we  
14 don't have to prove that, we just have to allege that.

15 The Defendants in their papers - and I'm sure  
16 they're going to talk about it in oral argument - they  
17 say we have a heightened pleading standard in Oklahoma.  
18 But Your Honor, you're a state court judge. You know  
19 as well as I do that in state court, notice-pleading  
20 state. As a notice-pleading state we have to do a  
21 short, concise statement of what our issues are and why  
22 we think we should have redress. We don't even have to  
23 put in the right law if it can be ascertained from the  
24 court that we can have redress. That is basic Oklahoma  
25 law.

1           And yes, we filed an 80-page Petition, but as  
2 Your Honor knows, we could have filed a 3-page Petition  
3 and met the pleading standard. We don't have to prove,  
4 we just have to have allegations. And those  
5 allegations must be taken as all as true. You have to  
6 take everything we've said in this document  
7 (indicating) as true. And I represent to you, it is  
8 true. And then you construe it in the most light  
9 favorable to our Plaintiffs.

10           And so I represent to you, when you do that,  
11 there's no way that this case can be kicked out at this  
12 point at a Motion to Dismiss. There's no way that this  
13 case should not be able to move forward and get into  
14 discovery, get into evidence on this issue.

15           And as Your Honor knows, in state court - this  
16 is not federal court - in state court, Motions to  
17 Dismiss are highly disfavored, particularly in a case  
18 where you have so much information in our Petition. I  
19 will discuss that further at length, but I'm going to  
20 bring in as my co-counsel and colleague, Professor Eric  
21 Miller to respond specifically to the standing argument  
22 by Mr. Tucker.

23           MR. MILLER: Thank you, Your Honor. My  
24 name is Eric Miller and I am a law professor at Loyola  
25 Marymount School of Law in Los Angeles, and I represent

1 the Plaintiffs in this case.

2 I'm going to address the arguments raised by the  
3 Chamber of Commerce and adopted by reference by the  
4 rest of the Defendants covering, first, the issue of  
5 standing, but also -- and I'm not clear whether the  
6 Chamber's already addressed the issue of causation, but  
7 the political questions doctrine, the separation of  
8 powers doctrine when they come up.

9 At this point I think it's worth reemphasizing  
10 what my co-counsel, Mr. Solomon-Simmons, just suggested  
11 which is there's really two cases before the Court  
12 today. There's a case that the Plaintiffs have pled  
13 -- there's a case that the Plaintiffs have pled and  
14 then there's a case that the Defendants wish we pled  
15 and to which they have responded. And we have pled  
16 limited legal claims, public nuisance and unjust  
17 enrichment. And the Defendants have not really  
18 addressed the unjust enrichment claim at all.

19 But at this point I want to address the standing  
20 argument. And our claim is that all the Plaintiffs  
21 have standing. But for purposes of surviving a Motion  
22 to Dismiss, all that matters is that one of our  
23 Plaintiffs have standing. And in their moving papers  
24 in the Motion to Dismiss, none of the Defendants have  
25 contested that Ms. Randle has standing to sue. And so

1 at the very least, given that uncontested in the moving  
2 papers that Ms. Randle has standing, the Motion to  
3 Dismiss should be denied.

4 Now, I should say at the outset we don't concede  
5 in our moving -- in our reply brief that the family  
6 members lack standing. Again, all of our Plaintiffs  
7 have standing.

8 Now, as Mr. Solomon-Simmons discussed, Oklahoma  
9 is a notice-pleading jurisdiction where Motions to  
10 Dismiss are generally disfavored. And I'll begin by  
11 reminding the Court of the three elements of standing:  
12 injuries on legal interest, causation, and remedy. But  
13 not only does the Chamber not contest that Ms. Randle  
14 has standing, the Chamber doesn't contest, really, that  
15 the other survivor Plaintiffs have suffered specific  
16 injuries to their legal interest. Accordingly, the  
17 Court shouldn't dismiss the case on that standing  
18 ground.

19 So just to address the claims featuring  
20 Ms. Randle, the Petition in Paragraphs 26 through 36  
21 provides a detailed particularized statement of injury,  
22 causation and remedy for each Plaintiff attributable to  
23 all Defendants.

24 Now, as the Chamber noted, we used Defendants  
25 plural on occasion, but that's because the Defendants

1 plural acted in concert to injure our Plaintiffs.  
2 Paragraph Nos. 96 and 97 provide another concise  
3 statement of these claims. And the rest of the  
4 position, as Mr. Simmons mentioned, exhaustively pleads  
5 causation, injury and remedy, more than enough to  
6 provide Defendants with notice about the nature of the  
7 injuries that they are alleged to have caused.

8 Now, the Plaintiffs allege two distinct claims,  
9 public nuisance and unjust enrichment. Defendants  
10 contest to standing in the context of the public  
11 nuisance claim and the relevant interest identified by  
12 the public nuisance statute, Title 50 of the Oklahoma  
13 Statutes, Section 1.

14 Ms. Randle alleges that the actions of the  
15 Defendant, including the Chamber of Commerce, caused a  
16 specific set of injury. All of our survivors were  
17 injured in Tulsa. It doesn't matter, for purposes of  
18 standing, where they now live if they were injured by  
19 the Chamber of Commerce and the other Defendants in  
20 Tulsa.

21 As to DescendentS actions in Paragraph 26,  
22 Ms. Randle alleges that all of the Defendants,  
23 including the Chamber of Commerce, looted and destroyed  
24 her neighborhood by destroying her residence, a  
25 specific residence that she lived in.

1 Ms. Randle also alleges causation. For example,  
2 in Paragraph 72 of the Petition, she states that,  
3 People who chose to participate in this raging mob,  
4 including the Chamber, are responsible for these acts  
5 of terror.

6 In Paragraph 26 she said, These actions caused  
7 her to have emotional and physical distress that she  
8 has to this day. In Paragraph 26 and page 39 of her  
9 deposition, Ms. Randle alleges another specific injury,  
10 The Defendants took her family home, from her  
11 deposition, at 1217 North Iroquois Street - she  
12 couldn't be more specific - through the racially  
13 discriminatory Urban Renewal program concocted by the  
14 Defendants, including the Chamber and the City.

15 All of this is more than enough to satisfy  
16 notice-pleading standards to allege standing. It's  
17 easy to see why the Chamber does not contest  
18 Ms. Randle's injuries. Again, so long as one of our  
19 Plaintiffs have standing, then it's inappropriate to  
20 dismiss the Petition on public nuisance grounds.

21 As for the descendants, our Petition alleges  
22 that the Defendants are injuring our Plaintiffs right  
23 now. And as Defendants' own case cited by the Chamber  
24 of Commerce multiple times, In re African-American  
25 Slave Descendants Litigation, it's Judge Posner's



1 opinion, Where the allegation includes assertions of  
2 current injuries based on the Defendants' contemporary  
3 actions, then Judge Posner said, quote, This claim has  
4 nothing to do with ancient violations.

5 Our case is not about long, dead people, but a  
6 vibrant, living community of individuals who -- many of  
7 whom are here in court right now. Every Plaintiff in  
8 this litigation alleges a wrong done to them personally  
9 and individually, not some long past wrong done to  
10 their ancestors.

11 Our Petition asserts a variety of ways the  
12 Defendants are injuring these Plaintiffs right now.  
13 More specifically, Plaintiffs allege that the City and  
14 Chamber of Commerce are currently publishing statements  
15 about the Plaintiffs and especially the families of  
16 prominent massacre victims that misrepresent those  
17 families' current support for the City and Chamber's  
18 fundraising projects.

19 So for instance, in the case of Don M. Adams,  
20 one of our Plaintiffs, we simply allege that the  
21 Chamber is asserting claims about his family that  
22 requires him to respond and which traumatizes him.  
23 Plaintiffs admit that when the institutions that  
24 murdered or assaulted their family members, burned down  
25 their family homes, and split apart their community are

1 right now insisting in public that their family members  
2 support the City and Chamber's public relations  
3 policies, that is traumatizing and has an impact on the  
4 Plaintiffs' mental health right now.

5 The Chamber, along with the City of Tulsa, has  
6 claimed that the Plaintiffs support their fundraising  
7 for their various pet projects, including New Horizon,  
8 but that's not true. In Paragraph 178 of the Petition  
9 Plaintiffs describe this, quote, Well-orchestrated,  
10 multi-faceted marketing campaign designed to influence  
11 wealthy donors and business interests to give them  
12 money, end quote.

13 In Paragraph 180, Plaintiffs allege that Mayor  
14 Bynum singled out Don M. Adams' family member, Mr. A.C.  
15 Jackson, to mislead donors about the family's support  
16 for the City and Chamber's fundraising efforts. In  
17 fact, as we allege, it is the City and the Chamber that  
18 are using these relationships between original victims  
19 and family members, are part of their marketing pet  
20 projects.

21 The class of Plaintiffs subject to this sort of  
22 injury is not some undefined worldwide group. It's not  
23 any person affected by racism. It is people that the  
24 Chamber and the City themselves have reached out to  
25 around the country and reached into these specific

1 families of the named Plaintiffs when they claim their  
2 support as part of their public relations propaganda.

3 The Chamber asked this Court what could be done  
4 in the future to present these injuries. What's the  
5 remedy? Well, the answer is a simple one on the face  
6 of the Petition. At the very least, we've asked the  
7 Court for declaratory relief to abate this nuisance.  
8 But for the most part, we think the remedy is clearly  
9 within your power to determine. And while we make  
10 suggestions, it's up to you to determine what the  
11 appropriate remedies are.

12 The same arguments that apply to Don M. Adams  
13 apply to Mount Vernon Church right now, not just Mount  
14 Vernon Church in 1921, not Mount Vernon Church in 1951  
15 or 2001, but Mount Vernon Church right now which is,  
16 again, being used as part of a public relations  
17 campaign. And the same goes for The Tulsa Ancestral  
18 Society.

19 These are public nuisance claims, but we also  
20 allege unjust enrichment. The Chamber's standing  
21 argument, for the most part, leaps over the unjust  
22 enrichment claim. But all of the Plaintiffs, including  
23 the family members, raise unjust enrichment claims.  
24 The Chamber has not contested that the family members  
25 have standing to bring those claims. So even if the

1 Court is unpersuaded of the family member Plaintiffs'  
2 standing to allege a public nuisance, the Court should  
3 find that the family member Plaintiffs do have standing  
4 to assert unjust enrichment.

5 We know that the Defendants did not list unjust  
6 enrichment - was one of our two claims - as one of the  
7 issues that they plan to address. So Your Honor,  
8 perhaps you can inquire whether the Defendants are  
9 going to address this later; otherwise, we can address  
10 this now.

11 And then I also wonder whether the Chamber is  
12 going to address causation again later and whether we  
13 should address that later or address that now.

14 THE COURT: Well, certainly -- shall I call  
15 you professor or counsel?

16 MR. MILLER: Counsel is fine.

17 THE COURT: Okay. Certainly, Counsel, any  
18 further argument on any of the topics, the Plaintiffs  
19 will be given a chance to respond. So if you're done  
20 with your response as to the first argument, then we'll  
21 go with reply to the first argument.

22 MR. MILLER: Thank you, Your Honor.

23 THE COURT: You're welcome.

24 So Mr. Tucker, reply on Counsel Miller response  
25 to your argument on the motion.

1 MR. JOHN TUCKER: Thank you, Your Honor.  
2 May it please the Court.

3 And I will confine --

4 THE COURT: We may need to plug the  
5 microphone back in.

6 MR. JOHN TUCKER: Right. I forgot.

7 Your Honor, I will confine my response -- my  
8 reply to that part of the response that was directed to  
9 my argument having to do with standing. Counsel  
10 brought in several other parts of his lawsuit in his  
11 response to our standing argument. I'm not going to  
12 address those. For example, they will come up --  
13 nuisance will come up later as a separate topic to be  
14 presented by someone later today.

15 I would note -- and obviously counsel, as  
16 everybody here, has some emotional feeling about the  
17 underlying issues in the case. And counsel from  
18 California clearly shares that tie to Oklahoma, and we  
19 welcome your participation and interest in our problems  
20 in Tulsa.

21 But I recall one of the things that he said  
22 early on is that Ms. Randle certainly has standing  
23 because she's here. And so if she has standing,  
24 everybody has standing. Well, at the outset every  
25 Plaintiffs' claim must stand or fall on its own. If

1 the Court chose to dismiss all the Plaintiffs except  
2 Ms. Randle who does live in Tulsa, Oklahoma, the  
3 lawsuit would not be dismissed, but those Plaintiffs  
4 that don't have standing or whose claims this Court  
5 does not have subject matter jurisdiction should be  
6 removed from the case.

7 Also with respect to Ms. Randle, she, like all  
8 the other Plaintiffs, cannot meet two and three,  
9 causation and redressability. Recall counsel's  
10 detailed presentation of all the things that happened  
11 to Ms. Randle in 1921. She lost her house. Well,  
12 actually, it wasn't her house, it was her parents'  
13 house. But those things all happened in 1921. Those  
14 things will be addressed when we present our arguments  
15 on the statute of limitations and they're not a part of  
16 standing.

17 The question about standing is, is: What do you  
18 have that's happening now? What is the causation that  
19 you've alleged and isn't redressable?

20 Counsel says this Court can determine what the  
21 remedy is, and I suppose in a sense that's true. But  
22 we know exactly everything that the Plaintiff has asked  
23 for, and everything that the Plaintiff has asked for is  
24 really better presented to the legislature than to this  
25 Court because the legislature can enact legislation to

1 do those things. This Court cannot do that. These  
2 Plaintiffs do not have -- have not alleged the three  
3 elements required for this Court to have subject matter  
4 jurisdiction or standing to sue.

5 Thank you, Your Honor.

6 THE COURT: All right. I have just a brief  
7 question.

8 MR. JOHN TUCKER: Yes, Your Honor.

9 THE COURT: So Mr. Tucker -- and I  
10 understand I have a list of topics --

11 MR. JOHN TUCKER: Yes.

12 THE COURT: -- that will be addressed by  
13 other counsel. But just globally, is it a fair  
14 statement that all Defendants are seeking to dismiss  
15 the Petition -- the Amended Petition in whole?

16 MR. JOHN TUCKER: Yes.

17 THE COURT: And the argument that the  
18 Chamber put forth, are all the Defendants adopting the  
19 argument you just stated?

20 MR. JOHN TUCKER: It is my belief that that  
21 is correct, Your Honor. We talked yesterday in our  
22 call in preparing for this hearing if individual  
23 Defendants might want to add a point or two of their  
24 own specific to their position, and I don't wish to  
25 prevent that.

1 THE COURT: But globally that's a fair  
2 statement?

3 MR. JOHN TUCKER: I believe so.

4 THE COURT: And certainly the Court has the  
5 court file. And I'm addressing this comment also to  
6 Plaintiffs' counsel. I have the court file. The Court  
7 has all the courtesy copies of the briefing. You can  
8 see part of that upon the bench. There's not room to  
9 bring all of them in here.

10 But some of the statements made in oral  
11 argument, the -- in your opening argument, Mr. Tucker,  
12 I made a note that the defense states that the  
13 Plaintiffs' response admits that there is no personal  
14 stake, and then Counsel Miller said in his response  
15 that that was not admitted. But I think the word  
16 "personal stake," when Counsel Miller said it, was not  
17 admitted that there's no standing. I think -- I'm  
18 going to give you an opportunity, Counsel Tucker, to  
19 clarify if your statement was directed at one of the  
20 prongs of the standing argument pertaining, perhaps, to  
21 the injury.

22 MR. JOHN TUCKER: That is correct, Your  
23 Honor.

24 THE COURT: And would you also, please,  
25 address briefly -- understanding it may be brought up



1 again. So as I understand Counsel Miller's oral  
2 argument today, the Plaintiff, all of them, are only  
3 asserting two claims which is public nuisance, and  
4 number two, unjust enrichment.

5 In the video presentation, Counsel Miller  
6 referred to declaratory relief based on an allegation  
7 that the Chamber and -- I've not memorized all the  
8 other Defendants, allegedly misusing - I'm just going  
9 to put this in my own words - misusing Don Adams'  
10 statements, misrepresent -- let me rephrase that.  
11 Misrepresenting positions of Don Adams and, perhaps,  
12 others, and seeking declaratory relief. So would you  
13 address if that falls under public nuisance or the  
14 unjust enrichment, or is that the third claim?

15 MR. JOHN TUCKER: Your Honor, I believe  
16 that would be a third claim. And we addressed that --

17 THE COURT: I think so.

18 MR. JOHN TUCKER: We addressed that in our  
19 briefs, and the reason we addressed it in our briefs is  
20 exactly what they're -- what they're alleging is the  
21 tort of misappropriation of personality which is a  
22 separate statutory remedy in Oklahoma, which they can  
23 bring a claim for that, but that claim really has to  
24 have been brought. It's not really a part of this  
25 lawsuit, although it was a part of the representation

1 today. And it has been in Plaintiffs' public  
2 announcements previously.

3 THE COURT: And I'll address that follow-up  
4 question to Counsel Miller. So that's all the  
5 questions I have for you, Counsel Tucker.

6 So Counsel Miller, will you please resume the  
7 podium --

8 MR. MILLER: Yes, Your Honor.

9 THE COURT: -- and clarify: Is the  
10 Plaintiff, through Adams -- and you mentioned the  
11 A.M.E. Church and maybe some others. Would you please  
12 describe with more particularity the declaratory  
13 relief and if that falls -- I'm going to ask you the  
14 same question essentially. Does that fall within  
15 public nuisance or unjust enrichment or is it a third  
16 claim for relief?

17 MR. MILLER: So we've alleged in our prayer  
18 for relief for public nuisance that this Court has it  
19 within its power to make declaratory statements that  
20 can help abate the nuisance. So we see issues such as  
21 declaratory relief falling within a range of options  
22 that Your Honor has at her disposal to abate the trauma  
23 that family members are feeling whenever they are  
24 forced by misrepresentations by the Chamber and the  
25 City to come out in public and defend. But it's also

1 | worth recognizing that there's still a claim under  
2 | unjust enrichment when what the Defendants do is divert  
3 | money away from donors who would otherwise give money  
4 | to support the survivors and the descendants and  
5 | channel it into the City's and the Chamber's pet  
6 | projects.

7 |           And my co-counsel, Mr. Swartz, is very happy to  
8 | address that issue if the Court would like further  
9 | discussion of it.

10 |           THE COURT: So I want to be clear. Is this  
11 | claim -- I would like you to identify: Is that portion  
12 | of the remedy addressed only to the Chamber and the  
13 | City of Tulsa?

14 |           MR. MILLER: Pretty much. It's primarily  
15 | to the Chamber and the City of Tulsa, Your Honor.

16 |           THE COURT: And specifically, which  
17 | Plaintiffs are making that claim?

18 |           MR. MILLER: So Your Honor, as far as the  
19 | unjust enrichment claim goes, all of our claims --

20 |           THE COURT: No. I want to --

21 |           MR. MILLER: On the public nuisance claim?

22 |           THE COURT: Misrepresentation allegation.

23 |           MR. MILLER: So the misrepresentation claim  
24 | is being made by -- by all our Plaintiffs as well.

25 | Clearly -- so we've got an unjust enrichment claim and

1 then we're making a separate claim that our Plaintiffs  
2 are suffering mainly emotional trauma based upon the  
3 actions of the Chamber and the City in consistently  
4 reaching out to involve them in their public relations  
5 campaign. And that causes harm to our Plaintiffs, the  
6 survivors, it causes harm to our descendants, our  
7 family members, including Ms. Cochrane Price,  
8 Ms. Williams, both Mr. Adamses, Stephen Williams, but  
9 also the church and The Tulsa Ancestral Society.

10 But so long as -- again --

11 THE COURT: And what is the remedy  
12 requested in the Petition, if any?

13 MR. MILLER: So just to be clear, this is  
14 not a misappropriation argument. We're not dealing  
15 with the right to publicity statute, Section 1449 here.  
16 What we're claiming is that there's an ongoing public  
17 nuisance and that nuisance started in 1921 but it  
18 continues to 2021. And part of that nuisance is that  
19 the Chamber and the City continue to press on the open  
20 wound of the massacre and reach out to -- single out  
21 families and family members, alleging that they are  
22 taking positions that they are not.

23 And if the -- if the -- it's the same as someone  
24 whose family member is dying, your father died, your  
25 son died, and yet the people who are engaged in causing

1 that trauma consistently want to reach out and single  
2 you out to retraumatize you by saying it wasn't as bad  
3 as you thought it was and you're really past it now.  
4 They're saying that to our living survivors, they're  
5 saying that to family members, and we're alleging that  
6 that causes a continuing and ongoing trauma that ought  
7 to be abated, and that this Court has it in its power  
8 to abate that nuisance.

9 THE COURT: So is the Plaintiff requesting  
10 in the Petition any sort of injunction or restraining  
11 order?

12 MR. MILLER: Yes.

13 MR. SOLOMON-SIMMONS: Yes.

14 THE COURT: Thank you.

15 Now, Mr. Tucker, if you'll retake the podium and  
16 simply inform me, if you can, and if not, you can talk  
17 with the other defense attorneys at recess, whether  
18 this argument will be addressed by other speakers.

19 MR. JOHN TUCKER: It's news to me that they  
20 want an injunction or a restraining order, Your Honor.

21 THE COURT: Then I'll hold this for --  
22 perhaps I'll revisit it again at a later time in  
23 today's proceeding.

24 MR. JOHN TUCKER: Thank you, Your Honor.

25 THE COURT: I think it's an important point

1 of clarification.

2 MR. SOLOMON-SIMMONS: Your Honor --

3 THE COURT: Yes.

4 MR. SOLOMON-SIMMONS: -- could I just  
5 address that point?

6 THE COURT: No, not right now.

7 All right. The next -- well, we will get back  
8 to that because I want to give the Defendants time to  
9 address, now that it's been clarified in oral argument,  
10 whether it's -- so this is a note -- a question, the  
11 answer to the Court, whether it's a defect in the  
12 pleading as to -- the defense made a comment, This is  
13 news to them. So if it's a defect in the pleading,  
14 that could be cured by amendment, that would be one  
15 answer. That would be one question I have. And the  
16 second question is: How does that affect the standing,  
17 if at all, pertaining to this allegation that it is an  
18 on -- a current injury by all of these people because  
19 presumably the speech -- or the complaint, conduct of  
20 the -- only the City and only the Chamber is occurring  
21 currently within the jurisdiction of the Court but  
22 affecting those people. So that's a question I'll  
23 leave to a later time in today's proceedings.

24 MR. JOHN TUCKER: Thank you, Your Honor.

25 THE COURT: And if necessary, further

1 briefing. So I'll hold that question for further  
2 argument.

3 Now, next is the statute of limitations, and  
4 who'll be presenting that?

5 MR. JOHN TUCKER: Your Honor, you're stuck  
6 with me one more time.

7 THE COURT: Very well. You may proceed.

8 MR. JOHN TUCKER: May it please the Court,  
9 John Tucker for the Tulsa Regional Chamber.

10 The second category for discussion is the  
11 statute of limitations. And again, I will not labor  
12 the Court with an extensive presentation because I know  
13 you're familiar with the arguments and the written  
14 briefs.

15 Claims seeking a -- an intervention by a court  
16 to redress the wrongs inflicted on the black community  
17 in Tulsa in 1921 have been filed before. As we know,  
18 one was brought in Oklahoma state court and the other  
19 was brought in the federal court for the Northern  
20 District of Oklahoma. Both were dismissed based upon  
21 the fact that the statute of limitations had expired.  
22 Both dismissals were affirmed by the appellate court.

23 Plaintiffs have claimed this lawsuit is  
24 different as it is based upon a purported public  
25 nuisance and the other lawsuits were not. In fact,

1 | this Amended Petition is the same lawsuit, it's just in  
2 | a different dress.

3 |           First, let me state that, as will be presented  
4 | later when we get to the topic of nuisance, it is  
5 | Defendants' position that nuisance is not an available  
6 | remedy for this lawsuit. For several reasons, it  
7 | simply is not a proper remedy; however, that second  
8 | proposition will be presented later in the day.

9 |           Defendants contend in our Motion to Dismiss that  
10 | this action is barred by the statute of limitations  
11 | regardless of the question of nuisance. Even if this  
12 | Court were to find that nuisance was an available  
13 | remedy as Mr. Solomon-Simmons has so eloquently urged  
14 | the Court, we contend that the statute of limitations  
15 | bars it regardless, and here's why: Plaintiffs claim  
16 | this to be a nuisance action because they want to fall  
17 | under the exception in our statute relating to  
18 | limitations which holds that the State of Oklahoma, a  
19 | state actor, any state actor, cannot be time barred in  
20 | exercising the right of the State to abate a public  
21 | nuisance. We see this in the newspapers every day, a  
22 | conflict about -- for example, the opioid litigation  
23 | pending before Judge Frizzell. We're seeing it now  
24 | with respect to the marijuana growers taking water.  
25 | These things constitute a public nuisance. These are



1 state actions, state actors abating the public  
2 nuisance.

3 Plaintiffs don't get to use that exception and  
4 here's why: Plaintiffs can bring a claim for public  
5 nuisance if the State doesn't, but to do so the  
6 individual Plaintiff or Plaintiffs seeking to avoid the  
7 statute of limitations must allege a special or  
8 peculiar injury unique to those individuals which is  
9 not shared by the public. Plaintiffs have not done  
10 that. Plaintiffs argue that kidnapping, false  
11 imprisonment, torture, assault, arson, murder, bombing,  
12 and other acts which occurred in 1921 for the initial  
13 basis of their lawsuit. They claim that these events  
14 100 years ago and the fact that they -- consequences of  
15 those events 100 years ago continue as a matter of  
16 economic and social fact satisfy the requirement that  
17 each Plaintiff must allege a special and peculiar  
18 injury different from the public at large.

19 The sad fact is that those events of the  
20 massacre of 1921 were visited on the entire community.  
21 And any harm suffered by these individual Plaintiffs in  
22 1921 is not different in any way from those injuries  
23 sustained in 1921 by victims not related to any of  
24 these people or of their descendants.

25 To apply the exception, the statute of

1 limitations requires allegation of special harm.  
2 Special means unique to the particular individual  
3 Plaintiff. The individual harm to a Plaintiff must be  
4 different from the harm to other descendants of the  
5 1921 massacre, whether they be black, Native American,  
6 or even other property owners of residents of  
7 Greenwood.

8 And you heard the response presentation by two  
9 counsel so far here today. Things that have occurred  
10 that they allege are causing harm to these people are  
11 not alleged to be in any way different from people who  
12 are other descendants who are not Plaintiffs or other  
13 victims.

14 The Plaintiffs' Amended Petition refers to Urban  
15 Renewal, segregation, economic discrimination suffered  
16 by black residents, not suffered by these individual  
17 Plaintiffs. And again, I'm not taking counsel's  
18 statements, but taking the allegations of the Petition.  
19 And the allegations of the Petition establish that  
20 nothing is unique to Plaintiffs' claims that are  
21 different from the public at large.

22 Plaintiffs repeatedly allege that the violent  
23 acts of 1921 affected the entire Greenwood and North  
24 Tulsa community. Plaintiffs' own allegations establish  
25 that these individual Plaintiff's claim can't qualify.

1 They aren't different. They can't qualify that they  
2 individually suffered a special injurious harm, in the  
3 words of the Court, in some way not common to the  
4 public at large.

5           When you take all Plaintiffs' allegations into  
6 consideration, what the Plaintiffs are really alleging  
7 is historic and continuing racial discrimination.  
8 That's what they really want to abate. State and  
9 federal law and the Constitution outlaw discrimination,  
10 but it still exists. In this lawsuit it's expressing  
11 an understandable frustration that laws do not stop  
12 discrimination, they do not end economic disparity.  
13 The facts of 1921 were considered in two prior lawsuits  
14 and in both statutes -- in both cases, the statute of  
15 limitations was applied. It applies to this lawsuit as  
16 well.

17           And even if Plaintiffs had alleged special and  
18 peculiar injury, which they did not, the exception of  
19 the statute of limitations does not apply to claims for  
20 money damages. Plaintiffs claim they do not seek money  
21 damages. They've said that in their papers. They said  
22 that in their arguments. But every item they claim  
23 that this Court should order is tied to money: A new  
24 hospital, immunity from city and county taxes for 99  
25 years, new mental health and education program,

1 property development, highway redesign, land trust,  
2 payment of monies to people who suffered -- whose  
3 ancestors suffered damages and loss in 1921 and were  
4 not compensated by insurance. You can call them  
5 abatement if you want to, but all they are is ways of  
6 assessing damages. And the statute of limitations  
7 apply.

8           If this Court were to determine the statute of  
9 limitations should be disregarded because of continuing  
10 wrong to the descendants of the massacre, the  
11 limitations periods are not really meaningful. The  
12 Seventh Circuit litigation concerning -- litigation  
13 concerning the descendants of African slaves, In re  
14 African-American Slave Descendants Litigation in 2006,  
15 When a person is wronged he can seek redress, and if he  
16 wins, his descendants may benefit, but the wrong to the  
17 ancestor is not a wrong to the descendants. For if it  
18 were, then problems of proof to one side, statutes of  
19 limitations would be toothless. A person whose  
20 ancestor had been wronged a thousand years ago could  
21 sue on the ground that it was a continuing wrong and he  
22 is one of the victims. Plaintiffs' attempt to  
23 characterize the massacre as a public nuisance is  
24 simply inaccurate and an attempt to dodge the statute  
25 of limitations applicable to torts committed 100 years

1 ago.

2 Any allegedly harmful action by any entity, if  
3 this were allowed to continue ever, would potentially  
4 permit future generations to bring suit under the  
5 theory that the wrong to the ancestor inherently harmed  
6 those future generations. Public policy of Oklahoma  
7 does not acknowledge that. It's been widely  
8 acknowledged in this country that the statute of  
9 limitations that bar suit for injury suffered in this  
10 massacre and the following on consequences of it is  
11 reflected in the fact that federal legislation has been  
12 proposed multiple times to provide an exception to the  
13 statute of limitations in 2007 and 2009 and 2012 and in  
14 2013. Congress has recognized that it is an issue for  
15 Congress to consider, but to date no legislation has  
16 been signed that changes the rule. So today, the rule  
17 is the statute of limitations precludes Plaintiffs'  
18 claims in this case.

19 Thank you, Your Honor.

20 THE COURT: Response.

21 MR. SOLOMON-SIMMONS: Yes, ma'am, Your  
22 Honor.

23 I would ask the Court to allow -- he talked all  
24 about nuisance, and I think I want to talk about  
25 nuisance in my response because he brings that up, and

1 I think it -- to give it the proper context for you to  
2 understand our arguments.

3 THE COURT: Well, as it relates to statute  
4 of limitations?

5 MR. SOLOMON-SIMMONS: Yes. But he also  
6 talked about our abatement. He also talked about,  
7 we're asking for money damages. He talked about the  
8 neighborhood. And all of that is part of my nuisance  
9 presentation. And I think it's necessary to respond to  
10 everything that he stated.

11 THE COURT: Well, I will note that nuisance  
12 is the fourth category. So to the extent that -- Court  
13 and counsel agreed in the telephone status conference  
14 yesterday that repetitive argument would not be  
15 productive use of the Court's or counsel's time. So if  
16 you address part of the nuisance argument now, you can,  
17 but if it's something that you're going to address in  
18 the fourth subject matter, I just urge you to select  
19 one time --

20 MR. SOLOMON-SIMMONS: Sure.

21 THE COURT: -- to do that.

22 MR. SOLOMON-SIMMONS: Sure. I understand.

23 THE COURT: You can also incorporate by  
24 reference your previous argument.

25 MR. SOLOMON-SIMMONS: All right. Thank

1 | you, Your Honor. I understand. Let me just get to the  
2 | right slide, if that's okay.

3 | THE COURT: Yes, counsel.

4 | MR. SOLOMON-SIMMONS: Okay. So Your Honor,  
5 | we have properly pled a nuisance claim which include  
6 | why the statute of limitations doesn't apply. And I  
7 | think this is important so you can have the full  
8 | context of this argument.

9 | We have to understand our nuisance law here in  
10 | Oklahoma. It is very unique. We're one of five states  
11 | that have the type of nuisance law that we have. The  
12 | text is very unambiguous and it allows for the  
13 | abatement of an ongoing nuisance. That's really  
14 | important to understand in the statute of limitations  
15 | of everything because the abatement is something that  
16 | allows us to get beyond the statute of limitations and  
17 | the nuisance itself. And the breadth and statute --  
18 | the breadth of the statute of nuisance has been tested  
19 | and applied for over 100 years in this state.

20 | Now, let's look at the text. A nuisance  
21 | consists in unlawfully doing an act, or omitting to  
22 | perform a duty. So again, so we can understand, this  
23 | is a Motion to Dismiss. You have to take our  
24 | allegations as true. In our Petition we have alleged  
25 | that the Defendants have done unlawful acts, starting

1 in 1921, that have continued, either unlawful acts or  
2 omitted to do certain duties. In fact, in our Petition  
3 from Paragraph 26 to 36, I believe it is, we outlined  
4 that for each particular Plaintiff why -- how this  
5 impacted those Plaintiffs.

6 This statute is very powerful because it says  
7 that if you don't -- if you do something unlawfully or  
8 you omit to perform a duty that annoys, injures or  
9 endangers the comfort, health, safety of others, then  
10 that can be a public nuisance right there. So let's  
11 just take that example. You kill people and then you  
12 conceal evidence of the murder, that is a crime. That  
13 is unlawful conduct. That unlawful conduct has  
14 continued to this day. That is a nuisance because it  
15 hurts the health and safety and the repose of these  
16 survivors that knew people that were killed. That is  
17 unlawful conduct that is continuing to this date.

18 Or - it's an or there - or offends decency.  
19 When you take resources that are earmarked for North  
20 Tulsa and Greenwood and black people, and you utilize  
21 it in South Tulsa to only build up South Tulsa and  
22 white Tulsa, that offends decency. That's happening  
23 right now. That is a public nuisance. That's why  
24 we're asking for declaratory relief. That's why we are  
25 asking for injunctive relief. It's in our prayer for



1 relief. I'm surprised they said they never heard about  
2 it. It's in our prayer for relief.

3 THE COURT: Let's focus on the statute of  
4 limitations.

5 MR. SOLOMON-SIMMONS: Sure.

6 All of this I'll talk about. This is all the  
7 unlawful acts that occurred since 1921 to today. We'll  
8 get to that.

9 The statute is very clear and the case law is  
10 very clear, if there is a public nuisance, the statute  
11 of limitations does not apply, period. And at this  
12 stage in our proceeding, the Motion to Dismiss stage  
13 where you take everything as true that we've stated in  
14 our Petition, we've stated that there is an ongoing  
15 nuisance that we believe we can prove if given the  
16 opportunity. If it's an ongoing nuisance, the statute  
17 of limitation does not apply. It's just that simple.

18 In Oklahoma, to talk about statute of  
19 limitations and nuisance, we found cases that we cited  
20 in our briefs of nuisances that go back 80 years. This  
21 Meinders case is a case where the nuisance started in  
22 1920, it continued to the 1990s, and then they had  
23 litigation on it for another twelve years. Because  
24 it's not about when the nuisance started, it's about if  
25 the nuisance continues. It's not as if the fire -- you

1 say, Oh, we burnt this building down and now, the fire  
2 is over with. But if the fire is still burning  
3 underneath the building, the nuisance is still ongoing.  
4 Or the Exxon Valdez oil spill that happened in the  
5 '80s. That oil spill happened -- if there are still  
6 remnants of that oil spill causing wildlife to die and  
7 people to have unclean water, that nuisance is  
8 continuing.

9 This is what we're alleging here, and Oklahoma  
10 law allows it. It allowed it in the Meinders case,  
11 80-year nuisance. It allowed it in the Briggs case, a  
12 56-year nuisance. This involved a case where a  
13 smelting plant was in operation from 1916 to 1917 --  
14 1972, and they didn't bring the nuisance claim until  
15 2015. They had been out of business for 30 years, but  
16 their activities while they were in business continued  
17 this nuisance into 2015. So Oklahoma is very, very  
18 clear if the nuisance continues, the statute of  
19 limitations does not apply.

20 And of course, we've already mentioned - I think  
21 the Defendants mentioned it - the opioid litigation.  
22 That was a 40-year nuisance. The State of Oklahoma -  
23 my friend, Kevin McClure right there - the State of  
24 Oklahoma went back 40 years on opioid manufacturers and  
25 said, You created a nuisance back in the '80s that

1 continues to today, in 2019, and you are responsible  
2 for it.

3 We are asking for the same opportunity, Your  
4 Honor, to show that this nuisance that was created has  
5 continued. We just want the opportunity to be able to  
6 prove what we said in our Petition.

7 I just want to make it, once again, clear - I  
8 don't think they understand our case - if the nuisance  
9 continues, if the effects are continuing -- this is not  
10 -- we're not saying this happened and it's over with.  
11 We are alleging, and we properly alleged it according  
12 to Oklahoma law, that this nuisance is continuing as a  
13 public nuisance; therefore, the statute of limitations  
14 does not apply at all.

15 Your Honor, you don't have to take my word for  
16 it. We can look at the Defendants' own words. Mayor  
17 Bynum himself has admitted that, In Tulsa, the racial  
18 and economic disparities that still exist today can be  
19 traced to the 1921 Race Massacre.

20 You don't have to take my words for it, Your  
21 Honor. You can take Mike Neal, the Tulsa Chamber of  
22 Commerce words who said in May 2019, We're sorry that  
23 our organization did not fulfill its civil and moral  
24 obligation. That is, they didn't -- they omitted to do  
25 a duty. That's part of the nuisance statute. We're

1 | sorry that we have not acknowledged the history for  
2 | nearly 98 years. 98 years they unlawfully covered up  
3 | what they did in this actual incident. We're sorry  
4 | that for too long we did not directly confront how the  
5 | racism that enabled the massacre also shaped the  
6 | economic disparities in our community. But here's the  
7 | part that's most important, Your Honor. The Chamber's  
8 | inaction and opportunism caused very real suffering and  
9 | denied economic prosperity to the surviving Greenwood  
10 | community, the effects of which are still felt in our  
11 | city today. They admit that the nuisance is ongoing.  
12 | We just want the opportunity to abate it.

13 |           The Tulsa Development Authority, who's not even  
14 | here today, and the City introduced this report just  
15 | this year, Your Honor, just in January, where they say,  
16 | As a result of forced segregation, job discrimination,  
17 | and the 1921 Race Massacre -- now, let's stop there.  
18 | Who caused the forced segregation? The Defendants did.  
19 | Who caused the job discrimination? The Defendants did.  
20 | Who caused and created the massacre? The Defendants  
21 | did. And they're saying because of that, that  
22 | devastated Tulsa's prosperous black economy, Black  
23 | Tulsans suffer - present tense, not suffered - Black  
24 | Tulsans suffer deep and crushing economic disparities.  
25 | The nuisance is ongoing. As a result, no statute of

1 limitations applies.

2 THE COURT: Counsel Solomon-Simmons, will you  
3 address Mr. Tucker's argument pertaining to why this  
4 lawsuit is not distinguishable from the rulings in the  
5 prior state and federal cases?

6 MR. SOLOMON-SIMMONS: I'm very happy to do  
7 so.

8 Number one, that was a federal court case. This  
9 is a state court case. That was a case brought under  
10 1983, 1985 federal laws that I work with on a daily  
11 basis. This is brought under the state law for public  
12 nuisance which is at 50 O.S., and for unjust  
13 enrichment. Those three things right there makes the  
14 main difference. That case was brought for individuals  
15 seeking to remedy their individual rights that had been  
16 violated. This is a public action brought on behalf of  
17 this neighborhood called Greenwood.

18 Again, Your Honor, that's why I say it's  
19 important that we understand in the public nuisance  
20 statute, 50 O.S. 2 states, Public nuisances are those  
21 which affect at the same time an entire community or  
22 neighborhood. That's the difference. In that case, if  
23 you look at the pleading -- and I was a baby lawyer at  
24 that time working on that case, and Professor Miller  
25 worked on that case. But if you look at the Petition,

1 | it lists over 200 individual names of individuals who  
2 | had individual causes of action. That's not how a  
3 | lawsuit is pled. This is a public nuisance action for  
4 | a public -- to abate a public nuisance.

5 |           And also in the Alexander case, the statute of  
6 | limitations had run. The argument in the Alexander  
7 | case that Mr. Tucker cites, we were arguing at that  
8 | time for equitable tolling because the statute of  
9 | limitations had run. In this case, a public nuisance  
10 | is ongoing. There is no statute of limitations.

11 |           THE COURT: Will you address the argument  
12 | that this case does not fall under the exception  
13 | pertaining to special harm?

14 |           MR. SOLOMON-SIMMONS: I'm happy to do that.  
15 | I'm very happy to do that. I have a slide for it.

16 |           First of all, we have pled -- again, this is a  
17 | Motion to Dismiss. We have pled special injury for  
18 | each Plaintiff. It's right there in Paragraph 26 and  
19 | 36.

20 |           Second, the Defendants acknowledge, they  
21 | concede, there is no special test to decide what is  
22 | special injury.

23 |           Third, special injury does not mean Plaintiffs  
24 | have to be the only individuals who's affected by the  
25 | nuisance. There's actually a case recently decided

1 | against the University of Oklahoma, it's called Melton.  
2 | I'll get the cite to you. It's in our pleadings. But  
3 | that case was decided just a few months ago. It  
4 | specifically stated -- it dealt with a young lady - and  
5 | I'm an OU grad - it dealt with a young lady who was at  
6 | an OU dorm room that had mold and she suffered some  
7 | injuries and she brought this public nuisance case.  
8 | But there were other young ladies all inside of the  
9 | dorm who also had similar injuries as hers, and the  
10 | Court specifically stated, Just because she had similar  
11 | injuries to the others in the dorm room doesn't mean  
12 | that she's not specially injured.

13 |           And I'll tell you, it's offensive to hear this,  
14 | "All black people are the same" argument that they're  
15 | making, that because they -- the community dealt with  
16 | this violent pain, that they can't have individualized  
17 | injuries. When these survivors think about what they  
18 | saw, what is more individualistic than that? There's  
19 | no one else in this entire world besides these three  
20 | people that's sitting right here that has those  
21 | injuries. They saw dead bodies on the street. They  
22 | ran for their life. How more specialized can you  
23 | possibly get? That argument needs to be -- I hope the  
24 | Court will reject that in 2021.

25 |           THE COURT: Well, I don't think that's a

1 legal argument. The Court applies the law.

2 MR. SOLOMON-SIMMONS: And that's what we  
3 want you to do, Your Honor, exactly. And the law is  
4 very clear here.

5 We've pled a special injury. The special  
6 injury -- other people can have it and there is no  
7 bright-line test of what a special injury is.

8 And I'm glad, Your Honor, that you say you apply  
9 the law because the law is, this is a notice-pleading  
10 state.

11 THE COURT: Well, I think it's undisputed  
12 that the standard the Court should apply and will apply  
13 is that the -- all the allegations are taken as true at  
14 this stage in the proceeding and pursuant to the  
15 motion, and the determination by the Court shall be  
16 viewing the motion and the response, reply in the light  
17 most favorable to the nonmoving party or parties. I  
18 think that's undisputed.

19 MR. SOLOMON-SIMMONS: Thank you, Your  
20 Honor.

21 THE COURT: Anything else right now?

22 MR. SOLOMON-SIMMONS: I don't know if you  
23 have any additional questions.

24 All right. Thank you so much.

25 THE COURT: You're welcome.



1           Mr. Tucker, do you have any reply on the statute  
2 of limitations?

3           MR. JOHN TUCKER: May I just very briefly,  
4 Your Honor?

5           I think the Plaintiffs' eloquent argument in a  
6 sense sums up the frustration he feels and many people  
7 in the audience feel about what happened in 1921, and  
8 the fact that as we look to the north we see that  
9 that's not a prosperous community. It's being  
10 developed today, but it's not a prosperous community.

11           As counsel said just a minute ago, he said, What  
12 we have here is a public action brought on behalf of  
13 Greenwood. Well, that's the problem. He says, If it's  
14 a public nuisance, the statute of limitations does not  
15 apply. It's just that simple. And he's right. If  
16 this were an action being brought by a state actor on  
17 behalf of the community of Greenwood, as much as the  
18 State of Oklahoma brought an action on behalf of the  
19 citizens of Oklahoma about the Illinois River, then the  
20 statute of limitations would not apply, could not  
21 apply. But we don't have a state actor bringing this  
22 litigation. We have an individual Plaintiff wanting to  
23 bring the litigation. And to do that, the individual  
24 Plaintiff -- Plaintiffs must establish that what  
25 happened to them is different in kind and character to

1 | what happened to everybody else that was in the  
2 | community of Greenwood in North Tulsa which was a  
3 | broader area than Greenwood.

4 |           And as counsel noted, he described specific  
5 | items of injury that the surviving Plaintiffs suffered,  
6 | and indeed, I'm certain they did. And I'm sure it was  
7 | an awful time. I can't imagine what it was like. But  
8 | it was in 1921, and that statute of limitations ran in  
9 | 1923. So the point being is that these Plaintiffs do  
10 | not qualify for the exception, the state exception to  
11 | the statute of limitations. And even if they did, the  
12 | remedy they seek is really damages under another name.  
13 | And you can't get damages as a private citizen bringing  
14 | an action for public nuisance for abatement.

15 |           Thank you, Your Honor.

16 |           THE COURT: And with that, the Court was  
17 | going to recess for lunch.

18 |           Do you have something right now, Mr. Solomon?

19 |           MR. SOLOMON-SIMMONS: Yes. If you'll just  
20 | give me one -- two minutes. I want to give you the  
21 | cite on Melton --

22 |           THE COURT: Thank you.

23 |           MR. SOLOMON-SIMMONS: -- which is 2021 --  
24 | it's a Westlaw cite. 2021 Westlaw 1220934. And  
25 | also --

1 THE COURT: Can you repeat that, please?

2 21 Westlaw --

3 MR. SOLOMON-SIMMONS: 1220934.

4 THE COURT: Thank you.

5 MR. SOLOMON-SIMMONS: I also wanted to cite  
6 50 O.S. 10 which specifically states that, A private --  
7 A private individual can bring a public nuisance action  
8 if they have a special injury, and that's what we've  
9 alleged in our Petition.

10 THE COURT: Thank you.

11 All right. The Court will recess for lunch and  
12 resume at 1:30. I'll have the courtroom opened back  
13 up, I think, at least 15 minutes before to allow people  
14 time. And it's approximately eight minutes after noon.  
15 We may open it up at 1:00 for the gallery and counsel.

16 And I will thank the ladies and gentlemen in the  
17 gallery. You have -- you have abided by all the  
18 Court's rulings, to my knowledge. So when you leave  
19 the courtroom, of course you can turn your phones back  
20 on if you want to. But I'm going to remind you that it  
21 is the Court's order that anything that was previously  
22 recorded in the courtroom, whether it's this courtroom  
23 or when we were across the hall in the other courtroom,  
24 it is against my rule if you were to broadcast that in  
25 any kind of public forum which would include any kind

1 of social media platform or other method. So when you  
2 get back, I need to remind everyone to turn their  
3 phones off.

4 So thank you for your attention this morning,  
5 and the Court will resume at 1:30.

6 Court's in recess.

7 (A recess was taken after which time the  
8 following proceedings were had:)

9 THE COURT: We'll reopen the record. Court  
10 and counsel present.

11 Ladies and gentlemen in the gallery, to the  
12 extent any of you were not here in the morning session,  
13 I'm going to repeat the Court's rules for this  
14 proceeding and all proceedings in the District Court of  
15 Tulsa County which is: The order of the Court is that  
16 there be no recording of any form or fashion, no audio,  
17 video, etc., no images taken while the Court is in  
18 session. And it would be a violation of the Court's  
19 order to do so. And then a distribution of those  
20 recordings would also be a violation of the Court's  
21 order. And those -- any such violation could be either  
22 direct or indirect contempt of court, depending on  
23 where the violation occurs, which may be punishable, if  
24 found guilty, by a term of six months in the Tulsa  
25 County Jail and up to a \$500 fine. So those are the

1 orders of the Court.

2 As I said in this proceeding and every  
3 proceeding in the District Court of Tulsa County, my  
4 bailiff is an authorized officer of the court and he  
5 will be not only assisting for your care and comfort,  
6 which is one of my directions to my bailiff, but also  
7 to enforce the Court's orders.

8 And so at this time I will request everyone to  
9 turn their cell phones in the off position, please.  
10 And if there are no other questions or administrative  
11 items, we will resume the hearing.

12 I have a few questions regarding -- it's  
13 possible, Mr. Tucker, I may have misheard one of your  
14 comments this morning, but I went back to check the  
15 court docket just to make sure that possibly -- I  
16 thought I heard you say Third Amended Petition. It's  
17 the First Amended Petition; right?

18 MR. JOHN TUCKER: Your Honor is correct. I  
19 misspoke.

20 THE COURT: And since I'm on the subject  
21 matter of administrative items, I just want to clarify  
22 that all of the -- let me back up a second.

23 So I did not address this morning on the record  
24 the dates of filing, but it is the First Amended  
25 Petition filed February 2nd, 2021. The various Motions

1 to Dismiss were filed in March, 2021.

2 And counsel for defense, do those supersede in  
3 their entirety the previous Motions to Dismiss that  
4 were filed in 2020?

5 MR. JOHN TUCKER: Yes, Your Honor.

6 THE COURT: Thank you.

7 And then the Plaintiffs' responses were filed  
8 June 1, 2021, and the replies were filed between August  
9 25 and August 30 of 2021. And that is what is before  
10 the Court this morning and this afternoon.

11 I did want to make a comment for those that are  
12 not familiar with the case. There was a comment made  
13 by counsel as to the interest in the case proceeding to  
14 discovery and I just wanted to note for the public,  
15 there has been some discovery conducted and that was by  
16 order of the Court.

17 Is that a fair statement, Counsel  
18 Solomon-Simmons?

19 MR. SOLOMON-SIMMONS: Yes. We had two  
20 depositions of two of the survivors.

21 THE COURT: And defense, do you agree that  
22 is a fair statement?

23 MR. JOHN TUCKER: Yes, Your Honor.

24 THE COURT: All right. And also, I  
25 wondered if the slides that we've been viewing, if

1 those have been provided.

2 MR. SOLOMON-SIMMONS: We can.

3 THE COURT: I think it would be helpful.

4 MR. SOLOMON-SIMMONS: Okay.

5 THE COURT: And did you provide a copy to  
6 the defense prior to showing them to the Court?

7 MR. SOLOMON-SIMMONS: No.

8 THE COURT: Okay. Does defense want a copy  
9 of the slides?

10 MR. JOHN TUCKER: Yes, Your Honor.

11 THE COURT: To the extent that there may be  
12 an appeal, the slides, we usually just preserve them as  
13 a court exhibit because they are things the Court  
14 looked at.

15 All right. Now, we will proceed -- the next  
16 item was the causation. Are you still going in the  
17 order that you outlined?

18 MR. JOHN TUCKER: Your Honor, we included  
19 causation in that last argument on the statute of  
20 limitations because that's where it really fits.

21 THE COURT: Okay.

22 MR. JOHN TUCKER: So the next argument  
23 would be nuisance.

24 THE COURT: Very well.

25 MR. JOHN TUCKER: Thank you.

1 THE COURT: I'm ready.

2 MR. COLIN TUCKER: Your Honor, Colin Tucker  
3 on behalf of the Regional Chamber to address nuisance.

4 There was some discussion of nuisance in the  
5 morning session. I've been through my notes and  
6 excised everywhere I saw overlap. I will do my best  
7 not to overlap, but there may be just a few sentences  
8 here or there where I touch on something that might  
9 have been touched on this morning to which I hope  
10 you'll indulge me.

11 The Petition at Paragraph 2 describes in visual  
12 detail how the Tulsa Race Massacre was one of the worst  
13 acts of domestic terrorism in United States history.  
14 The massacre killed hundreds of black residents,  
15 injuring thousands more, burning down almost 1,500  
16 homes and businesses. The Petition described the  
17 massacre as a brutal, inhumane attack against thousands  
18 of people.

19 Plaintiffs would have the Court deem all of this  
20 as simple nuisance. Ask an ordinary person on the  
21 courthouse plaza, What is a nuisance? What answer  
22 might you get from an ordinary person? A dog that  
23 barks and bites is a nuisance. A neighbor who hosts  
24 band practice in their driveway at 3:00 in the morning  
25 is a nuisance. The massacre was many terrible things



1 and nuisance is not among them, not in the ordinary  
2 definition of nuisance, not as understood by ordinary  
3 people trying to follow the law in Oklahoma.

4 Now, legally there are a whole handful --  
5 legally, there are a whole handful of reasons why  
6 Plaintiffs cannot state a claim for nuisance under  
7 Oklahoma law. First, the nuisance envisioned by  
8 Plaintiffs is irreconcilable with the concept of  
9 nuisance that was envisioned by the legislature when it  
10 enacted nuisance law in 1910. That was about a decade  
11 before the massacre.

12 Taken as a whole, what does the statute say?  
13 The statute addresses what nuisances are. It discusses  
14 how you abate them. But all of this within the  
15 language of the statute, which is more than just two  
16 sections, ties nuisance to use of the land, property  
17 rights, one way or another. The Chamber's Motion to  
18 Dismiss goes through these cases and how they apply the  
19 statute and what the legislature wrote at pages 8 to  
20 11.

21 The Plaintiffs recognize the necessity of tying  
22 an alleged nuisance to use of property as well. That's  
23 in -- they address that in their response. The  
24 response states, and I'll quote it, Consistent with the  
25 statutory texts, Oklahoma courts have applied the

1 nuisance statutes in a variety of nonproperty actions.  
2 The Plaintiffs seek to distinguish cases where nuisance  
3 does not involve property. That's the appropriate  
4 thing for a response to do. Of those cases, however,  
5 each of the three do indeed tie the nuisance to  
6 property. The Chamber's reply brief shows how each  
7 case does this, each of the three cases cited by  
8 Plaintiffs, at the reply's page 5. Each of those  
9 decisions have been provided for your reference in the  
10 appendix.

11 Perhaps understanding the Oklahoma cases don't  
12 entirely make the point. Plaintiffs also offer an  
13 example from a lawsuit in Ohio and one in New York  
14 State. Considering that the Plaintiffs have described  
15 Oklahoma's nuisance statute this morning as very  
16 unique, the two out-of-state cases are not instructive  
17 to an Oklahoma District Court.

18 And finally, Plaintiffs cite to the opioids  
19 litigation as compelling precedent. A trial court's  
20 order that is both stayed and pending appeal is not  
21 compelling, is not persuasive authority.

22 But being featured in Plaintiffs' response, the  
23 opioid litigation does bear a mention. That case,  
24 Purdue Pharma, is strikingly different than the issues  
25 before the Court today. Purdue Pharma was not filed by

1 individuals standing in for the state alleging public  
2 nuisance. It was filed by the sovereign, the State of  
3 Oklahoma. And very significantly in Purdue Pharma, the  
4 conduct that was alleged to be the nuisance was  
5 fraudulent marketing of opioids. That is the conduct  
6 that was alleged to be a nuisance. It could be stopped  
7 by the court. While there are many other distinctions  
8 of Purdue Pharma, that is the one most important in the  
9 context of nuisance.

10 Closely related to the requirement of a nexus  
11 between nuisance and property use is recognition that  
12 if Plaintiffs' conception of nuisance is allowed to go  
13 forward, the entire nuisance statute would violate due  
14 process under the Constitution. Due process requires  
15 that statutes be clear enough so that ordinary people  
16 have fair notice of what constitutes illegal conduct  
17 under a given statute. The purpose of due process is  
18 to prevent laws from being arbitrarily enforced or  
19 discriminatorily applied. In part, that's why the  
20 Oklahoma Statutes, those green books, are not just one  
21 or two volumes. They're shelves of books. They fill  
22 shelves because the law must be clear as to what the  
23 law meant to do, who it's meant to affect, and how to  
24 apply it. Due process, fairness, what is the law?

25 Oklahoma has had statutes on its books for many,

1 many decades that specifically address the unlawful  
2 acts set out in the Amended Petition. For example, if  
3 you commit assault, you could be sued under the statute  
4 for assault. Trespass, kidnapping, there's statutes  
5 for that. Outrage, wrongful death, there's statutes  
6 for that. Due process requires the law be set out  
7 before someone is prosecuted under that law.

8           When Plaintiffs argue that later case law in  
9 Oklahoma made clear in their view that the nuisance  
10 statutes applied more than just property rights, those  
11 cases are after day of the acts that they seek to apply  
12 the nuisance laws to. So at the time of those acts  
13 there was no notice or due process to the extent that  
14 later case law can be said to expanded those rights.  
15 And I must note that there was one case cited in the  
16 response that did come before 1921, but as set out in  
17 the reply at page 6, that case, in fact, did tie  
18 nuisance to property rights. And that case was Jones  
19 v. State, to be clear.

20           The Amended Petition proposes that Oklahoma  
21 statute is and has always been a catchall for any form  
22 of tort. It's some sort of super statute that  
23 encompasses all misconduct, no matter how long ago.  
24 Under the theory of the Amended Petition, there's  
25 nothing to stop a different group of named plaintiffs

1 bringing the same causes of action against the same  
2 Defendants 100 years from now.

3 If that is the true purpose of our nuisance  
4 statute, to have a super all-encompassing statute, why  
5 do we bother with all the rest of the law? Why don't  
6 we sweep the shelves clean of the green books? And we  
7 could just call everything we don't like and everything  
8 we want to fix a nuisance.

9 Now, I prepared an entire section to discuss  
10 standing under nuisance because independent of standing  
11 of simply plaintiffs in a case, standing is also an  
12 element of the cause of action. But I believe that was  
13 well addressed this morning, and I don't want to risk  
14 retreading the same ground. So if there are questions  
15 as to standing -- to nuisance and the concept of  
16 standing, I'd address them, but otherwise, I think we  
17 can let that go by.

18 Another reason for the Amended Petition's  
19 inability to state a claim for nuisance is that they  
20 haven't stated a claim for its abatement. Nuisance is  
21 a tort. At its core is conduct that should be stopped.  
22 It's the nature of nuisance. That's explained at page  
23 3 of the reply.

24 The Amended Petition describes conduct  
25 generations ago. By definition, that conduct is

1 incapable of abatement. It already happened. It's  
2 tragic history.

3 The Amended Petition then segues into the  
4 consequences of that conduct, asking the Court to  
5 presume that because consequences persist 100 years on  
6 the nuisance, whatever it is persist as well. The  
7 abatement of the nuisance is transposed with the  
8 nuisance itself. As the Plaintiffs wrote at page 15 of  
9 their response, quote, Plaintiffs are seeking abatement  
10 of a public nuisance that plagues Tulsa, end quote.

11 The proposed abatement is important. Everything  
12 Plaintiffs ask for, however framed, is a tangible  
13 benefit paid for with money. That was discussed this  
14 morning, but it goes to the ability to state the claim  
15 for nuisance. If you're asking for tort remedies,  
16 you're going to be subject to tort statutes of  
17 limitation.

18 That leads into another aspect of the role of  
19 abatement and role of the Court with nuisance. Has a  
20 claim been stated?

21 There's an analogy mentioned in the reply brief,  
22 a very Oklahoma contextual analogy, about the 1889  
23 Oklahoma Land Rush. It's unique to Oklahoma. The idea  
24 of the Land Rush, line up on the border. At one -- one  
25 moment in time, same time for everyone, all on the

1 border, go into the state. You race in to find the  
2 best plot of land you can find and you claim it. That  
3 was the idea. But there were Sooners. They got in  
4 early. They cheated. They broke the law. They took  
5 land they had no right to take. They took some of the  
6 best land. That was not fair to everyone who followed  
7 the law. It was not fair to everyone else. It was  
8 unlawful. What the Sooners did then affects who owns  
9 what land where even today.

10 And was it the Sooners that the Oklahoma  
11 Legislature had in mind when they enacted the public  
12 law nuisance statute 21 years later to cure the  
13 nuisance of improper taking of land? Would this Court  
14 entertain a nuisance lawsuit brought against Sooners or  
15 their descendants? That simply illustrates the  
16 difficulty of applying a nuisance cause of action to  
17 the remedies sought by the Amended Petition. They're  
18 not meant to go one and the other. Here, are there  
19 specific Defendants who can be ordered to cease  
20 specific conduct?

21 The response brief might just ask the Court to  
22 order the following conduct to cease: An interstate  
23 highway, Urban Renewal in the 1950s, the 1960s, and the  
24 1970s. The City created barriers to basic human needs;  
25 to jobs, financial security, education, housing,

1 justice, and health. Conduct to cease includes zoning  
2 regulations from the 1920s and onwards, segregation.

3 As for Plaintiffs' nuisance claim against the  
4 Regional Chamber, the Court is supposed to abate the  
5 Chamber's conduct. What's alleged in the Amended  
6 Petition? What did Plaintiffs talk about that the  
7 Chamber is supposed to abate? In the response,  
8 Plaintiffs write, quote, Soldiers who joined the melee  
9 at the behest of the City, County and Chamber and  
10 murdered and terrorized. That's their response at page  
11 6. Whatever behesting means, it was behested 100 years  
12 ago. What Plaintiffs argue is a nuisance in this case  
13 is nothing like the ongoing fraudulent marketing of  
14 opioids that the District Court of Cleveland County  
15 sought to bring to an end in Purdue Pharma.

16 Plaintiffs are asking the Court to apply vague,  
17 open-ended legal standards to determine liability and  
18 to assess damages. They're looking to accomplish  
19 sweeping social and societal changes. Those goals are  
20 incompatible with a 110-year-old nuisance statute, the  
21 purpose of which was to empower courts to stop specific  
22 misconduct for specific consequences related to  
23 property rights.

24 Thank you.

25 THE COURT: Whenever you're ready, counsel



1 for the Plaintiff.

2 MR. SOLOMON-SIMMONS: All right. Thank  
3 you, Your Honor.

4 So I'm going to respond to the multitude of  
5 arguments that were made by Mr. Tucker about nuisance.

6 Again, we have properly pled a nuisance claim.  
7 I think it's important that we once again understand  
8 our statute is very unique. What the Defendants want  
9 you to do is clearly something that the courts have no  
10 business doing. They want you to legislate from the  
11 bench. They want you to look at the statute which is  
12 unambiguous, and make -- and read things into it that's  
13 simply not there. This statute simply states, A  
14 nuisance consists in unlawfully doing an act, or  
15 omitting to perform a duty. Nowhere in the statute, no  
16 cases that they cite states that it requires a property  
17 interest. It's not in there. And I'm going to talk  
18 more about that.

19 Also, this statute was enacted in 1910. So just  
20 to go and respond to defense counsel's analogy about  
21 the Sooners which happened in 1889, no, you couldn't  
22 bring a public nuisance case because Oklahoma was not a  
23 state in 1889. Oklahoma became a state in 1907. And  
24 this nuisance statute was not enacted until 1910. So  
25 no, you could not bring that action for 1889.

1           But this particular statute was enacted in 1910.  
2 The massacre occurred in 1921; therefore, this statute  
3 is a statute that we can properly, legally fall  
4 underneath.

5           When we talk about unlawful activity or  
6 omissions that annoys, injures or endangers the  
7 comfort, repose, health, or safety of others, they want  
8 to call it a super statute. All I want to do is make  
9 sure we read the statute as is. We can't talk about  
10 what the intent of the statute is when we have it right  
11 on its face. Offends decency. Number three really  
12 does not apply to us. But number four, In any way  
13 renders other persons insecure in their life or use of  
14 their property.

15           So during the massacre which occurred in  
16 Greenwood -- remember, the public nuisance is about a  
17 neighborhood or a community. The massacre occurred in  
18 Greenwood. During this massacre -- before this  
19 massacre, Greenwood was the most successful  
20 African-American community in the history of this  
21 country. It had the largest black-owned hotel in the  
22 nation. It had the number one black newspaper in the  
23 nation. It had the top black doctor in the nation.  
24 Blacks had home ownership comparable with whites in  
25 Tulsa. All of that was going on, and then the massacre

1 happens. And during that massacre, the nuisance is  
2 created.

3 Now, we're talking about the use of property,  
4 making people insecure in their life and property. If  
5 -- during the massacre land was taken from Greenwood  
6 residents. That land was taken, has never been given  
7 back. So how is that not unlawful? The land was taken  
8 unlawfully. Does that not make someone insecure of  
9 their property when it was taken unlawfully and it  
10 hasn't been returned? That's what the statute states.

11 There is a litany of items that I can go through  
12 going from 1921 all the way up to today. I just want  
13 to highlight a few.

14 The Chamber, after the -- first of all, the  
15 Chamber was -- their members participated in the  
16 massacre, let's be clear about that, and this is in our  
17 Petition. After the massacre it was the Chamber that  
18 ran the City of Tulsa for about a two or three-week  
19 period. That's in our Petition. It was the Chamber  
20 that set up what they call internment camps and paid  
21 for them. It was the Chamber that printed the green ID  
22 cards that black people had to wear to be able to leave  
23 the internment camps. And they had to work for free,  
24 basically as a slave. It was the Chamber that paid for  
25 that.

1           It was the Chamber that stated in their records,  
2 in their minutes, that they wanted to take and continue  
3 to push black folks further north into North Tulsa.  
4 That's been the Chamber's policy since 1921. That  
5 policy has not changed, period. That's what we want to  
6 have the opportunity to prove.

7           It was the Chamber with the City, with the  
8 County, with the Sheriff's Department that empaneled a  
9 grand jury of all white men who falsely claimed the  
10 massacre on black residents. They also called it a  
11 riot specifically to make the black residents look like  
12 they were the culprits, also to make sure that black  
13 residents would not have an opportunity to receive  
14 their insurance benefits.

15           During that grand jury - and this is documented  
16 in our Petition which we incorporated the Tulsa Race  
17 Riot Commission Report from 2001 - they document how --  
18 at that particular grand jury proceeding, what they  
19 found is that one of the things they needed to do was  
20 have more aggressive policing of black -- racial  
21 discriminatory policing of blacks in Tulsa. That  
22 continues to this very day. That is a part -- a  
23 nuisance from the massacre. That can be abated by an  
24 injunction.

25           It's really not a difficult understanding of

1 | this case when you understand what we're really asking  
2 | for. We're not talking about societal ills. We're not  
3 | talking about everything in the state of Oklahoma,  
4 | every black person. We're talking about Greenwood and  
5 | North Tulsa who has had a nuisance since 1921.

6 | This is the facts. And remember, the Chamber  
7 | and all the Defendants wanted to push - this is written  
8 | - black people further into North Tulsa. All of their  
9 | activities with the Urban Renewal was specifically to  
10 | push black people -- take the remaining land and push  
11 | them further back into North Tulsa.

12 | The highway is -- they put the highway there  
13 | specifically and then they could starve the community  
14 | of resources, services, redlining. We incorporate in  
15 | our Petition a map of redlining that shows that behind  
16 | that north side of that highway, that's where the  
17 | redlining takes place. That is unlawful conduct that  
18 | continues to this very day. That is why the public  
19 | nuisance statute was put into place.

20 | You know, the defense counsel talked about a dog  
21 | barking. Is that a public nuisance? If the dog  
22 | continues to bark every night it barks, the nuisance  
23 | continues. We're saying that this nuisance continues.  
24 | That is why our allegations have been made in our  
25 | Petition.

1           You know -- again, on this policing point. In  
2 the late '80s, early '90s, we had a police chief by the  
3 name of Drew Diamond who specifically was pushed out of  
4 the City of Tulsa's Police Department because he stated  
5 they had a racially biased police force and the policy  
6 racially, discriminatorily policed North Tulsa. That  
7 goes back to the grand jury instructions from the 1921  
8 Tulsa Race Massacre. We've put ample information into  
9 our Petition from reports from the Human Rights Watch,  
10 from the Legal Defense Fund showing that those policies  
11 are continuing to this very day. The nuisance has  
12 never stopped. It is ongoing.

13           I'm going to move past -- you're going to have  
14 this document.

15           THE COURT: Yes.

16           MR. SOLOMON-SIMMONS: It shows from the  
17 '20s all the way to right now that this nuisance is  
18 continuing. But I also want to remind the Court that  
19 the Defendants agree, they admit that the nuisance  
20 continues; the mayor, we already went through that; the  
21 Chamber; TDA, the City of Tulsa. These quotes, this  
22 one from this year alone, is in present tense. It's  
23 not in past tense.

24           We've already talked about the statute of  
25 limitations.

1           There's a lot of discussion about the opioid  
2 nuisance claim, and I'm very happy if that is the case  
3 because defense counsel said that you cannot -- that  
4 Judge Balkman's order is not persuasive. Obviously  
5 it's not precedent, but I think another District  
6 Court's order who has dealt with a case similar to this  
7 would be persuasive authority. I've always heard that,  
8 in my 17 years of practice, that it is persuasive  
9 authority. And Judge Balkman found that the deceptive  
10 marketing campaign, the marketing campaign, qualifies  
11 as the kind of act or omission that will sustain  
12 liability under Oklahoma's nuisance law.

13           Now, defense counsel asked if a person out on  
14 the street believed that -- a deceptive marketing  
15 campaign, would that be considered a public nuisance?  
16 Well, the question is: What does it matter what the  
17 person on the street believe? The law states exactly  
18 what a nuisance can be if you meet the elements, which  
19 we do.

20           What's interesting about this opioid litigation  
21 is that the State, which has adopted -- which is  
22 actually the plaintiff in the opioid litigation, and  
23 the City of Tulsa has its own public nuisance lawsuit  
24 that was filed literally, Your Honor, one day after we  
25 filed this case. We filed our case on September 1,

1 | 2020. The very next day, September 2nd, 2020, the City  
2 | of Tulsa files their own opioid case. They do zero  
3 | public relations around it. No press release. It's  
4 | not discussed. I believe -- I submit to the Court  
5 | because the things that they're arguing, both the State  
6 | and the City, in their Petition meets the same things  
7 | that we're arguing. For example, they said that the  
8 | opioids constitute unlawful acts or omissions of duties  
9 | which annoy, injure, or endanger the comfort, repose,  
10 | health and safety of others, offend decency. That's  
11 | the same thing we're saying because that comes directly  
12 | from the statute. The statute allows you to do this.

13 | I think it's very important to look at the  
14 | similarities between the opioid litigation cases and  
15 | our case. Public nuisance, that's their claim. They  
16 | allege and are alleging currently in front of the  
17 | Oklahoma Supreme Court - I have their briefs here  
18 | (indicating) - a false and misleading advertising  
19 | leading to oversubscription of opioid medications.  
20 | We're alleging destruction of 40 city blocks that  
21 | continues to this day. The location for them is the  
22 | state of Oklahoma and the entire city of Tulsa. We're  
23 | just looking at the Greenwood/North Tulsa neighborhood.  
24 | They allege an ongoing harm. We allege ongoing harm.  
25 | They propose remedy is abatement. Our proposed remedy



1 is abatement. Their abatement plan specifically calls  
2 for funding programs to treat and mitigate and reverse  
3 the consequences of the nuisance. We're asking for  
4 programs to do the same thing for the nuisance here in  
5 Tulsa.

6 Now defense counsel, Mr. Tucker, just stated  
7 that there is a property requirement in the text, but  
8 I've shown you -- there's a property requirement for  
9 public nuisance, but Your Honor, I've shown you on  
10 several occasions the text of the nuisance statute. It  
11 does not contain a property requirement. And  
12 Defendants were not able to cite one Oklahoma case  
13 that's held that property is required for a public  
14 nuisance claim because it's not -- there's no cases  
15 exist. And even if a property requirement was  
16 required, we state that. Look at the highway. That is  
17 the property -- that is the greatest manifestation of  
18 property being utilized to further the nuisance. What  
19 about the guns that were used in the massacre? What  
20 about the bullets that were used in the massacre? What  
21 about the airplanes? That's all property.

22 Also, Mr. Tucker stated that this public  
23 nuisance law has been on the books since 1910, been  
24 utilized hundreds and hundreds of times throughout the  
25 state of Oklahoma, is void for vagueness. That's

1 simply not true.

2           They discuss talking about systematic racism and  
3 societal ills. Where in our Petition do we talk about  
4 fixing systematic racism or societal ills? We focus  
5 very specifically on abating the nuisance that is  
6 continuing in the Greenwood/North Tulsa neighborhood.  
7 That is what the nuisance statute was set out to do for  
8 these type of situations if you meet the elements, and  
9 that's what we're asking to do at this particular time.  
10 And we listed a litany of cases for so called, quote  
11 unquote, societal ills the nuisance statute was able to  
12 be utilized to fix or abate. That's the proper  
13 terminology.

14           Your Honor, it's clear that the nuisance statute  
15 has been applied for over 111 years now, and abate  
16 public nuisances. And if that requires the litigation  
17 of so-called societal ills, that's okay also.

18           I'd like to point out how contradictory the  
19 arguments of the Defendants who have all, my  
20 understanding, adopted the arguments of the Chamber in  
21 the nuisance arguments versus what they're arguing  
22 here. Both Defendants for the State of Oklahoma in  
23 their brief (indicating) to the State Supreme Court to  
24 protect their nuisance verdict --

25           THE COURT: I'm sorry. Can you just back

1 up? What brief are you referring to?

2 MR. SOLOMON-SIMMONS: Oh. I'm referring to  
3 the State of Oklahoma's appellate -- counter appellate  
4 answer brief, and brief in chief, and counter appeal  
5 related to the opioid litigation that occurred in  
6 Cleveland County.

7 THE COURT: Thank you.

8 MR. SOLOMON-SIMMONS: I'm sorry about that,  
9 Your Honor.

10 In this particular brief they argue that the  
11 public nuisance statute is not void for vagueness.  
12 That's at page 30. But in this case today they tell  
13 you that the public nuisance statute is void for  
14 vagueness.

15 They argue at page 34 that abatement is not  
16 money damages, but they're arguing today that abatement  
17 is money damages.

18 They argue at page 31 that an abatement plan  
19 requiring expenditure of funds is an equitable remedy,  
20 but they're arguing today in their papers that the  
21 abatement plan requiring expenditure of funds is not an  
22 equitable remedy.

23 They argue to the Oklahoma Supreme Court that  
24 public nuisance does not contain a property  
25 requirement, pages 25 to 27, but today they're telling

1 | this Court that public nuisance does contain a property  
2 | requirement.

3 |           They argue at page 34 of their brief that public  
4 | nuisance is not a tort, but today they're saying public  
5 | nuisance is a tort.

6 |           And they argue quite well, I may add, at page 27  
7 | that there is no finite list of what is a public  
8 | nuisance, but here today, Your Honor, they want to tell  
9 | you that when it comes to the massacre, that just  
10 | simply doesn't fit even though the statute does not  
11 | have specific: What is a public nuisance?

12 |           Now, we pretty much already talked about special  
13 | injury.

14 |           THE COURT: Okay. I'm going to stop you  
15 | there for a second.

16 |           So just point of clarification, when you said,  
17 | "They argue," are any of these Defendants/entities in  
18 | that lawsuit?

19 |           MR. SOLOMON-SIMMONS: Well, the State of  
20 | Oklahoma is in that lawsuit. And my understanding is  
21 | the State -- so the Chamber did the public nuisance  
22 | briefing for the Defendants and took those arguments  
23 | for -- my understanding, all the Defendants have  
24 | adopted the Chamber's arguments for this litigation.

25 |           MR. JOHN TUCKER: Just for clarification,

1 the Chamber's arguing here today as opposed to what  
2 somebody else did in Oklahoma City.

3 MR. SOLOMON-SIMMONS: Correct.

4 MR. JOHN TUCKER: I'm sorry. I just want  
5 to be clear on that.

6 THE COURT: And the State of Oklahoma has  
7 many different agencies. So the party here in this  
8 lawsuit is Oklahoma Military Department. So are you  
9 saying, Counsel Solomon-Simmons, that the State of  
10 Oklahoma is taking opposite positions between the  
11 military department, Counsel, and the position in the  
12 opioid lawsuit?

13 MR. SOLOMON-SIMMONS: Yes, ma'am.

14 THE COURT: Thank you.

15 Go ahead.

16 MR. SOLOMON-SIMMONS: Thank you.

17 We talked some about special injury this  
18 morning, but I do want to say one other thing about it.

19 In our response brief we pointed out that  
20 there's no Oklahoma case where a court has granted a  
21 Motion to Dismiss for failure to plead a special injury  
22 in a public nuisance case. In their reply brief the  
23 Defendants pointed out a case, McKay. This is a case  
24 that was -- it's a demur from 1910. So there isn't an  
25 Oklahoma case, again, where this has been dealt with on

1 a Motion to Dismiss, and even on a demur, that happened  
2 110 years ago. So that would be -- this Court would be  
3 the first court in Oklahoma in 110 years to dismiss a  
4 case based on special injury not being properly pled.  
5 We submit that we properly pled special injury in this  
6 particular case, but I just wanted to make that point.

7 Can I get a drink of water right quick?

8 THE COURT: Yes.

9 MR. SOLOMON-SIMMONS: One moment, Your  
10 Honor.

11 THE COURT: Yes.

12 MR. SOLOMON-SIMMONS: Your Honor, if you  
13 have any questions for me, I'm happy to answer them.

14 All right. Thank you.

15 THE COURT: Reply.

16 MR. COLIN TUCKER: I'll go a little bit in  
17 reverse order, primarily because that will help me go  
18 much more quickly.

19 We closed with -- I mentioned on special --  
20 special standing -- well, the response that the  
21 Plaintiffs discusses special standing were pages 8 to  
22 14, a substantial portion of the brief. And over those  
23 six pages the essential argument is that all human  
24 beings are unique, that all human beings have unique  
25 experiences over the course of their lives, and thus,

1 each human being is affected by a public nuisance in a  
2 special way. It seems if hundreds or thousands of  
3 people are suffering the same injury, the injury, while  
4 awful, does that make it special? A holistic  
5 discussion of sociology does not satisfy the statutory  
6 requirement of establishing the special status given --  
7 to give someone the same authority as the sovereign to  
8 bring public nuisance claims. But the six pages of  
9 discussion does demonstrate that it's really hard to  
10 fit Plaintiffs' claims in the case into the confines of  
11 what is nuisance.

12           There was mention that the statute on nuisance  
13 does not address a property requirement. There is not  
14 a single sentence in the statute that says from  
15 beginning to end, Thou shalt own property or use  
16 property of others to be subject to this statute. It  
17 is not blunt like that. I also note that  
18 Mr. Solomon-Simmons only cited the first three or four  
19 sections of the statute. The statute goes on for a  
20 number of sections. The ones that discuss property in  
21 the context of nuisance are in Sections 5, 15, 16, 17,  
22 and the cases mentioned in the Chamber's Motion to  
23 Dismiss are pages 9, 10 and 11.

24           There was a discussion of: What is the nuisance  
25 in the context of the Chamber? It wasn't just that day

1 of the massacre. It was, as I understood it, things  
2 going on for up to a couple of weeks thereafter. But  
3 then we got back to the subject of things like the  
4 building of highways and Urban Renewal. And while I  
5 heard argument that Plaintiffs are not seeking the  
6 Court to cure societal ills, they're describing society  
7 that we've been living in for decades and how they want  
8 to change that society. That's -- those are not  
9 abatable acts of nuisance and certainly not abatable  
10 acts of nuisance of the Chamber.

11 An example, the destruction of 40 city blocks  
12 that continues to this day. There aren't blocks being  
13 destroyed like there were blocks being destroyed in  
14 1921. And to say that that's occurring today is to say  
15 that a nuisance as set out in the Amended Petition is a  
16 completely different thing today. They're simply not  
17 related. They're not abatable.

18 I believe that touches each point I'd like to  
19 make. Thank you.

20 THE COURT: All right. I have just a few  
21 questions, and not of you. Thank you.

22 So Counsel Solomon-Simmons, would you agree that  
23 the Plaintiff, even in part, that the Petition is  
24 seeking a good faith extension of the law or argument  
25 that the claim is supported by the law?



1 MR. SOLOMON-SIMMONS: The public nuisance  
2 law?

3 THE COURT: Yes.

4 MR. SOLOMON-SIMMONS: No, I would not  
5 agree.

6 THE COURT: Is it in the Petition? And I  
7 don't know if the --

8 MR. SOLOMON-SIMMONS: Can I just -- I just  
9 want to be clear on that. We believe that the statute  
10 is very clear. The case law is very clear. If you  
11 meet the specific elements, then you can have a claim  
12 under public nuisance.

13 THE COURT: So if on the facts taken as  
14 true, which is the standard on a Motion to Dismiss, it  
15 would appear to the Court that in great part the  
16 Petition is distinguishable from the cases cited in  
17 support in the response briefing. So that is one  
18 reason I ask that question. And of course, it is  
19 proper and all counsel, I think, would agree that  
20 counsel may argue a good faith extension of the law as  
21 long as they admit that that, in part, is what they are  
22 arguing. But I just want to clarify. And that's not  
23 your position so I just wanted to ask that question.

24 MR. SOLOMON-SIMMONS: One second, Your  
25 Honor.

1 THE COURT: Yes.

2 MR. SOLOMON-SIMMONS: Again, Your Honor,  
3 just to be clear, we don't necessarily believe that we  
4 need a good faith extension, but if the Court is  
5 inclined, feel like we need it, we're happy to  
6 entertain that and anything we can clarify for the  
7 Court that would help you with that analysis.

8 THE COURT: Well, the reason I ask the  
9 question is just on its face - which that's how the  
10 motion is to be reviewed, considering the allegations  
11 in the Petition taken as true - I think one would have  
12 to agree that there is a distinct difference between an  
13 ongoing and current -- you use the opioid case in  
14 support of the Plaintiffs' opposition to the Motion to  
15 Dismiss, an ongoing fraudulent marketing scheme, and  
16 the destruction of 40 city blocks that occurred in  
17 1921. That is not ongoing.

18 MR. SOLOMON-SIMMONS: But it is an ongoing  
19 scheme to destroy the Greenwood community. This scheme  
20 is going on right at this very moment. And that scheme  
21 sees property being taken -- right at this very moment,  
22 people in Greenwood, property is being taken. Right at  
23 this very moment property that should be able to be  
24 purchased by people in Greenwood, they cannot do it.  
25 Right at this very moment things are happening, right

1 at this very moment.

2 Again, I go back to the grand jury discussions  
3 where they specifically stated, as in our Petition, We  
4 can never allow Greenwood to prosper like that again,  
5 and we must, more aggressively, police them. That  
6 continues this very day. That is happening right now.

7 THE COURT: So I think, then -- it possibly  
8 was Counsel Miller that referred the Court to  
9 Paragraphs 26 to 36 of the First Amended Petition.

10 What is the current ongoing activity? I'll just  
11 use one of the Defendants as an example. What is the  
12 Chamber currently doing that is part of this ongoing  
13 scheme? And if you -- if you can refer the Court to a  
14 paragraph number, that would be helpful.

15 MR. SOLOMON-SIMMONS: Sure.

16 Paragraph 177. Now, I want to point this out,  
17 but I also want to be clear that we do not have a  
18 heightened pleading standard in this case. And it is  
19 lawful in this standard to have notice pleading and  
20 say, We allege that this is happening, and that gets us  
21 over the threshold in and of itself. But in addition  
22 to that, we do lay out in 177 and 178, 179, 180, 181,  
23 182, 183, 184.

24 So Your Honor, if you think about this like the  
25 oil case we talked about, Meinders, where the oil was

1 in the ground for 80 years, it was there causing a  
2 problem. And until that oil can be abstracted and  
3 abated, that nuisance continues. And that's what we  
4 allege here. And if we get the opportunity, we believe  
5 we can prove it.

6 THE COURT: Well -- and as you know,  
7 Counsel - and if you disagree, please feel free to tell  
8 me - one of the purposes of a Motion to Dismiss is also  
9 to, in the Court's ruling, either to order such defects  
10 that have been identified that can be cured and the  
11 Court finds those to be necessary so that the  
12 Defendants can answer the Petition. That is important.  
13 And I certainly understand.

14 I think it is undisputed that Oklahoma is a  
15 notice-pleading state, but -- so I'll take your  
16 Paragraph 177 and, quote, Defendants have and still  
17 actively participate in schemes to prevent Greenwood's  
18 full reconstruction and harm North Tulsa's residential  
19 and business communities. And so on that one paragraph  
20 alone -- and I understand you don't have to have all  
21 the specific facts today --

22 MR. SOLOMON-SIMMONS: I'll give you --

23 THE COURT: -- in order for the Defendants  
24 to answer it other than denial or cannot admit nor deny  
25 which is the standard --

1 MR. SOLOMON-SIMMONS: Sure.

2 THE COURT: -- response in any case.

3 MR. SOLOMON-SIMMONS: I understand.

4 Well, let me give you an example. I grew up on  
5 36th Street North. My mother still lives there. And  
6 so in those neighborhoods it's routine that the City  
7 does not cut the yards. It's routine the City does not  
8 fix the streets. It's routine that the City allows --  
9 and that brings the property damage down. So like my  
10 mother's house, 3359 North Lansing Place, the property  
11 values go down. It doesn't happen out south. It  
12 doesn't happen in the white parts of town. That is  
13 something we can document. And when we get into  
14 discovery we'll be able to point and show how those  
15 policies are destroying -- continue destroying North  
16 Tulsa and the Greenwood community because that was  
17 always the plan from 1921 was to disperse and displace  
18 black people out of the valuable lands of Greenwood and  
19 put them further out north and let them suffer. And we  
20 can prove that. And I have lived that and the people  
21 in North Tulsa live it every single day.

22 THE COURT: So what is the Chamber doing  
23 currently to participate in the schemes to prevent  
24 reconstruction?

25 MR. SOLOMON-SIMMONS: The Chamber --

1 THE COURT: Yes.

2 MR. SOLOMON-SIMMONS: Yes. The Chamber  
3 partners with the City and with the Tulsa Planning  
4 Commission and TDA to ensure that their selected white  
5 business owners and members receive the property, the  
6 lucrative property that's been developed. Mr. Tucker  
7 talked about looking out north, into North Tulsa. If  
8 we also look out north we see a lot of cranes. We see  
9 a lot of cranes that are happening in Greenwood, and  
10 none of the people that own the land in Greenwood own  
11 those cranes. They're all white business owners who  
12 are members of the Chamber. And that money stays  
13 within the Chamber and the City, and they lock out  
14 black owners. And most of that land was stolen during  
15 the massacre, never to be returned. They don't have  
16 good title and we want to prove that, but we need  
17 discovery to do it.

18 THE COURT: All right. Let's see what  
19 other questions I have.

20 All right. So I asked you regarding the  
21 distinction which appears -- here, the distinction  
22 which appears to be obvious, but I think you answered  
23 it regarding an actively ongoing marketing scheme, as  
24 in the opioid case, with the allegations which, as you  
25 correctly pointed out, Oklahoma is a notice-pleading

1 state. But in order for the Court to evaluate, I will  
2 go by the Petition. So as I understand it, that's your  
3 answer to the Court's question, that in order to  
4 respond to the Defendants' argument, the Court simply  
5 looks at the face of the pleading and takes it as true.

6 MR. SOLOMON-SIMMONS: Yes, ma'am, Your  
7 Honor, but I will direct you to 178. We said, The  
8 Defendants are using a well-orchestrated, multi-faceted  
9 marketing campaign. This --

10 THE COURT: Now, that -- okay. That, I was  
11 actually going to bring up in a different question.

12 MR. SOLOMON-SIMMONS: Okay.

13 THE COURT: That, to me, appears to apply  
14 to the allegation about this misrepresentation scheme,  
15 which I had asked if that was a separate cause of  
16 action for which -- because it said on one of your  
17 video screens, one of your slides, that you were  
18 seeking declaratory relief which is why I asked if the  
19 Plaintiff -- those specific Plaintiffs were seeking any  
20 kind of injunction or restraining order pertaining to  
21 that marketing.

22 MR. SOLOMON-SIMMONS: And we are.  
23 Honestly, Your Honor. But also, this fits right into  
24 the public nuisance because this is an unlawful act of  
25 the Chamber and other Defendants marketing the Tulsa

1 Race Massacre as Tulsa Triumph. That was a marketing  
2 plan that they put forth. They marketed and said that  
3 this was something that Tulsa has moved on with,  
4 Greenwood is rising, everything is great here. And  
5 that lie injures and endangers these survivors because  
6 it's not true. And it's a marketing campaign and it is  
7 something that we want the Court to identify.

8           Never in the history of this court system has it  
9 been stated, Yes, what happened in 1921 was wrong.  
10 Yes, it was an injustice. And we're going to put an  
11 injunction to stop those areas that you can stop. Your  
12 Honor, we know that you can't order an abatement of any  
13 and everything, but there are certain powers that this  
14 Court has and does on a daily basis.

15           You and I have been lawyers a long time. We've  
16 seen the court being enjoined and file declaratory  
17 relief, and a host of a number of issues.

18           THE COURT: So you mentioned a name of,  
19 perhaps, one of these marketing campaigns, Tulsa  
20 Triumph. Is that what you said?

21           MR. SOLOMON-SIMMONS: Yes.

22           THE COURT: Is that somewhere in your  
23 Petition regarding the dates of these publications?

24           MR. SOLOMON-SIMMONS: It is. It would  
25 probably -- in reference by incorporation of our Human



1 Rights Report. But also when we talked about a  
2 well-orchestrated marketing campaign, that is what we  
3 were talking about.

4 THE COURT: Okay. And you contend that  
5 that is ongoing --

6 MR. SOLOMON-SIMMONS: It is ongoing.

7 THE COURT: -- at this time?

8 MR. SOLOMON-SIMMONS: At this very moment.

9 THE COURT: And it's pled somewhere within  
10 the four corners of this Petition?

11 MR. SOLOMON-SIMMONS: Yes, ma'am.

12 THE COURT: All right. Let me make a note,  
13 please.

14 And -- and I request your indulgence as I may  
15 ask some repetitive questions.

16 MR. SOLOMON-SIMMONS: Sure.

17 THE COURT: That specific claim is as to  
18 all of the Defendants or just the City and the Chamber?  
19 I had written down the City and the Chamber.

20 MR. SOLOMON-SIMMONS: Yes, Your Honor, the  
21 City and the Chamber.

22 THE COURT: And would you clarify, was that  
23 as to the individuals that you mentioned this morning,  
24 such as Don Adams? So was it part of the Plaintiffs or  
25 all of the Plaintiffs?

1 MR. SOLOMON-SIMMONS: It was all of the  
2 Plaintiffs.

3 When you understand the context, too, Your  
4 Honor, after the massacre it was the Chamber and the  
5 City that put together a well-orchestrated marketing  
6 campaign at that time to go around the nation saying  
7 that what happened was not that bad.

8 THE COURT: But I focused on my question.

9 MR. SOLOMON-SIMMONS: Okay.

10 THE COURT: So focus on -- is meant to be  
11 interpreted as a question right now.

12 MR. SOLOMON-SIMMONS: Sorry. I  
13 accidentally knocked my phone on. I apologize.

14 THE COURT: But you did answer my previous  
15 question that this Tulsa Triumph is one of the  
16 marketing campaigns that is currently ongoing.

17 MR. SOLOMON-SIMMONS: Yes.

18 THE COURT: And that is a theory that is  
19 being claimed by all of the Plaintiffs.

20 MR. SOLOMON-SIMMONS: Yes.

21 THE COURT: Okay. You've answered my  
22 question.

23 MR. SOLOMON-SIMMONS: Thank you, Your  
24 Honor. Thank you for your patience with me.

25 THE COURT: I may come back to that topic

1 with a different question, but for now -- we've been in  
2 court approximately an hour.

3 All right. The next topic, Counsel, I'm ready.

4 MR. WILKES: Your Honor, Keith Wilkes for  
5 the Defendants Board of County Commissioners for Tulsa  
6 County and Vic Regalado in his official capacity as  
7 sheriff of Tulsa County. I've also been asked to  
8 address the issues presented in the Motion to Dismiss  
9 relating to the Governmental Torts Claims Act, the  
10 GTCA. On behalf of my clients, the City of Tulsa, the  
11 Tulsa Metropolitan Area Planning Commission, the State  
12 of Oklahoma, and the Tulsa Development Authority, I'll  
13 refer to these group -- to this group collectively in  
14 my remarks as the Public Entity Defendants; in other  
15 words, everyone but the Chamber.

16 Your Honor, to echo, perhaps, what Mr. Tucker so  
17 well stated at the outset today, the Tulsa Race  
18 Massacre represents a dark moment in the history of our  
19 country, let alone the city. 100 years later it is  
20 difficult to comprehend the efforts of hate, fear and  
21 distrust that surely fueled the tragic and  
22 heartbreaking events of 1921. The Motions to Dismiss  
23 do not seek to minimize the tragedy of the Tulsa Race  
24 Massacre.

25 The Plaintiffs initiated this legal proceeding

1 in which the rule of law applies. It is the rule of  
2 law that places today's Defendants into the shoes of  
3 their predecessors of a century ago. And as such, it's  
4 the rule of law that leads to the inevitable legal  
5 conclusion that the claims against these Defendants  
6 must be dismissed.

7 First and foremost regarding the Tulsa  
8 Development Authority, shortly before lunch  
9 Mr. Solomon-Simmons referenced the TDA and said, They  
10 aren't even here. Counsel knows this hearing was  
11 rescheduled from its first date to today to accommodate  
12 his schedule. He also knows that counsel for TDA had  
13 to be in a jury trial today and advised the Court of  
14 his conflict. It should also be noted that the Tulsa  
15 Development Authority was not in existence in 1921. It  
16 was not until November 17th, 1959, that the City of  
17 Tulsa created its predecessor Tulsa Urban Renewal  
18 Authority which was renamed the TDA in 1986.

19 The Plaintiffs' causes of action are barred by  
20 the Governmental Torts Claims Act. Prior to the  
21 enactment of the GTCA dating back to Oklahoma's  
22 adoption of the state constitution, the state and its  
23 political subdivisions were immune under the common law  
24 from liability for the negligence of their employees in  
25 the presence of government functions. That was the law

1 in effect for many years until the Oklahoma Supreme  
2 Court overturned that, but gave the legislature a hint  
3 on how they could adopt laws to -- to reenact as a  
4 matter of statute. The Oklahoma Legislature took that  
5 hint.

6 Today, Plaintiffs' public nuisance and unjust  
7 enrichment claim against the Public Entity Defendants  
8 are barred by the Governmental Torts Claims Act under  
9 Title 51. The GTCA declares, The state, its political  
10 subdivisions, and all of their employees acting within  
11 the scope of their employment, whether performing  
12 governmental or proprietary functions, is immune from  
13 liability for torts. That's Title 51, Section  
14 152.1(A). The Oklahoma Legislature in its next  
15 statutory breath waives sovereign immunity, but, quote,  
16 only to the extent and in the manner provided in, end  
17 quote, the GTCA.

18 The exclusivity of the GTCA on the issue of  
19 sovereign immunity and the limited permissible action  
20 generally directs the analysis towards determining  
21 whether its limited waivers of sovereign immunity from  
22 tort suit encompass the particular suit -- or tort suit  
23 at issue. That's Barrios v. Haskell we cited in the  
24 briefs from the Oklahoma Supreme Court.

25 The Public Entity Defendants state, The

1 Plaintiffs' causes of action for public nuisance and  
2 unjust enrichments are torts under the Oklahoma  
3 Legislature's intentionally broad definition of tort as  
4 it applies to the GTCA. Plaintiffs argue otherwise.  
5 But their reliance on the traditional notions of tort  
6 is misplaced as it applies to the GTCA.

7 Tort is whatever the Oklahoma Legislature  
8 defines a tort to be in the Act as it applies to the  
9 GTCA and the Public Entities. A tort is a matter of  
10 statute. The GTCA's expansive and exclusive statutory  
11 definition of tort states, Tort means a legal wrong,  
12 independent of contract, involving violation of a duty  
13 imposed by general law, statute, the Constitution of  
14 the State of Oklahoma, or otherwise, resulting in a  
15 loss to any person, association or corporation as the  
16 proximate result of an act or omission of a political  
17 subdivision or the state or an employee acting within  
18 the scope of employment. That's Section 152(14). The  
19 GTCA definition is purposefully broad and includes  
20 Plaintiffs' causes of action.

21 There's a good history of how every time a court  
22 has sought to find a loophole and the GTCA find the  
23 liability or exposure to a governmental entity, the  
24 legislature has come back in turn and made those  
25 changes. And that can be found in Barrios, 2018 OK,

1 Subsections -- pardon me, numbered Paragraphs 10  
2 through 17.

3 The Oklahoma Supreme Court also recognize that  
4 the plain language of the Act stresses the  
5 legislature's intent to abrogate any common law  
6 theories of recovery if a governmental tortfeasor may  
7 be liable.

8 Public nuisance, Your Honor, is a tort under the  
9 GTCA. Plaintiffs' public nuisance cause of action is  
10 doomed on multiple fronts. Beyond its misuse, public  
11 nuisance is both a common law tort and a tort defined  
12 under the GTCA. As such, Plaintiffs cannot prevail  
13 against the Public Entity Defendants because public  
14 nuisance falls under the GTCA.

15 Public nuisance can be found in the Restatement  
16 (Second) of Torts as an unreasonable interference with  
17 a right common to the general public, and that's at  
18 Section 821B. Professor Prosser went way back, the  
19 official reporter for the Restatement (Second), noted  
20 in comments of -- in the comments of 821B that public  
21 nuisance constitutes the tort, and that's comment B.  
22 The Oklahoma Supreme Court has recognized public  
23 nuisance as a tort for the purposes of determining  
24 whether the doctrine of sovereign immunity applies to a  
25 civil suit against the state and its political

1 subdivisions.

2 In Coffey versus Oklahoma, 1976 OK 20,  
3 landowners sued the state under theories of public  
4 nuisance and the unlawful taking of their property.  
5 The Coffey court noted, quote, It has been held that a  
6 nuisance is a tort, or at least it involved tortious  
7 conduct, for the purpose of determining applicability  
8 of the doctrine of government immunity because it falls  
9 into the usual category of tort liability. And that is  
10 at Paragraph 16, and it cites to a Kansas Supreme Court  
11 case.

12 In a bit of certainly unintentional  
13 foreshadowing, the Oklahoma Supreme Court in Coffey  
14 also recognized, quote, No amount of sympathy for the  
15 plight of the plaintiffs can change the legal  
16 principles applicable to their claim. That's at  
17 Paragraph 24.

18 The Oklahoma Supreme Court concluded the  
19 plaintiffs' assertion that the case at bar sounds in  
20 nuisance or in tort negates the existence of any right  
21 for the reason of the state's sovereign immunity. The  
22 same holds true here. Dismissal is proper.

23 Further, in alleging public nuisance, Plaintiffs  
24 expressly identified and rely upon Oklahoma's nuisance  
25 statutes. We've seen plenty of slides and they appear



1 in the First Amended Petition throughout. The GTCA's  
2 statutory definition of tort includes, quote, A legal  
3 wrong, independent of contract, involving violation of  
4 a duty imposed by general statute, the Constitution of  
5 the State of Oklahoma, or otherwise. 152(14) Section.  
6 Whether by common law or statute, Plaintiffs' public  
7 nuisance cause of action is a tort as defined under the  
8 broad definition of the Governmental Torts Claims Act.

9 Now, unjust enrichment, this defies some  
10 conventional wisdom, but it is a tort in the GTCA's  
11 definition of what a tort is because the legislature  
12 has the discretion to define tort as it deems fit. We  
13 don't go back to the common law to decide whether  
14 unjust enrichment sounds in tort here as applied to  
15 public entities, we go to the GTCA.

16 Plaintiffs seek money for -- damages for monies  
17 Plaintiffs contend were not paid to them when certain  
18 Defendants allegedly received benefits from marketing  
19 Black Wallstreet. Standing aside, this unjust  
20 enrichment claim does not arise out of contract and is  
21 clearly brought under general -- Oklahoma general law  
22 statute, the Constitution of the State of Oklahoma, or  
23 otherwise. That's the definition of tort in the GTCA  
24 which Plaintiffs allege resulted in, quote, in a loss  
25 to any person, association or corporation.

1           Although not traditionally grounded in tort  
2 under the newly-expanded definitions - and they are  
3 relatively new - and exclusivity of liability  
4 provisions of the GTCA, Plaintiffs' unjust enrichment  
5 is a tort. Again, a GTCA tort is a legal wrong,  
6 independent of contract, involving violation of a duty  
7 imposed by general law, statute, or the Constitution of  
8 the United States, or otherwise. The purposeful  
9 breadth of the definition, by evolution of a  
10 legislative amendment, cannot be understated.

11           Oklahoma and its public subdivisions were immune  
12 from liability, as I referenced going back to the  
13 beginning of the state, until abrogated in 1983 by the  
14 Oklahoma Supreme Court who then said, of course, the  
15 abrogation of the common law sovereign immunity did not  
16 prevent the legislature from enacting on its own. The  
17 legislature took the hint.

18           The next legislative session, the legislature  
19 abrogated Vanderpool with a statutory declaration and  
20 then enacted the GTCA. In 2013, the Oklahoma Supreme  
21 Court, in Bosh versus Cherokee County Governmental  
22 Building Authority, held the GTCA did not bar a tort  
23 claim of excessive force in violation of a pretrial  
24 detainee's state constitutional rights. And this  
25 became known as a Bosh tort, and we saw those in state

1 and federal courts. Once again, the legislature acted.

2 In the next legislative session, the legislature  
3 amended the GTCA's definition of tort to include the  
4 alleged deprivation of statutory and the state  
5 constitutional rights. So we no longer have a Bosh  
6 tort because the legislature expanded the tort  
7 definition to take care of that, too. Similarly  
8 amended the scope of the State's liability and  
9 reinforced the exclusivity of the GTCA, and added what  
10 can reasonably be interpreted as a prophylactic  
11 statement to protect against future judicial  
12 interference. Quote, If a court of competent  
13 jurisdiction finds tort liability on the part of the  
14 state or a political subdivision of the state based on  
15 a provision of the Oklahoma Constitution or state law  
16 other than the Governmental Torts Claims Act, the  
17 limits of liability provided for in the Governmental  
18 Torts Claims Act shall apply. Oklahoma Stat. Title 51,  
19 Section 153.

20 So even if a court does find compelling an  
21 argument to go outside of the GTCA, the GTCA  
22 anticipates that and has now said that if that happens,  
23 you're still going to have to follow the GTCA with  
24 respect to tort damages as it applies to the state.  
25 These actions illustrate the depth of the legislature's

1 resolve to limit actions against the state and its  
2 political subdivisions by broadening the definition of  
3 tort in Oklahoma.

4 The GTCA definition now effectively captures any  
5 imaginable wrongdoing, whether grounded in the common  
6 law, whether grounded in statute, or even the Oklahoma  
7 Constitution, or otherwise, provided the wrongdoing is  
8 independent of contract. That's in Section 152,  
9 Subsection 14.

10 This is not a contract case. Plaintiffs' unjust  
11 enrichment theory and alleged wrongdoing does not arise  
12 out of any contract, but rather, is based upon the  
13 alleged wrongdoing that certain Defendants appropriated  
14 the Tulsa Massacre for their own financial and  
15 reputational benefits. That's in the First Amendment  
16 Petition at Paragraph 177 we just visited. As pled,  
17 this cause of action meets the GTCA's expansive tort  
18 definition. Unjust enrichment, like public nuisance,  
19 can only survive the doctrine of sovereign immunity if  
20 the GTCA's limited waivers of immunity expressly  
21 encompass the claim.

22 Your Honor, I have more on the GTCA, but I would  
23 note the Chamber would like to address unjust  
24 enrichment as it applies to it, and whether to do that  
25 on the back end of my presentation or do it now while

1 we're talking about unjust enrichment, then I'll  
2 return, whatever your preference would be in that  
3 respect.

4 THE COURT: Either way.

5 MR. JOHN TUCKER: Your Honor, I want to --  
6 pardon me. For the reporter, John Tucker for the  
7 Chamber. Sorry.

8 I want to specifically respond to questions that  
9 you asked this morning having to do with this unjust  
10 enrichment claim and how it's pled and what they seek.  
11 And -- it is correct that one item in the amended  
12 complaint asks that there be an injunction against  
13 using likenesses of victims in the massacre with  
14 dollars to be paid to -- with dollars to be paid to the  
15 Defendants [verbatim]. The persons are not identified.  
16 This is in the prayer for relief.

17 In the Petition, the allegations, No. 177  
18 through 185, do not identify any victims whose likeness  
19 has been appropriated.

20 In the Petition, Paragraph 179 at page 62 does  
21 allege that what's been misappropriated is the history  
22 of the massacre. They say that names and likenesses of  
23 survivors and descendants of massacre victims  
24 unidentified and not stated to be the Plaintiffs'  
25 ancestors in this case were those on which the history

1 was based which history was misappropriated.

2 As I say, no Plaintiff is identified except in  
3 Paragraph 180. No person is identified except in  
4 Paragraph 180. Mayor Bynum is quoted in using the  
5 story about Dr. A.C. Jackson, who we all know was  
6 murdered by the mob, and they refer to Dr. A.C.  
7 Jackson. The Plaintiff who is related to A.C.  
8 Jackson's family in this case, however, would not have  
9 standing because he is not a descendant. He is rather  
10 a collateral heir. He is the nephew and next friend of  
11 Dr. A.C. Jackson who, as we know, is deceased.

12 The -- what I'm suggesting is that as alleged,  
13 they make the statement in their prayer that they do  
14 seek an injunction. This is page 68, No. 6. An  
15 injunction prohibiting the Defendants from using the  
16 likenesses of victims in the massacre, or of  
17 individuals and businesses destroyed in the massacre,  
18 to their benefit without compensation. Well, as to the  
19 second part, individuals and businesses destroyed in  
20 the massacre, that's not a part of the Petition. An  
21 injunction prohibiting Defendants from using the  
22 likenesses of victims of the massacre, arguably that  
23 could be a part of the Petition, it just isn't.  
24 There's no preclusion drawn out demanding it to make it  
25 so. Of course in doing so, then they are -- when they

1 are talking about using the likenesses of the victims,  
2 it is squarely coming under 12 O.S. 1449(B), so  
3 foreshadowing what would occur next is 1449(D), is the  
4 newsworthiness exception. If the persons whose  
5 likenesses have allegedly been appropriated are  
6 newsworthy - and what could be more newsworthy than the  
7 disaster of 1921 - then it doesn't apply. That is a  
8 cumulative statute. Common law misappropriation still  
9 applies. But that's a two-year statute of limitations,  
10 and those folks have been gone for a long time.

11 So that's my exposition upon that topic. A  
12 little more complicated probably than you're expecting,  
13 but that's the full story.

14 THE COURT: Thank you.

15 MR. WILKES: Your Honor, the GTCA exempts  
16 the Public Defendants from liability. Plaintiffs cast  
17 the Defendants into a hodgepodge stew of culpability  
18 for the events of 1921 and beyond.

19 With respect to the sheriff of 1921, there's no  
20 specific allegations regarding his actions in the -- in  
21 the First Amended Petition. I know it's a matter of  
22 record, however, that the sheriff left the courthouse  
23 and the sheriff's office, went across the street to a  
24 growing mob of potential lynchmen and told them all to  
25 go home. And then he said he was going upstairs to be

1 with Mr. Roland, the prisoner, and said, If any of  
2 those folks were to come up the stairs after  
3 Mr. Roland, he was going to shoot them. And that is  
4 the documented history of the sheriff's role in the  
5 1921 race riot.

6 The GTCA definition now effectively captures any  
7 imaginable wrongdoing, Your Honor. And the GTCA  
8 expressly exempts Public Entity Defendants from  
9 liability for any loss.

10 There are 33 different exemptions under Section  
11 155. Those include: For the adoption or enforcement  
12 of or failure to adopt or enforce a law, whether valid  
13 or invalid, including, but not limited to, any statute,  
14 charter provision, ordinance, resolution, rule,  
15 regulation or written policy.

16 Performance of or the failure to exercise or  
17 perform any act of service which is in the discretion  
18 of the state or political subdivision or its employees.  
19 These are exemptions from liability.

20 No. 6, Civil disobedience, riot, insurrection or  
21 rebellion or failure to provide, or the method of  
22 providing, police, law enforcement or fire protection.  
23 That's an exemption from liability.

24 No. 16, Any claim which is limited or barred by  
25 any other law.



1           18, An act or omission of an independent  
2 contractor or consultant or his or her employees,  
3 agents, subcontractors other than employees of the  
4 state or political subdivision.

5           And 37, Use of a public facility opened to the  
6 general public during an emergency.

7           Those are, again, all in Section 155.

8           Oklahoma law further exempts Public Entity  
9 Defendants from liability for the alleged unlawful  
10 acts, the bad deeds, of their employees. The state --  
11 quote, The state or public -- political subdivision  
12 shall not be liable under the provisions of the  
13 Governmental Torts Claims Act for any act or omission  
14 of any -- of an employee acting outside the scope of  
15 the employee's employment, end quote. Title 51,  
16 Section 153(A). The GTCA makes a clear distinction  
17 between the government employee acting within the scope  
18 and one who was not. That's Martin v. Johnson, 1998  
19 Oklahoma 127.

20           Quote, Scope of employment means performance by  
21 an employee acting in good faith within the duties of  
22 the employee's office or employment or of tasks  
23 lawfully assigned by a competent authority, including  
24 the operation or use of an agency vehicle or equipment  
25 with actual or implied consent of the supervisor of the

1 employee, but shall not include corruption or fraud,  
2 end quote. Title 51, Section 152(12), also Oklahoma  
3 Supreme Court 2009 OK at Paragraph 8.

4 Conversely, an act of an employee is not in the  
5 scope of employment if the employee acted maliciously  
6 or in bad faith. That's Martin, 1998 OK at Paragraph  
7 28. Again, the Governmental Torts Claims Act.

8 Here, Plaintiffs allege that unnamed, quote  
9 unquote, county officials, and unnamed members of the  
10 county sheriff's office and members of the police  
11 department unlawfully and without just cause  
12 participated in the angry white mob, killing  
13 African-American Greenwood residents at Paragraph 68 of  
14 the First Amended Petition. More specifically,  
15 Plaintiffs allege these persons - no doubt that this  
16 happened - committed arson at 69, were responsible for  
17 stealing and looting personal property and for  
18 murdering hundreds. And those are at Paragraphs 75 and  
19 76 of the First Amended Petition.

20 How -- as horrific as those events were, as a  
21 matter of law, the malicious and intentional criminal  
22 acts by -- alleged by Plaintiffs to being committed by  
23 the employees of the state, city, county and sheriff's  
24 department relieves those Public Entity Defendants from  
25 any liability under the Governmental Torts Claims Act.

1 The Plaintiffs cannot recover. To the extent  
2 Plaintiffs' claims arise out of any allegation that the  
3 Public Entity Defendants failed in any of the above  
4 category, these Defendants are exempt from liability,  
5 the First Amended Petition must be dismissed.

6 Falling under the general -- under the  
7 Governmental Torts Claims Act, there's certain  
8 responsibilities that Plaintiffs have when bringing a  
9 claim in a case against a governmental entity. Here,  
10 the Plaintiffs have failed to do so, its compliance  
11 with the GTCA claims procedure. Even if Plaintiffs'  
12 claims were subject to a waiver of sovereign immunity  
13 and did not fall under any exclusions that I have  
14 identified for the Court and in the briefs, Plaintiffs  
15 failed to comply with the explicit mandatory notice  
16 provisions to maintain the lawsuit, this lawsuit, under  
17 the GTCA.

18 The GTCA requires that a lawsuit may only be  
19 maintained if written notice of a claim has been given  
20 to the governmental subdivision within one year of the  
21 tort injury and the action is commenced within 180 days  
22 after the denial of the claim. That's Sections 156 and  
23 157. The GTCA procedure applies to a tort claim as  
24 identified by the GTCA. Oklahoma Supreme Court 2003 OK  
25 2. This procedure is not optional. It's not an oops

1 and I get a do-over. Indeed notice and timely  
2 commencement are conditions precedent to the right to  
3 pursue judgment against a political subdivision.

4 Tuffy's versus the City of Oklahoma City, 2009 OK 4.

5 Compliance with the GTCA's notice provisions  
6 must be alleged in the Petition. Mansell v. City of  
7 Lawton, 1995 OK 81. None of the Plaintiffs allege  
8 compliance with the mandatory GTCA notice requirements  
9 and it's not addressed in their brief. Where, like  
10 here, plaintiff failed to allege compliance with these  
11 prerequisites in the petition, quote, The district  
12 court was without jurisdiction, end quote, to hear the  
13 GTCA claims. Burghart versus Corrections Corporation  
14 of America, 2009 Oklahoma Civ App 76. As a matter of  
15 law, dismissal of the First Amended Petition is proper.

16 Plaintiffs' claims are also required by -- time  
17 barred by the GTCA. We talked about statutes of  
18 limitations but not as it applies to the Act, the GTCA.  
19 Plaintiffs are out of time to file any claim under the  
20 GTCA, and they're thus barred from maintaining a  
21 lawsuit against any of the Public Entity Defendants.  
22 Any claim against a Public Entity Defendant was  
23 required, quote, to be presented within one year of the  
24 date the loss occurs. A claim against the state or a  
25 political subdivision shall be forever barred unless

1 notice thereof is presented within one year after the  
2 loss occurs, end quote. Section 156 of the Act.

3 Plaintiffs claim the Public Entity Defendants  
4 are liable for a nuisance. They allege it existed for  
5 at least 70 years. They go back further to the riot  
6 itself, but within the First Amended complaint there  
7 are admissions that they were aware of this nuisance  
8 and the effects of the nuisance, quote, Throughout the  
9 1950s, '60s and 1970s, end quote, where certain Public  
10 Defendant entities implemented, promoted certain  
11 policies. But they complain of the Defendants' failure  
12 to include the Greenwood and North Tulsa communities in  
13 the decision-making process back in the '50s, '60s and  
14 '70s. Many one-year statutes of limitations have  
15 passed since then.

16 The very next paragraph alleges in Plaintiffs'  
17 First Amended Petition that, This failure exacerbated  
18 nuisance conditions in the Greenwood and North Tulsa  
19 neighborhoods. And that's Paragraph 142 of the First  
20 Amended Petition.

21 You need allegations as true for the purpose of  
22 this motion. Plaintiffs admit the nuisance conditions  
23 existed as early as the 1950s within their brief --  
24 within the documents before the Court.

25 Similarly Plaintiffs' unjust enrichment claim

1 against the BOCC and the other Public Defendants  
2 relates back to 1921, and covers the last 100 years.  
3 Plaintiffs were required to present notice of the  
4 nuisance and unjust enrichment claims within one year  
5 of the loss that occurred. Accordingly, the right of  
6 Plaintiffs to present their GTCA claims expired  
7 sometime in the 20th century. Dismissal of the claims  
8 against the Public Entity Defendants is proper.

9 Now, in their response, Plaintiffs made an  
10 equitable -- advanced their equitable claims theory.  
11 They rely upon a theory that the GTCA does not apply to  
12 claims for equitable damages and state that this is all  
13 they seek through abatement, an accounting and a  
14 disgorgement of money identified in the accounting.  
15 That's in their response. This representation,  
16 however, is not legally sound or perhaps,  
17 intellectually honest.

18 Plaintiffs seek the payment of monetary damages  
19 to the victims and descendants of the Tulsa Race  
20 Massacre for previously inflicted harms suffered by  
21 those groups over the past century. And for that very  
22 purpose, Plaintiffs have established the Tulsa Massacre  
23 Victims Compensation Fund for the deposit of said  
24 payments. That's the First Amendment Petition,  
25 Paragraph 68. Despite Plaintiffs attempt to

1 characterize, the Victims Compensation Fund is  
2 something other than a Victims Compensation Fund. That  
3 should fool no one. They say, Well, we're not seeking  
4 compensation. They name the fund the Victims  
5 Compensation Fund. The argument, they're not asking  
6 for money damages and that's why the GTCA should not  
7 apply, but then they seek money anyway as part of some  
8 elaborate equitable remedy idea.

9 Plaintiffs in this case attempt to argue that  
10 GTCA is never applicable in claims where equitable  
11 remedies are sought. This is in their response. This  
12 is simply not consistent with the case law cited by the  
13 Plaintiffs or with the plain language of the GTCA. The  
14 only controlling Oklahoma cases cited by Plaintiffs to  
15 support their position that the GTCA does not control  
16 claims for equitable relief are: Barrios versus  
17 Haskell County, 2018 Oklahoma 90, and Gay Activists  
18 All. versus Board of Regents of University of Oklahoma,  
19 1981 OK 162. Neither of these cases does the Oklahoma  
20 Supreme Court make the sweeping pronouncement that the  
21 GTCA is inapplicable to all claims for equitable  
22 relief; instead, both cases address the GTCA's  
23 applicability to prospective injunctive relief.  
24 Further, in neither case did the requested injunctive  
25 relief require significant taxpayer funds to be

1 involved as is the case that's here.

2 Now, Plaintiffs cite the Court to legal  
3 authority in their response that if you just read their  
4 brief, not the law, it might support their position. A  
5 proper analysis, however, in chasing the citation trail  
6 shows that the cite of authority does not -- that they  
7 provide does not support their proposition.

8 Plaintiffs cite Sholer, S-H-O-L-E-R, versus  
9 State, 1995 OK 150, and Abab, Inc. versus City of  
10 Midwest City, a Western District of Oklahoma case,  
11 Westlaw No. 9073568, for the blanket proposition that,  
12 quote, the GTCA provides no bar, end quote, to their  
13 claims. That's in the First Amended -- that's in their  
14 response.

15 That conclusion in those cases do not apply.  
16 Sholer was a class action lawsuit to cover driver's  
17 license reinstatement fees, paid an excessive fee  
18 authorized by law, 1995 OK 150. The Oklahoma Supreme  
19 Court noted that the plaintiff did not seek  
20 compensation for a loss they suffered from the state,  
21 but rather sought a refund of an amount they overpaid  
22 to reinstate their driver's license. The Oklahoma  
23 Supreme Court applied the former definition of a tort  
24 under the GTCA, found the refund was outside of the  
25 GTCA.



1           Here, Plaintiffs do not seek a refund for  
2 payments made to any of the Defendants. They seek  
3 damages for the losses they claim who suffered as the  
4 result of the Defendants' alleged past actions. The  
5 distinction is further made in this claim reviewing the  
6 cited authority in *Abab*, a Federal District Court case  
7 relied upon by Plaintiffs.

8           In *Abab*, the defendant municipality argues the  
9 plaintiffs failed to comply with the GTCA and requested  
10 judgment on the pleading. Plaintiffs argue that their  
11 claims were for injunctive relief only and were not,  
12 therefore, subject to the GTCA notice requirements.  
13 The federal court there held, quote, The GTCA does not  
14 affect claims seeking only prospective injunctive  
15 relief, end quote, citing to *Barrios*, footnote 13 of  
16 *Barrios*.

17           Well, the proper considerance in interpretation  
18 of Oklahoma law that a federal trial judge may have,  
19 it's necessarily thought to follow that trail. Look at  
20 the legal authority. Look to footnote 13 of *Barrios*.  
21 In footnote 13 of *Barrios*, the Oklahoma Supreme Court  
22 noted that by operation of the Supremacy Clause, the  
23 GTCA, quote, Does not affect claims that fail to  
24 implicate the state's sovereign immunity, such as those  
25 seeking only prospective injunctive relief. Now, that

1 would appear to favor Plaintiffs' argument but for that  
2 proposition. The citation is Frew versus Hawkins, 540  
3 U.S. 431, the United States Supreme Court. Because  
4 footnote 13 does not contain any analysis but instead,  
5 cites to that Supreme Court case, it's necessary to  
6 review that Supreme Court case. The route of the  
7 analysis here reveal that the cited authority not only  
8 fails to support the proposition, it leaves the  
9 inevitable conclusion that dooms Plaintiffs' entire  
10 argument against the application of the GTCA.

11 In Frew v. Hawkins, the U.S. Supreme Court  
12 recognized the Eleventh Amendment confirmed sovereign  
13 status and cited, stating, important here, the Supreme  
14 Court explained that to ensure the enforcement of  
15 federal law, the Eleventh Amendment permits prospective  
16 injunctive relief against state officials acting in  
17 violation of federal law and allows courts to order  
18 prospective relief. And it cites to Edelman versus  
19 Jordan, 415 U.S. 651.

20 So citing Edelman versus -- and I appreciate the  
21 Court indulging this rabbit trail, but the rabbit trail  
22 leads to the answer. Citing Edelman versus Jordan, the  
23 Supreme Court went on to note that courts may not award  
24 retrospective, quote, for instance, money damages or  
25 its equivalent, if the state invokes its immunity, end

1 quote.

2           Following the legal authority trail from Abab to  
3 Barrios to Frew to Edelman leads to the following  
4 guidance and answer from the United States Supreme  
5 Court in Edelman. Quote, While the Court of Appeals  
6 described the retroactive award of monetary relief as a  
7 form of, quote, equitable restitution, end quote, it is  
8 in practical effect indistinguishable in many aspects  
9 from an award of damages against the state. It will be  
10 a virtual certainty to be paid -- it will be -- it will  
11 to a virtual certainty be paid from state funds and not  
12 from the pockets of the individual state officials who  
13 were the defendants in the action. It is measured in  
14 terms of monetary loss resulting from a past breach of  
15 a legal duty on the part of the defendant state  
16 officials. And that's Edelman. And that is the route  
17 of the citation. In other words, the court recognized  
18 that simply labeling a claim as equitable relief is not  
19 enough to overcome governmental immunity. The claims  
20 will need to require payment of government funds as a  
21 result of a past breach of a legal duty. Government  
22 immunity applies. And that's from the highest court in  
23 the land.

24           In the response, Plaintiffs assert that you're  
25 not welcome to recover money damages from a public

1 entity or to seek taxpayer money, but this is entirely  
2 consistent with the relief sought in their Amended  
3 Petition. In the Amended Petition they seek payment of  
4 all outstanding claims presented by Greenwood residents  
5 as a direct result of losses sustained in the massacre  
6 that were denied by Defendants or insurance companies,  
7 an accounting of things, such as the value of loss of  
8 private personal property stolen and looted, the value  
9 of claims made by survivors, the value of property  
10 lost, the value of loss of life so the amount  
11 identified in such accounting can be paid by the  
12 Defendants and placed in this compensation fund.  
13 That's not equitably.

14 Creation of the Victims Compensation Fund in  
15 which the valuation of an unjust enrichment derived  
16 from the accounting is -- is not equitable relief, Your  
17 Honor. Creation of a land trust, also another example.  
18 Immunity from taxes, creation of a scholarship program.  
19 These are all public funds to be spent for the sins of  
20 1921. Like the case in Edelman, the practical effect  
21 of each of these requested claims, damages for relief,  
22 is that taxpayer money would be paid as damages for  
23 alleged misconduct on behalf of governmental entities  
24 or acts.

25 Plaintiffs describe the monetary relief as truly

1 a claim for an award of damages; however, as Plaintiffs  
2 state, measured in the terms of monetary loss resulting  
3 from a past breach of a legal duty. That's money  
4 damages.

5 Plaintiffs do not seek money for future  
6 compliance by the governmental Defendants, rather  
7 Plaintiffs seek payment as a form of compensation for  
8 previously inflicted harms.

9 Plaintiffs are not exempt from the GTCA. The  
10 failure to follow GTCA is fatal to their lawsuit  
11 against the Public Entity Defendants. And this process  
12 is exactly what the GTCA was created to protect  
13 against, and it's what the legislature has repeatedly  
14 amended the GTCA to perfect -- to further protect the  
15 government and the state entities from liability if  
16 they fall within these exceptions. Whether Defendants  
17 [verbatim] now claim their damage claim is a claim for  
18 equitably compensatory damages, the substance of the  
19 requested relief makes it clear they seek money  
20 damages.

21 Your Honor, despite the inescapable conclusion,  
22 Plaintiffs' response attempts to persuade the Court to  
23 act contrary to the expressed rule of the Oklahoma  
24 Legislature. Plaintiffs' case law from other states  
25 and jurisdiction has no persuasive value in Oklahoma

1 with the intent of the law to resolve with the Oklahoma  
2 Legislature. It is not one for debate. The mandate is  
3 clear. The outcome cannot be avoided. Dismissal of  
4 Plaintiffs' claims against the Public Entity Defendants  
5 under the Governmental Torts Claims Act is proper under  
6 Oklahoma law.

7 Thank you.

8 THE COURT: All right. The Court's going  
9 to take a 15-minute recess. And it is approximately  
10 3:27 -- no, 3:23, so we will resume in 15 minutes.

11 Court is in recess.

12 (A recess was taken after which time the  
13 following proceedings were had:)

14 THE COURT: We'll be back on the record  
15 after recess.

16 And ladies and gentlemen in the gallery and our  
17 Plaintiffs, thank you for your patience in this very  
18 important proceeding.

19 To the extent there's anyone new that hasn't  
20 been in court in previous sessions, there is no  
21 electronic recording of any kind, whether it's video,  
22 audio, no photographs, nothing in the courtroom of  
23 these proceedings, and no broadcast if anything was  
24 taken. Any violation of that will be subject to direct  
25 and/or indirect contempt of the Court.

1 Any questions? No questions. Thank you.

2 So Counsel Solomon-Simmons, you may proceed.

3 MR. SOLOMON-SIMMONS: Thank you, Your  
4 Honor.

5 And before I can explain to you why the GTCA  
6 does not apply in this particular case, I would ask the  
7 Court if we could strike from the record the two times  
8 that the attorney for the sheriff called the massacre,  
9 the attempted genocide of people in Greenwood, a riot.  
10 It was not a riot. And that's one of the things that  
11 we want declaratory judgment on. It was not a riot, it  
12 was a massacre. And I think that should be stricken  
13 from the record.

14 THE COURT: It's duly noted, Counsel. I  
15 don't know that it's necessary to strike it from the  
16 record, but I'll ask for a response.

17 MR. SOLOMON-SIMMONS: Thank you.

18 THE COURT: Response.

19 MR. WILKES: I was unaware that I said  
20 that, Your Honor. That was -- I generally call it  
21 massacre, and I have tried to adjust as the name has  
22 transitioned in the last few years. And preceding that  
23 there was a time in Oklahoma it was called a riot.

24 THE COURT: All right. So having no  
25 objection to striking "riot," the Court will -- here's

1 the problem, though. I would prefer to replace it with  
2 the word "massacre" because we need the argument in  
3 context. Counsel for defense has admitted that he  
4 would do so, would refer to it -- or meant to. I don't  
5 want to put my own words into this objection. I agree.  
6 I noted that in my own head silently, but I don't think  
7 it affects the merits of the argument.

8 How would you propose to handle it for appellate  
9 purposes, if any?

10 MR. SOLOMON-SIMMONS: Well, I think it  
11 shows exactly what we're saying, that this nuisance is  
12 unabated, yet people are still calling this a riot when  
13 it's actually a massacre, and that's omission by the  
14 government. It's an omission of the duty to determine  
15 and correct what happened --

16 THE COURT: But see, here's the problem:  
17 Counsel for the defense has agreed that the word  
18 "massacre" would be substituted therein for the word  
19 "riot." I'm just asking you, Counsel Solomon-Simmons,  
20 how would you do that for the record?

21 MR. SOLOMON-SIMMONS: Your Honor, however  
22 you want to do it, I think we would not have an  
23 objection.

24 THE COURT: I'll defer to the court  
25 reporter, so --



1 MR. WILKES: And I would object to  
2 Mr. Solomon-Simmons' comments in the last few minutes  
3 with respect to my characterization. I misspoke and I  
4 apologize to the Court and counsel and everyone here in  
5 that respect. It was not meant with any animus towards  
6 anyone or the events or in any way understated the  
7 tragedy of the events of 1921 as I stated it  
8 consistently on the record.

9 THE COURT: Anything further on this?

10 MR. SOLOMON-SIMMONS: No, ma'am.

11 THE COURT: All right. You may proceed  
12 with your response.

13 MR. SOLOMON-SIMMONS: Thank you, Your  
14 Honor.

15 Simply put, the GTCA does not apply to actions  
16 for public nuisance seeking abatement. And I will  
17 explain that, but I want to start off by saying  
18 Mr. Wilkes stated about the GTCA - and for the most  
19 part we agree - the GTCA is all about money damages,  
20 but we don't seek money damages.

21 So in this portion of our discussion, I'm going  
22 to explain -- we're going to discuss the difference  
23 between legal relief is not -- the fact that legal  
24 relief is not the same as equitable relief. That  
25 equitable relief always has been available against

1 State of Oklahoma entities since statehood. That  
2 abatement is equitable relief. The equitable relief  
3 can include expenditure of money. The GTCA does not  
4 apply to equitable relief. The GTCA only covers money  
5 damages arising from the tort. Public nuisance for  
6 abatement is not a tort, and that public nuisance  
7 cannot flow through the GTCA to be consistent with the  
8 statute on its face.

9 So first, some Black Letter Law. Legal relief  
10 originates from the court of law, it's compensatory for  
11 past harms, and it is for money damages. Equitable  
12 relief originates from the court of equity, it's  
13 prospective, specific performance to stop or make the  
14 actions for prospective.

15 So understand the difference between legal  
16 relief and equitable relief, which I know Your Honor  
17 understands. Equitable relief has always been  
18 available against the State of Oklahoma governmental  
19 entities going back to the 1907 case that we cite. I  
20 can't really say that word very well, Markwardt versus  
21 City of Guthrie, that's a 1907 case, talks about an  
22 injunction against the City of Guthrie, that that was  
23 able to move forward. A 1942 case that we cite, Fid.  
24 Labs, Inc. versus Oklahoma City, citation 1942 OK 289.  
25 Again, it talks about that you can have money damages

1 -- I mean, injunctive relief or legal relief -- excuse  
2 me, injunctive relief against the state. 1981 was one  
3 of the cases that Mr. Wilkes talked about, the Gay  
4 Rights Activists versus Board of Regents of the  
5 University of Oklahoma. Once again, it talks about  
6 injunctive relief was allowed. And just recently, Your  
7 Honor, a case that was decided by -- in federal court,  
8 right across the street, the courthouse, we can look  
9 right over there (indicating), and decided by Judge  
10 Gregory Frizzell, Feenstra versus Sigler. It's a 2019  
11 case. Judge Frizzell, looking at this very issue of  
12 injunctive relief against the state as it's covered by  
13 the GTCA, he found that money damages -- I mean,  
14 injunctive relief -- that GTCA is inapplicable for  
15 suits seeking only injunctive or equitable relief.

16 Now, let's look at the statute of the GTCA, the  
17 plain language. What I want to point your attention  
18 to, Your Honor, is that this particular statute talks  
19 about if someone -- if the government is liable for  
20 money damages. It's right in the plain language of the  
21 statute. It covers money damages.

22 Further, when it talks about a claim -- you  
23 heard Mr. Wilkes talking about how you present a claim,  
24 you have to file a tort claim, etc. The Act defines a  
25 claim as any written demand presented, etc., etc.,

1 | would be for the recovery of money from the state and  
2 | political subdivisions as compensation. We don't seek  
3 | compensation. We seek equitable relief.

4 |           Again, we go back to Judge Frizzell's ruling. I  
5 | understand he's in the federal court and we've already  
6 | talked about the difference. He's in federal court.  
7 | But as you know, he's been a judge here in the state of  
8 | -- in Tulsa for 20 plus years. He's dealt with the  
9 | GTCA on many, many occasions. He looked at this issue  
10 | in 2019 and he said, Suits seeking only equitable  
11 | relief, the GTCA does not apply.

12 |           So Mr. Wilkes talked about some of the history  
13 | behind the GTCA. And I think that's important to  
14 | revisit that. If we look at this timeline from 1907,  
15 | which is statehood, to 2021, today, Oklahoma citizens  
16 | has always had the ability to seek equitable relief  
17 | against state entities. It's been a green light there  
18 | from statehood to today. But from 1907 to 1985, as  
19 | Mr. Wilkes has already stated, you could not receive  
20 | legal relief or monetary damages against the state  
21 | until 1985 when the GTCA was enacted. It allowed  
22 | Oklahoma residents, which I think is a good thing, to  
23 | be able to seek legal relief against state entities.  
24 | So in other words, Your Honor, the GTCA, it did not  
25 | foreclose and make it harder to sue the state, it just

1 made it easier because now, you can sue for equitable  
2 relief or monetary relief.

3 So let's look at this. If someone, like our  
4 Plaintiffs, wants to sue the state, if we were asking  
5 for money damages, which we're not, yes, we would have  
6 to go through the GTCA. But we're asking for equitable  
7 relief. Equitable relief is not a part of the GTCA.  
8 It's simply not there and no court has found that.

9 THE COURT: Well, I would like to ask you a  
10 question.

11 MR. SOLOMON-SIMMONS: Sure.

12 THE COURT: When you said in earlier  
13 argument that certain of the Plaintiffs, and then it  
14 was clarified, all of the Plaintiffs are seeking or  
15 alleging pain and suffering - maybe you didn't use  
16 those exact words, but trauma, you might have used the  
17 word trauma - from the publication, misrepresentation,  
18 wouldn't that fall under the category of money damages  
19 for their trauma?

20 MR. SOLOMON-SIMMONS: No, ma'am. That  
21 falls under the category of the public nuisance  
22 statute. It talks about if there's unlawful conduct or  
23 an omission of a duty that creates or injures, annoys  
24 someone's health, safety or repose. That is what we're  
25 talking about. We fit the definition for a special

1 injury underneath the public nuisance statute.

2 THE COURT: All right. Go ahead.

3 MR. SOLOMON-SIMMONS: Now, we've looked at  
4 the difference between legal relief and equitable  
5 relief. I think it's clear on its face and the case  
6 law we've cited in our briefs that equitable relief can  
7 be brought against state entities outside of the GTCA.

8 So now, you have to make a determination, Your  
9 Honor: Is abatement, is it equitable relief? And in  
10 the state of Oklahoma, abatement is a form of  
11 injunctive relief designed to eliminate an ongoing  
12 nuisance. And again, that is what we're alleging, an  
13 ongoing nuisance. This is not compensation for  
14 previously inflicted harm. And we have several cites  
15 there, Your Honor. And you're going to get a copy of  
16 our presentation, but this first cite is Walcott versus  
17 Dennes, 1911 Oklahoma 285, Paragraph 4.

18 THE COURT: Was this in your briefing,  
19 these citations?

20 MR. SOLOMON-SIMMONS: Yes, ma'am.

21 THE COURT: Okay. Thank you.

22 MR. SOLOMON-SIMMONS: So Your Honor,  
23 Defendants concede that in the state of Oklahoma, there  
24 is no Oklahoma case that states that the GTCA covers  
25 claims for equitable relief. Also, there's no other

1 court in the nation, at least that we have been able to  
2 find and Defendants didn't actually cite any, that held  
3 -- hold that the GTCA in those particular states cover  
4 claims for equitable relief.

5 So once we understand that the equitable relief  
6 can't go through the GTCA -- abatement is equitable  
7 relief. Now, we're looking at abatement. What if  
8 there's an expenditure of money? Well, abatement as  
9 equitable relief can include an expenditure of money.

10 I actually got this -- I think it's a very, very  
11 powerful quote and I got it, once again, out of the  
12 State of Oklahoma Supreme Court brief (indicating),  
13 where they're talking about this very issue. And they  
14 say, Equitable remedies, including nuisance abatement,  
15 back pay, and equitable restitution, frequently  
16 involves orders to pay. I'm going to step down to the  
17 last sentence which is coming from a Supreme Court  
18 case. That a judicial remedy may require one party to  
19 pay money to another is not a sufficient reason to  
20 characterize the relief as money damages.

21 And these cases are also in our brief, Your  
22 Honor.

23 To further illustrate the point, I also went  
24 back to the very well-written State of Oklahoma brief  
25 in the opioid litigation that's currently sitting in

1 front of the Supreme Court, but this issue is briefed  
2 in several pages. And they say -- the State says --  
3 the State of Oklahoma is arguing right now, today,  
4 that, Oklahoma law defines an abatable, or temporary,  
5 nuisance as one that may be abated by the expenditure  
6 of money or labor, and recognizes that abatement may  
7 require a defendant to expend funds. And then they  
8 cite Oklahoma City versus West, 1931 OK 693. And then  
9 they further go on to say, Ordering J&J - which we know  
10 is Johnson & Johnson - to fund an abatement plan does  
11 not make it a thinly-disguised damages award, because  
12 abatement may involve the expenditure of money but it  
13 doesn't change the nature of the relief that we seek  
14 which is prospective in nature, not a remedy for past  
15 harms.

16 Now, you heard the Defendants talk about our  
17 abatement plan that we put forward in our Petition.  
18 Again, Your Honor, we said it a thousand times, notice  
19 pleading, but we wanted to do more. We put forth a  
20 preliminary abatement plan. It's all equitable relief.  
21 But anything on this graph, anything we ask for that  
22 Your Honor, after a trial and witnesses and exhibits  
23 and depositions and discovery, you don't decide should  
24 be a part of the abatement plan, you will make that  
25 determination to strike it. And if there's anything on



1 the list that you say, Well, this sounds like monetary  
2 damages, you can make that determination to strike it.  
3 But it doesn't term our -- it doesn't make our entire  
4 case fatal just because there may be an expenditure of  
5 money on one of these areas that is about abatement.

6 We think it's very important that this point is  
7 understood. That at the end of the day, just like  
8 Judge Balkman in the opioid case in Cleveland County,  
9 the State asked for \$17.2 billion abatement plan, and  
10 the judge decided 500 and something million dollars.  
11 He made a determination. We just want you to make a  
12 determination after you get all the information and not  
13 just based upon our pleading.

14 And just to be clear, we have asked, as we  
15 stated several times, for different declarations --  
16 different declarations and injunctions throughout our  
17 cause of action -- our prayer for relief, excuse me.

18 THE COURT: Can you go back to that,  
19 please? Can you flip your slide back? Thank you.

20 MR. SOLOMON-SIMMONS: Yes, ma'am.

21 THE COURT: So the one prong of the  
22 abatement slide which states, Injunction against,  
23 financial benefit and use of image --

24 MR. SOLOMON-SIMMONS: Yes.

25 THE COURT: -- that is relating to the

1 Triumph marketing plan?

2 MR. SOLOMON-SIMMONS: Triumph marketing  
3 plan?

4 THE COURT: I think you called it Triumph.  
5 That category -- is that that category?

6 MR. SOLOMON-SIMMONS: Yes, that's one of  
7 those categories, yes, ma'am.

8 THE COURT: Okay. So that was my question,  
9 and perhaps I could have stated it more clearly.

10 So the Petition is not seeking -- in addition to  
11 injunction, it's not seeking the money to be awarded  
12 that was unjustly received by the Defendants.

13 MR. SOLOMON-SIMMONS: That's correct. What  
14 we ask for -- that's correct. What we ask for, just  
15 like in any injunction -- that's correct. I'll leave  
16 it at that.

17 THE COURT: And then when you stated  
18 something about damages for the trauma suffered as a  
19 result of this ongoing publication, I was thinking that  
20 you were talking about some money damages, but you're  
21 not.

22 MR. SOLOMON-SIMMONS: I am not.

23 THE COURT: Okay. Thank you.

24 MR. SOLOMON-SIMMONS: And when you look  
25 back at our Petition, which I know you will, we're not

1 talking about specific money damages going to the  
2 individuals.

3 THE COURT: Okay. Thank you.

4 MR. SOLOMON-SIMMONS: Again, based on what  
5 we've discussed -- I just want to go back again. Judge  
6 Frizzell looked at this issue and he stated, Suits  
7 involving equitable relief do not flow through the  
8 GTCA.

9 We've already discussed this about money  
10 damages. I won't waste the Court's time.

11 I think it's also important to understand that  
12 the GTCA blocks private rights of action, not public  
13 rights of action, and there's a difference between the  
14 two. A private right of action protects rights  
15 belonging to individuals, typically brought by private  
16 plaintiffs in private civil lawsuits. That's not what  
17 we have here. We have a public nuisance case brought  
18 on behalf of duties owed to a community or neighborhood  
19 by individuals who have a special harm, a special  
20 injury, as required by our special unique statute,  
21 50 O.S.

22 So one of the defense counsel said, These type  
23 of claims are traditionally brought by the government,  
24 but they didn't bring this claim. And in Oklahoma, our  
25 statute - and I think it's 50 O.S. 7 - allows the

1 plaintiff to step into the shoes of the state. 50 O.S.  
2 10, I'm sorry. It allows the plaintiff to actually  
3 step into the shoes of the state if they sufficiently  
4 plead a special injury which we submit that we have.

5 Third reason why the GTCA doesn't apply to this  
6 public nuisance case is because it only applies to  
7 torts, and a public nuisance seeking abatement is not a  
8 tort.

9 You know, defense counsel, Mr. Wilkes, talked  
10 about the Coffey case out of Kansas, but that case  
11 dealt with a private nuisance of a homeowner trying to  
12 recover \$3,000 in damages for, I think, damage to  
13 their -- the roof of their home. It's not applicable  
14 to our situation. Public nuisance seeking abatement is  
15 simply not a tort.

16 How do we know this? Tort originates from a  
17 court of law. Public nuisance originates from a court  
18 of chancery. Tort focuses on past harm. The public  
19 nuisance seeking abatement focuses on ongoing harm  
20 which we allege here. Tort protects private rights.  
21 Public nuisance in Oklahoma protects public rights.  
22 Tort is for money damages. Public nuisance seeking  
23 abatement is injunctive relief. And most importantly,  
24 I believe in Oklahoma, tort statute is Title 76, the  
25 public nuisance statute is Title 50. And one of the

1 defense counsel stated, There are many, many statutes  
2 -- many sections of that statute. I agree. And all of  
3 them fit our case wonderfully.

4 Excuse me one second.

5 Speaking of the public nuisance statute, look at  
6 50 O.S. Section 2. It says, A public nuisance is one  
7 which affects at the same time an entire community or  
8 neighborhood.

9 Now, let's look at this amended definition of  
10 tort that Mr. Wilkes talked about, that this amended  
11 definition came about in 2014. He talked about it  
12 dealing with the Bosh case, which my co-counsel,  
13 Mr. Bryan and Mr. Terrill who are not here today,  
14 actually were the counsel of record in that case. And  
15 when they made this particular new definition -- it's a  
16 couple of things here that's important. It talks about  
17 a legal wrong - which we've already established a legal  
18 wrong is monetary damages, that's not what we're  
19 talking about here - resulting in a loss to a person,  
20 an association, or a corporation. But they do not say  
21 a loss to a neighborhood or a community which is  
22 covered by the public nuisance statute. It simply does  
23 not apply to a public nuisance case.

24 Mr. Wilkes talked -- I'm sorry. Mr. Wilkes  
25 mentioned Barrios or Barrios on many occasions. We

1 | also cite this case because we think this case helps us  
2 | tremendously because Barrios simply says that the state  
3 | tort claim act covers money, quote quote, money damages  
4 | as compensation for prior wrongs committed against  
5 | them.

6 |           Again, Your Honor, we're not seeking monetary  
7 | damages for past harms. We seek abatement for the  
8 | continuation of a public nuisance that is continuing to  
9 | this very day. The GTCA simply does not apply to our  
10 | case.

11 |           I go back to Judge Frizzell. He looked at this.  
12 | It only is applicable to suits for money damages.

13 |           There was a discussion about the intent of a  
14 | statute. In Oklahoma it's clear the government cannot  
15 | have immunity if the statute is doubtful, ambiguous or  
16 | silent. That's important because the GTCA statute does  
17 | not bar claims for injunctive relief. And what the  
18 | Defendants want you to do, they want you to read into  
19 | or place words and language in the statute substituting  
20 | your judgment -- or this Court's judgment for the  
21 | legislature's at 2300 North Lincoln when that language  
22 | is simply not there.

23 |           Now, to be fair, the GTCA has been amended  
24 | several times that Mr. Wilkes talked about. So we know  
25 | that the legislators know how to amend it. And as he

1 stated, they can put anything in there they want to  
2 because that's their power. They have only one time  
3 even discussed injunctive relief in the GTCA. It was  
4 in 1999 when everyone was afraid of the Y2K, maybe  
5 collapse of the world. Everybody was scared at that  
6 time period, those who are old enough to remember it.  
7 I am. In that amendment they specifically stated you  
8 couldn't have a claim against the state related to Y2K  
9 failure, and they specifically stated, Claim or cause  
10 of action, including, without limitation, any civil  
11 action or action for declaratory or injunctive relief  
12 based on allegations of computer system failures. This  
13 tells you, Your Honor, if they wanted to restrict  
14 injunctive relief claims in general, they know how to  
15 do it. They didn't do it in that new amended  
16 definition in 2014. Our claim is not bound by the  
17 GTCA, period, point blank, on its face.

18 Your Honor, if this Court were to adopt the  
19 Defendants' position, it would prevent all suits for  
20 equitable relief against state entities. Basically you  
21 could not have any suits ever against the state for any  
22 equitable relief. Why do I say that? Because 50 O.S.  
23 Section 8 of the public nuisance statute clearly gives  
24 us three remedies for public nuisance. One, an  
25 indictment or information. Obviously, we can't ask for

1 that. I wish we could. Two, a civil action. So in a  
2 public nuisance, one could ask for money, but we didn't  
3 ask for money. We're seeking three, an abatement which  
4 is equitable relief.

5 So if you were to adopt the Defendants'  
6 rationale that only -- only suits that you can bring  
7 against the State of Oklahoma outside of GTCA is a  
8 contract, that means you would never have, moving  
9 forward, a case against the state entity for equitable  
10 relief, and that simply is not the law. There's no  
11 case in Oklahoma that's found that. It's not in the  
12 statute. And the last time this was looked at by  
13 world-respected jurists here in Tulsa found that the  
14 GTCA does not apply to equitable relief.

15 Thank you, Your Honor. I'll answer any of your  
16 questions.

17 Mr. Swartz is going to respond to Mr. Tucker's  
18 discussions about unjust enrichment.

19 THE COURT: Okay.

20 MR. SWARTZ: Good afternoon, Your Honor,  
21 pleased to be here to have a chance to speak after  
22 several hours.

23 THE COURT: Do you mind stating and  
24 spelling your name?

25 MR. SWARTZ: Yes. It's Michael Swartz,



1 S-W-A-R-T-Z.

2 THE COURT: Thank you.

3 MR. SWARTZ: I'm going to address the  
4 unjust enrichment claim which has sort of been  
5 sandwiched in between different arguments, including  
6 the GTCA. So I'm just going to level set as to what  
7 the claim is and I'll be brief. I know the hour is  
8 late.

9 Okay. Here we go. All right. We talked about  
10 the notice pleading. I don't think you need to hear  
11 more about that.

12 First of all, the unjust enrichment claim is  
13 alleged against the City, the TDA, the Planning  
14 Commission, Tulsa County, and the Chamber. This is the  
15 basic allegation that we've been talking about where  
16 we've alleged that these Defendants have been profiting  
17 off the community by misappropriating the story, not a  
18 common law misappropriation but an unjust enrichment.  
19 They've obtained a benefit for themselves that they  
20 told people is going to benefit other people, benefit  
21 the clients here and the community, but it hasn't.  
22 It's separate and distinct from the public nuisance.  
23 So it's been kind of mushed together, but they're  
24 separate claims, different statute of limitations, all  
25 sorts of different issues.

1           They've been particularly -- we talked about  
2 Tulsa Greenwood Rising and the cultural city and the  
3 money that's been raised. A lot of money has been  
4 raised on the story using the likenesses. Now, we're  
5 not making a likeness claim, but the likeness has been  
6 invoked, the story has been invoked. We're not saying  
7 we have IP rights to all of those issues. We're saying  
8 that it's unjust for them to retain this benefit. It's  
9 a classic, basic, equitable claim.

10           The term "unjust enrichment" describes a  
11 condition resulting from a -- the failure of a party to  
12 make restitution in circumstances where it's  
13 inequitable.

14           Four elements - I'm sure you get these claims  
15 all the time in this court - unjust, retention of, a  
16 benefit received, at the expense of another. The  
17 Defendants, they were claiming unlimited rights to all  
18 of the funds and proceeds that relate to the massacre.  
19 That is absolutely not what we're seeking. We are  
20 seeking disgorgement of monies that have been obtained  
21 through the various episodes leading up to the  
22 centennial events and the Greenwood Triumph, and all of  
23 these other sorts of efforts that have been promoted,  
24 according to our allegations, have been for the white  
25 community. They've been represented at the black

1 community but the benefits accrued to the white  
2 Tulsans.

3           Again, we talked about the Greenwood -- the \$30  
4 million that were raised for Greenwood Rising. We've  
5 alleged that the Defendants have promoted tourism and  
6 economic development by invoking the name "Black Wall  
7 Street." I really want to be clear, we're not claiming  
8 intellectual property rights to that. We are claiming  
9 that they've raised money on this idea of Greenwood  
10 Triumphs and they've kept it all for themselves and it  
11 has not gone to the community and the Plaintiffs that  
12 we represent. The Petition alleges that Black Tulsans  
13 will see no direct benefit from the funds raised, and  
14 we set that forth in our Petition in detail.

15           Again, we're very fortunate here where we're  
16 able to point to arguments that the Defendants make  
17 when they're in a different situation. When the City  
18 was plaintiff, has been plaintiff in the opioid  
19 litigation, they have pursued their own unjust  
20 enrichment claim. And it's very rare you have the same  
21 time, the same party arguing the exact opposite, but I  
22 think it's telling that this unjust enrichment claim is  
23 viable.

24           In the opioid-related litigation against  
25 pharmaceutical companies, the City has alleged, as

1 unjust enrichment, that those companies received,  
2 quote, a benefit in the form of billions of dollars in  
3 revenue from the sale of prescription opioids to treat  
4 chronic pain and, quote, retained that benefit at the  
5 expense of Tulsa who has borne and who continues to  
6 bear the economic and social costs of those companies'  
7 scheme. So they argue that that's an unjust enrichment  
8 claim when they make it, but when they're the  
9 defendants, that doesn't make out an unjust enrichment  
10 claim. That obviously cannot be.

11 With regard to the GTCA -- so I'm going to just  
12 pick up on where Mr. Solomon-Simmons left off.

13 First of all --

14 MR. WILKES: Object, Your Honor. This is  
15 not counsel who's been identified to address the GTCA  
16 on behalf of the Plaintiffs.

17 THE COURT: I'm going to allow Mr. Swartz  
18 to continue.

19 Thank you.

20 MR. SWARTZ: Thank you.

21 First of all, the GTCA does not apply to the  
22 Chamber. So if you thought that GTCA applies, which  
23 for the reasons Mr. Solomon-Simmons gave, it doesn't.  
24 The Chamber still has to defend against the unjust  
25 enrichment claim.

1           But as Mr. Solomon-Simmons also went through in  
2 detail, the GTCA does not apply to equitable claims.  
3 And it's well-settled that unjust enrichment is not a  
4 tort that would be barred, for example, by the GTCA,  
5 but rather, as the Oklahoma Supreme Court has held, a  
6 condition which results from the failure of a party to  
7 make restitution in circumstances were it not to do so  
8 is inequitable, that is, the party has money in its  
9 hands that, in equity and good conscience, it should  
10 not be allowed to retain. And again, the Oklahoma  
11 Supreme Court has also stated that the remedy of  
12 restitution to prevent unjust enrichment - which is  
13 what we're seeking - lies not in the law of contract or  
14 tort, but rather in the substantive law of restitution.

15           So the remedies that we're seeking are  
16 well-accepted equitable remedies. We're seeking an  
17 accounting and we're seeking disgorgement of the  
18 ill-gotten gains. And we cite in our brief and then  
19 here, authority why that's equitable relief. I think  
20 there's no real issue about that.

21           Again, this notion that any time a dollar needs  
22 to be spent has met money damages is just not the law.  
23 Your Honor set forth earlier, We're going to stick to  
24 the law. Obviously, sometimes remedial measures  
25 require the expenditure of money.

1           Again, we point to the opioid case. They argue  
2 that in satisfaction of their unjust enrichment claim,  
3 the Purdue Pharma court required the creation of an  
4 Opioid Lawsuit Abatement Fund consisting of \$465  
5 billion [verbatim] that it deemed necessary to abate  
6 the nuisance in question, and that was not money  
7 damages. It was restitution.

8           One of the things that the Defendants argue in  
9 response, or on the unjust enrichment claim, is the  
10 common defense that I'm sure you've seen all the time  
11 which is, there's an adequate remedy of law. And we  
12 heard reference to the misappropriation statute -- I'm  
13 sorry, the misappropriation of likeness statute as  
14 somehow barring the claim, but that is not enough. A  
15 suit in equity will not lie where the plaintiff has a  
16 plain, adequate and complete remedy at law. But the  
17 remedy must be complete, practical and efficient. And  
18 the statute that they point to which gives the person a  
19 right to recover compensation for misuse of their image  
20 or unauthorized use of their image is not a complete  
21 remedy. That's kind of a small piece of what we're  
22 seeking here.

23           This is a big story, fundraising campaign/  
24 marketing campaign. Even look to analogy of the opioid  
25 marketing in terms of marketing, giving rise to unjust

1 enrichment. That's based on a story, it's based on  
2 misappropriation, and critically, it's based on the  
3 notion that these folks are benefiting from it when  
4 they're not.

5           There's no adequate remedy of law. The City,  
6 Chamber - it says the State, I don't think we have them  
7 in there - pursued fundraisers' money through  
8 misrepresentations that the Greenwood Rising History  
9 Center would benefit Black Tulsans. The fact that the  
10 fundraising activities are based on the victims',  
11 including the survivors', likenesses does not transform  
12 the nature of their unjust enrichment claim, it's only  
13 one aspect of it. And that's Statute 12 O.S. Section  
14 1449, the likeness statute. That does not foreclose  
15 their unjust enrichment claim.

16           Again, they use likenesses, but we're not  
17 seeking compensation for those likenesses. We're  
18 seeking compensation for these fundraising efforts that  
19 were based on -- no, their fundraising efforts. We're  
20 seeking disgorgement of their fundraising -- did I say  
21 that wrong? Okay. I got Mr. Solomon-Simmons watching  
22 out for me. I appreciate that. We're seeking  
23 disgorgement of their ill-gotten gains from these  
24 fundraising efforts. And the claim is based on the  
25 repeated false representation that Black Tulsa supports

1 the Greenwood Rising History Center and would benefit  
2 from that.

3           And when we get a chance to prove our case, when  
4 we develop discovery -- this is not in our pleading,  
5 but to explain how we see this case proceeding. Went  
6 ahead with centennial events. Your Honor may be aware  
7 there were certain high-profile performers, like John  
8 Legend was going to perform, Stacey Abrams was going to  
9 speak. When they learned the truth about what was  
10 happening in terms of the Greenwood Rising fundraising  
11 efforts and how it wasn't going to benefit the black  
12 community and the clients that we represent, they  
13 backed out. And there are fundraisers who we intend to  
14 seek evidence from who will explain that they thought  
15 the money that they were giving was going to benefit  
16 the community that we represent, but it didn't.

17           I'm wrapping up.

18           The cases that they cite to try to distinguish  
19 unjust enrichment provide that where there's an  
20 adequate remedy at law, there's no unjust enrichment.  
21 They point to contract cases. Each of the cases they  
22 point to are contract cases where they say, Well,  
23 there's a contract, so you can't also get unjust  
24 enrichment. Obviously the Plaintiffs have no contract  
25 with any of these folks to be able to recover money.



1 They don't have contracts with the City, the TDA, the  
2 Planning Commission, Tulsa County, or the Chamber.  
3 That's all a matter of unjust enrichment.

4 I think that's all. Unless there's any  
5 questions, I'll leave it at that, Your Honor.

6 THE COURT: No questions.

7 All right. Mr. John Tucker, do you wish to  
8 reply?

9 MR. JOHN TUCKER: If I may, Your Honor.

10 And maybe I'm just not smart enough to  
11 understand what you said, but I am frankly puzzled  
12 because we hear Mr. Damario Solomon-Simmons tell us  
13 what this is all about, is that we stood on the backs  
14 of these people, make all of this money improperly,  
15 then we hear what he's talking about is that our claim  
16 is based on likeness but we're not seeking damages for  
17 likeness. We don't want that, we want disgorgement  
18 because you raised dollars on the idea of Greenwood  
19 Triumph. Now, how on earth would these Plaintiffs have  
20 any standing, have anything to say about Greenwood  
21 Triumph or any other civic activities that are  
22 going on for the entire community; black, white,  
23 Mexican-American, whatever they might be. I'm frankly  
24 puzzled.

25 In the Petition they say that the Defendants

1 misappropriated the massacre to raise funds. I'm -- I  
2 will stand by what I said earlier. I think that they  
3 have a right to bring a claim to enjoin the City or any  
4 of the other parties from using their likeness if they  
5 don't want that to happen. I think they can state that  
6 claim. They haven't done it yet, but they can. And I  
7 think that's just about what they have.

8 Thank you.

9 THE COURT: Counsel Wilkes.

10 MR. WILKES: Thank you, Your Honor.

11 A lot of these discussions by  
12 Mr. Solomon-Simmons didn't relate to the Governmental  
13 Torts Claims Act. Talked about opioid litigation  
14 and -- the opioid litigation is not the GTCA, and by  
15 invoking the opioid litigation as subterfuge for  
16 discussing the GTCA is not helpful.

17 We also heard that they aren't seeking any  
18 damages for what happened in the past, for what  
19 happened in 1921. Yet, in their Amended Petition they  
20 seek, quote, Payment of all outstanding claims  
21 presented to Greenwood residents as a direct result of  
22 losses sustained in the massacre that were denied by  
23 Defendants or insurance companies because of  
24 Defendants' misrepresentation of the massacre. An  
25 accounting of things, such as, quote, The value of loss

1 of private personal property stolen and looted, end  
2 quote. Quote, The value of claims made by survivors,  
3 end quote. Quote, The value of property lost, end  
4 quote. Quote, The value of loss of life, end quote.  
5 So that an amount identified, these damages can be put  
6 into an accounting to be paid out into a Victims  
7 Compensation Fund. And to state that we're not seeking  
8 monetary damages is disingenuous, Your Honor.

9 The -- they also seek an order directing any  
10 fees or revenue due the Defendants associated with  
11 providing licensing or other services to private or  
12 public groups. Item after item seeks monetary damages.

13 We go to the United States Supreme Court which  
14 is the route of the citation by the Oklahoma Supreme  
15 Court. And again, while the Court of Appeals described  
16 this retroactive award of monetary relief as a form of  
17 equitable restitution, it is in practical effect  
18 indistinguishable in many aspects from an award of  
19 damages against the State. It will, to a virtual  
20 certainty, be paid from state funds and not from the  
21 pockets of the individual state officials who are the  
22 defendants in the action. It is measured in terms of  
23 monetary loss resulting from a past breach of a legal  
24 duty on the part of defendant state officials.

25 Again, in other words -- and that's the Edelman

1 versus Jordan case. The court recognizes simply  
2 labeling a claim for relief as equitable is not enough  
3 to overcome governmental immunity, just labeling this  
4 equitable. Look at the substance of what they ask for.  
5 They seek money damages from the State.

6 With respect to -- I think I heard three or four  
7 times that Judge Frizzell may have touched upon a  
8 related issue in a case across the street. The court  
9 there also made clear that the Oklahoma -- quote, The  
10 Oklahoma Supreme Court recognized that the  
11 legislature's decision to allow a tort suit against the  
12 government is, after all, a decision as to whether the  
13 people's tax dollars should be used to pay money  
14 damages to those who successfully sue the state. So  
15 this recognition is consonant with our long-standing  
16 recognition of the legislature's exclusive power to set  
17 the state's fiscal policy. He cites Barrios. Thus as  
18 interpreted by Oklahoma's highest court, the OGTC  
19 reflects a concern regarding the imposition of money  
20 damages against the state, which we're going to  
21 disagree. They're going to say these aren't money  
22 damages, these are equitable relief. They're seeking  
23 compensation directly tied to their loss of 1921. They  
24 say so in their amended complaint.

25 With respect to the -- there's confusion over an

1 allegation that it's not a tort under the GTCA if it  
2 seeks equitable. It's mixing the definition.  
3 Definition of tort in the GTCA is very clear. It does  
4 not speak at all to the remedy side. The scope of  
5 liability does not change the definition of tort.

6 In a concurring opinion by Justice -- by Justice  
7 Scalia, the City of Monterey, municipality, versus Del  
8 Monet Dunes at Monterey, Limited, 526 U.S. 687,  
9 footnote one, the court says, Before the merger of law  
10 and equity, a contested right would have to be  
11 established at law before relief could be obtained in  
12 equity. Thus a suit in equity to enjoin an alleged  
13 nuisance could not be brought until a tort action at  
14 law established the right to relief. Since the merger  
15 of law and equity, any type of relief, including purely  
16 equitable relief, can be sought in a tort suit so that  
17 I can file a tort suit action seeking only an  
18 injunction against a nuisance. If I should do so, the  
19 fact that I seek only equitable relief would disentitle  
20 me to a jury, but that would not render the nuisance  
21 suit any less a tort suit. It's a tort suit.

22 THE COURT: Repeat that citation, please.

23 MR. WILKES: Yes, certainly. It is 526  
24 U.S. 687, footnote one. It's on page 6 of the City of  
25 Tulsa's reply.

1 Counsel says that a public nuisance is not a  
2 tort without any support in the law. A public nuisance  
3 is a tort under the GTCA. The Restatement (Second) of  
4 Torts says a public nuisance is a tort. Professor  
5 Prosser, who I'll take over any one else who's stepped  
6 up to this podium today, says public nuisance  
7 constitutes a tort. It's a tort.

8 And again, as to the unjust enrichment, we have  
9 addressed that with respect to the claims of damages.  
10 It's clear that they seek monetary damages and it is  
11 also clear that the definition - if you want to look at  
12 Black Letter Law - the definition from the Governmental  
13 Torts Claims Act is wide open for anything and  
14 everything, other than arising out of contract, to fall  
15 under the GTCA. And then that gives people an  
16 opportunity -- it doesn't disenfranchise them from an  
17 opportunity to bring suit. They then have an  
18 opportunity to bring suit. They can file their claim  
19 in the right process unless, perhaps, the governmental  
20 entity falls into one of the exceptions that are  
21 enumerated within the GTCA. The state, the sovereign  
22 waive immunity with the GTCA except for these 33  
23 instances that are set forth in the statute.

24 So it's not set out as a scheme to not allow  
25 people to come forward with their suits against the

1 state or a subdivision. There's a process that they  
2 must follow. They didn't follow it. And because of  
3 that, this Court does not have jurisdiction over the  
4 Governmental Torts Claims Act and over either cause of  
5 action against the Public Entity Defendants. And their  
6 Petition, the First Amended Petition, must be  
7 dismissed.

8 Thank you.

9 THE COURT: All right.

10 MR. SOLOMON-SIMMONS: Can I respond to --

11 MR. WILKES: Your Honor, I object.

12 MR. SOLOMON-SIMMONS: -- unless you don't  
13 want me to.

14 THE COURT: I think you thoroughly briefed  
15 it and we have the slide presentation.

16 Is there something -- I'll ask this: Is there  
17 something that counsel for either -- any of the  
18 Defendants said that was new information today, not  
19 included in their briefs? It's kind of a yes or no.

20 MR. SOLOMON-SIMMONS: Well --

21 THE COURT: Unless Attorney Wilkes or  
22 Tucker raised something in their reply, oral argument,  
23 that was not in the briefing --

24 MR. SOLOMON-SIMMONS: Sure.

25 THE COURT: -- that would be the only thing

1 I would permit you to address.

2 MR. SOLOMON-SIMMONS: Sure.

3 He stated just now about -- that you could still  
4 bring a lawsuit, but just go to the GTCA. So if the  
5 sheriff's department he represents is going -- is  
6 breaking into -- if the sheriff's department, who he  
7 represents, is going to someone's home and harassing  
8 them on a daily basis, and that homeowner comes to the  
9 Tulsa County Courthouse to file an injunctive relief to  
10 stop the sheriff's department from harassing,  
11 underneath their logic that case gets kicked out  
12 because the person doesn't go to the GTCA. It simply  
13 doesn't make sense underneath our statutory scheme.

14 THE COURT: All right. That argument is  
15 concluded.

16 So who's presenting on laches?

17 MS. GRAY: I am, Your Honor.

18 THE COURT: Thank you.

19 State your name for the court reporter, please.

20 MS. GRAY: Yes, Your Honor. I am Kristina  
21 Gray. I'm an attorney with the City of Tulsa and the  
22 Tulsa Metropolitan Area Planning Commission, referred  
23 to in the briefing as TMAPC. And I will be relatively  
24 brief today, being that it's late in the hour and  
25 you've heard several arguments today on timing issues.



1           You heard an argument today on statute of  
2 limitations which was adopted by all of the Defendants,  
3 and you've heard an argument just from Mr. Wilkes  
4 regarding the timing issues with respect to the  
5 governmental torts claims. But I think it's important  
6 that you hear from the Defendants just briefly with  
7 respect to the issue of laches, especially considering  
8 you've heard a lot of arguments from the Plaintiffs'  
9 side regarding equitable remedies; that this is an  
10 equitable case, these are equitable claims and  
11 equitable remedies.

12           So one issue that both the City and TMAPC and  
13 the Defendants addressed in their briefing was the  
14 issue laches. In the event that the Court finds that  
15 the other timeliness issues do not bar the claims, then  
16 an equitable defense or equitable claim is that of  
17 laches.

18           And as was addressed in our briefing, laches is  
19 an equitable defense that defends against the  
20 advancement of claims for an inexcusable delay for an  
21 unreasonable and unexplained length of time. And in  
22 this case, as addressed in our briefing, the mere  
23 ignorance of facts cannot excuse the delay. One must  
24 be diligent to make such an inquiry and an  
25 investigation as to the circumstances, and must

1 reasonably suggest a means of knowledge that are  
2 equivalent to actual knowledge.

3 One of the arguments that the Plaintiffs raised  
4 in their response to the City and TMAPC's briefing is  
5 that because this is a public nuisance suit, that  
6 somehow this claim is exempt from a laches defense,  
7 similar to the statute of limitations arguments that  
8 you've heard earlier in the day. But as we responded  
9 in our reply, that's simply not the case.

10 The case that the Plaintiffs rely on is this  
11 Revard versus Hunt, and the citation is in the  
12 briefing, but it's this 1911 OK 425 case. And  
13 basically the cite specifically from the case, and I  
14 quote, is where a party is specially injured by a  
15 public nuisance and brings an action to abate the same,  
16 the lapse in time will either legalize the same or --  
17 nor estop the injured party from bringing an action in  
18 its abatement. So that's the language that's being  
19 relied upon by the Plaintiffs, very similar to the  
20 statute of limitations arguments that you heard  
21 earlier. However, the language, similar to the statute  
22 of limitations arguments, is they have to be specially  
23 injured, it has to be a public nuisance argument, and  
24 it has to be brought for -- specifically for abatement.

25 So I'm not going to rehash for the Court because

1 | there's been a lot of argument today, and I am going to  
2 | respect the Court's time on the argument about whether  
3 | these specific Plaintiffs were specially injured in  
4 | this case. And I would just adopt the arguments that's  
5 | already been made in this case there. But again, even  
6 | assuming that this Court finds that there was a special  
7 | injury, that case only allows for the specific instance  
8 | for abatement of a very specific nuisance to avoid a  
9 | laches defense.

10 |         Well, in this case as we've seen from the slide,  
11 | that we've heard from counsel, the Plaintiffs in this  
12 | case are looking for declaratory relief, injunctive  
13 | relief for unjust enrichment. So that doesn't mean  
14 | that even if the Court were to find that this case  
15 | somehow allows for them to avoid laches for an  
16 | abatement argument, which the Defendants don't agree,  
17 | that it doesn't open carte blanche for them to avoid  
18 | the laches defense or any and all arguments.

19 |         So we specifically believe that these specific  
20 | Plaintiffs, as were argued by Counsel Tucker earlier,  
21 | were not specifically injured, so they don't apply  
22 | under this case. But definitely, the claims for unjust  
23 | enrichment going back 100 years are subject to a laches  
24 | defense. And when you look at the definition of  
25 | abatement under Blacks Law Dictionary, it specifically

1 talks about stopping specific conduct. Well, as  
2 Counsel Wilkes just talked about, the damages that are  
3 being sought are not just to stop future conduct, it's  
4 looking at going back and asking for, you know, damages  
5 looking backward seeking. So we're not just looking at  
6 abatement which is this very specific exception to  
7 laches.

8 When we talk about laches, we're talking about  
9 unreasonable delay as well as material prejudice to the  
10 Defendants. Now, one of the responses to the  
11 Plaintiffs in their response brief was that laches is  
12 not necessarily appropriate in a motion to defense -- a  
13 Motion to Dismiss setting.

14 Now, the Parks versus Classen case which the  
15 Defendants cited would say that in cases where, on the  
16 face of the petition, it's obvious that this was an  
17 unreasonable, unexplained delay, then it is appropriate  
18 to dismiss on a laches defense based on the face of the  
19 petition. In this case, based on the face of the  
20 Petition, this Court could find an unreasonable delay.

21 Based on Paragraph 26, based on Paragraph 27,  
22 based on Paragraph 112, some of these facts go back to  
23 knowledge of these Defendants back to 1921. Paragraph  
24 112 states that they had allegations about the zoning  
25 laws dating back to 1923.

1 Paragraph 113 goes back to -- from 1921  
2 allegations through the 1950s.

3 Paragraph 115 goes back to 1958 allegations to  
4 the Tulsa Urban League.

5 Paragraph 123 of the First Amended Petition goes  
6 back to allegations regarding information and things  
7 that happened in the 1930s.

8 Paragraph 144 talks about allegations from 1957,  
9 and on and on.

10 Paragraph 167 has allegations from a report from  
11 2013.

12 So from the face of the Petition, the knowledge  
13 of the Plaintiffs regarding a long history of events  
14 and their knowledge of these events for 50, 60, 70, 80  
15 years, it's obvious from the face of the Petition.

16 And then we have to talk about the prejudice to  
17 the Defendants. Now, the Plaintiffs want to say there  
18 is no prejudice to the Defendants when we talk about,  
19 you know, what could possibly be prejudicial. But  
20 we've heard Mr. Solomon-Simmons say, Well, look, this  
21 is claims talking about 1921. We've seen pictures of  
22 the highway that we want to talk about. But when we  
23 talk about witnesses and documents and putting on these  
24 kind of discovery in cases after 60, 70, 80, 100 years,  
25 the prejudice of putting on a case and defending this

1 kind of case when these witnesses -- these Plaintiffs  
2 have had this knowledge, the prejudice to Defendants is  
3 obvious that trying to find witnesses, trying to find  
4 documents to defend a case after 60, 70, 80 years, that  
5 kind of information becomes lost.

6 Now, the Plaintiffs contend that they didn't --  
7 they didn't willingly lay behind the law because they  
8 didn't know that this was a use of the public nuisance  
9 doctrine until the opioid litigation came about in  
10 2017. But today, Mr. Solomon-Simmons has put the  
11 statute up on the presentation board and made it very  
12 clear in his argument that the statute is clear, the  
13 law is clear, that it's been around since 1910, and  
14 that by looking at the face of the statute and the face  
15 of the law, his arguments today have been that  
16 basically anybody could tell that nuisance or public  
17 nuisance in these situations was available. So by  
18 counsel's arguments to the Court today, he should have  
19 been able to make the argument -- or the decision  
20 within the last 20, 30, 40 years that this was  
21 something that was available.

22 So in the event that this Court finds that  
23 equitable remedies is what's available and is outside  
24 of the statute of limitations time limits arguments or  
25 the governmental tort claims arguments, the Court --

1 the Defendants would encourage the Court to look at the  
2 laches defense and the timeliness of the face of the  
3 Petition, that it's obvious that these are claims that  
4 were known to the Plaintiffs for 20, 30, 40 years; that  
5 public nuisance, unjust enrichment are not new legal  
6 theories; and that these claims have been capable of  
7 being brought for many years and have not been done so.

8 Thank you.

9 THE COURT: Response.

10 MR. SWARTZ: Yes.

11 I'm glad we have an opportunity to address the  
12 unjust enrichment claim as well. The unjust enrichment  
13 claim goes back two years, so we're not going back in  
14 time or tolling or anything. The unjust enrichment  
15 claim has no timeliness issue. It's separate from the  
16 laches claim. It's a two-year claim that we have. So  
17 I don't think any of those arguments about laches  
18 applying relates to the unjust enrichment claim because  
19 we're not going back in time.

20 With regard to laches in general, there's three  
21 reasons why it doesn't provide a basis for dismissal:  
22 One, it doesn't apply to claims for public nuisance;  
23 two, but even if it did apply, Defendants have not met  
24 their burden; and three, it's an equitable doctrine  
25 that the Court can decline to apply if equity warrants.

1           So we'll go back to the statute of limitations.  
2 This is 50 O.S. Section 7. And this is the public --  
3 this is the public nuisance statute of limitations.  
4 And it says clearly, No lapse of time can legalize a  
5 public nuisance amounting to an actual obstruction of  
6 public right. Now, this is unusual. It's not like a  
7 statute of limitations for contracts which says you  
8 must sue within X number of years, or a tort that says  
9 you must sue within Y number of years. This says, No  
10 lapse of time can legalize a public nuisance.

11           Now, Oklahoma case law makes it extremely clear  
12 that laches does not apply to public nuisance claims.  
13 Both estoppel and the equitable defense of laches share  
14 the elements of delay and resulting prejudice to the  
15 other party.

16           Here's the Revard case that defense counsel  
17 cited. It makes it clear that laches will not estop a  
18 private litigant from bringing a public nuisance claim.  
19 Quote, Public -- well, public nuisance claims are,  
20 quote, exempted from the operation of the statute of  
21 limitations and of laches. That, really, is the end of  
22 it. I mean, laches shortens the statute of limitations  
23 and the statute is clear and the legislature has been  
24 clear that no lapse of time will legalize public  
25 nuisance.



1 I did want to touch on Alexander. It was raised  
2 earlier today, the prior case that was brought  
3 following the release of the Tulsa Race Massacre Report  
4 in 2001. Mr. Solomon-Simmons explained why it's not  
5 applicable. It's raised in their laches argument so  
6 I'll just address it briefly.

7 Those are different claims. They were federal  
8 civil rights claims, constitutional claims, and common  
9 law tort claims related to the massacre and its  
10 immediate aftermath. In that case the plaintiffs  
11 conceded that their claims were time barred. We do  
12 not. It's an ongoing public nuisance. The issue there  
13 was equitable tolling, and laches was not considered in  
14 Alexander. So I think the law is very clear that  
15 laches does not apply, but if Your Honor disagrees and  
16 looks at laches, the Defendants have not met their  
17 burden.

18 And laches has two elements, unreasonable delay  
19 and material prejudice. There's no bright-line test  
20 for determining what those things mean. It's  
21 discretionary. It basically means what you in your  
22 discretion thinks it means. It's an affirmative  
23 defense. So the party claiming the doctrine's benefit  
24 has the burden of proof. And like all affirmative  
25 defenses, it's best raised on an answer, and rarely

1 invoked on a motion to dismiss as they're trying to do  
2 here.

3 Granting -- this is one of the treatises.  
4 Equitable determinations involved in determining the  
5 applicability of the doctrine of laches are more  
6 appropriately resolved at a late stage in a lawsuit.  
7 Generally therefore, laches cannot be raised by a  
8 motion to dismiss.

9 So some of these issues that are being raised  
10 actually present impediments, and there's been lots of  
11 studies done on the Tulsa Race Massacre. We have  
12 survivors who are here in this courtroom. That can be  
13 dealt with later in the proceeding. You can adjust for  
14 that then. But to foreclose the lawsuit on the basis  
15 of an equitable doctrine upfront would be totally  
16 inappropriate.

17 Since proving laches is dependent on detailing  
18 particular facts and the harm they cause the defendant,  
19 again, the Motion to Dismiss is inappropriate.

20 The Parks -- I'll skip the Parks case.

21 One of the cases that the Defendants invoke is  
22 the Osage Nation case. In that case laches was applied  
23 but that was a different situation. That laches  
24 jurisprudence involved improper building permits or  
25 improper application of zoning laws. And in that case

1 the Osage Nation plaintiffs alleged and challenged the  
2 utility-scale construction project that had begun  
3 before the petition was filed. And on the face of the  
4 complaint, there was alleged -- Osage, pardon me, Your  
5 Honor, Osage Nation. The facts alleged in the  
6 complaint included knowledge of the permit issued,  
7 location of the project, and ongoing construction which  
8 were sufficient to apply laches.

9 And then the governmental interest was that the  
10 plaintiff didn't speak up. And because the plaintiff  
11 didn't speak up, there was an expenditure of a huge  
12 amount of money. That's not the case here. There was  
13 a further -- there might have been a delay that  
14 increased the amount of harm that was ongoing, but it's  
15 different than the situation where the government  
16 expends money. And the court in that case importantly  
17 said that, when it was barring injunctive relief, it  
18 explained that, quote, Equitable proceeding defenses  
19 such as laches and estoppel are not available against  
20 the state and its agencies acting in a sovereign  
21 capacity unless - and that's key - application would  
22 further a principle of public policy or interest.  
23 There is no countervailing public policy or interest  
24 here that would support the application of laches on  
25 behalf of the government.

1           Laches only applies to prejudice-dealing delay.  
2           The Oklahoma Supreme Court has made clear the defendant  
3           is required to show more than a mere lapse of time.  
4           Equity must follow the law. It may not allow legal  
5           limitations to be abridged unless there are equitable  
6           considerations of a compelling nature which demonstrate  
7           prejudice, prejudice-dealing delay.

8           With regard to the reasonableness of the delay,  
9           courts have routinely acknowledged that a delay that  
10          falls within a statute of limitations period is  
11          reasonable. The legislature here was clear in the  
12          public nuisance statute itself, again, No lapse of time  
13          can legalize a public nuisance. If the Court were to  
14          override the legislature's clear intent, that would be  
15          legislating from the bench which we all know is  
16          inappropriate.

17          With regard to that unreasonable delay, they  
18          argue in their brief that, quote, Plaintiffs cannot  
19          show that there was no unreasonable delay in asserting  
20          their claims. Well, that flips the burden. We don't  
21          have to show there was no unreasonable delay. It's an  
22          affirmative defense, and because of that they have the  
23          burden of proving and pointing to specific allegations  
24          that allege unreasonable delay that materially  
25          prejudices them, and they haven't met that burden.

1           Now, in their motion itself, they don't even  
2 mention prejudice. And when we called them out on  
3 that, then they said, Oh, well, maybe their witnesses  
4 are no longer available and documents may not be  
5 retained. But that is not the type of material  
6 prejudice that we need to demonstrate.

7           The Hedges case that we cite shows the  
8 difficulty of establishing that defendant was  
9 materially prejudiced. There, even where the defendant  
10 alleged a wrongful delay that placed him in a far worse  
11 situation than he would have been had the petition been  
12 filed earlier - in that case there was additional  
13 compounding interest on missed child support payments -  
14 the court nevertheless found the defendant was not  
15 materially prejudiced. It's not enough to simply be in  
16 a worse position by a lapse of time, you have to be in  
17 a materially worse position. And the court's decision  
18 itself says that.

19           The defendant urges that he is put at a severe  
20 disadvantage and will be irreparably damaged if he were  
21 ordered to satisfy the full amount of the arrearage  
22 that is pressed. At the time of trial his gross annual  
23 income was 30,300. He argues that because of his age -  
24 he's in his 50s - he will never earn enough money to  
25 pay off the obligation and the large amount of interest

1 that mother has allowed to accrue during the years of  
2 her inaction and failure to enforce the unpaid child  
3 support obligation. So there's a lot more money that's  
4 accrued here. The court holds, Although as a result of  
5 mother's delay he now owes a substantial amount of  
6 accrued interest, his proof does not demonstrate that  
7 the delayed institution of enforcement proceedings  
8 placed him in a far more detrimental or disadvantaged  
9 position. It indicates only that he would now owe more  
10 money. So they haven't shown the prejudice inducing  
11 delay that you would need to show.

12           Again, regarding prejudice, they've thrown out  
13 only in their reply the sentence that the prejudice to  
14 the Defendants in having to identify witnesses, locate  
15 documents, and defend allegations spanning 100 years is  
16 significant. They don't say anything beyond that.  
17 They have a burden on this issue, it's an affirmative  
18 defense. They don't identify the witnesses, the  
19 documents, the allegations. And again, this should not  
20 be a basis to dismiss an entire claim. It's a basis  
21 for you to address during the proceedings if  
22 appropriate.

23           THE COURT: Well, counsel, would you agree  
24 that counsel for the City, Ms. Gray, has -- she raised  
25 in her oral argument a case. Would you agree that that

1 case might apply at all?

2 MR. SWARTZ: I'm not sure, Your Honor,  
3 which case you're referring to.

4 THE COURT: Well, we'll ask Ms. Gray to  
5 look at her notes and --

6 MS. GRAY: It was the Parks case, their  
7 motion -- their response to the Motion to Dismiss.  
8 That was in our briefing as well.

9 MR. SWARTZ: Yes, sure.

10 The Parks case -- we had a Parks slide I might  
11 have skipped over.

12 In Parks, I think it actually shows the  
13 difficulty in asserting a laches defense on a motion to  
14 dismiss. There, the court dismissed the demurrer  
15 because, quote, The unusual circumstances as would  
16 render specific performance inequitable do not appear  
17 upon the face of the petition, they must be pleaded by  
18 answer to be available.

19 So yes, there are circumstances - I'll say it  
20 wrong again, Osage Nation - where there are very  
21 detailed pleadings about why a delay is unreasonable.  
22 And again, that case had the specific zoning law  
23 background to it. But it's clear from the case law,  
24 from the treatises that confirm the defense, and it's  
25 rarely applied on a motion to dismiss.

1           Again, it would be extraordinary if the court  
2 rule applied to an equitable doctrine that would  
3 somehow override the statutes. It says, No lapse of  
4 time can legalize a public nuisance amounting to actual  
5 obstruction of public right.

6           And again this equitable doctrine, if you were  
7 to apply it, you would be saying it would be  
8 inequitable for the Plaintiffs to proceed because of  
9 the lapse of time and material prejudice that you would  
10 find. You have discretion not to apply it. And we  
11 would submit the facts and circumstances in this  
12 situation with the Plaintiff survivors would make it  
13 inequitable to foreclose a claim based on some sort of  
14 delay.

15           And to just address the issue on -- that was  
16 raised with regard to the public nuisance statute, we  
17 do believe it's clear on its face. We don't think  
18 there's any doubt about its applicability here and  
19 special injury and all the other issues that we  
20 discussed at length today.

21           That said, sometimes statutes lay in the books  
22 and people aren't thinking of them in a certain  
23 context. It happens in the civil rights area all the  
24 time, people find statutes that clearly apply and then  
25 they get enforced. So the fact that we were not aware



1 earlier that -- the way that the Oklahoma State and  
2 City creatively applied the statute. Clearly it  
3 applies to the opioid situation. We picked up on that  
4 and that's one of the reasons for the delay. But we  
5 don't have to show that's a reason, and it doesn't  
6 undermine the notion that the statute is clear on its  
7 face.

8 Thank you, Your Honor.

9 THE COURT: Reply.

10 MS. GRAY: Just briefly, Your Honor.

11 I think -- obviously one of the Plaintiffs' main  
12 points has to do with the statute of limitations so I  
13 won't rehash the statute of limitations and just say  
14 obviously the Defendants disagree, that the statute of  
15 limitations is applicable. And if the statute of  
16 limitations is inapplicable, then I believe that that  
17 applies to the laches argument. And I'll defer to the  
18 argument that's already been made with respect to the  
19 statute of limitations.

20 I would like to address the argument that was  
21 made by counsel that the unjust enrichment argument is  
22 only -- the unjust enrichment claim has been limited to  
23 two years because on the face of the Plaintiffs'  
24 Petition, on page 69, they specifically ask for  
25 injuries or damages regarding the injuries caused by

1 the unjust enrichment, including an accounting which  
2 shall include monies raised by the Defendants - these  
3 are subsections - monies raised by the Defendants  
4 through public and private sources since 2010 from  
5 marketing of the Greenwood neighborhood; subsection B  
6 is all monies received by the Defendants from public  
7 and private sources for use in the Greenwood  
8 neighborhood and community from June 1st, 1921 to 1960;  
9 subsection C is all monies received by the Defendants  
10 from public and private sources for the use in North  
11 Tulsa from 1960 to the present. And these are all  
12 subsections of an accounting of, quote, the unjust  
13 enrichment by the Defendants.

14 So I would argue that on the face of the  
15 Petition, Plaintiffs' unjust enrichment claims seems to  
16 extend way past a two-year time frame and that they're  
17 asking for an accounting and then payment of damages  
18 long past a two-year accounting, but much more into --  
19 all the way back to 1921. Therefore, our laches  
20 argument is applicable to the unjust enrichment claim  
21 because their damages are seeking all the way back to  
22 1921.

23 And those are the only additional arguments I  
24 would make.

25 THE COURT: Thank you.

1 MR. SWARTZ: Can I say something to --

2 THE COURT: One moment.

3 Ms. Gray, you may have a seat.

4 MS. GRAY: Thank you.

5 THE COURT: And I'll just note for the  
6 record there was some table talk over at Plaintiffs'  
7 table. And yes, I would like Mr. Swartz -- Counsel  
8 Swartz, if you'll resume your position at the podium  
9 and respond narrowly to that.

10 MR. SWARTZ: Yes.

11 To the extent we seek relief connected to unjust  
12 enrichment beyond two years, I want to clarify that we  
13 are not seeking that, some overlap of public nuisance,  
14 but the unjust enrichment claim, we're not seeking any  
15 of these remedies beyond two years. So to the extent  
16 there are things that we more broadly --

17 THE COURT: So let me ask you a question.  
18 So on page 69, if the Court were to dismiss with  
19 prejudice all claims prior to two years before the  
20 filing of the suit, that would be consistent with your  
21 statement?

22 MR. SWARTZ: To the extent -- yes. I just  
23 want to be clear -- yes. But to be clear, that it only  
24 relate -- to the extent the remedy is only tied to  
25 unjust enrichment. I don't want to -- I want to be

1 careful to the extent it overlaps with public nuisance,  
2 but --

3 THE COURT: So I'm asking you: Is page 69  
4 an overlapping page? Because this is --

5 MR. SWARTZ: Yes. Yes, Your Honor.

6 THE COURT: So this is an example for  
7 counsel and the ladies and gentlemen in the gallery.  
8 These very technical definitions that are not only  
9 within the statutes enacted by the State of Oklahoma,  
10 but also within case law that all the attorneys who  
11 have spoken today and those who have not spoken, but  
12 the citations to authority that are in the briefing,  
13 there is a lot for the Court to digest because there  
14 are these overlapping - in your words, Counsel -  
15 overlapping legal theories.

16 MR. SWARTZ: Right.

17 And to the extent we overreached a little bit,  
18 we're pulling back because we didn't -- it's been drawn  
19 to our attention and so we're cutting back on that.

20 Again, to be clear -- really clear for the  
21 record because it's very important, just on the unjust  
22 enrichment claim. Again, that paragraph, that does  
23 relate to unjust enrichment where we are cutting back  
24 on.

25 THE COURT: But that entire page is one

1 paragraph.

2 MR. SWARTZ: Okay. So we could parse this  
3 afterwards. I don't think right now is the best time  
4 to do that, but perhaps we could follow up with a  
5 letter or whatever the procedure is with Your Honor.

6 THE COURT: And we'll talk about that, I  
7 think, at the end of the hearing.

8 I just want to state for everyone here, I really  
9 appreciate your time and attention today.

10 We have one more argument. I would like to  
11 finish today. We have the political question. We have  
12 the separation of powers and political question.

13 MR. SOLOMON-SIMMONS: Absolutely.

14 Can we take a recess?

15 THE COURT: Yes, we will. But here's what  
16 I want to say - --

17 MR. SOLOMON-SIMMONS: Okay.

18 THE COURT: -- it's five till 5:00 and my  
19 court reporter has very graciously agreed to stay today  
20 after 5 o'clock.

21 And I just wanted to express my appreciation to  
22 all of the ladies and gentlemen in the gallery. This  
23 has been a very long and tedious day, but it is  
24 extremely important, not only to the parties involved,  
25 but to all the community.

1           And so to the extent that, perhaps, some of your  
2 friends and neighbors and family members were here  
3 earlier today and have left, or if you leave -- if you  
4 leave on the recess you won't be able to get back in  
5 the building after 5 o'clock, I'll tell you that right  
6 now.

7           So I just want to express my appreciation to  
8 those who have paid attention to the proceedings today,  
9 and I want to publicly acknowledge all of the really  
10 hard work that all the attorneys have done. And it is  
11 appropriate for attorneys to disagree on how certain  
12 cases might apply to a case at issue. That does not  
13 make them any less of attorneys. So I have to express  
14 acknowledgement of the hard work of all the attorneys,  
15 and there are a lot of them working on this case.

16           And I want everyone to know that the duty of the  
17 Court is to apply the law free from passion, politics  
18 and prejudice, and that is the duty of the Court. And  
19 I will do that duty. I serve the public. I love the  
20 people that I serve. And these are difficult subject  
21 matters. And it is with very heavy heart -- I think  
22 anyone looking at the massacre cannot -- acknowledges  
23 the very tragic history involved. But my duty in this  
24 motion is to apply the law free from emotion, politics  
25 and prejudice.

1           So I'm letting everyone know I will consider all  
2 of the arguments. And there have been some excellent  
3 oral arguments presented today that is very helpful to  
4 the Court. And I appreciate the time of counsel in not  
5 only briefing it, but presenting the oral argument to  
6 flesh out some of these nuances.

7           And as Counsel Swartz said, there are some  
8 things that possibly Plaintiff may -- might admit that  
9 they would file a Second Amended Petition on certain  
10 topics, certain issues in the case. And that is a  
11 normal part of every proceeding. I just want everyone  
12 to know that.

13           And so once the Court renders a decision, it  
14 will be typed, it will be filed of record, and then  
15 procedurally there may be hearings that the Court  
16 conducts with counsel on matters of procedure. And  
17 I'll let everyone know, because this involves multiple  
18 parties and multiple claims, there is a special  
19 statutory requirement that if anything is brought up on  
20 appeal in a multi-party, multi-claim case, it may fall  
21 under the part of the statute that calls for  
22 certification of an interlocutory appeal. And that's a  
23 procedural item that I would invite counsel to look at,  
24 if appropriate, based on the Court's order.

25           And this may be a case that if it falls within

1 that category and a motion were presented, or even if a  
2 joint motion were presented, I would probably want to  
3 have a very brief hearing on it if I had any questions.  
4 And then as appropriate, if something were to go up on  
5 appeal immediately, that is just one example of a  
6 procedure that you might see in the record or you might  
7 not.

8 So we are going to take a very short comfort  
9 recess and then I want to hear the last argument.

10 And I'll just remind the ladies and gentlemen,  
11 you're free to use the restrooms on this hallway or on  
12 a different floor, but if you leave the building, you  
13 will not be able to get back in.

14 So we'll just take maybe ten minutes.

15 So Court's in recess.

16 (A recess was taken after which time the  
17 following proceedings were had:)

18 THE COURT: We'll be back on the record.  
19 Court and counsel present. And we are ready to hear  
20 the last designated argument, separation of powers and  
21 political question.

22 Counsel, please state your name for the record.

23 MR. MCCLURE: Kevin McClure for the State  
24 of Oklahoma, Oklahoma Military Department, Your Honor.

25 THE COURT: When you're ready, you may



1 proceed.

2 MR. MCCLURE: There's been a lot of  
3 discussion about the Governmental Torts Claim Act and  
4 what is allowed and what is not allowed under that  
5 statute. When I drafted the -- our portion of the  
6 separation of powers doctrine, it was focused mainly on  
7 this Court's ability to order any kind of equitable  
8 relief against my client, the military department. It  
9 should be noted that there's only one claim against us  
10 and it's the nuisance claim. The second claim is not  
11 brought against the military department. Plaintiffs  
12 have stated that.

13 And I stated also in our reply that after the  
14 military department left in 1921, there's no allegation  
15 that we are continuing any kind of nuisance claim. And  
16 when I got to the separations of power argument, that  
17 was when I remembered - several other cases I've been  
18 in - that a court of equity cannot order a coordinate  
19 branch of the government to do something that would  
20 invade their province. As this Court's aware, the  
21 legislature cannot pass laws and tell you how you can  
22 rule in a -- a case that creates a heightened standard  
23 of -- standard of admissibility, such as the worker's  
24 comp claims. The -- likewise, the legislature cannot  
25 tell the executive branch what to do once they

1 appropriate the money to the executive branch.

2 Well, in this case, this Court has no power to  
3 give the Plaintiffs the kind of relief they want. And  
4 yeah, they're going to say, Well, we're not asking for  
5 anything but injunctive relief. Well, the military  
6 department hasn't done anything in their Petition since  
7 we left in 1921.

8 The claims that are made are monetary damages.  
9 They want to say that they are not, but yet the  
10 pleadings states that they are monetary damages in and  
11 of themselves. In their prayer for relief at page  
12 67 -- 67 through 73, they ask for money and monies. In  
13 their prayer for relief under Paragraphs 2, 7, 8,  
14 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), they ask for  
15 costs and prayers. Actually, I'm citing after the  
16 fact. That's in Paragraph No. 4.

17 In Paragraph No. 6, they ask for compensation  
18 for. And all throughout their prayer for relief they  
19 are asking for the Court to order the legislature to  
20 award them money somehow. But you cannot do that.  
21 It's nothing personal to you. It's just the judiciary  
22 cannot invade the province of the legislature. The  
23 legislature is the one who has the prerogative to pass  
24 financial budgeting -- the taxpayer money. The  
25 legislature passes laws and we cannot -- you cannot

1 | order us to -- order the military department to pass a  
2 | law that would set up some kind of fund. The military  
3 | department doesn't do that. And as I stated in our  
4 | brief, the only other object of your ability would be  
5 | to the Oklahoma Legislature. They are not in this  
6 | lawsuit and you can't sue the Oklahoma Legislature  
7 | because time and time again our Supreme Court has said  
8 | you can't sue the legislature for acts that they do in  
9 | passing the laws.

10 |           Other than what I have written in the briefs as  
11 | to the separation of powers doctrine and how it relates  
12 | to the claims made in this case, they can say, Well,  
13 | we're only asking for an injunction. Well, what are  
14 | you going to order the military department to do? They  
15 | haven't asked you to do anything for the military  
16 | department. The military department and the national  
17 | guard aren't here any more that I know of. They may  
18 | have an office here, but we're not doing anything now,  
19 | especially under the nuisance statutes. Well, they  
20 | say, But there's a continuing violation, a continuing  
21 | nuisance. Well, then tell me what it is. What am I  
22 | doing now? What is the military department doing now  
23 | that is a nuisance? They haven't pled that. And they  
24 | can't plead that from the facts that they have.

25 |           As for the political question doctrine, this

1 case, like all other cases, are really best suited for  
2 the legislature. The legislature does have the power  
3 to create laws that could compensate the clients. This  
4 is the wrong forum for that. The proper forum is the  
5 legislature. And I don't think that -- in any way to  
6 plead the case other than to order us to do something  
7 or not do something. Just like you do in the federal  
8 court when you're suing an individual in an official  
9 capacity under ex parte Young, the court talks about,  
10 Well, I can order you to stop violating the law or I  
11 can order you to enforce the law that is already in  
12 place. I can't order you to do anything else. That's  
13 Coeur d'Alene Tribe where the U.S. Supreme Court said  
14 -- even in that case they said they weren't asking for  
15 equitable relief -- they weren't asking for money  
16 damages, but the Supreme Court came back and said,  
17 Yeah, you would be getting equitable relief -- excuse  
18 me, you would be getting money damages of a type. And  
19 I did not brief that because I did not have that case  
20 as far as part of my argument.

21 But other than that, this Oklahoma Military  
22 Department doesn't have anything else to add to the  
23 arguments today other than I heard a lot of argument  
24 about, that this was -- this is a statute and the  
25 statute should be read the way it was of the nuisance

1 claim. Well, the Governmental Tort Claims Act  
2 specifically says, Every statutory right, every  
3 statutory right must be -- go through the Governmental  
4 Tort Claims Act. And if they're going to rely on the  
5 statute, then they must comply with the law.

6 Thank you.

7 THE COURT: Counsel, for a point of  
8 clarification, you mentioned, perhaps, a case name that  
9 you said you didn't brief, but did you say it in your  
10 argument?

11 MR. MCCLURE: No, I did not. I said it --  
12 Coeur d'Alene. It's the Coeur d'Alene Tribe. It was  
13 the -- a case where they talked about -- even though  
14 they weren't asking for money damages, what they would  
15 get in effect would be money damages. And I also  
16 talked about it later in the Verizon case out of --  
17 that came out of North Carolina. It was a U.S. Supreme  
18 Court case where only prospective injunctive relief was  
19 allowed, and that does not include money damages. Even  
20 saying you're not going to do it, but yet you're asking  
21 for it anyway.

22 THE COURT: Thank you.

23 Response.

24 MR. MILLER: Are we doing both political  
25 question and separation claims together or are we doing

1 | them individually?

2 |           THE COURT: I think it was one argument,  
3 | was it not? Counsel McClure --

4 |           MR. MCCLURE: I'm sorry. What was that?

5 |           THE COURT: -- was there any other attorney  
6 | who's going to present on this argument?

7 |           MR. MCCLURE: No.

8 |           MR. MILLER: Thank you, Your Honor.

9 |           THE COURT: Yes.

10 |           MR. MILLER: Eric Miller. Again, I am  
11 | counsel for the Plaintiff.

12 |           And -- I just want to be clear here. Our slide  
13 | is not showing up. And I certainly don't want to take  
14 | any more of the Court's time than is necessary. I know  
15 | law professors have a tendency to go on and on and I  
16 | will try to resist that instinct.

17 |           First of all, I want to say that there is no --  
18 | so what -- the Plaintiffs have sought injunctive  
19 | relief, and the essential point is that one of the  
20 | aspects of injunctive relieve we seek in this case,  
21 | especially against the national guard, the military  
22 | department, is declaratory. And what we seek is  
23 | essentially a declaration that they have failed to  
24 | abate the nuisance for the last 21 years -- I'm sorry,  
25 | the last 100 years, since 1921.

1 I just want to be clear that it's really  
2 important to the community here, declaratory relief is  
3 not a minor remedy for us. It's actually a major  
4 remedy for us because for a 100 years, various  
5 Defendants, all of the Defendants, have failed to own  
6 up to their actions and what they have done. And  
7 declaratory relief is certainly within the power of  
8 this Court to issue, and it doesn't present a political  
9 question. It is within the power of the Court to mete  
10 this sort of -- to issue this sort of remedy.

11 In the moving papers, the Defendants also raise  
12 a political question doctrine, and I just want to  
13 address that because there is no political question  
14 issue in this case. Political questions concern  
15 essentially the right of Congress to recognize foreign  
16 groupings of states, or domestic groupings of states,  
17 or competing states from domestic states as proper  
18 representatives, or Congress' sole authority to make  
19 rules conducting the impeachment process. If the Court  
20 were to accept the Chamber's proposed definition of the  
21 political question doctrine, then every controversial  
22 race discrimination case, every controversial case,  
23 period, would present a political question doctrine.

24 Defendants haven't cited a single case that  
25 actually applies the political question doctrine to

1 | this complaint. In both Baker versus Carr -- I'm  
2 | sorry. Just to be clear, in both Baker versus Carr and  
3 | In re African-American Slave Litigation, the Supreme  
4 | Court and the Seventh Circuit, Judge Posner writing the  
5 | opinion, refused to dismiss a case on political  
6 | question grounds. And part of the reason in the  
7 | African-American Slave Litigation that the court did  
8 | that was -- and we're back again to the -- that we  
9 | began with which is that this case is not about long  
10 | dead ancestors who are alleging -- who are alleging are  
11 | distantly related to the Plaintiffs in this case. This  
12 | case has always been about living survivors and current  
13 | claims presented by the Greenwood and North Tulsa  
14 | community. So it's not a claim about the distant past.  
15 | It's always been a case about the very real present.

16 |           The Oklahoma Supreme Court has recognized public  
17 | nuisance as a justiciable claim as early as 1910 and  
18 | has delegated to the court the role of determining the  
19 | outcome of public nuisance claims. So there's no  
20 | political question doctrine in resolving a public  
21 | nuisance because the legislature resolved it in 1910.  
22 | They gave you the power to do that. There's no worry  
23 | about embarrassing the legislature because the  
24 | legislature just has given you the power to decide  
25 | public nuisance as justiciable.



1           Ultimately, the Defendants seek to turn this  
2 case into a general referendum on race and racism. But  
3 Plaintiffs do not seek to remedy racism in the state of  
4 Oklahoma. We don't even seek to remedy racism in the  
5 city of Tulsa. What we're asking -- just as the State  
6 of Oklahoma and City of Tulsa in the opioid litigation  
7 don't seek to remedy drug addiction.

8           Public nuisance are injuries to local  
9 communities that are well within the capacity of this  
10 Court to manage. The Greenwood and North Tulsa  
11 nuisance presents a geographically limited class of  
12 Plaintiffs, one neighborhood of one town in comparison  
13 to the statewide class in State of Oklahoma versus  
14 Purdue Pharma. Remedying that nuisance is well within  
15 your power and we urge the Court to remedy the nuisance  
16 as soon as possible.

17           Thank you very much.

18           THE COURT: Reply, if any.

19           MR. MCCLURE: No.

20           THE COURT: Okay. I have a question for  
21 Counsel Miller. If you will retake the podium.

22           MR. MILLER: Yes, Your Honor.

23           THE COURT: Can you please address the  
24 statement that Counsel McClure made pertaining to the  
25 State of Oklahoma Military Department? I would like

1 | you to clarify: What is the Plaintiff seeking as to  
2 | specifically that Defendant?

3 | MR. MILLER: Declaratory relief, Your  
4 | Honor.

5 | THE COURT: Okay. So please comment on the  
6 | fact that McClure -- Counsel McClure stated the  
7 | military department is not doing anything and hasn't  
8 | been functioning for many, many years.

9 | MR. MILLER: So as I mentioned earlier,  
10 | Your Honor, the military department, we believe in our  
11 | pleadings, is associated with the state and national  
12 | guard. And what we seek, at least from the state, is  
13 | an acknowledgement that -- even if the military  
14 | department is now a defunct state entity, nonetheless,  
15 | we seek a declaratory statement that acknowledges their  
16 | role in the massacre, and its part of the ongoing  
17 | failure to abate that has and continues to harm the  
18 | Greenwood and North Tulsa community. Still haven't  
19 | received an adequate apology or acknowledgement from  
20 | the State, the City, the Chamber and the other  
21 | Defendants.

22 | THE COURT: Okay. Thank you.

23 | So Counsel McClure, will you please clarify  
24 | pertaining to: Is the military department, does it  
25 | encompass the state and/or the national guard?

1 MR. MCCLURE: The national guard existed,  
2 and I went back as far as I could in the statutes as to  
3 when the military department was actually created. The  
4 military department was created somewhere around 1941,  
5 I believe. So the military department, I guess, is not  
6 really the correct named party. But even if you would  
7 sue the national guard, the national guard is  
8 incorporated into the military department. So they  
9 have national guard plus national air guard, and so --  
10 and then they also address issues -- excuse me. They  
11 also have, like, the army reserve, reservist show up.  
12 And they're all over that. We have one adjunct general  
13 in charge of all of that.

14 As far as what we have done, did you say, still?

15 THE COURT: Okay. So that clarifies one  
16 item which is the national guard would fall under the  
17 umbrella of the military department.

18 MR. MCCLURE: Correct.

19 THE COURT: But is this a defect that could  
20 or could not be cured as to failing to name the proper  
21 party, or is that relevant here?

22 MR. MCCLURE: I think it's adequate to name  
23 the military department as the group national guard.  
24 But as far as the remedies they seek, they would have  
25 to seek those against the Oklahoma Legislature which

1 they cannot do. That's where the separation of powers  
2 comes in. The military department --

3 THE COURT: So would you address, please --  
4 strike that.

5 Okay. Did you have anything --

6 MR. MCCLURE: That's all, Your Honor.

7 THE COURT: So I'll ask Counsel Miller.

8 So when Counsel McClure referred the Court to  
9 the Petition, page 67 and I believe Paragraphs 4, 6 and  
10 10, amongst others, pertaining to Plaintiff seeking  
11 money pertaining to the Defendant Military Department,  
12 but then in your response you stated that Plaintiffs do  
13 not seek money from the military department, they seek  
14 a public acknowledgement.

15 MR. MILLER: Can I quickly confer with my  
16 co-counsel?

17 THE COURT: Yes. I don't --

18 MR. MILLER: Thank you for your patience,  
19 Your Honor.

20 So our first point is, just to be clear again,  
21 we don't seek money from anyone. We seek equitable  
22 injunctive relief. But second of all, if you are  
23 willing to order declaratory relief that we have  
24 requested, we feel that's very important.

25 Thank you, Your Honor.

1 THE COURT: I'm going to ask you a  
2 follow-up question. So in the abatement plan slide  
3 that I think Counsel Solomon-Simmons commented on, is  
4 the military department anywhere in that slide?

5 MR. MILLER: I believe there's a  
6 declaratory relief bubble in that slide, and so the  
7 military department would be contained within that  
8 bubble, Your Honor.

9 THE COURT: But that's not anything to be  
10 funded by the -- I'm trying to clarify.

11 MR. MILLER: We're not asking for -- we can  
12 get into a discussion about whether a state funding is  
13 appropriate or not, that's a side issue for this. What  
14 we're asking for on this point is declaratory relief,  
15 Your Honor.

16 Does that answer your question?

17 THE COURT: Well, in some ways.

18 Those bubbles are not limited -- on the slide  
19 show that we're looking at, they're not limited to any  
20 particular Defendant. So on the top left corner where  
21 it says Declarations, hyphen, liability and  
22 abatement --

23 MR. MILLER: Yeah.

24 THE COURT: -- what is the abatement relief  
25 sought against the military department?

1 MR. MILLER: Your Honor, there's an ongoing  
2 injury to the community where the -- we've alleged that  
3 the military department/national guard, however we can  
4 appropriately identify the relevant institution, has  
5 failed to take responsibility for its actions and  
6 continues to cause distress and harm to the community  
7 in general and perhaps individuals in particular, and  
8 so we simply want declaratory relief, a portion of  
9 responsibility that can end that continuing injury to  
10 the community, Your Honor.

11 Thank you, Your Honor.

12 THE COURT: Thank you for answering my  
13 question.

14 Anyone have any final -- I know in the beginning  
15 - it's been a long day and I appreciate your time -  
16 counsel had stated to the Court, and I did not oppose  
17 this plan. If there be any argument that one counsel  
18 might want to supplement, now is the opportunity to do  
19 so if you have not already done so.

20 MR. MCCLURE: If I may, Your Honor.

21 As to counsel's statement they just made, they  
22 want a -- you to declare under a declaratory judgment  
23 that the Oklahoma Military Department/National Guard  
24 did wrong, that would be only an advisory opinion.  
25 It's no remedy out of that. You can't do a declaratory

1 judgment without some kind of remedy to that.

2 And can you order the military department to  
3 issue a statement? I don't know if you can or not.  
4 But as far as just a declaratory judgment, it's a  
5 nonjudiciable issue if he's not going to ask for any  
6 kind of remedy.

7 THE COURT: Is that a defect that might be  
8 cured through amendment? If you'll address that point.

9 MR. MCCLURE: I don't know how they could  
10 address that through any kind of amendment.

11 THE COURT: All right. Any other  
12 supplements -- supplemental argument by defense?

13 MR. JOHN TUCKER: No.

14 THE COURT: All right. Counsel Miller, do  
15 you have anything in follow-up to Counsel McClure to  
16 the question I just asked?

17 MR. MILLER: I -- no, Your Honor.

18 THE COURT: Okay. Thank you.

19 All right. This concludes our proceedings for  
20 today.

21 I do need to remind counsel for Plaintiff, there  
22 is -- the Court Exhibit 1 needs to be handed to the  
23 court reporter. And do you have a copy for defense and  
24 Court?

25 MR. SOLOMON-SIMMONS: Yes.

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THE COURT: Thank you.

Is there anything else before I close the record today?

MR. SOLOMON-SIMMONS: Your Honor, we just want to thank you for your time today.

THE COURT: I have already thanked all of the ladies and gentlemen here, including counsel and court staff.

All right. With that, ladies and gentlemen, the Court's in recess and is adjourned for today. Have a wonderful rest of your day.

(Court's Exhibit No. 1 was marked by the reporter, and proceedings concluded.)



C E R T I F I C A T E

1  
2  
3 STATE OF OKLAHOMA )  
4 COUNTY OF TULSA ) ss

5 I, BRENDA EL HASSAN, a Certified Shorthand  
6 Reporter in and for the State of Oklahoma, duly  
7 licensed under and by virtue of the laws of the State  
8 of Oklahoma, certify that on the 28th day of September,  
9 2021, I reported in shorthand at the City of Tulsa,  
10 County of Tulsa and State of Oklahoma, the foregoing  
11 proceedings, Case No. CV-2020-1179, before the  
12 Honorable Caroline Wall, Judge of the District Court,  
13 said hearing later being reduced to typewriting under  
14 my supervision.

15 I further certify that the foregoing proceeding  
16 is a true and correct transcript of the oral  
17 proceedings had at said hearing and that I am not a  
18 relative, counsel or attorney of either party or clerk  
19 or stenographer of either party or otherwise interested  
20 in the event or outcome of this action or proceeding.

21 IN WITNESS WHEREOF, I have hereunto set my hand  
22 and official Seal this 23rd day of April, 2022.

23  
24  
25 BRENDA EL HASSAN, CSR, RMR, CRR  
Official Court Reporter

DISTRICT COURT OF OKLAHOMA  
Official Transcript