IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE; VIOLA FLETCHER; HUGHES VAN ELLISS, SR.; HISTORIC VERNON A.M.E. CHURCH, INC.; LAUREL STRADFORD; ELLOISE COCHRANE-PRICE; TEDRA WILLIAMS; DON M. ADAMS; DON W. ADAMS; STEPHEN WILLIAMS; AND THE TULSA AFRICAN ANCESTRAL SOCIETY, Plaintiffs, vs. CITY OF TULSA; TULSA REGIONAL CHAMBER; TULSA DEVELOPMENT AUTHORITY; TULSA METROPOLITAN AREA PLANNING COMMISSION; BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, OKLAHOMA; VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERIFF OF TULSA COUNTY; and OKLAHOMA MILITARY DEPARTMENT, Defendants.	Case No.: CV-2020-01179 Judge Caroline Wall

JOINT RESPONSE OF ALL DEFENDANTS TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW

Defendants submit their Joint Response to Plaintiffs' Supplemental Memorandum of Law Addressing *State of Oklahoma v. Johnson & Johnson* ("*Pl. Supp.*").

Summary of How the *J & J* Opinion Relates to the Nuisance Claim Here

"This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law." (*J & J* at ¶ 39) The overriding theme of the Oklahoma Supreme Court's *J & J* decision is that societal problems can be so pervasive, so deep-seated, and so longstanding that the judicial branch is not equipped to redress them. They are simply non-justiciable.

1. The judicial branch cannot attempt to manage "public policy matters" and "societal problems" because those are the responsibility of the executive and legislative branches of government.

2. Public nuisance claims may address "discrete, localized problems," not "policy problems." To do otherwise would make Oklahoma's nuisance statute unconstitutionally vague.

3. A public right is more than an aggregate of private rights by a large number of injured people, discussing an Illinois case asserting community-wide gun violence to be a public nuisance requiring abatement. The Illinois case was dismissed upon finding there is no public right to be free from the threat that others may break the law.

4. An abatement remedy must cause the alleged public nuisance to cease to exist; if it does not, the remedy must be rejected. If the remedy fails, the case fails to state a claim and should be dismissed.

5. The *J & J* decision is not restricted to a products liability context. The Court's instructions in its ¶ 39 are a judicial dictum that is "highly persuasive" and must not be "lightly disregarded."

THE *J & J* DECISION IN THE CONTEXT OF THIS CASE

I. *J & J* reinforces the teaching that nuisance is not a "super tort" that provides sweeping tort remedies without regard to any statute of limitation.

A. Courts cannot address "public policy problems" and "societal problems" because those are the responsibility of the executive and legislative branches.

The Amended Petition asserts that the 1921 Race Massacre created an ongoing nuisance reflected in the City of Tulsa's 2018 Equality Indicators Annual Report. That report

compared the demographics of North Tulsa to other areas of the City in the areas of economic opportunity, education, housing, justice, public health, and services. The Amended Petition states that over 50 community leaders joined in demanding that the City implement societal reforms in response to this report. *Am. Petition* at ¶ 74; fn. 70. The Amended Petition then laments that none of the reforms demanded have been implemented. *Id.*

Addressing nuisance law, the *J & J* Court makes clear that the judicial branch of the government does not have superpowers that allow it to step in and cure societal ills, even when the legislative and executive branches have yet to do so:

> The Court has allowed public nuisance claims to address discrete, localized problems, not policy problems. Erasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague. The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches. These branches are more capable than courts of balancing the competing interests at play in societal problems.

Id. at ¶ 39.

The Amended Petition defines the ongoing nuisance as ubiquitous, touching every aspect of life, and demanding nothing less than a Court-ordered overhaul and reconstruction of the private, public, and government institutions that comprise our community:

> Greenwood and North Tulsa residents continue to experience racially discriminatory and disparate treatment in public services, employment opportunities, banking, education opportunities, policing, funding, and facilities and encounter deadly barriers to basic human needs, including jobs, financial security, education, housing, justice, and health that annoy, injure, or endanger their comfort, repose, health, or safety and render them insecure in life, or the use of their property.

Id. at ¶ 195; *see also* Section XII, ¶¶ 12(a) through (h) (cataloging the varied redistributions

of individual rights and wealth sought by Plaintiffs to effect nuisance abatement). This sort of Court-ordered reshaping of society is not justiciable, stated the *J & J* Court, because it is the responsibility of other, co-equal branches of government:

> Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.

Id. ¶ 39. The Oklahoma Supreme Court's decision in *J & J* directly addresses and endorses a central proposition of the Defendants' motions to dismiss: "All Plaintiffs lack standing because their alleged injuries and remedies cannot be redressed by the judicial branch." The Amended Petition seeks to reform society. That is a laudable goal. But it is not a goal that can be achieved through a claim of public nuisance, said the Oklahoma Supreme Court.

B. A public right is more than an aggregate of private rights by a large number of injured people.

To establish public nuisance, a plaintiff must show that a public right has been violated. J&J at ¶ 24. The Court distinguished a public right as "a right to a public good," as opposed to "an assortment of private rights." A "public good," the Court explained, is an "indivisible resource shared by the public at large, like air, water or public rights-of-way." *Id.* This is important because the Court explained in the next section of its opinion what things are <u>not</u> a "public good" and thus are not subject to abatement as a public nuisance.

C. There is no "public right of health" any more than there is a public right to be free from the threat of crime.

In *J & J*, the State characterized its public nuisance claim as "interference with the public right of health." *Id.* at ¶ 25. The *J & J* Court compared that claim to a claim that gun

proliferation is a public nuisance. In *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004), the Illinois Supreme Court found that there is no *public* right to be free from the threat that others may break the law, like there is no *public* right to be free from the threat posed by vehicle drivers who break the law. The *J & J* Court's endorsement of the *Beretta* holding does not depart from established public nuisance law. *See, e.g.*, Restatement (Second) of Torts § 821B, Comment g, at 92 (1979) (a public right is "not like the individual right that everyone has not to be assaulted") (quoted in *Beretta* at 213 Ill. 2d 351, 374).

Plaintiffs contend they have rights to jobs, financial security, education, housing, justice, and health and that infringement of those rights is a nuisance. (*Am. Petition* at ¶ 174). They further assert a nuisance comprised of the decades-long physical, economic, and cultural destruction of a neighborhood, the effects of which now extend to all residents of North Tulsa and beyond. (*Resp. to Chamber's Am. General Motion to Dismiss* at p. 11). These are the broad societal issues that the Oklahoma Supreme Court does not recognize as a "public right" that can be restored through an action for public nuisance.

D. The abatement remedy must cause the public nuisance to cease to exist; if it does not, the remedy must be rejected.

The *J & J* Court found the abatement remedy sought by the State would not cause the alleged nuisance to "cease to exist," and for that reason, the remedy was rejected. *Id.* at ¶ 32. In the absence of a remedy, a cause of action should be dismissed for failure to state a claim. *Est. of Hicks ex rel. Summers v. Urb. E., Inc.*, 2004 OK 36, ¶ 3, 92 P.3d 88, 90. The abatement remedies sought by the Amended Petition would be a financial windfall for Plaintiffs, but it would not cause the alleged nuisance to cease to exist. *Id.*, Section XII, ¶¶ 12(a) through (h).

II. The *J & J* Court did not 'only' forbid application of nuisance law to products liability claims.

A. The Court's Opinion instructs that when claims involve public policy and societal problems, those claims cannot be remedied through a nuisance action. The district courts must treat this blunt pronouncement as "highly persuasive."

Plaintiffs' Supplemental Brief construes the entire *J & J* decision as narrowly limited to products liability, claiming the Court "repeatedly makes clear that its holding is limited to the interaction between products liability law and Oklahoma's public nuisance statute." *Id.* at 2. Plaintiffs ask the Court to entirely disregard the entirety of paragraph 39 of the decision –the part that instructs Oklahoma courts to stay out of public policy issues, to not grapple with solving societal problems, and to leave those matters to the Legislature-- because those instructions are mere "contextual considerations." *Id.* at 18.

Disregarding the *J and J* Court's broader pronouncements on the role of nuisance law is contrary to the Oklahoma Supreme Court's own directives to district courts. "Judicial dictum, while not binding on the court at a later date, is highly persuasive and should be given greater weight then obiter dictum." *Stark v. Watson*, 1961 OK 17, 359 P.2d 191, 196. The *Stark* court helpfully explained that "judicial dictum" is a statement of the Court not necessary to reach the ultimate holding but otherwise relating to the matters at hand:

> Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel, and deliberately passed on by the court, though not necessary to a decision. While neither is binding as a decision, judicial dictum is entitled to much greater weight than the other, and should not be lightly disregarded.

Stark v. Watson, 1961 OK 17 ¶ 21, 359 P.2d 191, 196, *quoting Crescent Ring Co., Inc. v. Travelers' Indemnity Co.*, 102 N.J.L. 85, 132 A. 106, 107; *see also Sebring v. Fed. Deposit Ins.*

Corp., 1963 OK 297 ¶ 8, 401 P.2d 479, 482 (citing and following *Stark*).

The *J & J* Court's holding is that nuisance law does not provide a remedy for products liability claims because that was the factual context in which the case arrived from the district court. The *J & J* Court's judicial dictum is that nuisance law does not provide a remedy for public policy and societal problems, either. These pronouncements in ¶ 39 of *J & J* are "highly persuasive" and "should not be lightly disregarded" by this District Court.

As that Court stated, "Public nuisance is fundamentally ill-suited to resolve a claim against product manufacturers." *J & J* at ¶ 21, *quoted* in *Pl. Supp.* at p. 4. Through its judicial dictum at ¶ 39, the Court gave notice that public nuisance also is "fundamentally ill-suited" to resolve claims seeking to change public policy or to redress societal ills.

B. Plaintiffs' Amended Petition invites the Court to create and fund public programs, formulate public policy, and indulge in judicial activism.

1. Examples of what Plaintiffs demand from this Court.

In their Supplemental Brief on *J & J*, Plaintiffs double down on their demands that this Court reshape large swathes of society. According to Plaintiffs, this Court must exercise its equitable powers more intrusively than any State or Federal Court in history. Among the 23 (if not more) demands for equitable relief asserted by the Supplemental Brief and the Amended Petition are the following demands for Court-ordered relief:

- the Court must cure the lack of "viable public infrastructure" in both Greenwood and the North Tulsa Communities (*Pl. Supp.* at 3, citing *Petition* at ¶ 74);
- the Court must "replace structures and institutions" destroyed in the massacre (*id.*);
- the Court must provide "material support for rebuilding the Black businesses, homes, schools, and hospital" (*id.*);
- the Court must cause to cease any, and all conduct by anyone alleged to oppress and undermine "the predominantly Black North Tulsa community;" (*id.*);
- the Court must order the demolition of Interstate 244 and the Inner Dispersal Loop

(*id.*, citing Petition at ¶ 88 and *Amended Pet.* at ¶ 193);

- the Court must order that policing strategies in the "community" be reformed to stop alleged "over-policing" (*Pl. Supp.* at 5);

- the Court must declare as a matter of law that all descendants of any person adversely impacted by the events of 1921 are immune from any sort of sales tax, property tax, or any other form of City or County tax. (*Amended Pet.* at XII)

Again, these are just examples. The work of deconstructing an entire community physically and socially and then trying to piece it back together better than before is something for which a district court is fundamentally ill-suited.

2. The tearing down and rebuilding of society is outside of judicial expertise, requiring this Court to decline to exercise its jurisdiction.

Plaintiffs frame their case as one of simple public nuisance, albeit one arising out of "murder, arson, looting, land theft and domestic terrorism." (*Pl. Supp.* at 3). These are not "minor criminal offenses" that the *J & J* court classified as being within the scope of public nuisance. (*Id.* at ¶ 14). Consideration of the many things Plaintiffs deem a nuisance and the remedies proposed to abate the nuisance shows that Plaintiffs have brought political questions before the Court.

The Supreme Court has articulated six factors, any one of which dispositively indicates the presence of a non-justiciable political question. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691 (1962). "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Baker*, 369 U.S. at 210, 82 S.Ct. 691 (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55, 59 S.Ct. 972 (1939)). As explained in a law

review article that was cited by the *J & J* court:

> When analyzing and applying these six [*Baker v. Carr*] factors, lower courts have rearticulated them in the form of three specific questions: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" The presence of any one of the foregoing six factors is enough to withdraw a matter from the realm of justiciability.

Hon. Luther J. Strange III, *A Prescription For Disaster: How Local Governments' Abuse Of Public Nuisance Claims Wrongly Elevates Courts And Litigants Into A Policy-Making Role And Subverts The Equitable Administration Of Justice*, 70 S.C. L. Rev. 517 (Spring 2019), cited in *J & J* at fn. 20.

No district court in Oklahoma – if not the whole nation—has the judicial expertise to tackle even one of the examples of equitable relief sought by Plaintiffs in this case, as listed above in (B)(1). In response, plaintiffs may argue that this Court can gain the necessary expertise through reliance on teams of special masters and expert witnesses and the like. While sociologists, economists, urban planners, human geographers, and other academic types indeed could contribute towards the ultimate solutions sought by Plaintiffs, the appropriate forum for doing so is before legislatures and city councils and the United States Congress—not in a court of law.

3. Public policy development is not just beyond areas of judicial expertise but is an unnecessary intrusion into other branches of government.

The *J & J* court criticized the district court for "stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues...." *Id.* at ¶ 39. Plaintiffs ask this Court to do the very same thing that *J & J* teaches

was plain error by a district court: to take lands and to create government programs to address a wide range of "social issues," and to create and fund government programs designed to address "health issues," for example, by ordering the construction of a Level 1 Trauma Center Hospital in Greenwood, ordering funding to rebuild hospitals lost in 1921, and somehow devising orders that eradicate racism because it is "a public health crisis." *Amended Pet.* ¶¶ 120,169, 171, XXI(1) and XXI(12)(f). The parallels between Plaintiffs' demands and the *J & J* court's admonition could not be more clear.

The Court's exercise of jurisdiction here also would not be prudential because other branches of government are addressing the same societal concerns. For example, the Tulsa City Council in June passed a nonbinding resolution in which they committed to establish a community-led process within six months to evaluate the recommendations of the state's 1921 Tulsa Race Riot Commission (see Resolution No. 20113, Ex. 1).

The Oklahoma Supreme Court made clear in *J & J* that creating and funding government programs to address societal problems "goes too far." The non-justiciability of the issues raised by Plaintiffs, coupled with the engagement of other branches of government on these same issues, compels dismissal.

4. Plaintiffs' Supplemental Brief and the *J & J* decision show that the problems Plaintiffs aspire to solve with this lawsuit are not "discrete, localized problems" that are justiciable as a public nuisance.

"The Court has allowed public nuisance claims to address discrete, localized problems, not policy problems." *J & J*, 2021 OK ¶ 39; *Pl. Supp.* at p. 19. The problems for which Plaintiffs seek redress are neither discrete nor localized. First, begin with Plaintiffs themselves. Plaintiffs are not the nine individuals and two entities listed in the caption of this case. Plaintiffs are residents of the historical Greenwood area. (*Am. Petition* ¶ 195).

Plaintiffs are residents and organizations anywhere within North Tulsa.[1] (*Id.* and at XII) Plaintiffs are anyone within Tulsa County who survived the massacre or descended from someone who survived, perished, was injured, or lost property in the massacre. (*Id.*) Plaintiffs are neither discrete nor localized.

Nor are the activities alleged to be a nuisance discrete or localized. Consider the Oklahoma cases cited in *J & J* as those that form the boundaries of discrete, localized conduct that can be a nuisance. They address saloons, pollution, an adult bookstore, housecats, a hedgerow, a barn, a dog, gambling, cigarette smoking, a dance hall, a retail lumber monopoly in a small town, and liquor advertisements. *Id.* at fn. 13 (citing and summarizing 18 cases).

In comparison, Plaintiffs construe the most violent sorts of conduct as nuisances, including "shooting, wounding and killing," aerial bombardment, "stealing and destroying personal property," arson, and terrorism. (*Pl. Supp.* at 12-15). Plaintiffs further find nuisance to lie in activities neither criminal nor offensive, such as enacting public policies, zoning laws, and urban renewal projects.[2] (*Id.* at 16-17)

From the perspective of the *J & J* court, Plaintiffs' proposed nuisances are not within the "traditional bounds" of public nuisance claims. (*Id.* at ¶ 15) Plaintiffs' claims here are much more similar to those in handgun litigation, which the *J & J* court addressed at length. *Id.* at ¶ 26, citing and quoting *City of Chicago v. Berreta U.S.A. Cop.*, 821 N.E.2d 1099 (Ill. 2004).

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[1] North Tulsa is not a formally defined geographic area. It has been described by the Tulsa World as bounded by Cincinnati Avenue to the West, North 56th Street to the North, 145th East Avenue to the East, and Interstate 244 to the South, an area of approximately 50 miles. Tulsa World, December 4, 2015.

[2] While not within the "traditional bounds" of nuisance conduct, the acts of legislating, zoning, urban renewal, and the like are all matters of public policy. Abatement of public policies is inextricably tied to the creation and administration of public policy and, thus, nonjusticiable.

J & J quoted the holding of *Berreta*, that "'there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs'." In *Beretta*, the court construed the public right at issue as an assertion of the plaintiffs, on behalf of the entire community, of the individual right not to be assaulted. *Id.*, 821 N.E.2d at 1116. Here, on behalf of the entire Greenwood/North Tulsa/Tulsa County community, Plaintiffs assert the right to be free from urban renewal, from fire regulations and zoning codes, from too much policing, from too little housing code enforcement. They assert the right to be free from racial discrimination with public services, with employment, with banking, with education, with policing, with facilities, with housing, with justice, with financial security, and health, all of which pose a "nuisance." (*Am. Petition* at ¶ 195).

The non-traditional nuisance activities alleged in *Beretta* were rejected by the district and appellate courts and were likewise criticized by Oklahoma's *J & J* court. In reversing the State's opioid judgment, the *J & J* Court warned that allowing non-traditional public nuisance claims to proceed would render Oklahoma's nuisance statute unconstitutional. (*Id.* at fn. 24) Plaintiffs' attempt to circumvent the traditional bounds of public nuisance claims should not succeed here, either.

Conclusion

Plaintiffs' Supplemental Brief gets one thing very right: "[t]here is a finite number of events in history that can be compared to the Massacre and fewer still that resulted in the actual destruction of an actual neighborhood." *Id.* at 6. Nuisances, by comparison, are common: more than 170 appellate decisions alone of Oklahoma's courts address nuisance claims. When you're looking for redress for "the worst act of domestic terrorism in American History" (*Pl. Supp.* at 5), whose effects reverberate through society a hundred years later, you

don't try to shoehorn all of that into the traditional bounds of public nuisance. Instead, you seek to reform society and provide reparations for what was lost--- public policy remedies for a public policy problem.

The Oklahoma Supreme Court's rejection of the "Opioids Litigation" foreshadows the future of Plaintiffs' claims at the appellate level. The *J & J* decision provides highly persuasive support for the Motions to Dismiss of all Defendants.

Respectfully submitted,

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I hereby certify that on the 7th day of March, 2022, a copy of the above and foregoing was sent to the following via U.S. Mail, correct postage fully prepaid:

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