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

1. LESSIE BENNINGFIELD RANDLE, Tulsa Race Massacre Survivor, 2. VIOLA FLETCHER, Tulsa Race Massacre Survivor, 3. HUGHES VAN ELLISS, SR., Tulsa Race Massacre Survivor, 4. HISTORIC VERNON A.M.E. CHURCH, INC., a domestic not-for-profit corporation, 5. LAUREL STRADFORD, great-granddaughter of J.B. Stradford, 6. ELLOUISE COCHRANE-PRICE, daughter of Clarence Rowland and cousin of Dick Rowland, 7. TEDRA WILLIAMS, granddaughter of Wess Young, 8. DON M. ADAMS, nephew and next friend of Dr. A.C. Jackson, 9. DON W. ADAMS, great-grandson of Attorney H.A. Guess, 10. STEPHEN WILLIAMS, grandson of A.J. Smitherman, 11. THE TULSA AFRICAN ANCESTRAL SOCIETY, an unincorporated association, Plaintiffs, v. 1. CITY OF TULSA, a municipal corporation,	Case No.: CV-2020-01179 Judge Caroline Wall

2. TULSA REGIONAL CHAMBER, a domestic not-for-profit corporation,

3. TULSA DEVELOPMENT AUTHORITY,

4. TULSA METROPOLITAN AREA PLANNING COMMISSION,

5. BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, OKLAHOMA,

6. VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERIFF OF TULSA COUNTY,

7. OKLAHOMA MILITARY DEPARTMENT,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT TULSA REGIONAL CHAMBER'S AMENDED MOTION TO DISMISS AND BRIEF IN SUPPORT

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Plaintiffs hereby submit this Brief in Opposition to the Amended Motion to Dismiss filed by Defendant Tulsa Regional Chamber (the "Chamber"). This opposition is one of six opposition briefs filed by Plaintiffs on June 1, 2021 (the "June 1 Oppositions") in response to the seven motions to dismiss filed by Defendants on March 12, 2021 (the "March 12 Motions"). Plaintiffs respectfully refer the Court to Plaintiffs' Opposition to State of Oklahoma's Motion to Dismiss to an overall introduction to the June 1 Oppositions and a chart which shows where responses to arguments made in the March 12 Motions are responded to in the June 1 Oppositions.

INTRODUCTION

One of the two briefs submitted by the Chamber is devoted to the Chamber's argument that this Court lacks subject matter jurisdiction under 12 O.S. § 2012(B)(1) because Descendant Plaintiffs[1] and the Church[2] have not suffered an actual, concrete, and non-conjectural injury sufficient to confer Article II standing. The Chamber also argues that all Plaintiffs lack standing because this Court is incapable of redressing their injuries. In its second brief, the Chamber argues that Plaintiffs' claims are barred by the political question doctrine.

The Chamber's arguments are misplaced. First, the Chamber largely relies on an inapplicable line of case law brought by the descendants of enslaved people, discussed *infra*, which the Chamber uses to minimize the specific injuries suffered by the individual Plaintiffs, which form the basis of their claims. Then, the Chamber argues that this Court cannot adjudicate issues of public significance – which, among other things, ignores this Court's recent decision in the *State v. Purdue Pharma*, No. CJ-2017-816 (Ok. Dist. Ct. Nov. 15, 2019)

[1] "Descendant Plaintiffs" refers to Plaintiffs Laurel Stradford, Ellouise Cochrane-Price, Tedra Williams, Don M. Adams, Don W. Adams, Stephen Williams, and The Tulsa African Ancestral Society.

[2] "Church" refers to Plaintiff Historic Vernon A.M.E. Church, Inc.

(the "Opioid Litigations"), discussed *infra*. For these, and the other multiple, independent reasons described *infra*, the Court should reject the Chamber's attempts to shield the facts from this Court.

ARGUMENT

Oklahoma looks to federal jurisprudence on Article III standing to guide the determination of standing questions under Oklahoma law. *Hendrick v. Walters*, 1993 OK 162, ¶ 5, 865 P.2d 1232, 1236, n.14. Under that jurisprudence, as the Chamber agrees, "[t]he three threshold criteria of standing are (1) a legally protected interest which must have been injured in fact — *i.e.*, suffered an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision." *HSBC Bank USA, Nat'l Ass'n v. Lyon*, 2012 OK 10, ¶ 4, 276 P.3d 1002, 1004. Those factors are generously applied. "Standing can be supported by a very slender reed of injury." 13A Wright & Miller, *Federal Practice and Procedure* § 3531.4, at 6 (3d ed. Oct. 2020). At this juncture, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, [courts presume] that general allegations embrace those specific facts that were necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As set forth below, Defendants have plainly caused the injuries suffered by Plaintiffs. This case is readily distinguishable from a line of cases brought by descendants of enslaved people, discussed *infra*. Unlike in those cases, Defendants have acknowledged a causal link between the actions of Defendants and the specific injuries suffered by Plaintiffs. Indeed, current City of Tulsa Mayor G.T. Bynum recently stated that, "[i]n Tulsa, the racial and

economic disparities that exist today can be traced to the 1921 race massacre." Pet.[3] ¶ 1. Likewise, current Chamber President and CEO Mike Neal recently said that, "[t]he racism that enabled the massacre also shaped the economic disparities in our community." Pet. ¶ 170 n. 66. As discussed thoroughly in Plaintiffs' Opposition to Tulsa Regional Chamber's Second Motion to Dismiss (the "Opp'n to Chamber Nuisance MTD") each Plaintiff has suffered a special injury that stems from the Massacre. Opp'n to Chamber Nuisance MTD 8. Lastly, the injuries suffered by Plaintiffs and caused by Defendants, can be redressed by this Court, which recently held that opioid manufacturers were liable for a nearly half-billion dollar abatement plan related to the opioid epidemic they caused. That matter and others, discussed in-depth *infra*, proves that this Court is capable of redressing severe public nuisances, which concern matters of public significance.

I. The Petition Sufficiently Alleges that Each Plaintiff Suffered an Actual, Concrete, and Non-Conjectural Injury

The Chamber admits that Plaintiffs Mother Randle, Mother Fletcher, and Mr. Ellis (*i.e.*, the Survivor Plaintiffs) suffered actual, concrete, and non-conjectural injuries. *See, e.g.*, Chamber's Mot.[4] 1. The Chamber only challenges whether the injuries suffered by the Descendant Plaintiffs and the Church are sufficiently actual, concrete, and non-conjectural to confer standing. In making this argument, the Chamber simply ignores detailed allegations in the Petition as to the injuries suffered by those Plaintiffs and relies on cases that are readily distinguishable or inapposite.

[3] "Pet." refers to Plaintiffs' First Amended Petition filed February 2, 2021.

[4] "Chamber's Mot." refers to Tulsa Regional Chamber's Amended Motion to Dismiss and Brief in Support filed March 12, 2021.

A. The Petition Adequately Alleges Injuries Suffered by the Descendant Plaintiffs

The loss of property that one otherwise would have inherited constitutes a concrete injury in fact sufficient to support standing and "the right to pass on valuable land to one's heirs is a valuable right." *See Hodel v. Irving*, 481 U.S. 704, 711, 715 (1987). In *Hodel*, the United States Supreme Court held that plaintiffs had standing to challenge legislation that led to an unconstitutional taking of their ancestors' property. *Id.* at 715. Likewise, in *Bodner v. Banque Paribas*, the court found that descendants of Jewish customers of French financial institutions had standing to sue those institutions for their participation in a scheme to expropriate their customers' assets during the Nazi occupation. 114 F. Supp. 2d 117, 124-27 (E.D.N.Y. Aug. 31, 2000). As alleged in detail in the Petition, the Descendant Plaintiffs have each suffered severe financial and emotional harm, including the loss of property, due to Defendants' perpetuation of the Massacre and failure to abate the century-long public nuisance that it unleashed. Pet. ¶¶ 138-43. For example, Descendant Plaintiff Laurel Stradford's ancestor J.B. Stradford was widely considered to have been the wealthiest and most successful resident of Greenwood at the time of the Massacre. Pet. ¶ 30. J.B. Stradford was the owner of the Stradford Hotel, which was a fifty-four room brick establishment that housed a drug store, barber shop, restaurant and banquet hall. The Stradford Hotel was valued at $75,000 at the time of the Massacre. *See* OKLA. COMM'N TO STUDY THE RACE MASSACRE REPORT OF 1921 ("RACE MASSACRE REPORT"), at vi (Feb. 28, 2001), https://www.okhistory.org/research/forms/freport.pdf.[5] Within hours of the Massacre

[5] The Race Massacre Report was incorporated in its entirety by reference in Plaintiffs' First Amended Petition, and therefore its contents may be considered by the Court on a motion to dismiss. Pet. at n.3; *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

beginning, Defendants condemned the hotel – as well as J.B. Stradford's fortune and Plaintiff Stradford's family inheritance – to rubble.

Likewise, the Petition alleges the ancestors of the other Descendant Plaintiffs owned property in Greenwood which was destroyed in the Massacre. For example, Defendants:

- Tarnished the family surname, defamed with false allegations, and destroyed the property of Plaintiff Price's father, Clarence Rowland. Pet. ¶ 31.
- Destroyed the property of Plaintiff Williams' grandmother Wess Young. Pet. ¶ 32.
- Looted and destroyed the property of Plaintiff M. Adams' uncle, A.C. Jackson, and used his story, name, and likeness for their own self-aggrandizement. Moreover, the Petition alleges that Defendants brutally shot Mr. Jackson. The Petition also alleges that Mr. Jackson then bled to death while imprisoned in a facility overseen by Defendant Chamber. Pet. ¶ 129.
- Looted and destroyed the property of Plaintiff W. Adams's great-grandfather, H.A. Guess, who also lost clients, income, and his savings because of Defendants' actions. Pet. ¶ 34.

The Petition's allegations are more than sufficient to survive a motion to dismiss, and Plaintiffs' status as descendants does not mean otherwise. The Petition alleges a through-line from the systematic destruction of wealth in Tulsa to Descendant Plaintiffs' financial and emotional condition today. At the time of the Massacre, Greenwood had "two black schools, … and two black newspapers . . . some thirteen churches and three fraternal lodges . . . plus two black [movie] theaters and a black public library." Pet. ¶ 44. Greenwood was a thriving American community. Today, the opposite is true.

While, as Defendants note, Greenwood had a brief economic resurgence in the middle of the century, Black families in Tulsa faced a system that was stacked against them, which Plaintiffs allege is a continuation of the nuisance caused and perpetuated by Defendants. During the 1950s and continuing through today, Greenwood has had a lack of adequate code-compliant housing due in large part to the City and County's failure to enforce zoning codes.

Pet. ¶¶ 116-17. Further, Black home ownership declined dramatically after the Massacre, exacerbating and ballooning the racial wealth gap. Pet. ¶ 125 n. 44. Today, there is not even a hospital that serves the Black residents of North Tulsa. *See* Pet. ¶ 44 n. 12. These factors, combined with the urban renewal program discussed *infra*, ensured that Greenwood never thrived in perpetuity. Indeed, Defendant City of Tulsa itself has recognized that "historical actions including redlining and exclusionary zoning have led to disinvestment in neighborhoods that were once thriving in Tulsa." *See The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument,* HUMAN RIGHTS WATCH, at 15 (May 29, 2020), https://www.hrw.org/news/2020/05/29/us-provide-reparations-1921-tulsa-race-massacre.

Descendant Plaintiffs' emotional trauma also confers standing. Indeed, courts routinely find plaintiffs have standing based on far less. *Cf. Awad v. Ziriax*, 670 F.3d 1111, 1120-24 (10th Cir. 2012) (finding plaintiff had standing to challenge proposed constitutional amendment that "condemn[ed] his religion and exposes him and other[s in his faith]… to disfavored treatment"); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222-23 (10th Cir. 2005) (finding plaintiffs had standing to sue based on unwanted exposure to a statue); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679-82 (9th Cir. 2001) (finding birdwatcher plaintiffs had a concrete "aesthetic interest" in viewing birds). Here, Plaintiffs' injuries go "significantly beyond a psychological consequence from disagreement with observed government conduct…hurt feelings…or a person's deep and genuine offense." *See Awad*, 670 F.3d at 1123 (internal citations omitted).

Additionally, Defendants' argument that the "general rule is that [an] action should be brought in the name of the party whose legal right has been affected," *see e.g.*, Chamber's Mot. 2, is misguided because the Petition alleges that Descendant Plaintiffs' legal rights are those

that have been affected by Defendants' actions. Indeed, as in *Bodner*, Descendant Plaintiffs seek this Court's intervention, and acknowledgment of the injury they have suffered.

Defendants continually rely upon *In re African-American Slave Descendants Litigation*, where the court held that plaintiffs could not "establish a personal injury by merely identifying tort victims and alleging a genealogical relationship." *See* 304 F. Supp. 2d 1027, 1047 (N.D. Ill. Jan. 26, 2004). Defendants expect this Court to believe that just because Plaintiffs' allegations deal with racial disparities stemming from an atrocity that their injuries are therefore analogous with a line of litigation brought by the descendants of slaves, discussed *infra*, and therefore cannot be redressed by this Court.

While such an assertion is facially erroneous, the court's decision in *African-American Slave Descendants* is also readily distinguishable from a legal perspective. First, Plaintiffs do not allege a tort. *See* Plaintiffs' Combined Opposition to City of Tulsa and Tulsa Metropolitan Area Planning Commission's Motions to Dismiss the First Amended Petition (the "Opp'n to City/TMAPC MTD"). Second, Plaintiffs allege injuries based on more than a genealogical relationship. Plaintiffs injuries are based on Defendants' systematic destruction of their property during the Massacre, and the trauma and hardships that stem from that loss.

Defendants further use *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1048, to argue that it is "a mere assumption" that Descendant Plaintiffs would be "beneficiaries of their ancestors' wealth." *See* Chamber's Mot. 9. Unlike in *African-American Slave Descendants Litigation* though, the Petition here specifically alleges that Descendant Plaintiffs' ancestors held considerable property, wealth and prosperity, which was taken from them. *See* Pet. ¶¶ 30-35. Moreover, the Petition alleges that Defendants then denied Descendant Plaintiffs' ancestors – as well as Descendant Plaintiffs themselves – their ability to recover

such property, wealth, and prosperity. To call it a "mere assumption" that a descendant would be a beneficiary of an ancestors' property, wealth, and prosperity ignores the reality of how generational wealth accrues in the United States.

Moreover, Descendant Plaintiffs do not seek a remedy for wide-ranging "social ills," as the Chamber contends. *See* Chamber's Mot. 4. Among other slave-descendant cases, Defendants rely upon *Cato v. United States* to argue that an allegation of a "generalized, class-based grievance" is insufficient to confer standing. *Id.* at 16 (citing *Cato*, 70 F.3d 1103, 1109 (9th Cir. 1995). Unlike in *Cato*, Descendant Plaintiffs do not allege a "class-based grievance" based off the damages from the enslavement of and continued discrimination against African Americans. In fact, Plaintiffs' allegations specifically demonstrate how they have been specially injured by Defendants and have suffered an injury different than that to the general public. *See* Opp'n to Chamber Nuisance MTD 8.

Lastly, Defendants reliance on *Indep. School District No. 9 of Tulsa Cty v. Glass,* 1982 OK 2, 639 P.2d 1233, is unfounded. In *Independent School District No. 9*, the Oklahoma Supreme Court found that the plaintiff *did* have standing because it had a legal interest in protecting its revenues from illegal conduct and arbitrary action by a public board. *See* 1982 OK at ¶ 8, 639 P.2d at 1237. Likewise, here, Plaintiffs have a legally protected interest – to have a public nuisance, which is specifically injurious to them, abated, and to not have Defendants' unjustly enrich themselves on the basis of Plaintiffs' trauma and loss.

The fact is Black residents of Tulsa, including Descendant Plaintiffs' families, were forced to flee Tulsa due to the Massacre and Defendants have prevented the thriving Black Greenwood of a previous era from returning, depriving the Descendant Plaintiffs of property,

wealth, and prosperity. The Petition alleges that Defendants inflicted actual, concrete, and non-conjectural injuries upon the Descendant Plaintiffs.

B. The Petition Adequately Alleges Injury Suffered by the Church

Plaintiff Church is the only standing Black-owned structure on Historic Greenwood Avenue that existed on the day of the Massacre in 1921. Defendants do not dispute the Petition's factual allegations about the harm they inflicted upon the Church – *i.e.*, that, as a result of the Massacre, the Church's sanctuary and a majority of its red-brick edifice was burned to the ground; the Church lost its pastor and many prominent members; and the Church's community was financially and socially destroyed. Pet. ¶ 29. Those are actual, concrete, and non-conjectural injuries.

Instead, Defendants argue that the Church as named did not "legally" exist at the time of the Massacre, Chamber's Mot. 6-7, and that the Church cannot satisfy the requirements of associational standing because it members did not have a "'direct, immediate and substantial' interest in the controversy and a 'personal stake in the outcome," Chamber's Mot. 7 n.3 (quoting *Okla. Educ. Ass'n (OEA) v. State ex rel Okla. Legislature*, 2007 OK 30, ¶ 9, 158 P.3d 1058, 1063). An association, however, has standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 670 (10th Cir. 2006). Here, Plaintiff Church satisfies this three-prong test.

First, members of the Church would have independent standing to sue for the reasons set forth above. Second, the Church, in seeking to abate the public nuisance directly serves the organization's purpose, which is to help build and support a strong Black faith community in

Greenwood. Defendants' failure to abate the ongoing nuisance continues to plague the Church today, as the trauma of its members and losses to its membership remain. Lastly, the remedy sought by Plaintiffs does not require the participation of the Church's members in the lawsuit. If Defendants were to abate the public nuisance, it would allow the Church to build and strengthen its congregation, to the benefit of all of its individual members.

II. Plaintiffs Have Pleaded Causation for Purposes of Standing

To establish causation for purposes of standing, a plaintiff must demonstrate their injury is "fairly traceable" to the conduct of the defendants. *Horton v. Sw. Med. Consulting, LLC*, 2017 WL 2951922, at *2 (N.D. Okla. July 10, 2017). "[A]ll of the persons whose acts contribute to such damage are liable therefore." *Town of Sentinel v. Boggs*, 1936 OK 620, ¶ 20, 61 P.2d 654, 659. It is sufficient that "defendant's act was a contributing (not *substantial*) factor in producing the plaintiff's injuries." *Lee v. Volkswagen of Am., Inc.*, 1984 OK 48, ¶ 29, 688 P.2d 1283, 1289. When many sources contribute to a harm, standing can be established by demonstrating the defendants made unlawful contributions, which cause or contribute to the plaintiffs' injuries. *See Nat. Res. Def. Council v. Texaco Refin. & Mktg., Inc*., 2 F.3d 493, 504-05 (3d Cir. 1993). As to a claim of nuisance, "the critical question is whether the Defendant *created or assisted in the creation of the nuisance*." *Cty of Santa Clara v. Atl. Richfield Co*., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006).

The Chamber argues that Plaintiffs' fail to "allege[] any factual connections between the alleged wrongful conduct of the Chamber and their claimed injuries." Chamber's Mot. 11. As set forth below, the opposite is true.

A. All Defendants Caused the Massacre and Plaintiffs' Injuries

The Petition alleges that each Defendant caused and participated in the Massacre. For example, the Petition alleges that Defendants City, Chamber, Board of County Commissioners

of Tulsa County, and Members of the County Sheriff's Department committed arson on approximately 1,500 Greenwood residents' homes and businesses. Pet. ¶ 69. Those who participated in the Massacre were responsible for the murder of hundreds of Black citizens of Greenwood. They stole or destroyed 150 business and 1,200 houses, valued between $50-100 million in today's currency. Pet. ¶ 77. Defendants were meticulous in their efforts to deprive the Black community of all valuables – carefully stripping homes before setting fires. Pet. ¶ 78. Their actions left thousands Black people homeless, which also left those Black residents of Greenwood with an unfathomable financial, emotional, and physical toll. Pet. ¶ 74.

Further, the Chamber formed the Public Welfare Board, which oversaw the forceful detention of more than 5,000 Greenwood residents in "concentration camps." Pet. ¶¶ 82-83. The Chamber then paid for the green identification cards, which the City and National Guard required any Greenwood community member to possess if they were to leave the concentration camp – many of whom could only leave to work for a white employee, often for no pay and under threat of violence effectively under conditions of slavery. Pet. ¶¶ 84-87. Defendants attempted to destroy Greenwood and its memory – and have since done everything in their power to make sure it never returns.

B. All the Defendants Acts and Omissions Caused the Ongoing Public Nuisance

When the bullets stopped spraying and the bombs stopped falling on June 1, 1921, the harm Defendants' actions had inflicted upon Plaintiffs and their ancestors had only just begun. Over the last century, the Petition alleges that Defendants actively prevented Greenwood's rebirth and, in doing so, furthered an ongoing public nuisance.

The Petition's allegations of continuing and ongoing injury confer standing upon Plaintiffs. Defendants' actions stifled economic, social, and cultural opportunities in the

Greenwood and North Tulsa communities, depriving Plaintiffs of those opportunities and redirecting their benefits to Tulsa's white community. One of the worst examples of Defendants' conduct over the past century is what Defendants call the urban renewal program – or, as it is known to many Black Tulsans, the urban *removal* program. Pet. ¶ 145 n. 47.

Defendants used the urban renewal program as a disguise to achieve their policy goal of pushing Black Tulsans north. Central to this strategy was the decision to build a highway directly through the core of what was the Greenwood business district. Pet. ¶ 144. In doing so, Defendants sought to deprive, and did deprive, Plaintiffs and Greenwood's Black community of their property without providing any form of just compensation. In particular, for example, following the Massacre, Defendant TDA took the prime real estate once owned by Plaintiff Mother Randle's family, and turned it into a white-owned business. *See* Pet. ¶ 147 n. 50.

Through zoning laws, Defendants caused overcrowding and impeded home construction in Greenwood. Pet. ¶ 112. The effects of those zoning laws in Greenwood and on its Black residents and former residents are well documented. *See e.g.*, Pet. ¶¶ 114-15. Further, Defendants have made no effort to invest in the public infrastructure in Greenwood that they destroyed during the Massacre. Pet. ¶ 118. On the other side of town, however, Defendants helped white South Tulsa flourish by, among other things, investing billions in resources, infrastructure, and development. Pet. ¶ 139. Further, Defendants City and Chamber have engaged in wide-scale racial segregation, precluding Black North Tulsans from occupying senior roles in public employment. Pet. ¶¶ 132, 136. Those are just a few examples of the discriminatory policies that have caused the ongoing nuisance. *See also* Pet. ¶¶ 138-43. It was also prominent leaders of the City, County, and Chamber who incorporated the Tulsa Ku Klux

Klan, knew that many of their officers and employees were part of the Klan, and supported the Klan's terrorism of the Black Greenwood community. Pet. ¶ 111.

The Petition alleges more than the continuing generalized wrong or non-specific injuries that courts have found insufficient to allege standing in the cases upon which Defendants rely. Defendants cite a string of *pro se* and *forma pauperis* suits to defend their argument that continuing injury cannot confer standing, and once again seek to analogize Plaintiffs' case to litigation brought by slave descendants. *See, e.g.,* Chamber's Mot. at 15-16. (*Himiya v. United States,* 1994 WL 376850 (N.D. Ill. Jul. 15, 1994); *Bell v. United States,* 2001 WL 1041792 (N.D. Tex. Aug. 31, 2001); *Bey v. U.S. Dep't of Just.,* 1996 WL 413684 (S.D.N.Y. Jul. 24, 1996); *Langley v. United States*, 1995 WL 714378 (N.D. Cal. Nov. 30, 1995)). They specifically highlight the Ninth Circuit's opinion in *Cato* holding that injuries based on "disparities in employment, income, and education" were a "generalized, class-based grievance." 70 F.3d at 1109-10. Simply, the allegations and circumstances present in these cases bear no resemblance to the facts alleged by Plaintiffs, which as described in detail *supra*, outline conduct undertaken by Defendants, which is fairly traceable as causing Plaintiffs' specific injuries. At any time over the past century, Plaintiffs could have abated the nuisance they created on their own. Their failure to do so necessitates action by this Court.

C. Defendants' Actions During and After the Massacre Caused the Racial Disparities in Current Day Tulsa

"[T]he 1921 Tulsa race riot . . . destroyed what was then the wealthiest Black community in the country." Pet. ¶ 173. Today, undeniable economic and social disparities persist, which Defendants do not dispute. Unemployment in Tulsa's Black community is more than twice that of white Tulsans. Pet. ¶ 174. The median household income of white residents of Tulsa is over $20,000 more than that of Black residents of Tulsa. Pet. ¶ 167. Those

disparities extend into and persist in education, housing, access to justice, and health. Pet. ¶ 174. Defendants have plainly acknowledged this reality. *See supra*.

These injuries are particularly acute for the families of the Descendant Plaintiffs, who enjoyed prominent roles in their communities and whose ancestors laid the foundation for their families to enjoy financial security and stability in North Tulsa for generations to come.

III. This Court is Capable of Redressing Plaintiffs' Injuries

Lastly, the Chamber argues this Court is incapable of remedying the alleged injuries and that Plaintiffs' claims are barred by the political question doctrine. Chamber's Mot. 16. The Chamber claims that Plaintiffs have asserted a "generalized grievance" and refer to various aspects of the abatement requested in the Petition to illustrate this. *See* Chamber's Mot. 17. According to the Chamber, the "generalized grievance" is shared with a potentially large group of people, and the Court cannot "adjudicat[e] abstract questions of wide public significance which amount to 'generalized grievances.'" *Id.* But if this were the rule – and it is not[6] – it would swallow public nuisance claims entirely.

The entire point of a public nuisance claim is that it addresses a larger grievance suffered by a group of people (with standing conferred upon governments or individuals who have suffered a special injury as a result of the nuisance). Indeed, state and federal courts have regularly heard public nuisance cases on issues of wide public significance – and those cases do not survive or fall based on the salience of the issue presented.

For example, in *City of Cincinnati v. Beretta USA Corp.*, the Ohio Supreme Court held that plaintiffs had stated a viable public nuisance claim against gun manufacturers. 768 N.E.

[6] Plaintiffs must simply demonstrate this Court a likelihood, as opposed to mere speculation, "that the injury is capable of being redressed by a favorable court decision." *HSBC Bank USA, Nat'l Ass'n v. Lyon*, 2012 OK 10, ¶ 4, 276 P.3d 1002, 1004.

2d 1136 (Ohio 2002).[7] But this Court needs to look no further than the recent Opioid Litigations, in which an Oklahoma state court sided with the State of Oklahoma in agreeing to a nearly half-billion dollar abatement plan to remedy the public nuisance created by the distribution and marketing of prescription opioids across the state of Oklahoma by pharmaceutical manufacturers. *See State v. Purdue Pharma,* No. CJ-2017-816 (Ok. Dist. Ct. Nov. 15, 2019). It would be manifestly unjust for this Court to determine that Plaintiffs lack standing to abate the public nuisance caused by the Massacre, including those Plaintiffs who survived the Massacre when the same Court determined that the opioid crisis was capable of redressability through abatement.[8]

IV. The Political Question Doctrine Does Not Apply

Finally, the Chamber argues that this case should be barred under the political question doctrine. Chamber's Gen. Mot.[9] 2. The political question doctrine is a narrow federal doctrine rooted in the separation of federal powers. *See Zivotofsky ex. rel Zivotofsky v. Clinton,* 566 U.S. 189, 195 (2012). To determine whether the doctrine applies, federal courts employ a six-factor test articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186, 215 (1962),[10] which the Chamber asks the court to apply here.

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[7] Public nuisance statutes had been used to regularly seek to hold gun manufacturers liable. This ultimately led to Congress immunizing gun manufacturers from such suits via the Protection of Lawful Commerce in Guns Act. S. 397 (109th Cong.). The specter of public nuisance suits also led to the landmark multi-billion dollar settlement agreement between 46 states, 5 U.S. territories, the District of Columbia and five of the largest tobacco manufacturers. *See Master Settlement Agreement*, PUBLIC HEALTH LAW CENTER, MITCHELL HAMLINE SCHOOL OF LAW, https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement. Once again, Plaintiffs case can be distinguished from *African-American Slave Descendants*. There, Plaintiffs did not bring a public nuisance claim. *See In re African-Am. Slave Descendants*, 304 F. Supp. 2d 1027, 1042-43 (N.D. Ill. 2004)

[8] Moreover, Defendant City of Tulsa is currently pursuing its own public nuisance action against the opioid manufacturers. *City of Tulsa v. Cephalon, et. al*., CJ-2020-02705 (Okla. Dist. Ct. Sept. 2, 2020).

[9] "Chamber's Gen. Mot." refers to Tulsa Regional Chamber's Amended General Motion to Dismiss as to All Plaintiffs and Brief in Support filed March 12, 2021.

[10] The six *Baker* factors are: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the

As an initial matter, the Oklahoma Supreme Court has never expressly adopted the federal political question doctrine, and although *Baker v. Carr* has occasionally been cited in Oklahoma state courts for various propositions, Plaintiffs could not find a single example of an Oklahoma state court applying *Baker v. Carr*'s six-factor test.[11] Even more on point, the Chamber cites *no* case at all – from any court in the country – wherein the political question doctrine was applied to bar a public nuisance suit.

Even assuming, however, that it would be appropriate for an Oklahoma state court to apply the federal political question doctrine, the application of the doctrine and the *Baker* factors would not result in dismissal here. The doctrine is a "narrow exception" to the judiciary's general "responsibility to decide cases properly before it." *Zivotofsky*, 566 U.S. at 194-95. It is *not* meant as a crutch for courts to avoid difficult questions. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) ("[J]udges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.").

Indeed, in the case most relied on by the Chamber in both of its briefs, *African-American Slave Descendants Litigation*, while ruling that most of the descendants of enslaved people lacked standing, the Seventh Circuit actually *reversed* the District Court's

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impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

[11] The authority the Chamber relies on for invoking this federal doctrine in state court is *Oklahoma Education Association (O.E.A.) v. State ex rel. Oklahoma Legislature*, wherein the Oklahoma Supreme Court ruled that it could not hear an action "challeng[ing] the current level of funding for common education" because the Oklahoma Constitution expressly authorized the legislature to establish a public school system and declare fiscal policy. *Okla. Educ. Ass'n (O.E.A.) v. State ex rel. Okla.Legislature*, 2007 OK 30, ¶ 4, 158 P.3d 1058, 1065. In doing so, the Court neither cited nor referred to *Baker v. Carr* or the federal question doctrine. Moreover, the Chamber does not and cannot point to any express grant of authority in the Oklahoma Constitution to abate public nuisances upon which this Court would be infringing by hearing this case.

determination that the political question doctrine also barred the claims. As the Seventh Circuit explained: "plaintiffs have been careful to cast the litigation as a quest for conventional legal relief. All they are asking the federal judiciary to do is to apply state law (plus the one federal statute, 42 U.S.C. § 1982) to the defendants' conduct." *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 758–59 (7th Cir. 2006). Likewise, Plaintiffs here are seeking abatement of an ongoing public nuisance pursuant to an Oklahoma statute that authorizes such suits.

Turning to the six *Baker* factors, the Chamber only argues that the second, third, and fourth factors "establish that the suit before this Court is a political question." Chamber's Gen. Mot. 3. Each is addressed below.

A. *Baker* Factor No. 2: There is No Lack of Judicially Discoverable and Manageable Standards for Resolution

The second *Baker* factor asks whether there is a "lack of judicially discoverable or manageable standards for resolving [the claim at issue]." *Baker*, 369 U.S. at 217. The Chamber concedes that Plaintiffs already have offered a detailed plan of abatement in the Petition, but complains that because the plan is not "exhaustive," this means that Plaintiffs are asking the court to "simply order away the long lasting, systemic damage of racism," which exceeds discoverable and manageable standards for resolution. Chamber's Gen. Mot. 4. This argument mischaracterizes Plaintiffs' requested relief.

Plaintiffs do not ask the Court to "order away" racism. Rather, Plaintiffs ask the Court to abate an ongoing public nuisance that arises from a horrific act of domestic terrorism that destroyed an entire neighborhood and community in Tulsa – which has still not been rebuilt. Indeed, public nuisance suits do create complex issues for abatement, but that complexity is not beyond the ability of courts to discover and manage. Indeed, courts have "successfully adjudicated complex common law public nuisance cases for over a century." *Connecticut v.*

Am. Elec. Power Co., 582 F.3d 309, 326 (2d Cir. 2009) (finding that the doctrine did not apply to an action "seeking abatement of defendants' ongoing contributions to the public nuisance of global warming"), *rev'd on other grounds,* 564 U.S. 410 (2011).

As recently evidenced in the Opioid Litigations, the Court is more than capable of managing a remedial plan that requires it to oversee the allocation of funds necessary to abate a wide-ranging public nuisance. *See* Final Judgement After Non-Jury Trial, at 30-43, *State v. Purdue Pharma,* No. CJ-2017-816 (Okla. Dist. Ct. Nov. 15, 2019). There, the court adopted a version of the State's Abatement Plan, which was based on a public health approach and "drew upon best practice documents from Johns Hopkins, the White House, the Oklahoma Commission, the Surgeon General, and the CDC…[wherein the] experts reviewed other State plans, academic literature, research, and produced an outline of recommendations." *Id*. at 31. The plan included, among other things, establishing a comprehensive Opioid Use Disorder treatment program, funding for addiction treatment, creating public medication and disposal programs, and expanding targeted education programs. *Id*. at 31-34.

Here, Plaintiffs seek a concrete and specific abatement plan that parallels the Abatement Plan authorized by the Court in the Opioid Litigations. Plaintiffs' proposed relief is based on extensive social science and historical data. At trial, Plaintiffs will need to prove the existence of the public nuisance and what is necessary to abate it. But the Court cannot avoid that exercise by concluding on a motion to dismiss – based on a federal doctrine not even applicable to an Oklahoma state court – that there are not discoverable or manageable judicial standards for resolution.

B. *Baker* Factor No. 3: It Is Not Impossible for the Court to Decide This Case Without An Initial Policy Determination of a Kind Clearly for Non-Judicial Discretion

The third *Baker* factor asks whether it is impossible for the court to decide the case without an initial policy determination of the kind clearly for non-judicial discretion. *Baker*, 369 U.S. at 267. This factor is not implicated here.

First, the fact that the previously discussed factor weighs in favor of Plaintiffs is outcome determinative for the second factor. "[T]he existence of judicially discoverable and manageable standards 'obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.'" *Xianhua v. Oath Holdings, Inc.*, 2021 WL 1700227, at *10 (N.D. Cal. Apr. 29, 2021) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d. Cir. 1995) (addressing the third *Baker* by referring to the second *Baker* factor).

Second, Plaintiffs are asking this Court to interpret an Oklahoma statute to determine whether Defendants "unlawfully . . . act[ed] or omit[ed] to perform a duty, which act or omission . . . annoys, injures, or endangers the comfort, repose, health, or safety of other[] . . . or . . . i]n any way renders other persons insecure in life, or in the use of property." Pet. ¶ 190. Determining whether that criteria is satisfied does not require any "initial policy consideration" – it requires only the application of statutory text to facts, a decidedly judicial exercise.

For example, in *Al-Tamimi v. Adelson*, the D.C. Circuit found that a claim under the Alien Tort Statute was justiciable even though the court would need to determine whether Israeli soldiers were committing genocide in a Palestinian village. 916 F.3d 1, 11 (D.C. Cir. Feb. 19, 2019). This question touched on intensely sensitive political issues. But the court noted that it was a "purely legal issue" capable of judicial review because "[g]enocide has a legal definition." *Id.* *See also Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (claims of torture and killing against Nicaraguan leaders did not present a political question

because the claims did not require the court to opine on its view of U.S. foreign policy and only required the court to determine the legality of defendants' actions). The third *Baker* factor is plainly inapplicable.

C. *Baker* Factor No. 4: Undertaking This Case Does Not Indicate a Lack of Respect by the Court for the Other Branches of Government

No political decision has been made by a co-equal branch of government that strips the Court of its authority to hear and address this controversy. This stands in stark contrast to one of the cases cited by the Chamber, in which the Oklahoma Supreme Court dismissed a suit alleging inadequate public school funding under the political question doctrine because "the Legislature's policy-making power specifically includes both public education and fiscal policy." *See Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 20, 158 P.3d 1058, 1065 (quoting Ok. Const. Art. XIII, § 1 and Art. I, §V). No analogous statutory or constitutional provision relegates Massacre-related matters to another branch of government.

The Oklahoma legislature, in passing a public nuisance statute, clearly contemplated a role for the judiciary in this very instance – in addition to any remedies that might be provided by the executive or legislative branches. By no means are those branches precluded from acting, as they were not precluded from acting in response to the opioid epidemic either in lieu of or in addition to the actions taken by the court.

CONCLUSION

For the reasons set forth herein, this Court should deny the Chamber's Amended Motion to Dismiss, allowing discovery to proceed and allowing the parties to build a complete record on which this Court can address each of the issues presented by Plaintiffs' claims. In the alternative, this Court should grant Plaintiffs leave to amend to cure any defect in the Petition. Plaintiffs also request oral argument be heard on this motion.

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