IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.*, MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, PLAINTIFF/APPELLEE/COUNTER-APPELLANT, v. **(1)** JOHNSON & JOHNSON, **(2)** JANSSEN PHARMACEUTICALS, INC, **(3)** ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC., **(4)** JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC., AND **(5)** JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC. DEFENDANTS/APPELLANTS/COUNTER-APPELLEES, AND **(6)** PURDUE PHARMA L.P., **(7)** PURDUE PHARMA, INC., **(8)** THE PURDUE FREDERICK COMPANY, **(9)** TEVA PHARMACEUTICALS USA, INC., **(10)** CEPHALON, INC., **(11)** ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC., **(12)** WATSON LABORATORIES, INC., **(13)** ACTAVIS LLC, AND **(14)** ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC., DEFENDANTS.	Case No. 118,474

BRIEF IN SUPPORT OF DEFENDANTS/APPELLANTS/COUNTER-APPELLEES BY *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION – OKLAHOMA

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Americans for Prosperity Foundation is a nonprofit organization that operates a state chapter in Oklahoma ("AFPF-OK") that advocates for long-term solutions to the country's biggest problems. AFPF-OK believes the rule of law and maintaining the separation of powers are both critical components to solving these problems.

AFPF-OK is interested in this case because the trial court's unprecedented expansion of the public nuisance doctrine threatens the separation of powers and undermines the rule of law. The lower court's novel application of the equitable abatement remedy transfers core legislative power to the executive branch—Attorney General—and judicial branch in violation of Okla. Const. art. IV, § 1. This would vest policymaking authority in the judicial branch, which this Court has always rejected. *E.g.*, *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 4, 984 P.2d 200, 204. This unconstitutional power transfer undermines foundational limitations on the judicial role and negates the checks and balances associated with the normal appropriations process. This unprecedented expansion would have unintended consequences radiating far beyond the facts and circumstances of this case into new and unforeseen areas.

Recognizing that the opioid crisis is a serious public health issue, the Legislature—and by extension the People of Oklahoma—have a key role in solving this problem under the Oklahoma Constitution. The worthy and important end of constructively addressing this statewide public health issue does not justify the means pursued by the Attorney General and trial court. Nor does it justify jettisoning the normal legislative process and along with it the separation of powers, the rule of law, and due process to force private companies to fund the government programs preferred by the Attorney General and the trial court. This is particularly true because there is no suggestion that Defendants-Appellants did anything to run afoul of normal product liability law or sold a defective product.

AFPF-OK agrees with Defendants-Appellants and other supporting *amici* that imposition of public nuisance liability here was unlawful and unconstitutional for a host of reasons. AFPF-OK writes separately to focus on why the trial court's erroneous imposition of equitable abatement was both *ultra vires* and unconstitutional, even though well intentioned and regardless of how sound and effective the trial court's policy solutions to the opioid problem may be.[1]

SUMMARY OF ARGUMENT

The question before the Court is not whether curbing opioid abuse is a worthy goal. Instead, this appeal is about (1) whether the trial court can expand public nuisance law beyond its historical bounds set forth in 50 O.S. § 1 *et seq.*; and (2) whether the trial court can use the remedy of abatement to enact legislative policy to address a statewide public health issue.

The order on appeal is a wholesale transfer of power away from the Oklahoma Legislature to the executive branch and the judicial branch. This transfer violates the Oklahoma Constitution and erodes the rule of law. This judicial usurpation of the Legislature's responsibility to set policy through legislation and fund government programs through the appropriations process should not be allowed to stand.

It is axiomatic that judges do not make public policy under the banner of equity. As Chief Justice Roberts put it, judges "do not have a commission to solve society's problems, as they see them[.]"[2] Instead, it is a judge's "duty to call balls and strikes[.]"[3] The Oklahoma

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[1] AFPF-OK does not take any position on the wisdom of the public policy responses to the public health problem of opioid misuse that the trial court imposed and ordered Defendants-Appellants to fund. AFPF-OK instead writes solely with respect to the separation of powers problems with the means used to effectuate these public policies, regardless of how worthy these ends might be.

[2] *State v. Lead Indus. Ass'n*, 951 A.2d 428, 436 (R.I. 2008) (quoting John G. Roberts, Jr., United States Senate Committee on the Judiciary Questionnaire 66 (August 2, 2005)).

[3] *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020).

Constitution tasks the politically accountable legislature with resolving political questions through the legislative process and funding government programs through the appropriations process, while tasking the judiciary with adjudicating cases and controversies.

The novel expansion of the public nuisance doctrine and equitable abatement remedy sanctioned by the trial court has no basis in law or history. Accordingly, this Court should reverse the trial court's final judgment, as a mistaken venture into judicial policymaking.

ARGUMENT

I. THE TRIAL COURT'S EXPANSION OF PUBLIC NUISANCE LAW IS UNPRECEDENTED AND LACKS ANY LEGAL BASIS.

There is no precedent in this Court's history that supports subjecting the manufacturer of a lawful product to public nuisance liability based on misuse of that product. Even though Oklahoma's public nuisance statutes have been codified for over a century, this Court has never sanctioned the executive and judicial branches usurping the Legislature's policymaking function to set statewide policy for public health. Nor should it.

Discovery of broad new powers in an old law, many decades after its enactment, to implement what that official views as sound public policy is an indicator of unconstitutional and *ultra vires* overreach. *See, e.g., Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014). The Court should reject the Attorney General's attempt to transform the centuries-old common law doctrine of public nuisance and equitable abatement into a wide-ranging judicial cure-all for societal problems involving complex policy judgments. Pursuant to the Oklahoma Constitution, this power is granted to the Legislature, not the judicial and executive branches. *See* Okla. Const. art. V, § 1; *id.* art. IV, § 1; *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 20, 158 P.3d 1058, 1065.

Rather than passing legislation targeting opioid use, regulating or prohibiting the manufacture of opioids, or putting funding of opioid programs to a vote through an appropriations process, Plaintiff attempts to fund their new policy initiative by imposing liability on the manufacturer of a Food and Drug Administration-approved product. The lower-court's retroactive policy making threatens legal stability and uniform application of law. David Missarian, *The Opioid Dragon of Johnson & Johnson is Slayed. All Hail the Killing of the Not Guilty*, 47 Rutgers L. Rec. 305, 307 (2019–20) (criticizing lower court case). Put simply, "[t]he combination of *parens patriae* standing and public nuisance claims as an instrument to reform public policy and institute social change through judicial action is wildly problematic." Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. Rich. L. Rev. 405, 459 (2020). The decision below is not only constitutionally infirm but misapplies the law of public nuisance and abatement.

A. Historical Genesis of Public Nuisance and Equitable Abatement

The trial court's decision breaks sharply with centuries of jurisprudence cabining this common law doctrine and remedy. It largely decouples public nuisance liability from use of real property or infringement of public rights. *See Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). It also subsumes product liability law, FDA regulations, and false claims act liability under various statutes law. *See id.* ("[I]f public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'" (cleaned up)). A brief survey of the historical use of the nuisance doctrine and abatement remedy brings the scope and scale of the trial court's error into stark relief.

"The traditional public nuisance involves blocking a public roadway or, in recent times, dumping sewage into a public river or blasting a stereo when people are picnicking in a public park." Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 541–42 (2006). "Public nuisance traces its origins back more than 900 years[.]" Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 745 (2003). "Over [that time], it has been used as a remedy that allowed governments to use the tort system to stop conduct that was considered quasi-criminal because, although not strictly illegal, it was deemed unreasonable in view of its propensity to injure someone exercising a common societal right." Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 948 (2007).

In twelfth-century England, nuisance law "began as a criminal writ, belonging only to the Crown. It was used in cases that involved encroachments upon the King's land or the blocking of public roads or waterways." *Id.* at 951. "The King, through a sheriff and later an attorney general, could bring suit to stop an infringement and force the offending party to repair any damage to the King's property." Schwartz & Goldberg, 45 Washburn L.J. at 543. Two centuries later, nuisance law was expanded "beyond the rights of the Crown to include rights common to the public, such as the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases." *Id.* (cleaned up). "The first statute known to address public nuisances, enacted in 1389, stated, 'If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto

the Mayor or Sheriff or Bayliff of such Town etc.'" Steven Czak, Note, *Public Nuisance Claims after Conagra*, 88 Fordham L. Rev. 1061, 1072 (2019).

"English common law was generally adopted without change in Colonial America. With respect to public nuisance, early American cases fell into one of two categories. Initially, they focused on obstruction of public highways or navigable waterways[.]" Faulk & Gray, 2007 Mich. St. L. Rev. at 953. "Historically, American public nuisance cases involved non-trespassory invasions of the public use and enjoyment of land." Schwartz & Goldberg, 45 Washburn L.J. at 545. These early cases also "involved using property in ways that conflicted with public morals or social welfare. These cases often involved gambling halls, taverns, or prostitution houses." *Id.*

"Most states have adopted statutes defining public nuisances and providing a cause of action for those affected. These statutes largely mirror concepts of public nuisance as developed at English common law." Czak, 88 Fordham L. Rev. at 1061. Oklahoma is no exception. *See* 50 O.S. §§ 1, 2, 8, 11. As discussed, Oklahoma's state nuisance statute was enacted in 1910, *see* R.L. 1910, §§ 4250, 4251, 4257, 4260 (codified at 50 O.S. §§ 1, 2, 8, 11); *see also Kenyon v. Edmundson,* 1920 OK 351, ¶¶ 2-9, 193 P. 739, 741 (applying 1910 Oklahoma public nuisance statute), and 50 O.S. §§ 1, 2, 8, 11 have remained unchanged, except that in 1980, 50 O.S. § 1 was amended to exempt certain preexisting agricultural activities, *see* HB 1707, c. 189, § 1, eff. October 1, 1980.[4] It is reasonable to surmise the Legislature intended to codify the common law framework for nuisance law as it existed in 1910. *See also Sudbury*

[4] Even before then, the Territory of Oklahoma statutorily defined public nuisance and, by statute, prescribed remedies. *See Reaves v. Territory,* 1903 OK 92, ¶¶ 19-22, 74 P. 951, 953 (noting that in addition to prior case law on public nuisance, "which are undoubtedly the now settled law of this country, the statutes of this territory, aside from the criminal statutes, have defined a public nuisance" and quoting Wilson's Statutes, §§ 3717, 3718, 3724 (Territory of Oklahoma)).

v. Deterding, 2001 OK 10, ¶ 16, 19 P.3d 856, 859–60. Indeed, when the Oklahoma Legislature enacted 50 O.S. §§ 8, 11 in 1910 public nuisance was not yet reclassified as a tort.[5]

The public nuisance doctrine and abatement remedy lay dormant for decades. "After the New Deal movement in the 1930s, with the expansion of 'comprehensive statutory and regulatory schemes' determining acceptable societal behaviors, public nuisance theory was not necessary to define societal boundaries and largely faded from American jurisprudence." Schwartz & Goldberg, 45 Washburn L.J. at 546.

B. The Public Nuisance Doctrine and Abatement Remedy Should Not Be a Vehicle to Alter Public Policy and Regulate Industries Without Legislative Involvement.

In 1971, the America Law Institute attempted to expand the public nuisance doctrine beyond historical precedent with the adoption of Restatement (Second) of Torts § 821B. Gifford, 71 U. Cin. L. Rev. at 807. Rather than adopting Professor William Prosser's historically-based definition of public nuisance, *see id.* at 806, the ALI adopted a broader definition: "A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). The public nuisance "sections of the Second Restatement constituted less of a restatement of the law than a purposeful departure from prior precedent." U.S. Chamber, Institute for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance*, 7 (Mar. 2019), https://instituteforlegalreform.com/research/waking-the-litigation-monster-the-misuse-of-public-nuisance/.

It is important to note that the Restatement (Second) of Torts § 821B did not and could not have amended Oklahoma public nuisance law codified at 50 O.S. § 1 et seq. The relevant

[5] *See* Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. Tort L. 1, 20 (2011) (explaining "the understanding that public nuisance is a form of tort liability is of relatively recent origin" and "a product of the Restatement (Second) of Torts, the relevant provisions of which were approved by the American Law Institute in 1971 and published in 1977.").

portions of these statutes have not been amended since at least 1910. Nonetheless, other local governments have attempted to co-opt this broadened conception of public nuisance in an "attempt to galvanize popular opinion or to effect changes the locality was unable to achieve through its geographically limited legislative authority." The Honorable 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, 519 (2019). "At the heart of many of these lawsuits are governmental authorities seeking funding so that they can continue providing or perhaps even expanding services that the public needs and that they may be obliged to provide. . . . Such court-sanctioned usage of the tort system violates the fundamental principle of the separation of powers." Faulk & Gray, 2007 Mich. St. L. Rev. at 974.

Attempts to expand the public nuisance doctrine into a tool to impose liability on product manufacturers are particularly problematic. In a well-reasoned opinion, the U.S. Court of Appeals for the Third Circuit rejected this expansion.[6] "[T]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law would become a monster that would devour in one gulp the entire law of tort." *Camden Cnty.*, 273 F.3d at 540 (cleaned up). As that court reasoned, "[i]f defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity." *Id.*

[6] Other courts have similarly rejected holding manufacturers of lawful products liable under the public nuisance doctrine. Some examples include *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 455 (R.I. 2008), *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004), *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 204 (N.Y. App. Div. 2003), and *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001).

Rather than heeding the warnings of the Third Circuit and other courts, the trial court expanded the public nuisance doctrine and abatement remedy to impose liability on an opioid manufacturer to fund the policy response to a *statewide* health problem. This decision threatens to subsume product liability law. Further, the abatement remedy represents an ahistorical attempt by the executive and judicial branches to make policy and secure funding for that policy without legislative involvement. This violates separation of powers.

II. THE TRIAL COURT'S ABATEMENT REMEDY IS INCONSISTENT WITH OKLAHOMA LAW AND VIOLATES SEPARATION OF POWERS.

The trial court's liability finding and sweeping remedy represent an ahistorical application of public nuisance and abatement to broad public policy issues. The trial court lacked the authority to impose this "abatement" remedy under 50 O.S. 1 et seq. Moreover, the abatement remedy violates separation of powers.

A. The Trial Court Lacked Authority to Create and Fund Government Programs Under the Guise of Equity.

Under Oklahoma law, "[t]he remedies against a public nuisance are: 1. Indictment or information, or, 2. A civil action, or, 3. Abatement." 50 O.S. § 8. The Attorney General and other government officials are solely authorized to seek abatement of the nuisance. *Id.* § 11. Here, however, the purported abatement remedy bears no resemblance to any abatement that a court imposed under the common law in the 800-plus-year existence of the public nuisance doctrine, which the Legislature codified in 1910 when it codified the abatement remedy. *See* R.L. 1910, §§ 4257, 4260 (codified at 50 O.S. §§ 8, 11). Neither does the court's abatement remedy imposing, funding, and appropriating a state-wide public health program have any precedent in Oklahoma case law arising after 1910. *See infra.*

In essence, the trial court mistakenly believed that the remedy of abatement authorized it to impose legislative-type remedies such as judicially-created government programs and to fund these programs outside of the normal appropriations process. The "primary architect" of the State's abatement plan was the State Mental Health Commissioner, not the Legislature.[7] *See* R.654, Final J. After Nonjury Trial ("Final J.") at 31 ¶ 4. The State's plan was developed by a number of administrative health experts drawing from a number of state and federal best practices documents, as well as academic literature. *See id.* at 31 ¶ 6. Drawing from these materials, the trial court mandated various treatment, education, training, regulation, and enforcement programs. *See id.* at 32–41 ¶¶ 8–63. The trial court found that "[f]unding for investigatory and regulatory actions related to the nuisance are necessary to abate it." *Id.* at 37 ¶ 39. Tellingly, as to the true nature of the remedy, the trial court also found the "Office of the Attorney General requires salary and benefits . . . for the purpose of policy and legislative development and tracking." *Id.* at 41 ¶ 60. The trial court found that it would cost $465 million to fund these programs, requiring Defendants to pay this sum. *Id.* at 41 ¶ 63. The trial court then went on to establish a special Abatement Fund—apparently outside of the normal appropriations process—retaining jurisdiction to administer this fund. *See id.* at 42 ¶ 69, 43 ¶ 72.

The trial court lacked statutory authority to impose this public policy remedy, which at its core is legislative and regulatory in nature. The Oklahoma Legislature did not grant the Oklahoma courts the authority to fashion anything resembling this sweeping remedy when it codified the common law understanding of abatement in 1910. It would be unreasonable to construe the 1910 Oklahoma Legislature's statutory authorization of the "abatement" remedy

[7] In this brief, the appellate record is cited as "R.#" with the number corresponding to the instrument number in the Notice of Completion of Record.

as a blank check authorizing trial courts to craft public policy and regulate industries through judicial decrees, as happened here. At the time 50 O.S. §§ 8, 11 was adopted, public nuisance had never been applied to manufacturers and distributors of legal non-defective products, let alone used to obligate them to fund government public policy responses under the auspice of "abatement." *See* Gifford, 71 U. Cin. L. Rev. at 745. Tellingly, the trial court's Final Judgement After Non-Jury Trial does not cite a single case to support its claimed equitable authority to impose an abatement remedy consisting of the creation of various government programs to be funded by Defendants-Appellants. *See* R.654, Final J. And for good reason.

To fully understand the trial court's error here, however, a brief survey of traditional application of the public nuisance doctrine in Oklahoma is instructive. For example, courts have understandably found that forty cats in one home may constitute a public nuisance, imposing the equitable abatement remedy to reduce the cat population to manageable levels. *Boudinot v. State ex rel. Cannon,* 1959 OK 97, 340 P.2d 268. In 1920, this Court found an overly odoriferous desiccating plant was a public nuisance and, after the plant owner's efforts to abate the olfactory issues proved unsuccessful, affirmed the trial court's injunction, finding "it was clearly the duty of the court to enjoin the continuation of the business in that locality." *Kenyon*, 1920 OK 351, ¶ 14, 193 P. 739, 742. Likewise, the unsafe storage of large quantities of gasoline or kerosene on private property may also rise to the level of public nuisance. *Ferriman v. Turner*, 1924 OK 606, ¶ 5, 227 P. 443, 446. Unlawful wagering on dog races has also been deemed a public nuisance, and continued operations were enjoined to abate the nuisance. *State ex rel. Callihan v. Wokan Amusement Co.*, 1933 OK 163, ¶¶ 19–20, 19 P.2d 967, 970. And obstruction of a public highway has been deemed a nuisance abated by a prohibitory injunction barring the defendant from obstructing public access to the strip of land

at issue. *Siegenthaler v. Newton*, 1935 OK 998, 50 P.2d 192. These decisions are consistent with the common law, the plain language of Oklahoma's nuisance statute, and common sense. The "cause and nature" of the problems in these cases were clear, and there could be little dispute as to the "means necessary" to abate the nuisance. *See also* Gifford, 71 U. Cin. L. Rev. at 824.

The trial court's abatement remedy here is dramatically different and beyond the traditional conception of abatement. Rather than grant the narrow and precise relief traditionally associated with abatement in Oklahoma, the trial court "function[ed] as a legislature devising solutions to multi-faced social issues." *Id.* There is no doubt that some of the government programs the trial court established and funded may well be appropriate public policy responses to the public health issues presented by this case *if* enacted and lawfully funded by the Legislature. But the ends do not justify the means. Instead, any regulatory and public-policy gaps must be filled by the Legislature.

B. The Trial Court's Abatement Remedy is an Unconstitutional Violation of Separation of Powers.

The trial court's equitable abatement remedy also violates the Oklahoma Constitution and the separation of powers. Under the Oklahoma Constitution, "[t]he powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial . . . and neither shall exercise the powers properly belonging to either of the others." Okla. Const. art. IV, § 1. "[T]he state's policy-making power is vested exclusively in the Legislature." *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 20, 158 P.3d 1058, 1065. The Legislature's authority extends to "all rightful subjects of legislation," Okla. Const. art. V, § 36, which include, as relevant here, programs "designed to protect and serve the public health[.]" *Cryan v. State*, 1978 OK CR 91, ¶ 15, 583

P.2d 1122, 1125. As the Oklahoma Supreme Court has found before, "[t]he legislature has the exclusive authority to declare the fiscal policy of Oklahoma limited only by constitutional prohibitions" and thus Oklahoma courts are "constitutionally prohibited" from "invad[ing] the Legislature's power to determine policy."[8] *Okla. Educ. Ass'n*, 2007 OK 30, ¶ 25, 158 P.3d 1058, 1066. *See also* Okla. Const. art. V, § 55 (appropriations). But that is exactly what the trial court did here.

Deliberate legislative process notwithstanding,[9] courts may not invade the legislative domain to address public policy problems:

> As imperfect as the functioning of state legislatures in reality may be, the attorney general's appropriate role within the constitutional framework is not to replace the legislatively enacted provisions regulating products with a regulatory scheme, whether resulting from settlement or judicial decree, which implements his or her own vision of social engineering. Nor will public policymaking be improved by a process that prioritizes regulatory goals depending on whether corporations with perceived deep pockets can be blamed for causing a particular public health problem.

Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 969 (2008). Nor should the Attorney General seek to inject the courts into these political disputes. *See also* Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 Ariz. St. L.J. 1109, 1164 (2012).

As one former state attorney general put it: "The expansion of governmental public nuisance claims beyond their traditional bounds . . . inject[s] courts and litigants into what is,

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[8] Tellingly, the trial court itself repeatedly highlighted the statewide problems at issue in this case. *See* R.654, Final J. at 2 ¶ 3, 4 ¶ 1 ("The parties agree Oklahoma is suffering a crisis related to opioid abuse. . . . The State of Oklahoma and the public in general are currently experiencing an opioid crisis and epidemic.").

[9] "Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

at bottom, a democratic policy-making decision that courts and litigants are ill-suited to make." *See* Strange III, 70 S.C. L. Rev. at 563. "[C]ourts are not always the best forum to resolve problems associated with . . . every form of commercial activity. As for those societal problems associated with, or following, legal . . . manufacturing and marketing, their resolution is best left to the legislative and executive branches." *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 105 (N.Y. App. Div. 2003). Such is the case here. Yet, the trial court did the exact opposite, using the abatement remedy in an effort to solve a societal health problem better suited to the political branches.

The State's abatement plan, which the trial court largely adopted, essentially asked the trial court to legislate from the bench in an effort to address a societal problem by authorizing costly government spending programs and determining how the programs will be funded. This remedy violates the separation of powers and the Oklahoma Constitution, and the trial court lacked the authority to impose it. *Cf. Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (holding the "County's frustration cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch.") (citation omitted). Increased judicial intrusion on the Legislature will follow if the trial court's expansive application of its equitable powers is upheld. *Cf. Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring).

III. IF THE TRIAL COURT'S ABATEMENT REMEDY IS UPHELD, THERE WOULD BE NO PRINCIPLED LIMIT ON THE JUDICIARY'S POWERS TO IMPOSE BROAD PUBLIC POLICY MANDATES THROUGH JUDICIAL DECREE.

As discussed above, the trial court's abatement remedy was *ultra vires* and unconstitutional. What's more, it is not only unsupported by case law but devoid of any

limiting principle. Soft drink manufacturers or sugar producers could be held liable for the nation's obesity crisis. Private litigants could sue automobile manufacturers for the societal harms associated with drunk driving or crashes since interlocking devices are not standard despite drunk driving killing thousands of Americans each year. Other examples abound. *See* Appellants' Br. at 20–21.

If the trial court's abatement remedy is affirmed there would be no principled limit on the judiciary's ability to bypass the Legislature and issue, fund, and enforce de facto legislation in the form of a judicial decree. Moreover, the Attorney General will not be the only plaintiff with the ability to initiate litigation to cure societal problems. Enterprising plaintiffs are sure to bring novel claims attempting to force selectively targeted defendants to pay for other societal problems. With precedent supporting massive judgments, the incentive to settle claims for defendants will be overwhelming, and it may be decades before this Court can shape public nuisance law. This is not how the Oklahoma Constitution dictates policy be made in Oklahoma.

Instead, these political questions should be answered by the democratically elected political branches. *See also* Strange III, 70 S.C. L. Rev. at 544 ("Public nuisance suits brought by local governments present courts with nonjusticiable political questions disguised as litigants' claims and prayers for relief."). "Their significantly greater resources render those two branches appropriately empowered and, virtually always, vastly better suited to address, investigate, evaluate, and resolve perceived societal problems[.]" *Sturm, Ruger & Co.*, 309 A.D.2d at 105. "Any judicial decree resulting from litigation that seeks to penalize or impose heightened requirements on conduct or products that were already regulated and were in compliance with existing law and regulations intrudes on the legislature's province and addresses a political question." Strange III, 70 S.C. L. Rev. at 548.

At bottom, addressing the public health issues associated with opioid misuse "involves complex policy judgments." *Id.* at 547. Courts are ill-equipped to make these political judgments. *See also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (rejecting public nuisance lawsuit regarding complex issue, noting that "judges lack the scientific, economic, and technological resources" of federal agency, which "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions"). Instead, "[a]ny change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004).

It is emphatically the province of the political branches to craft policy solutions to address Oklahoma's opioid-related issues, as required by the Oklahoma Constitution. Not the courts.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed this 20th day of October, 2020, by depositing it in the U.S. Mail, postage prepaid to:

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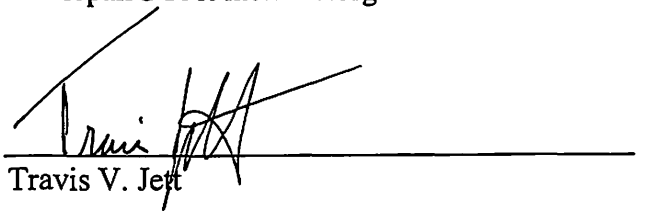

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