IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff/Appellee, vs. (1) PURDUE PHARMA L.P., Defendant; (2) PURDUE PHARMA, INC., Defendant; (3) THE PURDUE FREDERICK COMPANY, Defendant; (4) TEVA PHARMACEUTICALS USA, INC., Defendant; (5) CEPHALON, INC., Defendant; (6) JOHNSON & JOHNSON, Defendant/Appellant; (7) JANSSEN PHARMACEUTICALS, INC., Defendant/Appellant; (8) ORTHO-McNEIL JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC., Defendant/Appellant; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC., Defendant/Appellant; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; Defendant; (11) WATSON LABORATORIES, INC., Defendant; (12) ACTAVIS LLC, Defendant; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC., Defendants/Appellants.	Supreme Court Case No. 118,474 Cleveland County Case No. CJ-2017-816 Judge Thad Balkman

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS

Philip S. Goldberg (*pro hac* pending)
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
Tel: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

William W. O'Connor, OBA # 13200
Margo E. Shipley, OBA # 32118
HALL ESTILL HARDWICK GABLE
GOLDEN & NELSON, P.C.
320 S. Boston Ave., Suite 200
Tulsa, OK 74103
Tel: (918) 594-0590
Fax: (918) 594-0505
Email: boconnor@hallestill.com
Email: mshipley@hallestill.com

Attorneys for *Amicus Curiae*

INDEX

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") and its members are troubled by the lower court's ruling, which endorses a significant departure from long-standing public nuisance law. The liability in this case is not grounded in traditional legal principles and, if followed by other courts, threatens open-ended, potentially industry-wide liability for a variety of other products that may also have foreseeable risks or inherent externalities. Manufacturers of products, from pharmaceuticals to oil and gas to household chemicals, engage in commerce of such products every day. The NAM is concerned the District Court's rulings could lead to more litigation against these manufacturers regardless of fault, the regulatory structures in place to balance those risks, or the benefits the products provide.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

INTRODUCTION

From time to time, governments have filed lawsuits targeting products with known downstream risks—from lead paint to oil and gas to household chemicals to prescription drugs. These lawsuits have sought to force the manufacturers of the products to fund state and local efforts to deal with those downstream risks. These lawsuits, as with the case at bar, are about generating revenue and second-guessing federal or state regulatory regimes, not

applying traditional liability law. Absent wrongful causation, liability law does not impose blame or obligations for these harms on the manufacturers that put the lawful, beneficial products into the stream of commerce. The hallmarks of this type of litigation, therefore, have been vague-sounding causes of action, attenuated notions of wrongdoing, and the stoking of public opinion. Most courts have rejected these cases, finding the fundamental liability principles of wrongful causation of harm cannot be cast aside.

In this litigation, Oklahoma's Attorney General, along with other state and local governments, are pursuing manufacturers involved in the selling of prescription opioid medication seeking to subject them to joint and several industry-wide liability for all costs related to opioid abuse. The Attorney General here is invoking Oklahoma's public nuisance statute, OKLA. STAT. tit. 50, § 1. He is arguing that, if misleading, marketing and promotion of this legal, highly regulated product could somehow constitute a public nuisance under the statute. Other government plaintiffs are similarly invoking their states' public nuisance laws. As this *amicus* brief shows, neither Oklahoma's public nuisance statute nor common law public nuisance theory, here or elsewhere, imposes such unprincipled, open-ended liability.

This Court, in particular, has been clear that Oklahoma's statutory and common law public nuisance laws have a specific, entirely different purpose: to resolve a variety of communal disturbances created by the close spatial proximity in which people live. *See, e.g.*, *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985). It is a land-use cause of action to mitigate unreasonable uses of one's property or unreasonable impacts on others' property. Therefore, to be liable for a public nuisance one must use property or engage in an activity that "transgresses the just restrictions upon use or conduct which the proximity of other persons or property imposes." *Id.* Examples of public nuisance cases have included

allegations over operating an adult bookstore, sewage disposal plant, or race track that have unlawful impacts on the surrounding community. *See, e.g.*, *Field v. Hess*, 540 P.2d 1165 (Okla. 1975) (offending decency through running adult bookstore); *City of Bethany v. Twin Lakes Gun Club*, 236 P.2d 255 (Okla. 1951) (pollution and odor from sewage facility); and *Smilie v. Taft Stadium Board of Control*, 205 P. 2d 301 (Okla. 1949) (noise from race track).

Because Oklahoma's public nuisance statute covers a wide variety of local disturbances, its terms are broad enough to cover the assortment of property misuses that could occur within a community. It applies to any unlawful conduct that "annoys, injures or endangers the comfort, repose, health, or safety" of those around him or her, or offends public decency. OKLA. STAT. tit. 50, § 1. The breadth of these terms makes sense only in the narrow context of local, property-based conflicts. Applying them to product manufacturing, marketing and other activities unmoored to specific properties can create unlimited and unprincipled liability—just as in this case. Manufacturing any product with inherent risks or externalities, including when the product provides benefits and is regulated to balance those risks, could be said to endanger the health or safety others. Yet, the District Court cast aside century-long precedent and this essential context by observing that nothing in the text "*requires* the use of or a connection to real or personal property." Op. at *22 (emphasis added). Such sweeping, indefensible liability has no support in tort law or Oklahoma's public nuisance statute. Otherwise, any business that trades in a product category with inherent risks could be subject to massive, industry-wide liability at the whim of a government attorney.

Amicus fully appreciates that opioid abuse in Oklahoma and other states is a critical public health issue, but there is a substantial dissonance between the allegations against Defendants and the public nuisance statute's purpose, terms, and remedies. Defendants are

engaged in the commerce of beneficial, regulated products, not a public nuisance. *Amicus* respectfully urges the Court to stay within mainstream American jurisprudence by rejecting this broad expansion of public nuisance law, reversing the ruling below, and ensuring that Oklahoma courts do not engage in deep pocket jurisprudence through statutes never intended for that purpose. Amicus respectfully urges the Court to apply the state's public nuisance law in accordance with its traditional history, not as the lower court misapplied it.

ARGUMENT AND AUTHORITIES

PROPOSITION ONE: THIS LITIGATION HAS NO SUPPORT IN THE HISTORY AND PURPOSE OF PUBLIC NUISANCE LAW

The District Court's ruling authorizes a radical departure from public nuisance law. Going back to English common law—and more than 200 years of American jurisprudence—public nuisance law has provided governments with the ability to force people to stop and abate the effects of quasi-criminal behavior interfering with communal rights of others in their vicinity. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743-47 (2003). As indicated, Oklahoma has always followed these parameters. In this State, a public nuisance involves the "use of property" and unlawfully "affects at the same time an entire community or neighborhood, or any considerable number of persons." *Briscoe*, 702 P.2d at 36; OKLA. STAT. tit. 50, § 2. Typical public nuisances have no redeeming qualities for the community or neighborhood, such as polluting a river or running a bar with loud music at night; these activities unlawfully disturb surrounding neighbors. The person engaging in the misconduct—not the manufacturer of the stereo or product used—is responsible for the public nuisance. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 565-66 (2006).

Starting in the 1970s, a group of individuals started a campaign to transform public nuisance from a local land-use government cause of action into a tool for requiring large businesses, rather than individual wrongdoers or taxpayers, to remediate environmental damage or pay costs of social harms, regardless of wrongdoing or causation. *See id.* at 547-48. They believed suing individual wrongdoers would be inefficient, whereas presumed deep-pocketed manufacturers could address the issue on a macro scale. Their goal was to use the amorphous nature of the word "nuisance" and some of its terms to overcome well-settled requirements of nuisance law and circumvent products liability and consumer protection acts. *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . ."). The cause of action also had rarely been used, meaning many judges were unfamiliar with its traditional uses and boundaries.

The group's first act was to pursue changes to the public nuisance chapters of the Restatement (Second) being drafted then in hopes of breaking "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other things, they sought to remove the wrongful conduct requirement so claims could be brought, as attempted here, even when defendants engaged in lawful commerce. *See id.* Although fully presented, none of their changes were adopted in the black letter of the Restatement. Their first test case also failed. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971). In that case, they pursued businesses that sold products or engaged in activities that collectively caused smog in and around Los Angeles. The court dismissed the claims because the rudderless use of liability without appreciable standards was inconsistent with public nuisance law. *See id.*

at 645. Plaintiffs were "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court." *Id.* The group behind these cases expressed frustration that courts adhered to the tenets of public nuisance law and served as a "gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy deployed in the case at bar of using government public nuisance actions to circumvent products liability, marketing laws and product regulations began in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (observing the changes sought by the environmentalists "invite[d] mischief in other areas—such as products liability"). These cases targeted manufacturers of products that were "unpopular," had inherent risks, or could be used in ways that created harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984) *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of Bloomington v. Westinghouse Electrical Corp.*, 891 F.2d 611 (7th Cir. 1990) (PCBs); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco). Again, judges schooled in rules and policies of public nuisance law did not embrace this strategy, and the cases were largely dismissed.

The case at bar strikes many of the same chords as these other public nuisance cases. They have been based on allegations related to promotion or marketing of a product. *Compare State of R.I. v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008) (rejecting efforts to expand public nuisance to include allegations related to product design, marketing, and distribution practices) *with* Op. at 24 ("The challenged conduct here is Defendants' misleading marketing and promotion of opioids."). They suggested manufacturers should be liable merely because they made a profit selling the product, regardless of wrongdoing.

Compare Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) (rejecting notion that public nuisance liability can be based on sales and profits) *with* Op. at 10 (suggesting public nuisance liability can be based on efforts intended to "increase Defendants' profits from opioids"). The government plaintiffs have also tried taking extreme liberties with causation, seeking to create industry-wide liability by asserting governments should not have to satisfy proximate cause because their suits are for injuries to the public as a whole. *See St. Louis v. Benjamin Moore*, 226 S.W.3d 110 (Mo. 2007).[1] Further, courts have held the use of government funds to remediate public health injuries is not recoverable in a public nuisance action. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144-47 (Ill. 2004) (these costs are essentially taxes to be levied at the legislature's discretion).

In rejecting these claims, courts across the country have explained the dissonance between sale and manufacture of goods and public nuisance liability, regardless of the product at issue. Public nuisance is fundamentally about "using [one's] property to the detriment of the use and enjoyment of others." *City of Bloomington*, 891 F.2d at 614 (citations omitted). Because manufacturers do not retain "the right to control" their products, the manufacturer is not responsible for any nuisance resulting from the use or misuse of their products. *See id.* In tobacco litigation, the only court to rule on a public nuisance claim similarly explained that applying public nuisance to selling products would create an "overly broad definition of the elements of public nuisance" that "is simply not found in Texas case law and the Court is unwilling to accept the State's invitation to expand a claim for public nuisance." *American Tobacco Co.*, 14 F. Supp. 2d at 972. Indeed, "the role of 'creator' of a

[1] Defendant extensively covers problems with the District Court's proximate cause rulings, which will not be addressed here to avoid unnecessary repetition. *See* Def. Br. at 29-39.

nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien." *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1993).

Otherwise, governments would have near limitless ability to impose liability on an industry if its products could contribute to risks of enough people. *See Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (The City "deliberately framed [its] case as a public nuisance action rather than a product liability suit."), *aff'd*, 823 N.E.2d 126 (Ill. App. Ct. 2005). As here, governments could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. The theory would "give rise to a cause of action . . . regardless of the defendant's degree of culpability." *Tioga Pub. Sch. Dist. V. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

Public nuisance law in Oklahoma and other states is not so amorphous. It does not create liability over categories of inherently harmful products or shift costs to manufacturers for downstream risks associated with such products absent the core liability requirements of fault and causation.[2] *Amicus* respectfully submits the Court should affirm the standards and norms of the public nuisance statute and find it applies only to unlawful local, community-based activities—not product manufacturing and marketing.[3]

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[2] The Supreme Court of Illinois also explained that the assertion that public nuisance law can be applied to these cases because companies engaged in these activities while on land and roads, which the District Court here asserts, is not in concert with public nuisance law and does not offer any limiting principle. *See City of Chicago*, 821 N.E.2d at 1111 ("The mere fact that defendants' conduct in their plants, offices, and stores puts [their products] into the stream of commerce does not state a claim for public nuisance based on their use of land.").

[3] As Defendants explain in greater detail, when laws are applied in ways that "engender the possibility of arbitration and discriminatory enforcement," they run afoul of the federal "void-for-vagueness" doctrine. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 290 n. 12 (1982); Def. Br. at 22-23.

PROPOSITION TWO: THE COURT SHOULD OVERTURN THIS ATTEMPT TO CONVERT OKLAHOMA'S PUBLIC NUISANCE LAW INTO AN ALL-ENCOMPASSING CAUSE OF ACTION

From a political perspective, there is an allure for government officials to create a catch-all cause of action for pursuing mostly out-of-state manufacturers to pay for in-state social and environmental problems. *See generally* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009). So, it is not surprising that lower courts on occasion have allowed such diversions from public nuisance law. Some courts have been candid about their desire to address a problem—even if the liability finding was admittedly not based on the law. *See, e.g., State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983) (allowing a public nuisance claim against a company that did not cause the pollution at issue with the observation that "[s]omeone must pay to correct the problem"); *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) (explaining approval of legal shortcuts to proving the public nuisance claim as to not "turn a blind eye" to the problem of lead poisoning).[4] Other courts have been more circumspect. Either way, when high courts have been called upon to review these rulings, as this Court is here, the high courts have largely overturned them.

The ramifications of allowing lower courts to transform public nuisance law to create funding mechanisms can be seen here. In framing opioid litigation under government public

[4] *See also* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1998) ("As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so.").

nuisance theory,[5] governments have tried to blur traditional liability law and put market participants into a litigation Cuisinart, seeking to subject them to joint and several liability. As University of Richmond Professor Carl Tobias explained, the litigation tactic initially was to file a dozen or so cases, create the threat of massive unpredictable liability, increase the stakes through negative media coverage, and pressure the companies to settle. *See* Jef Feeley & Jared S. Hopkins, *Big Pharmas's Tobacco Moment as Star Lawyers Push Opioid Suits*, Bloomberg (Aug. 15, 2017). As former plaintiffs' lawyer Richard Scruggs added, states should not focus on winning in court, but make the argument publicly as to "who should pay as between the general public and the industry whose otherwise legal products caused the epidemic." Richard Scruggs, *Are Opioids the New Tobacco?*, LAW360 (Sept. 18, 2017). This strategy of trying to generate money to offset expenses worked, leading to a "race to the courthouse" by two thousand cities and counties (and some states) seeking a piece of the action—often for overlapping populations. Marissa Evans, *In 'Race to the Courthouse,' Lawyers Urge Texas Counties to Sue Over Opioids*," Texas Trib., Mar. 13, 2018.

Many companies, including in this case, have settled rather than face the prospect of such unwieldy, unprincipled and unlimited liability. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (observing that with "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); Henry J. Friendly, *Federal Jurisdiction: A General View 120* (1973) (labeling such settlements as "blackmail settlements"). While some may applaud this Machiavellian result, unmerited mass liability must not be coerced through leveraging transaction costs and inefficiencies of litigation. As

[5] When individuals brought personal injury claims against opioid manufacturers, courts concluded that responsibility for the drug abuse rested with physicians who overprescribed (Footnote continued on next page)

courts in other states have held when reaching the merits in opioid-related cases, "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it's bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct., Jan. 8, 2019); *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019) (manufacturers do not control how opioids are prescribed or used). The Supreme Court of Iowa explained this point in a different context, stating "[d]eep pocket jurisprudence is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted).

For these reasons, high courts have stepped in to correct lower court rulings that have extended the boundaries of public nuisance law—an action needed here. For example, the first major victory for proponents of expansive public nuisance litigation was the Rhode Island lead paint case, which made national headlines. As here, the trial court found that manufacturers of a product (lead pigment and paint) could be subject to public nuisance liability for the downstream risks of the product (lead poisoning). *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007). Again as here, the trial court based this liability on the manufacturers' promotion of the products and jettisoned traditional causation requirements; it then required the manufacturers to pay the costs of abating lead paint from older homes. *See id.* The Rhode Island Supreme Court overturned this verdict. *See Lead Indus. Ass'n*, 951 A.2d at 428. It found "[t]he law of public nuisance never before has been applied to products, however harmful." *Id.* at 456. "[P]ublic nuisance law simply does not provide a remedy for this harm. . . . However grave the problem of lead

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the drugs and individuals who took them. *See* Schwartz et al., 70 Okla. L. Rev. at 386.

poisoning is in Rhode Island . . . [t]he state has not and cannot allege facts that would fall within the parameters of what would constitute a public nuisance." *Id.*

The New Jersey and Missouri Supreme Courts issued similar rulings in their lead paint cases. The New Jersey Supreme Court explained that "plaintiffs' loosely-articulated assertions here . . . cannot sound in public nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007). "[T]he use of land by the one creating the nuisance" is "essential to the concept of public nuisance." *Id.* at 495. "[W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action." *Id.* at 501. The Missouri Court likewise rejected St. Louis's attempt to depart from traditional public nuisance. *See St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007). In the only lead paint case that has resulted in liability, the California Supreme Court inexplicably denied review, allowing the deep pocket ruling below to stand. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51 (Cal. Ct. App. 2017), *review denied* (Cal. Feb 14, 2018). The failure of the California Supreme Court to take the case has led to a dramatic increase of claims involving other products with inherent risks or externalities.

Even the U.S. Supreme Court has stepped in to overturn a lower court's ruling that would have allowed public nuisance theory to be used over product externalities and risks. *See Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011). In that case, the U.S. Court of Appeals for the Second Circuit had allowed a case to go forward that would have subjected utility companies to public nuisance liability for contributing to global climate change. *See Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 330 (2d Cir. 2009) (suggesting such

liability could arise where "regulatory gaps exist"). The Supreme Court in a unanimous ruling dismissed the case, stressing that setting national energy policy to account for climate change concerns was "within national legislative power" and that Congress and EPA are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions. *Am. Elec. Power*, 564 U.S. at 421, 428. The same is true here with the U.S. Food & Drug Administration ("FDA") and state regulators, their regulation over the prescription drug market, and their ongoing efforts to balance the benefits and risks of opioid pain medication. Some may disagree with these regulations, including here, but that should not open the door to regulation through litigation. *See* Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22 (calling similar attempts at regulation through litigation "faux legislation, which sacrifices democracy").

The Court should join with these other courts by putting the brakes on this attempt to create a "super" cause of action in Oklahoma. The public nuisance statute does not provide any legal standards for fairly assessing the benefits and risks of products or related promotional activities. Liability in Oklahoma should remain principled.

PROPOSITION THREE: TRADITIONAL BODIES OF LAW, INCLUDING PRODUCTS LIABILITY AND THE REGULATORY PROCESS, SHOULD NOT BE SUPPLANTED BY PUBLIC NUISANCE LITIGATION

The bodies of liability law applicable to Defendants' conduct at issue in this litigation include products liability, negligence, warranty law and consumer protection acts.[6] Each of these causes of action has its own purposes, elements, and remedies. Collectively, they manage the risks product manufacturers can control, namely putting lawful, non-defective

[6] *See, e.g., Kirkland v. General Motors Corp.*, 521 P.2d 1353 (1974) (establishing products liability in the state); OKLA. STAT. 15 § 17-751 *et seq.* (consumer protection act).

products into the market. Here, the District Court did not determine Defendants violated these laws or seek to impose remedies available under these laws. Nonetheless, it subjected Defendants to joint and several liability for the entire opioid abuse crisis in the State. These laws, not statutory or common law public nuisance, should continue to be the basis of liability for claims related to products and promotion activities. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

If the lower court's ruling is allowed to stand, manufacturers could be subject to industry-wide liability in Oklahoma for selling and marketing products with known risks of harm with few if any defenses. This concept has been termed "category liability" for product manufacturers and has been widely rejected. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997). As Professors Henderson and Twerski have explained, the effect of "holding producers liable for all the harm their *products* proximately cause" is to "prohibit altogether the continued commercial distribution of such products." Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329 (emphasis added); *see also* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998) (reporting "courts have not imposed liability for categories of products that are generally available and widely used"). Also, manufacturers cannot police customers to ensure products are not misused or neglected in ways that could create a public nuisance. They are not insurers against abuse. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973) ("[L]iability for products is clearly not that of an insurer.").

Allowing courts to manage public risks associated with products through nuisance liability is particularly inappropriate here given that the FDA is directly engaged in the risk

assessments and balancing the lower court purported to do. All aspects of prescription drugs are highly regulated, from their risks and benefits to human health to their design and labeling. *See* 21 U.S.C. § 821 *et seq.* When Defendants sold the FDA-approved medications at issue here, they were engaged solely in legal sales of legal drugs in a highly regulated distribution chain. They and the distributors are registered with state and federal governments to sell these medicines, the medicines must be dispensed at licensed pharmacies, and each person must obtain a prescription from a licensed physician to purchase them. Further, the FDA is working diligently on collaborative risk management plans based on improved surveillance, better education, and stronger warnings calling attention to opioid diversion. *See* Opioid Medications, U.S. Food & Drug Admin. ("One of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs.").[7]

Using the blunt tool of public nuisance law to supplant or second-guess these policy decisions will undermine this regulatory regime. Ensuring liability law properly aligns with these regulations is a significant concern for *amicus* and its members because manufacturers of all types of products with inherent risks—from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer risks. Weighing costs, benefits and social value of producing and using these products and factoring in any adverse effects is part of the delicate balancing for which only legislatures and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with affected communities, and consider all the stakeholders' interests–not just the state attorneys and

[7] https://www.fda.gov/drugs/information-drug-class/opioid-medications

others who choose to file lawsuits. If a company violates any of these regulations, there are enforcement remedies tailored to the violations available to the government agencies.

Here, respectfully, the Court should not allow the State or the lower courts to circumvent these regulatory or enforcement laws by deliberately misapplying the public nuisance statute to create a backdoor right of action. To be clear, this case finds no support in Oklahoma's public nuisance statute and does not resemble any claim Congress had in mind when enacting the Food Drug & Cosmetic Act, or the Oklahoma Legislature with the public nuisance statute. The case has no foundation in the law and should be dismissed.

CONCLUSION

For these reasons, *Amicus Curiae* the National Association of Manufacturers respectfully submits the District Court's judgment should be reversed.

Respectfully submitted,

HALL ESTILL HARDWICK GABLE
GOLDEN & NELSON, P.C.

William W. O'Connor, Esq. OBA # 13200
Margo E. Shipley, Esq., OBA # 32118
320 S. Boston Ave., Suite 200
Tulsa, OK 74103
Tel: (918) 594-0590
Fax: (918) 594-0505
Email: boconnor@hallestill.com
Email: mshipley@hallestill.com

Philip S. Goldberg (*pro hac pending*)
SHOOK HARDY & BACON, LLP
1800 K Street, NW, Suite 1000
Washington, DC 20006
Tel: (202) 783-8400
Fax: (202) 783-4211
Email: pgoldberg@shb.com

Attorneys for Amicus Curiae the National Association of Manufacturers

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the foregoing instrument was hand-delivered for filing to the Supreme Court of Oklahoma on this 19th day of October, 2020. I also certify that a true and correct copy of the foregoing instrument was mailed via U.S. Mail, postage prepaid, to the following:

Michael Burrage, OBA #1350 Reggie Whitten, OBA #9576 WHITTEN BURRAGE 512 North Broadway, Suite 300 Oklahoma City, OK 73102 Tel: 405-516-7800 Fax: 405-516-7859 mburrage@whittenburragelaw.com rwhitten@whittenburragelaw.com *Attorneys for Plaintiff*	Mike Hunter, OBA #4503 Abby Dillsaver, OBA #20675 Ethan A. Shaner, OBA #3091 OFFICE OF ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA 313 N.E. 21st Street Oklahoma City, OK 73105 Tel: 405-521-3921 Fax: 405-521-6246 mike.hunter@oag.ok.gov abby.dillsaver@oag.ok.gov ethan.shaner@oag.ok.gov *Attorneys for Plaintiff*
Bradley E. Beckworth, OBA #19982 Nathan B. Hall, OBA #32790 Lisa Baldwin, OBA #32947 NIX, PATTERSON & ROACH, LLP 512 North Broadway, Suite 200 Oklahoma City, OK 73102 Tel: 405-516-7800 Fax: 405-516-7859 bbeckworth@nixlaw.com lbaldwin@nixlaw.com nhall@nixlaw.com *Attorneys for Plaintiff*	Ross Elliot Leonoudakis Robert Winn Cutler Nix Patterson, LLP 3600 N. Capital of Texas Highway, Suite B350 Austin, TX 78746 Tel: 512-328-5333 Fax: 512-328-5335 rossl@nixlaw.com winncutler@nixlaw.com *Attorneys for Plaintiff*

Larry D. Ottaway, Esq., OBA #6816 Amy Sherry Fischer, Esq., OBA #16651 Andrew M. Bowman, Esq., OBA #22071 201 Robert S. Kerr Avenue, 12th Floor Oklahoma City, Oklahoma 73102 Tel: (405) 232-4633 Fax: (405) 232-3462 larryottaway@oklahomacounsel.com amyfischer@oklahomacounsel.com andrewbowman@oklahomacounsel.com	Andrew W. Lester, OBA No. 5388 A.J. Ferate, OBA No. 21171 SPENCER FANE LLP Suite 600 9400 North Broadway Extension Oklahoma City, OK 73114 Tel: (405) 844-9900 Fax: (405) 844-9958 alester@spencerfane.com aiferate@spencerfane.com
Benjamin H. Odom, OBA No. 10917 John H. Sparks, OBA No. 15661 Michael W. Ridgeway, OBA No. 15657 ODOM & SPARKS, PLLC HiPoint Office Building 2500 McGee Drive Ste. 140 Norman, OK 73072 Tel: (405) 701-1863 Fax: (405) 310-5394 odomb@odomsparks.com sparksj@odomsparks.com ridgewaym@odomsparks.com	Charles C. Lifland Sabrina H. Strong Jonathan P. Schneller O'MELVENY & MYERS, LLP 400 S. Hope Street Los Angeles, CA 90071 Tel: (213) 430-6000 Fax: (213) 430-6407 clifland@omm.com sstrong@omm.com jschneller@omm.com
Stephen D. Brody O'MELVENY & MYERS LLP 1625 Eye Street NW Washington, DC 20006 Tel: (202) 383-5300 Fax: (202) 383-5414 sbrody@omm.com	Jeffrey L. Fisher O'MELVENY & MYERS LLP 2765 Sand Hill Road, Menlo Park County of San Mateo, CA 94025-7019 Tel: (650) 473-2633 Fax: (650) 473-2601 jlfisher@omm.com

William W. O'Connor