

In the Supreme Court of the State of Oklahoma

CHARLES EDWARD PACK, II; MARA NOVY; LEONARDO DE ANDRADE;
ELIZABETH LUECKE; NANCY KUNSMAN; HEATHER SPARKS; LEO J. BAXTER;
AMY ANNE FORD; WILLIAM F. SHDEED; AND DANIEL KEATING,
Petitioners,

v.

STATE OF OKLAHOMA; PRESIDENT *PRO TEMPORE* OF THE
OKLAHOMA SENATE; SPEAKER OF THE HOUSE OF REPRESENTATIVES;
THE OKLAHOMA STATE DEPARTMENT OF EDUCATION,
Respondents.

ON APPLICATION TO ASSUME ORIGINAL JURISDICTION AND
PETITION FOR WRIT AND DECLARATORY RELIEF

**BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION &
LEGAL DEFENSE FUND
IN SUPPORT OF RESPONDENTS**

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INDEX AND AUTHORITIES

Index and Authorities..... i

Identity, Interest and Authority to File 1

Introduction and Statement of the Case..... 1

Questions Presented 2

Other Authorities

OKLA. CONST. art. IV, §1 2

OKLA. CONST. art. XIII, §5..... 2

Argument and Authorities 2

I. Applicants’ Two Substantive Challenges to HB3399 Both Are Meritless Because the Legislature Acted Pursuant to Its Constitutional Authority..... 2

Other Authorities

OKLA. CONST. art. IV, §1 2-3

OKLA. CONST. art. XIII, §5..... 2

A. The Board of Education’s Constitutional Grant of Authority Makes the Board Subject to the Legislature..... 3

Cases

Board of Regents v. Baker,
1981 OK 160, 638 P.2d 464..... 3-4

Board of Regents v. Merit Protection Comm’n,
2001 OK 17, 19 P.3d 865..... 5

Dep’t of Revenue of Oregon v. ACF Indus., Inc.,
510 U.S. 332 (1994)..... 4

Ethics Comm’n v. Cullison,
1993 OK 37, 850 P.2d 1069..... 5

State ex rel. Miller v. Bd. of Educ.,
212 Kan. 482, 511 P.2d 705 (Kan. 1973) 4

Trapp v. Cook Const. Co.,
1909 OK 259, 105 P. 667..... 5

Other Authorities

OKLA. CONST. art. V, §15
OKLA. CONST. art. XIII, §53, 4, 5
OKLA. CONST. art. XIII, §83, 4
OKLA. CONST. art. XIII, §B-2 4-5

B. The Oklahoma Constitution’s Separation-of-Powers Provisions Do Not Prohibit the Legislature’s Acting within the Powers that the Constitution Grants to the Legislature6

Cases

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916).....6
Dreyer v. People of State of Illinois,
187 U.S. 71 (1902).....6
Schuette v. Coalition to Defend Affirmative Action,
134 S. Ct. 1623 (2014).....7
Whalen v. U.S.,
445 U.S. 684 (1980).....6

Other Authorities

OKLA. CONST. art. IV, §16
OKLA. CONST. art. V, §16
OKLA. CONST. art. XIII, §56

II. Even If Applicants Were to Prevail on One or Both of their Constitutional Claims, HB3399 Would Be Severable7

Other Authorities

75 O.S. §11a(1)(a).....8
75 O.S. §11a(1)(b).....8

Conclusion9

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund (“Eagle Forum”), a nonprofit corporation headquartered in Saint Louis, Missouri, files this brief pursuant to the Court’s order dated July 3, 2014. Since its founding in 1981, Eagle Forum consistently has supported autonomy in areas (like education) of predominantly state and local concern and has sought to protect the ability of States (and local governments) to set their own course, free from outside control in areas that the Constitution reserves to the people and the states. Similarly, Eagle Forum has also long argued for judicial restraint under separation-of-powers principles, which argue for allowing elected officials to chart the states’ course in matters of profound public concern. Eagle Forum has an active Oklahoma chapter, the members of which will be affected by this Court’s resolution of this important matter. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

INTRODUCTION AND STATEMENT OF THE CASE

Members of Oklahoma’s Board of Education (the “Board”) and several parents and educators (collectively, “Applicants”) ask this Court to assume original jurisdiction over their petition to enjoin and declare invalid the recently enacted Oklahoma House Bill 3399 (“HB3399”). In essence, HB3399 substitutes appropriate, Board-adopted subject-matter standards (starting with Oklahoma’s prior 2009-10 curriculum) for the Common Core State Standards (“Common Core”) developed by the Common Core State Standards Initiative that Oklahoma adopted by statute in 2010 and makes any new standards subject to Legislative review. HB3399 thus seeks to wind back the curriculum to 2009-10 and to impose legislative review on new curricula prospectively. The respondents are the State of Oklahoma, the President *Pro Tempore* of the Oklahoma Senate, the Speaker of the Oklahoma House of Representatives, and Oklahoma’s State Department of Education (collectively, “Oklahoma”).

QUESTIONS PRESENTED

Applicants challenge HB3399 on two grounds and seek to enjoin and declare unlawful the entire act due to the lack of severability that they perceive. Against the foregoing background, Applicants expressly present two questions: (1) whether HB3399 violates Article XIII, Section 5 of Oklahoma’s Constitution by allowing the Legislature to infringe on the Constitutional authority of the Board, and (2) whether HB3399 violates Article IV, Section 1 of Oklahoma’s Constitution by giving the Legislature excessive, controlling influence over the executive power of the Board. *Amicus* Eagle Forum respectfully submits that Applicants’ filings also implicitly present a third question: (3) if Applicants prevail on either of the first two questions, whether any of HB3399 is severable.

ARGUMENT AND AUTHORITIES

I. APPLICANTS’ TWO SUBSTANTIVE CHALLENGES TO HB3399 BOTH ARE MERITLESS BECAUSE THE LEGISLATURE ACTED PURSUANT TO ITS CONSTITUTIONAL AUTHORITY

Applicants’ challenge to HB3399 relies on two key provisions of Oklahoma’s Constitution: (1) the independence that Applicants’ perceive in the Board’s constitutional charter, and (2) the Constitution’s adoption of the separation-of-powers doctrine. As the plain text of the two relevant provisions makes clear, Applicants’ arguments are meritless.

First, the “independent” Board is expressly subject to legislative control:

The supervision of instruction in the public schools shall be vested in a Board of Education, *whose powers and duties shall be prescribed by law*. The Superintendent of Public Instruction shall be President of the Board.

OKLA. CONST. art. XIII, §5 (emphasis added). Second, Oklahoma’s Constitution recognizes separation-of-powers principles, but only except as otherwise provided in the Constitution:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative,

Executive, and Judicial; and *except as provided in this Constitution*, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

OKLA. CONST. art. IV, §1 (emphasis added). Where other provisions of the Constitution become relevant to rebut Applicants' two arguments, *amicus* Eagle Forum will raise them in the relevant subsection below.

A. The Board of Education's Constitutional Grant of Authority Makes the Board Subject to the Legislature

Applicants argue that, as a constitutional entity, the Board is immune from at least some legislative control. Applicants' Br. at 5-9. While perhaps facially credible, based on the precedents that Applicants cite for *other* constitutional bodies, the argument evaporates upon consulting the constitutional provisions creating the Board and those other bodies.

As signaled above, the Constitution vests the Board merely with "[t]he supervision of instruction in the public schools" and provides that the Board's "powers and duties shall be prescribed by law." OKLA. CONST. art. XIII, §5. By contrast, for example, "[t]he government of the University of Oklahoma shall be vested in a Board of Regents," OKLA. CONST. art. XIII, §8, which makes it disingenuous for Applicants to cite *Board of Regents v. Baker*, 1981 OK 160, ¶7, 638 P.2d 464, 466, for the proposition that "[e]very positive delegation of power by the Constitution to one officer or department of government implies a negation of its exercise by any other officer or department." Applicants' Br. at 6. The powers conferred on the Regents for the University versus those conferred on the Board here for K-12 instruction are simply too different for Applicants to rely on *Baker* to support their petition.

Specifically, in *Baker*, this Court relied on the Board of Regents' broad delegation to *govern* the University:

We find that Article XIII, § 8, of the Oklahoma Constitution establishes the Board of Regents of the University of Oklahoma as an independent body charged with the *power to govern* the University. While constitutionally assured independence cannot be equated with complete immunity for legislative regulation, it is unnecessary for us to fully examine here the nature and extent of legislative regulation applicable to Board. The determination of faculty salaries is clearly an integral part of the power to govern the University and a function essential in preserving the independence of the Board.

Baker, 1981 OK 160, ¶19, 638 P.2d at 469 (emphasis added). In analyzing a similar issue, the Supreme Court of Kansas distinguished between supervision and control because the Kansas Constitution gave the K-12 board the power of “supervision” over K-12 education, whereas it gave the board of regents the power of “control and supervision” over the state university: “we believe ‘supervision’ means something more than to advise but something less than to control.” *State ex rel. Miller v. Bd. of Educ.*, 212 Kan. 482, 492, 511 P.2d 705, 713 (Kan. 1973). Here, too, the Board’s mere power to *supervise* is nothing like the Board of Regents’ power to *govern*.

In any event, where Oklahoma wishes to make constitutional entities independent of the Legislature, it does so by conveying power to govern without regard to the Legislature. *See* OKLA. CONST. art. XIII, §§8 (quoted *supra*), B-2 (“Board of Regents of Oklahoma Colleges shall hereafter have the *supervision, management and control* of [certain] State Colleges”) (emphasis added). Consistent with *Miller* and the canon of statutory construction that “identical words used in different parts of the same act are intended to have the same meaning,” *Dep’t of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (internal quotations omitted), “supervision” in Article XIII, Section 5 obviously does not mean the “supervision, management and control” that the Constitution uses in Article XIII,

Section B-2.¹ If the term “supervision” had the broad meaning that Applicants allege, the additional terms in Article XIII, Section B-2 would be mere surplusage.

But even if supervision did have the broad meaning that Applicants would impose on it, the Board’s powers and duties are expressly made subject to Legislature, *see* OKLA. CONST. art. XIII, §5 (the Board’s “powers and duties shall be prescribed by law”), which is the entity to which the Constitution vests general law-making authority: “Legislative authority of the State shall be vested in a Legislature.” OKLA. CONST. art. V, §1. This difference in the constitutional charter of the Board and the constitutional charters of the entities in the decisions that Applicants cite is dispositive. The argument that “[e]very positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person,” Applicants’ Br. at 7 (*quoting Trapp v. Cook Const. Co.*, 1909 OK 259, ¶11, 105 P. 667, 670); *accord Ethics Comm’n v. Cullison*, 1993 OK 37, ¶18, 850 P.2d 1069, 1076, simply has no bearing when the Board’s constitutional charter expressly *vests the Legislature* with defining the Board’s powers and duties. Indeed, once the Board’s duties are defined by the Legislature, the Legislature has no apparent intent to *supervise* the Board’s implementation of those duties. Supervision of duties *defined by the Legislature* is all that Article XIII, Section 5 arguably vests in the Board.

The Legislature and the People have so lost confidence in the Board’s members that it has become necessary to reassert the Legislature’s full control over defining the subject matter of public instruction. It is disturbing, but not surprising, that the Board’s members seek to evade that political and practical judgment by substituting this Court’s judgment. As

¹ This Court’s *Merit Protection* decision – cited at Applicants’ Br. at 6-8 – relies on the stronger language of Article XIII, Section B-2, *Board of Regents v. Merit Protection Comm’n*, 2001 OK 17, ¶2, 19 P.3d 865, 866, which makes *Merit Protection* inapposite here.

outlined above, however, Applicants’ constitutional-independence argument is baseless, and this Court should reject it.

B. The Oklahoma Constitution’s Separation-of-Powers Provisions Do Not Prohibit the Legislature’s Acting within the Powers that the Constitution Grants to the Legislature

Applicants’ separation-of-powers argument (Applicants’ Br. at 9-13) flounders on the text of the constitutional provision on which Applicants rely. As recognized for state-law purposes, the separation-of-powers doctrine – by its express terms – applies only “*except as provided in this Constitution.*” OKLA. CONST. art. IV, §1 (emphasis added). As indicated in Section I.A, *supra*, HB3399 is fully consistent with the design of Oklahoma’s Constitution with respect to the K-12 education under the Board’s supervision: (1) the Board’s powers and duties shall be provided by law, OKLA. CONST. art. XIII, §5, and (2) the Legislature is the body entrusted to enact laws. OKLA. CONST. art. V, §1. As such, the Legislature plainly operated within its powers, as conferred by the Constitution. Obviously, the exercise of a power that the *Constitution expressly vests in the Legislature* cannot itself be implicitly unconstitutional: “the Constitution does not conflict with itself by conferring, upon the one hand, a ... power, and taking the same power away, on the other, by the limitations of the due process clause.” *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As unquestionably important as the separation-of-powers principles that Applicants cite are, those principles simply are not relevant to HB3399.

Although litigants often can resort to federal rights when (as here) state-law rights fail them, the U.S. Constitution does not even apply to state-law separation-of-powers issues: “[the] doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States.” *Whalen v. U.S.*, 445 U.S. 684, 689 (1980); *accord Dreyer v. People of State of Illinois*, 187 U.S. 71, 84 (1902). For that reason, Applicants cannot resort

to the federal Constitution to press the separation of powers as a philosophical principle of government.

Indeed, as the U.S. Supreme Court recently recognized, it is profoundly undemocratic for courts and plaintiffs to see to wrest control of important policy decisions from the People and their elected representatives: “Our constitutional system embraces ... the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014). This Court should heed the U.S. Supreme Court’s reluctance to impose an “unprecedented restriction on the exercise of [the] fundamental right held not just by one person but by all in common ... to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process”:

Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate’s power must be limited because the people cannot prudently exercise that power even after a full debate, *that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.*

Id. at 1637 (emphasis added). Like the U.S. Supreme Court in *Schuette*, this Court should reject Applicants’ petulant insistence that they know best and therefore can displace Oklahoma’s voters and elected officials.

II. EVEN IF APPLICANTS WERE TO PREVAIL ON ONE OR BOTH OF THEIR CONSTITUTIONAL CLAIMS, HB3399 WOULD BE SEVERABLE

The gravamen of Applicants’ claim is that the ongoing legislative oversight in Section

4 of HB3399 represents an unauthorized intrusion in the Board's or the Executive's powers,² but that is not what this litigation is really about. This litigation is about keeping Common Core in Oklahoma's schools. Because HB3399's removing Common Core and restoring the prior status quo is easily severable from Section 4, as well as the other sections that Applicants consider entangled with Section 4 – namely, Sections 3, 8, and 12, *see* Applicants' Br. at 13-15 – Applicants would not be entitled to keep Common Core, even if they were correct about HB3399's encroaching on the Board's or the Executive's constitutional prerogatives.

Absent a severability clause, Oklahoma statutes will be voided in their entirety by invalid provisions only under two circumstances: (1) the valid parts “are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one,” or (2) the valid parts “standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” 75 O.S. §11a(1)(a)-(b). Applicants challenge only Section 4 and, by implication, the three other provisions so allegedly tied to Section 4 as to require this Court to void them along with Section 4. *Amicus* Eagle Forum respectfully submits that HB3399's repeal of the Common Core provisions can survive, even assuming *arguendo* that this Court finds Section 4 – and thus Sections 3, 8, and 12 – invalid.

Given the exigent timing of this litigation versus the upcoming 2014-15 school year, *amicus* Eagle Forum respectfully submits that this Court could order the Board to revert to its pre-Common Core 2009-10 curriculum for the upcoming academic year, which would

² It bears emphasis that Applicants' two theories are somewhat contradictory. The Board cannot be both constitutionally independent and part of the Executive Branch. In any event, as explained in Sections I.A-I.B, *supra*, both of Applicants' theories are baseless.

provide sufficient time for the Legislature to develop an alternative approach to ensuring an appropriate curriculum for Oklahoma children prospectively in future academic years. In the unlikely event that this Court adopts either of Applicants' two merits theories, a Solomonic remedy of preserving the repeal of Common Core nonetheless would be consistent with Oklahoma's severability laws and the obvious legislative intent.

CONCLUSION

For the foregoing reasons and those argued by Oklahoma, this Court should deny the relief requested if the Court assumes jurisdiction over Applicants' cause.

Dated: July 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2014, a true and correct copy of the foregoing document was served by first-class, postage-prepaid U.S. Mail (with a courtesy copy by email were indicated) on the following counsel for the parties:

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