No. 123,238

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TOBACCO SETTLEMENT ENDOWMENT TRUST FUND,

Petitioner,

v.

KEVIN STITT, GOVERNOR OF OKLAHOMA, *et al.*,

Respondents,

RESPONSE OF GENTNER DRUMMOND, KYLE HILBERT, AND LONNIE PAXTON TO PETITIONER'S APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

On November 7, 2000, the people of Oklahoma established the Tobacco Settlement Endowment Trust Fund ("TSET") by constitutional amendment. OKLA. CONST. art. X, § 40. TSET's primary purpose is to expend funds received by the State from "any settlement with or judgment against any tobacco company or companies." *Id.* § 40(A). The Constitution provides that TSET's Board of Directors ("the Board") is composed of seven members who, upon appointment by Respondents, "shall serve seven-year terms of office." *Id.* § 40(D).

Unlike other constitutional boards in Oklahoma, the Constitution does not provide that TSET's Board may only be removed "for cause," nor does the Constitution otherwise limit Respondents' power of removal. *Compare id., with, e.g.*, OKLA. CONST. art. XXVI, §§ 1, 3. Instead, the people expressly empowered the Legislature to "enact laws to further implement" the constitutional provisions regarding TSET and its Board. *Id.* art. X, § 40(G). Pursuant to that grant of authority, the Legislature recently promulgated House Bill 2783 ("HB 2783"), which allows for the removal of Board members by their respective appointing authorities with or without cause.

HB 2783 passes constitutional muster. This Court does not look to the Constitution to see if the Legislature is empowered to act. *Jackson v. Freeman*, 1995 OK 100, ¶¶ 18, 19, 905 P.3d 217, 221. Rather, this Court looks to the Constitution only to see if legislative action is specifically prohibited. *Id.* Thus, matters not detailed by the Constitution are within the power of the Legislature. *Id.* Those principles dictate the outcome here. The manner of and basis for removal of TSET Board members are not covered by the Constitution. It is therefore within the power of the Legislature to provide for the removal of TSET's Board as the Legislature sees fit.

Petitioner's arguments to the contrary are internally inconsistent, devoid of authoritative support, and otherwise unavailing. Petitioner asserts that where the Constitution specifies the term of office of an appointed officer, any statute that allows for the removal of such an officer prior

to the expiration of his or her term is unconstitutional. Thus, in Petitioner's view, HB 2783 is unconstitutional because the Constitution says that Board members "shall serve seven-year terms of office" and HB 2783 would allow Respondents to remove Board members prior to the expiration of their term. But Petitioner's arguments quickly sacrifice internal logical consistency, as they must, to avoid absurd results. In other words, Petitioner's arguments prove too much.

Specifically, Petitioner asserts that HB 2783 is unconstitutional because the "voters approved a mandatory seven-year term and staggered terms" and "[t]he length of the terms can only be changed by a vote of the people." Petitioner's Brief ("Pet. Br.") at 7. That assertion is immediately followed by a **concession** that members of the Board may be removed prior to the expiration of their terms upon conviction of a felony, because they, "like all appointed state officers, are subject to suspension upon the conviction of a felony pursuant to 51 O.S. § 24.1." *Id.* at 8. But the Constitution does not say that TSET's Board members "shall serve seven-year terms of office *unless convicted of a felony.*" And Petitioner makes no attempt to explain how constitutional language that allegedly prohibits the Legislature from promulgating any statute allowing for the removal of Board members prior to the expiration of their seven-year terms does not also prohibit the application of 51 O.S. § 24.1 to TSET's Board. Petitioner's arguments are therefore inconsistent and unsupported by the relevant constitutional language.

Ultimately, this case boils down to a simple question: Where the Constitution provides that an appointed officer "shall serve" a set term of office and is silent as to the manner in which such an officer can be removed, may the Legislature provide for the removal of that officer with or without cause before the expiration of the appointed officer's term? If the Court decides original jurisdiction is appropriate and reaches the merits, it should answer that question in the affirmative and uphold the constitutionality of HB 2783.

STANDARD OF REVIEW

Again, this Court does not "look to the Constitution to determine whether the Legislature is authorized to do an act, but rather, to see if the act is prohibited." *Jackson*, 1995 OK 100, ¶¶ 18, 19, 905 P.3d at 221. Thus, "matters not covered by the constitutional language will be within the power of the Legislature." *Id.* "If there is any doubt as to the Legislature's power to act in any given situation, the doubt should be resolved in favor of the validity of the action taken by the Legislature." *Draper v. State*, 1980 OK 117, ¶ 10, 621 P.2d 1142, 1146. As such, "[a] heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute." *Fent v. Okla. Capitol Improvement Auth.*, 1994 OK 64, ¶ 3, 984 P.2d 200, 204. To meet that heavy burden, the claimant must demonstrate that the statute "is clearly, palpably, and plainly inconsistent with the Constitution." *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr.*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188. For the following reasons, Petitioner has not met that burden here.

ARGUMENT AND AUTHORITIES

I. THIS CASE DOES NOT WARRANT THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has long recognized that original jurisdiction "is intended primarily only as a 'stand-by' service, to be exercised only when . . . great injury will be done by the failure of this court to exercise that original jurisdiction." *Jarman v. Mason*, 1924 OK 722, ¶ 20, 229 P. 459, 463. As this Court has stated:

> Naturally all litigants would like, in the first instance, to step into [a] court of last resort, thereby avoiding the expense and delay incident to appeal, but the interests of the whole people of the sovereign state are paramount to those of the individual litigants in a single case. ... [T]his court was by the framers of the Constitution intended primarily as an appellate court.

Kitchens v. McGowen, 1972 OK 140, ¶ 6, 503 P.2d 218, 219 (quoting *Jarman*, 1924 OK 722, ¶ 27, 229 P. at 464). Thus, original jurisdiction will be assumed only when the matter "concern[s] the public

interest, i.e., the case is *publici juris* in nature" *and* there is "some urgency or pressing need for an early decision." *Edmondson v. Pearce*, 2004 OK 23, ¶ 11, 91 P.3d 605, 613.

A writ of prohibition is not lightly granted, either. It "is an extraordinary writ, and cannot be resorted to when the ordinary and usual remedies provided by law are available." *Jeter v. Dist. Ct. of Tulsa Cnty.*, 1922 OK 140, ¶ 4, 206 P. 831, 832. To obtain a writ of prohibition, Petitioners must show: "(1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of that power will result in injury for which there is no other adequate remedy." *James v. Rogers*, 1987 OK 20, ¶ 5, 734 P.2d 1298, 1299 (citation omitted).

This Court should not exercise original jurisdiction in this case because the issues raised by Petitioner are not particularly urgent. Petitioner offers the following three-tiered hypothetical to support its claim that this matter is urgent: "***If*** a Respondent removed a member of the TSET Board of Directors pursuant to HB 2783, and [***if***] the law is subsequently ruled unconstitutional, votes of the Board ***could be*** challenged and ruled void." Petitioner's Application ("Pet. App.") at 3 (emphasis added). The Court should not assume original jurisdiction where Petitioner offers nothing more than conjecture on top of conjecture to demonstrate that this matter is urgent and warrants original jurisdiction.

Similarly, Petitioner offers only conclusory allegations that a "usual remedy is not available to obtain judicial determination before this law takes effect." *Id.* at 4. Again, Petitioner provides no evidence that any member of its Board is under imminent threat of removal. Moreover, had Petitioner brought its claims in the district court, that court could have granted injunctive relief and prohibited the removal of TSET's Board pending appeal.[1] Even now, the district court could

[1] To be clear, although the present Respondents contend that the district court is the proper forum for Petitioner's claims, Petitioner would not be entitled to injunctive relief from the district court for the reasons set forth herein. Namely, Petitioner is not likely to succeed on the merits.

enter such relief before any Board member is removed—an event that might never occur.

The Court should refuse to exercise original jurisdiction in this case because this matter is not urgent. The better course is to deny original jurisdiction and allow Petitioner to bring its claims in the district court. Thus, the Court should deny Petitioner's Application without reaching the merits of Petitioner's claims.

II. HB 2783's Removal Provision Passes Constitutional Muster.

If the Court reaches the merits of this case, it should uphold HB 2783 because it is a proper exercise of legislative power. As a matter of black-letter law, this Court held over 100 years ago that "[t]he whole matter of removal or suspension from office, the causes for which, and the mode in which it may be effected, not being expressed in the Constitution, *is a proper subject of legislation.*" *Leedy v. Brown*, 1910 OK 342, ¶ 7, 113 P.117, 179 (emphasis added) (quoting *Ex parte Wiley*, 54 Ala. 226, 228 (Ala. 1875)). Indeed, "[i]t is part of the sovereignty of the state—part of the lawmaking power—and is not either expressly or impliedly withheld from the [Legislature]." *Id.* **That precedent alone is dispositive and dictates a ruling for Respondents here.**

Of course, that precedent does not stand alone. In 1923, this Court reiterated that "if there be no law which prohibits the removal of an appointee from an appointive position in the executive department,[2] nor any law prescribing the manner of removal, then this court is powerless to make a law by interpolation, arbitrary interpretation, or otherwise, which purports to do that which the law does not[.]" *Bynum v. Strain*, 1923 OK 596, ¶ 12, 218 P. 883, 885. Thus, this Court explained in 1932, in the absence of an explicit constitutional limitation, "the question of how an officer shall be removed from office" is a "'rightful' subject of legislation[.]" *Wentz v. Thomas*, 1932 OK 636, ¶ 37, 15 P.2d 65, 70. And "even without a statute, an executive officer may

[2] Members of TSET's Board, as constitutional officers with "important duties in connection with the fiscal affairs of the state," are undeniably executive officers. *See Arnold v. Bd. of Comm'rs of Creek Cnty.*, 1926 OK 549, ¶ 10, 254 P. 31, 34.

exercise the power of removal, unless expressly prohibited, for the power of appointment, under the law, carries with it the power of removal under the law." *State ex rel. King v. Rowe*, 1931 OK 328, ¶ 26, 300 P. 727, 730 (quoting *Cameron v. Parker*, 1894 OK 51, ¶ 21, 38 P. 14).

Bynum, in particular, deserves further attention. *Bynum* dictates that, in the absence of an explicit constitutional or statutory provision, this Court is powerless to interfere with the removal of an appointed executive officer. 1923 OK 596, ¶ 12, 218 P. at 885. The specific question before the *Bynum* Court was whether the Governor could remove the Banking Commissioner prior to the expiration of his term. *Id.* ¶ 2, 218 P. at 884. Much like it does for the members of TSET's Board, the Constitution provides that the Banking Commissioner "shall be appointed by the Governor for a term of four years," but it is silent as to the Commissioner's removal from office. OKLA. CONST. art. XIV, § 1. Under Petitioner's argument, the constitutional provision mandating a four-year term would necessarily prohibit the Governor from removing the Commissioner in the absence of a felony conviction against the Commissioner. But this Court did not see it that way in *Bynum*. Rather, the Court held that, because the Constitution was silent as to removal of the Banking Commissioner, and the Legislature conferred the power of removal on the Governor by statute, the Governor could properly remove the Commissioner prior to the expiration of his four-year term. 1923 OK 596, ¶ 12, 218 P. 883, 885 ("in the absence of law the courts have as little power to direct the Governor in the discharge of executive duties as the Governor has to direct the court in the discharge of judicial duties"). Petitioner's mistaken view was embraced in *Bynum*, to be sure, but only by the dissent. *See, e.g., id.* ¶ 16, 218 P. at 893 (Kennamer, J., dissenting) ("The majority opinion in legal effect converts the term of office of Bank Commissioner to one at the pleasure of the Governor, instead of for four years, as provided by law."). In short, this debate already took place, and was resolved, over 100 years ago.

As is the case with the Banking Commissioner, the Constitution neither prohibits the

removal of TSET's Board members, nor prescribes the method thereof. *See* OKLA. CONST. art. X, § 40. Rather, the Constitution provides that Respondents may each appoint one member of the Board, and it empowers the Legislature to enact further laws governing TSET and the Board. *Id.* § 40(D), (G). Thus, under *Bynum*, it is undoubtedly within the power of the Legislature to provide for the removal of the Board members by statute. Accordingly, HB 2783 does not offend the Constitution; it fulfills the Legislature's constitutional duty to promulgate rules governing TSET and the Board. This Court's precedent mandates that conclusion.

To be sure, there can be no question that the Constitution protects some constitutionally appointed officers from removal unless good cause can be shown. But the fact that the Constitution expressly limits the removal of such officers and does not similarly limit the removal of TSET's Board only serves to further demonstrate that HB 2783 is within the power of the Legislature. In Oklahoma's history, when such limits are deemed necessary, they have been explicit.

By way of example, the Constitution provides that members of the Pardon and Parole Board "**shall be removable for cause only** in the manner provided by law for elective officers not liable to impeachment." OKLA. CONST. art. 6, § 10 (emphasis added). Similarly, members of the Board of Regents for Higher Education and the Board of Regents for Agricultural and Mechanical Schools and Colleges "**shall be removable only for cause** as provided by law for the removal of officers not subject to impeachment." *Id.* § 31a; art. XIII, § A-2 (emphasis added). That same language restricts removal of the Director and members of the Wildlife Conservation Commission. *See id.* art. XXVI, §§ 1, 3. And the members of the Alcoholic Beverage Laws and Enforcement Commission are "removable from office **for cause** as other officers not subject to impeachment." *Id.* art. XXVIII, § 1 (emphasis added). The simple fact that the Constitution explicitly limits the removal of other appointed officers but does not limit the removal of TSET's Board members plainly indicates that it is within the power of the Legislature to provide for the

removal of TSET's Board members in whatever manner the Legislature sees fit.

Petitioner's arguments to the contrary are unavailing. As a preliminary matter, Petitioner fails to identify any constitutional language that could reasonably be construed to limit the removal of TSET's Board members. Certainly, under *Bynum*, the mere fact that the Constitution provides that Board members "shall serve seven-year terms" does not render them nonremovable prior to the expiration of their term.

Further, Petitioner's argument is largely self-defeating. Petitioner asserts that, because the Constitution says that Board members "shall serve seven-year terms," the Legislature is prohibited from allowing Respondents to remove Board members prior to the expiration of their seven-year terms. Pet. Br. at 7. Yet, Petitioner concedes that members of TSET's Board may be removed prior to the expiration of their terms if they are convicted of a felony under 51 O.S. § 24.1. *Id.* at 8. Assuming *arguendo* that the phrase "shall serve seven-year terms" prohibits the Legislature from promulgating a statute that allows the removal of Board members prior to the expiration of their terms, Petitioner fails to explain how that prohibition would not also preclude the removal of a Board member who is convicted of a felony during his or her term. Logic would dictate that either both provisions are constitutional or both provisions are unconstitutional. This Court should not allow Petitioner to arbitrarily pick and choose which statutory removal provisions apply to its Board. Put differently, if this Court were to rule for Petitioner here, it would invariably lead to 51 O.S. § 24.1 being declared unconstitutional, as well. Logic would win out, in the end, regardless of whether Petitioner disavows that conclusion now.

Finally, Petitioner's arguments fail because Petitioner's interpretation of the Constitution would lead to absurd results. Set aside the logical inconsistencies inherent in Petitioner's argument and suppose that the Constitution prohibits the removal of Board members under any statutory provision other than 51 O.S. § 24.1. In that scenario, TSET's Board members are immune from

22 O.S. § 1181, leaving them free to engage in—without any possibility of removal—willful neglect of duty, gross partiality, oppression, corruption, extortion, willful maladministration, and habitual drunkenness while in office. And that is not the end of the absurdities in the world Petitioner creates. Indeed, in this scenario, TSET Board members could even refuse to account for public funds received by their office. *See* 22 O.S. § 1181 (listing causes for removal of officers). Under Petitioner's argument, unless and until those acts result in a felony conviction, TSET's Board members—unelected officials—are not removable from office by the elected officials that appointed them merely because the Constitution says Board members "shall serve seven-year terms of office." Obviously, that was not the intent of the people of Oklahoma when they enacted the relevant provisions of the Constitution.[3]

The Constitution provides that the members of TSET's Board are appointed by Respondents to "serve seven-year terms of office." OKLA. CONST. art. X, § 40. But the Constitution is silent regarding the removal of Board members. And where the Constitution is silent, the Legislature is empowered to act as it sees fit. Therefore, because the Constitution does not prohibit the Legislature from allowing the members of the Board to be removed at will by their respective appointing authorities, HB 2783 is within the Legislature's power and the Court should deny Petitioner relief on the merits.

III. THE CONSTITUTION NO LONGER REQUIRES TSET'S BOARD MEMBERS TO SERVE STAGGERED TERMS.

Petitioner also argues that HB 2783 is unconstitutional because it does not require Board members to serve staggered terms. That argument is unsupported by the relevant constitutional

[3] It is also worth noting that Petitioner's hyper-literalist reading of "shall serve seven-year terms of office" would seemingly create problems upon a Board member's resignation or death while in office. If "shall" always means shall and "seven" must always mean exactly seven (and no less), then it would seem that even the quitting or perishing of a Board member would not allow a replacement until their seven-year term is up.

language. The Constitution required that the "initial appointed members" to the Board "shall serve staggered terms of office as provided for by law." OKLA. CONST. art. X, § 40(D). The very next sentence of that section provides, "[t]hereafter, the appointed members of the Board of Directors shall serve seven-year terms of office." *Id.* Although Petitioner contends that there are sound policy justifications for requiring the Board to remain staggered beyond the "initial appointees," such policy arguments cannot overcome the plain language of the Constitution requiring only the "initial appointees" to serve staggered terms. Any other ruling would render the word "initial" completely superfluous. *See State ex rel. Ogden v. Hunt*, 1955 OK 125, ¶ 8, 286 P.2d 1088, 1091 ("Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.").

Because the Constitution requires only the "initial appointees" to serve staggered terms of office, HB 2783 is constitutionally sound.

CONCLUSION

For the reasons set forth herein, the Court should deny Petitioner's relief and uphold HB 2783.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of July, 2025, a true and correct copy of the foregoing Response was mailed, postage prepaid to the following:

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