

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JAMES P. NAIFEH, STANDARD  
DISTRIBUTING COMPANY, BRIAN  
HUTCHINSON, HUTCHINSON OIL  
COMPANY, LLC, PHILIP MORRIS USA  
INC., R. J. REYNOLDS TOBACCO CO.,  
ROGERS OIL CO., INC., COREY L.  
COOPER, STEPHENSON WHOLESALE  
COMPANY, INC.,

Petitioners,

v.

STATE OF OKLAHOMA *ex rel.*  
OKLAHOMA TAX COMMISSION,  
THE HONORABLE MARY FALLIN,  
GOVERNOR, in her official capacity,  
THE HONORABLE SENATOR MIKE  
SCHULTZ, SENATE PRESIDENT  
PRO TEMPORE, in his official capacity,  
THE HONORABLE REPRESENTATIVE  
CHARLES MCCALL, SPEAKER OF  
THE HOUSE, in his official capacity,  
Respondents.

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

JUL 21 2017

MICHAEL S. RICHIE  
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No. PR-116102

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**BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' APPLICATION TO  
ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY  
RELIEF AND WRITS OF PROHIBITION AND/OR MANDAMUS**

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JULY 21, 2017

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## INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (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 \$2.17 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 leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM brings an important perspective to the legal issues raised by Petitioners. Certain industries make easy targets for onerous taxes passed at the last minute to balance the State's budget. Article V, Section 33 ensures that such taxes are not rushed through by bare majorities at the end of a legislative session. Because the NAM's members are subject to taxes in general and to the unlawful tax imposed by SB 845, Laws 2017, ch. 369 (sb 845), § 8, eff. Aug. 25, 2017 ("SB 845"), in particular, they have a profound interest in ensuring that the requirements of Article V, Section 33 are respected.

## SUMMARY OF ARGUMENT

There are over 3,000 manufacturing firms in Oklahoma, accounting for almost 10% of the total output of the State. *See* Ctr. for Mfg. Research, *Oklahoma Manufacturing Facts* (rev. Mar. 2017).<sup>1</sup> Manufacturers employ about 8% of the State's workforce, representing 127,000 jobs. *See id.* Manufacturers across the nation also sell goods in Oklahoma, further contributing to the State's economy by creating additional jobs in the wholesale and retail sectors.

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<sup>1</sup> Available at <http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/State-Manufacturing-Data/April-2017/Manufacturing-Facts---Oklahoma>.

Manufacturing flourishes in Oklahoma in part because of provisions like Article V, Section 33 of the Oklahoma Constitution. Article V, Section 33 prohibits the adoption of new taxes in the last five days of the legislative session, without the support of three-quarters of the Legislature or a majority of Oklahomans. That provision ensures that certain industries will not be targeted for burdensome tax increases just so the Legislature can balance the State's budget at the eleventh hour.

In this case, the Legislature passed SB 845 by bare majorities in the waning hours of a legislative session, with the principal objective of raising enough revenue to fund state expenditures for the next fiscal year. Article V, Section 33 forbids such measures. Bills such as SB 845, which single out certain industries for massive taxes in contravention of constitutional constraints, are a significant concern to the NAM's members and manufacturers across the country. This Court should not permit Oklahoma to bypass the dictates of its own Constitution.

## ARGUMENT

### I. SB 845 Is An Unconstitutional Revenue Bill

Article V, Section 33 of the Oklahoma Constitution requires revenue bills to originate in the House of Representatives, be passed before the last five days of the legislative session, and be approved by three-quarters of the Legislature or a majority of voters. Okla. Const. art. V, § 33. Under this Court's precedent, a bill is a "revenue bill" if it possesses two attributes. First, the "principal object" of the bill is to raise revenue. *Leveridge v. Okla. Tax Comm'n*, 1956 OK 77, ¶ 8, 294 P.2d 809, 811 (quoting *Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002, 1006). Second, the bill levies taxes "in the strict sense of the word," rather than creates revenue "incidentally." *Id.* (internal quotation marks omitted). SB 845 meets both criteria.

### A. The Principal Object Of SB 845 Is To Raise Revenue

According to Respondents, SB 845 is not a revenue bill because it serves a regulatory purpose by discouraging smoking. *See* Resps. Br. 18-20. That misses the point. The question in this case is not whether SB 845 serves a regulatory purpose, but whether that is its *principal* purpose. Even if SB 845 had the effect of discouraging smoking, its principal object is plainly something else: to raise an enormous amount of revenue—\$257 million *per year*. Tellingly, 99% of that amount is not dedicated to smoking cessation at all, but is rather earmarked to pay for part of the State’s general healthcare budget.

To determine the principal object of a bill, both text and context matter. The name of the bill—and the Legislature’s stated objective in passing it—are not determinative. As this Court has explained, “a court’s constitutional analysis must be based upon what the legislation *actually accomplishes* by that which is created by the statute, and not by what a legislature states it is accomplishing.” *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 21, 373 P.3d 1057, 1068 (emphasis in original); *see also Olustee Coop. Ass’n v. Okla. Wheat Utilization Research & Mkt. Dev. Comm’n*, 1964 OK 81, ¶ 9, 391 P.2d 216, 218 (“The question whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature, and, if it is in its nature a tax, it is not material that it may be called by a different name.” (internal quotation marks omitted)).

In *Holland v. Oklahoma*, for example, this Court examined whether an “access payment” imposed on health carriers was an unconstitutional tax. *See* 2010 OK 60, 240 P.3d 665. The exaction at issue in *Holland* was described as a “payment” rather than a tax, HB 2437 § 4(E), 2010 Leg., 52d Sess. (Okla. 2010) (enrolled May 24, 2010), and was adopted as part of Oklahoma’s scheme for regulating both health carriers and its Medicaid program. This Court, however, concluded that it was in fact an unconstitutional tax. *Holland*, 2010 OK 60, ¶ 1, 240 P.3d 665.



The Court should reach the same conclusion here. The plain text of SB 845 demonstrates that the principal object of the bill is to raise revenue. By its terms, Section 7 of SB 845 imposes a \$1.50 “fee” per pack of cigarettes—a classic excise tax projected to generate an amount of revenue equal to almost 4% of the *entire* annual budget of the State of Oklahoma. See SB 845 §7(B); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 23 & n.3 (1990) (describing a similar exaction imposed on wholesalers based on the volume of alcoholic beverages sold as an “excise tax”).<sup>2</sup> Not surprisingly, then, the cigarette “fee” here is collected by the Oklahoma Tax Commission, and it is treated as a cigarette tax for purposes of Oklahoma’s state-tribal compacts. SB 845 §§ 2, 7.

Moreover, apart from a \$1 million set-aside, SB 845 does not earmark any revenue for smoking cessation. Instead, Section 8 creates a “Health Care Enhancement Fund” for use “at the *discretion* of the Legislature for the purpose of enhancing the health of Oklahomans.” SB 845 § 8 (emphasis added). In other words, the cigarette “fee” adds \$256 million to the State’s general revenues, which the Legislature may use to pay for general healthcare expenditures.

Indeed, the “fee” imposed by SB 845 is wholly out of proportion to the expense of regulating cigarette wholesalers—which bear the burden of the “fee.” It is also far out of proportion to the cost of regulating the bill’s requirements to post no-smoking signs in public places and develop strategies for decreasing tobacco use. See, e.g., SB 845 §§ 3-4. Under this Court’s precedent, these facts make the cigarette “fee” a tax. As this Court has explained, a fee is a “regulatory enactment under the police power serving the purpose of protection of the public.” *Red Slipper Club, Inc. v. City of Oklahoma City*, 1979 OK 118, ¶ 5, 599 P.2d 406, 408. It should not exceed the expense of issuing a license or regulating the business on which the fee is

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<sup>2</sup> The 2018 budget for Oklahoma is \$6.8 billion. See Okla. Policy Inst., *FY 2018 Budget Highlights* (June 8, 2017), available at <http://okpolicy.org/fy-2018-budget-highlights>.

imposed. *See id.* Thus, this Court has upheld a court docketing fee on the ground that the fee was not “unreasonable in amount” and was “less than the amount appropriated to pay the salaries of the justices, commissioners, marshal, and other expenses of maintaining the court.” *In re Lee*, 1917 OK 458, ¶ 21, 168 P. 53, 56. But where, as here, a “fee” is “wholly out of proportion to the expenses involved, it will be declared a tax.” *Red Slipper Club*, 1979 OK 118, ¶ 6, 599 P.2d at 409.

Under the plain text of SB 845, then, the cigarette “fee” operates like an excise tax, is collected like an excise tax, is used like an excise tax to fund general expenditures (namely, general healthcare expenditures), and is treated like an excise tax for purposes of the State’s compact obligations with Indian tribes. It is difficult to imagine a clearer example of a revenue bill.

“Words used in a part of a statute,” moreover, “must be interpreted in light of their context.” *Matter of Estate of Little Bear*, 1995 OK 134, ¶ 22, 909 P.2d 42, 50. A statute should not be read standing alone, but “in light of the law in effect at the time of its enactment.” *Head v. McCracken*, 2004 OK 84, ¶ 14, 102 P.3d 670, 680 (internal quotation marks omitted); *see also Hogg v. Oklahoma County Juvenile Bureau*, 2012 OK 107, ¶ 7, 292 P.3d 29, 33 (“This Court will further reconcile different provisions of legislative acts to give intelligent effect to each and render them harmonious and consistent where possible.”).

Here, context suggests that SB 845 was a last-ditch attempt to prevent a budget shortfall prohibited by the Oklahoma Constitution. Article X, Section 23 of the Oklahoma Constitution requires the Legislature to balance the budget each year. Prior to adopting SB 845, the Legislature had failed to comply with that constitutional requirement. So the Legislature passed SB 845 on the last day of the legislative session, plugging a \$200 million gap in the state budget. Had the Legislature failed to pass SB 845, the state budget would presumably have been

unbalanced, in violation of the Oklahoma Constitution. SB 845's purpose should thus be understood in light of Oklahoma's balanced budget requirement. *See Oklahoma v. Robertson*, 2006 OK 99, ¶ 7, 152 P.3d 875, 878 (“[W]e do not limit our consideration to a single word or phrase. Instead, we construe together the various provisions of relevant enactments, in light of their underlying general purpose and objective, to ascertain legislative intent.”). Context confirms what the text alone establishes: The principal object of SB 845 is to raise revenue.

**B. SB 845 Raises Taxes In The Strict Sense And The Revenue It Creates Is Not Merely Incidental**

SB 845 also possesses the second attribute of a revenue bill. The cigarette “fee” is a tax in the strict sense: It is a classic excise tax imposed on a unit of goods. In *Olustee*, this Court described a tax as “a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment . . . to provide public revenue for the support of the government.” 1964 OK 81, ¶ 8, 391 P.2d at 218 (internal quotation marks omitted). It accordingly concluded that a per-bushel fee imposed on wheat growers was a tax. *See id.* ¶ 10. In *Ex parte Fuller*, this Court similarly concluded that a \$10 licensing “fee” imposed on vending machines was “a revenue measure; its purpose was the raising of revenue and not that of regulation, and, since it was enacted within five days of the close of the legislative session, falls clearly within the inhibition of section 33, art. 5, of the Constitution, and is invalid.” 1925 OK CR 422, 238 P. 512, 513. Here, the cigarette “fee” is a forced burden assessed against wholesalers on a per-pack basis, providing revenue to support the Government. It too is a tax.

Revenue raised by SB 845, moreover, is in no sense “incidental.” Even if *one* of SB 845's objectives is to decrease smoking, its *principal* objective is to raise revenue to bring the State in compliance with the Oklahoma Constitution's balanced budget provision. After all, the cigarette “fee” is projected to generate revenue approaching 4% of the annual budget of Oklahoma—an amount reflecting the size of the State's budget shortfall, not the costs of smoking on the State's

healthcare system. Indeed, SB 845 nowhere discusses the costs of smoking or indicates that the objective of the bill is to recover those costs. *See* SB 845 §§ 1-9.

The cigarette “fee” is thus very different from cases such as *Ex parte Tindall*, where this Court held that a mileage tax on commercial carriers was not a revenue bill because the tax was tied to a particular regulatory purpose: to pay “for the maintenance of the public highways.” 1924 OK 669, 229 P. 125, 130. The purpose of the mileage tax was to regulate “a growing effort, on the part of certain enterprises, to appropriate the public highways to their own free use as a ‘transportation roadbed’ for hire and profit, to the inconvenience and detriment of the public.” *Ex parte Sales*, 1924 OK 668, 233 P. 186, 187 (describing mileage tax at issue in *Tindall*). Here, in contrast, SB 845 gives the Legislature “discretion” to use the revenue generated by the cigarette “fee” as it chooses, rather than linking the “fee” to smoking-related health expenditures. SB 845 § 8. SB 845 is thus a revenue bill, not a regulatory measure.

## II. This Court Should Not Permit The Legislature To Sidestep Article V, Section 33

If the Oklahoma Legislature were permitted to pass the single largest revenue bill of the 2017 session *without* complying with the requirements of Article V, Section 33, then those requirements would be meaningless. All taxes could be said to discourage behavior by making it more costly to engage in. If that were enough to turn a tax into a regulatory measure, then the requirements of Article V, Section 33 would have no application at all: *Any* revenue bill could be exempted from those requirements, simply by characterizing it as a regulatory measure. Discouraging consumption of any product may be consistent with *some* regulatory purpose, but that alone is not enough to convert a revenue bill into a regulatory measure.

Nor should the Legislature be permitted to bypass Article V, Section 33 simply by tacking on regulatory provisions to a revenue bill, as the Legislature did here. Such provisions do not automatically change the character of a bill for purposes of Article V, Section 33. If they

did, the Legislature could have simply added a couple of health insurance regulations to the bill imposing the health carrier “access payment” at issue in *Holland*, and voilà: A revenue-raising provision subject to Article V, Section 33 would have been transformed into a regulatory bill exempt from Article V, Section 33’s strictures. Such legislative sleight of hand is contrary to the requirements of the Oklahoma Constitution—particularly in this case, where the vast majority of the regulatory provisions included in SB 845 replicate existing Oklahoma laws, and where none applies to the wholesalers actually burdened with remitting the cigarette “fee.” *See* Petrs. Br. 11-12. Permitting the Legislature to avoid the requirements of Article V, Section 33 is particularly harmful to manufacturers, which are often easy targets of end-of-session taxes designed to meet budget shortfalls.

As explained above, to ensure that the requirements of Article V, Section 33 are respected, this Court has been clear it will look beyond what the Legislature stated it was accomplishing with SB 845, and instead examine what the legislation has actually done. *Torres, supra*. Further, this Court has been clear it will look beyond what might be *an* object of the legislation to what is the “*principal* object.” *Leveridge, supra*. It would violate both “the spirit and the letter” of Article V, Section 33 to permit the Legislature to rebrand a bill such as SB 845—which raises a tremendous amount of revenue, and which was passed to comply with the balanced budget requirements of the Oklahoma Constitution—as a regulatory measure. *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 3, 142 P.3d 400, 403.

### **III. Article V, Section 33 Protects Manufacturers From Revenue Bills That Lack Popular Support**

Revenue bills should be adopted in a manner that “more directly represents the opinions, feelings, and wishes of the people” than other kinds of legislation. *Anderson*, 1908 OK 250, 98 P. at 1005 (quoting Justice Story). Article V, Section 33 reflects that principle by requiring revenue bills to originate in the House of Representatives, which more directly represents the

citizens of Oklahoma; by requiring those bills to be passed prior to the last five days of the legislative session, permitting time for fair and open debate about the wisdom of such measures; and by requiring revenue bills to be adopted by a supermajority of the Legislature or a majority of the people, ensuring broad support for new taxes.

All three of those requirements protect manufacturers. This case is not the only example of a last-ditch effort to cover state budget expenditures by imposing a tax on a particular industry. At the end of the 2010 session, the Legislature imposed a new “access payment” on health carriers to make up for budget shortfalls caused by Medicaid expenditures; this Court later invalidated the “access payment” as an unconstitutional tax. *See* HB 2437; *Holland*, 2010 OK 60, 240 P.3d 665. And at the end of the 2017 session, the Legislature passed not just the cigarette “fee,” but also a new sales tax on motor vehicles. *See* HB 2433 § 2, 2017 Leg., 56th Sess. (Okla. 2017) (enrolled May 26, 2017). All of these measures were adopted within the last five days of the legislative session by bare majorities of the Legislature. And SB 845 is further flawed because it did not originate in the House.

Article V, Section 33 protects Oklahoma businesses from being singled out in precisely these sorts of measures—new taxes concocted at the end of a legislative session, without adequate time for debate, and without sufficient support from Oklahoma’s legislators or citizens. This Court should uphold the protections of Article V, Section 33, and bar enforcement of SB 845.

### CONCLUSION

Because SB 845 is a revenue bill that taxes a specific product in order to raise money to fund the State’s general expenditures, the Legislature was obliged to comply with Article V, Section 33 of the Oklahoma Constitution. The Legislature failed to do so, and this Court should declare SB 845 unconstitutional.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2017, I mailed through deposit in the U.S. Postal Service a true and correct copy of the foregoing Entry of Appearance, with sufficient postage prepaid thereon, to:

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