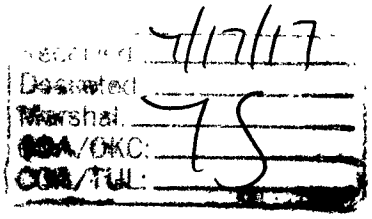
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA AUTOMOBILE DEALERS ASSOCIATION, an Oklahoma corporation, L and J ACQUISITIONS, LLC D/B/A BATTISON HONDA, and CAITLIN CANNON, an Individual,	)	FILED SUPREME COURT STATE OF OKLAHOMA JUL 17 2017
Petitioners,	)	CLERK
v.	)	Case No. 116,143
STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,	)	
Respondent.	)	



RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS and TABLE OF AUTHORITIES

INTRODUCTION

For over a hundred years, this Court has held that a bill that eliminates an existing tax exemption is not a "revenue bill" subject to the procedural requirements of Article V, § 33 of the Constitution. The challenged bill (H.B. 2433) does just that. Sales of motor vehicles were exempt from the State's 4.5% sales tax, but were subject to a 3.25% excise tax. H.B. 2433 would partially roll back the sales tax exemption such that a 1.25% sales tax would apply to motor vehicle sales. Coupled with the 3.25% excise tax, the resulting total tax rate for the sale of motor vehicles is 4.5%—the same rate at which sales of most other personal property are taxed. Thus, the effect of H.B. 2433 is "that certain property theretofore exempt from taxation shall thereafter be subject to taxation."[1] Under this Court's precedent "[s]uch amendments do not constitute a revenue bill."[2] The Legislature relied on this precedent in determining that H.B. 2433 is not subject to Article V, § 33. Having failed to carry their "heavy burden"[3] of proving that H.B. 2433 is "clearly, palpably, and plainly inconsistent with the Constitution"[4] and "fraught with constitutional infirmities beyond a reasonable doubt,"[5] Petitioners' request for relief must be denied.

The Court, however, need not reach the merits of this case because the Petition suffers from a second fatal defect: Petitioners ask only for a writ of prohibition, but that relief is available only against entities exercising judicial or quasi-judicial authority. There is no allegation that Respondent Oklahoma Tax Commission has exercised quasi-judicial authority over Petitioners in enforcing the challenged bill—rather, they seek to restrain what is quintessentially an executive function. Thus, for this second independent reason, the Petition must be denied.

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[1] *Cornelius v. State*, 1914 OK 222, ¶ 9, 140 P. 1187, 1189.
[2] *Leveridge v. Oklahoma Tax Comm'n*, 1956 OK 77, ¶ 13, 294 P.2d 809, 812.
[3] *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204.
[4] *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188.
[5] *Calvey v. Daxon*, 2000 OK 17, ¶ 24, 997 P.2d 164, 172 (citations and internal marks omitted).

BACKGROUND

Oklahoma imposes a tax of 4.5% "upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code ... of each sale of ... [t]angible personal property."[6] The Oklahoma Sales Tax Code provides for several exemptions from the state sales tax.[7] One such exemption is found in Section 1355(2) of Title 68 which, prior to the enactment of H.B. 2433, fully exempted sales of motor vehicles from the state sales tax.[8]

H.B. 2433 modified this provision, such that it now provides that "[f]or the sale of motor vehicles or any optional equipment or accessories attached to motor vehicles on which the Oklahoma Motor Vehicle Excise Tax levied in Section 2101 et seq. of this title has been, or will be paid, all but a portion of the levy provided under Section 1354 of this title, equal to one and twenty-five-hundredths percent (1.25%) of the gross receipts of such sales" will be exempt.[9] The Motor Vehicle Excise Tax referenced in Section 1355(2) imposes a tax of 3.25% upon all sales of new vehicles.[10] Thus, under H.B. 2433, the cumulative sales and excise tax rate for new vehicles is 4.5%—the same rate at which the State taxes sales of most other tangible personal property.[11]

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[6] 68 O.S.2011 § 1354(A)(1). The Oklahoma Sales Tax Code is found at 68 O.S. §§ 1350 et seq.
[7] *See, e.g.*, 68 O.S.2011 § 1355.
[8] 68 O.S.2011 § 1355(2).
[9] Pet. App'x Tab 7, § 1. H.B. 2433 also provides that the sale of motor vehicles is not subject to any county or municipal sales tax. *Id.*
[10] 68 O.S.2011 § 2103(A)(1).
[11] A general state sales tax was first enacted in 1933 at rate of 1%. 1933 Okla. Sess. Laws Ch. 196. The vehicle excise tax was first enacted in 1935, also at a rate of 1%, specifying that it was in lieu of all other taxes due during the same year the excise tax is due. *See* 1935 Okla. Sess. Laws Ch. 66, Arts. 7 & 12. An explicit full exemption from the general sales tax for vehicle sales was enacted in 1937; that same year, both the sales tax and excise tax rate were raised to 2%. *See* 1937 Okla. Sess. Laws Ch. 50, Art. 8 & Ch. 66, Art. 10. Both taxes were modified over the years in various ways, and they both increased to 3.25% in 1985. *See* 1985 Okla. Sess. Laws Ch. 179, §§ 86 & 90. Since that time, the vehicle excise tax has remained the same, but the general sales tax was increased to 4% in 1987 and 4.5% in 1989. *See* 1987 Okla. Sess. Laws Ch. 113, § 16; 1989 Okla. Sess. Laws, 1st Ex. Sess. Ch. 2, § 101. Meanwhile, the full exemption of vehicle sales from the general sales tax has remained since 1937, until the enactment of H.B. 2433.

STANDARD OF REVIEW

In conducting a constitutional analysis, courts "indulge every possible presumption that an act of the Legislature was constitutional."[12] A law will be deemed unconstitutional only if it "is clearly, palpably, and plainly inconsistent with the Constitution."[13] Specifically in the context of Article V, § 33, this Court has emphasized: "If there are two possible interpretations—one of which would hold the legislation unconstitutional, the construction must be applied which renders them constitutional. Unless a law is shown to be fraught with constitutional infirmities beyond a reasonable doubt, this Court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision."[14]

ARGUMENT

I. Because Petitioners do not seek to restrain the exercise of judicial or quasi-judicial authority, they cannot demonstrate entitlement to the writ of prohibition.

Petitioners ask this Court to issue the extraordinary writ of prohibition but never address, much less prove, the elements that must be shown for such a writ to issue. "Before a writ of prohibition may issue, a petitioner 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."[15] Petitioners cannot meet the first element required for prohibition because their suit against the Oklahoma Tax Commission ("OTC") seeks to restrain executive power, not judicial or quasi-

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[12] *Adwon v. Okla. Retail Grocers Ass'n*, 1951 OK 43, ¶ 11, 228 P.2d 376, 379.
[13] *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188-89.
[14] *Calvey v. Daxon*, 2000 OK 17, ¶ 24, 997 P.2d 164, 172 (citations and internal marks omitted).
[15] *Maree v. Neuwirth*, 2016 OK 62, ¶ 6, 374 P.3d 750, 752 (citing *Baby F. v. Oklahoma County Dist. Court*, 2015 OK 24, ¶ 8, 348 P.3d 1080; *James v. Rogers*, 1987 OK 20, ¶ 5, 734 P.2d 1298).

judicial power. "The failure to establish any of these three elements is said to be fatal to the petition for a writ of prohibition."[16]

This Court confines the use of the writ of prohibition "to the prevention of usurpation or excess of jurisdiction by courts and bodies possessing, for certain purposes and in certain instances, quasi judicial powers."[17] The exercise of "'quasi-judicial' power, within the meaning of [the writ of prohibition], includes the power to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature."[18] While OTC does at times exercise quasi-judicial power, not all actions of OTC are quasi-judicial in nature.[19] Here, OTC is not engaged in any fact-finding proceeding, nor is there any question about the application of the challenged bill to Petitioners that requires the weighing of evidence. Nor do Petitioners request that OTC be forbidden from exercising judicial discretion. Rather, Petitioners simply ask that OTC be restrained from enforcing the provisions of H.B. 2433 at all in any factual circumstance, which OTC has a duty (not discretion) to enforce.[20] That is, they seek to restrain classic executive power, not quasi-judicial power.[21] "The writ of prohibition will not lie to an executive ... board to control or regulate it in the performance of a[n] ... executive function."[22]

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[16] Harvey D. Ellis & Clyde A. Muchmore, 6 Okla. Appellate Prac. § 22:51 (2016) (citing *James*, 1987 OK 20, 734 P.2d at 1299; *Umholtz v. City of Tulsa*, 1977 OK 98, n. 1, 565 P.2d 15, 18 n. 1).

[17] *State v. Vaughn*, 1912 OK 533, ¶ 2, 125 P. 899, 900; *see also Wilson & Co. v. Oklahoma Gas & Elec. Co.*, 1942 OK 152, ¶ 31, 126 P.2d 1009, 1014.

[18] Ellis & Muchmore, *supra*, at § 22:51 (citing *Umholtz*, 1977 OK 98, ¶ 9, 565 P.2d at 18); *see also Jackson v. ISD No. 16 of Payne County*, 1982 OK 74, ¶ 12 n.20, 648 P.2d 26, 31 n.20; *Green v. Bd. of Comm'rs of Lincoln Cty.*, 1927 OK 217, ¶ 13, 259 P. 635, 637.

[19] *See State ex rel. Oklahoma Tax Comm'n v. Fugatt*, 1937 OK 415, ¶¶ 6-9, 70 P.2d 472, 473-74.

[20] *See* Pet. Appl., p. 5 (asking the Court "to issue its writ of prohibition barring the OTC from ***enforcing*** H.B. 2433 and imposing a 1.25% sales tax on the purchase of motor vehicles" (emphasis added)).

[21] *See, e.g., Tweedy v. Oklahoma Bar Ass'n*, 1981 OK 12, ¶ 9, 624 P.2d 1049, 1054 (the power to execute law or appoint those charged with "the duty of enforcement" is "a purely executive function").

[22] *Jamieson v. State Bd. of Med. Examiners*, 1913 OK 202, ¶ 7, 130 P. 923, 924.

Out of many hundreds of decisions regarding the writ of prohibition,[23] Petitioner is able to cite only one case where this Court appears to have specifically issued the writ of prohibition regarding a non-judicial exercise of authority.[24] But that case does not explain why the writ was appropriate, nor did it fashion a legal rule creating an exception to the first element of prohibition. Courts generally accord such "drive-by jurisdictional rulings ... no precedential effect,"[25] having not been "raised in briefs or argument nor discussed in the opinion of the Court."[26] The "Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."[27] Accordingly, this Court's precedent demands that the only requested relief in this case—a writ of prohibition—be denied because Petitioners do not seek to restrain the exercise of judicial or quasi-judicial authority.

II. H.B. 2433 does not "levy taxes in the strict sense of the word" because the elimination or reduction of a tax exemption does not amount to a levy of taxes.

Petitioners' sole argument is that H.B. 2433 is invalid because it was not passed pursuant to the procedures specified under Article V, § 33 of the Oklahoma Constitution. This constitutional provision applies only to "bills for raising revenue."[28] This Court has consistently taken a narrow view of what constitutes a "revenue bill,"[29] and has consistently declined to apply

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[23] *See* Ellis & Muchmore, *supra*, at § 22:59 (non-exhaustive list of dozens of decisions regarding the writ of prohibition, all relating to exercise of judicial authority).

[24] Pet. Appl. 5, ¶ 11 (citing *Oklahoma Wildlife Fed'n, Inc. v. Nigh*, 1972 OK 144, 513 P.2d 310).

[25] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

[26] *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

[27] *Id.*; *see also Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 13, 158 P.3d 1058, 1064; *Davis v. Davis*, 1985 OK 85, ¶ 19 & n.40; 708 P.2d 1102, 1110 & n.40.

[28] OKLA. CONST. art. V, § 33.

[29] *See* Resp. App'x, Tab 1, Ramsey, *What is a 'Revenue Bill'* at 1568, 1574 (noting that this Court has given a "a very narrow definition of the term 'revenue bill'" and has been "particularly deferential" and "often gone to great effort to find an act of the Legislature to be constitutional"); *accord* 1 SUTHERLAND, STATUTORY CONSTRUCTION § 9:6 (7th ed.) ("The general tendency favors narrow construction of what constitutes a revenue bill...[and] [a]lthough the U.S. Supreme Court has not passed directly upon the revenue bill provision, it has indicated a preference to restrict the provision to the narrowest possible terms.").

Article V, § 33 to invalidate legislation.[30] Since the year after statehood, this Court has interpreted "bills for raising revenue" for the purposes of Article V, § 33 as "(1) those laws whose principal object is the raising of revenue" and (2) "which levy taxes in the strict sense of the word."[31] As demonstrated below, this Court has held that bills that eliminate tax exemptions do not meet this second element, even if they have the object and effect of raising revenue. Because H.B. 2433 does not "levy taxes in the strict sense of the word," it was not subject to the procedural requirements of Article V, § 33.

This Court first articulated this principle over a hundred years ago in *Cornelius v. State*, where it addressed a mortgage "registration tax" of fifty cents for every $100 secured by that mortgage.[32] Unlike other forms of property, mortgages were exempt from ad valorem taxation, so the challenged bill subjected mortgages to a separate tax. Quoting another court, this Court stated "it is not sufficiently clear that a law, which merely declares that certain property theretofore exempt from taxation shall thereafter be subject to taxation, is strictly a law for raising revenue."[33] Thus, because the bill merely provided that "when revenue is to be raised mortgages shall contribute thereto as land," the Court found "no merit in the contention that the act is a revenue

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[30] *See, e.g.*, *Ali v. Fallin*, 2017 OK 39; *Fent v. Fallin*, 2014 OK 105, 345 P.3d 1113; *Calvey*, 2000 OK 17, 997 P.2d 164; *Fent v. Okla. Capitol Improvement Auth.*, 1999 OK 64, 984 P.2d 200; *Leveridge v. Okla. Tax Comm'n*, 1956 OK 77, 294 P.2d 809; *Pure Oil Co. v. Okla. Tax Comm'n*, 1936 OK 516, 66 P.2d 1097; *Thompson v. Huston*, 1935 OK 17, 39 P.2d 524; *Meek v. State*, 1933 OK CR 30, 22 P.2d 933; *Wallace v. Gassaway*, 1931 OK 210, 298 P. 867; *Jones v. Blaine*, 1931 OK 17, 300 P. 369; *Fullerton v. State*, 1929 OK 475, 282 P. 674; *In re Protest of Chicago, R. I. & P. Ry. Co.*, 1929 OK 263, 279 P. 319; *Ex parte Tindall*, 1924 OK 669, 229 P. 125; *Ex parte Sales*, 1924 OK 668, 233 P. 186; *Ryan v. State*, 1924 OK 662, 228 P. 521; *Dickey v. State ex rel. City of Tulsa*, 1923 OK 414, 217 P. 145; *Lusk v. Ryan*, 1918 OK 94, 171 P. 323; *In re Lee*, 1917 OK 458, 168 P. 53; *Trustees', Executors' & Secs. Ins. Corp. v. Hooton*, 1915 OK 1059, 157 P. 293; *Johnson v. Grady Cnty.*, 1915 OK 459, 150 P. 497.

[31] *Calvey*, 2000 OK 17, ¶¶ 10, 14, 997 P.2d at 168, 170. Under this definition, "laws under which revenue may incidentally arise are not 'revenue bills' or 'bills for raising revenue' within the meaning of art. 5, § 33." *Id.*

[32] *Cornelius v. State*, 1914 OK 222, ¶ 5, 140 P. 1187, 1188.

[33] *Id.* at ¶ 9, 140 P. at 1189

bill."[34] The Court later reaffirmed that the legislation imposing this mortgage "tax" was not a revenue bill.[35]

The Court most directly addressed tax exemptions in *Leveridge v. Oklahoma Tax Commission*, where a car dealer challenged a bill that removed an excise tax exemption applicable to certain cars, alleging that the bill did not comply with the requirements of Article V, § 33.[36] Even though car dealers would have to pay greater taxes as a result of the bill, this Court held that the bill "does not within its four corners levy a tax and for said reason is not per se a revenue bill."[37] Citing the *Cornelius* case discussed above, the Court held that "at most" the bill "merely declare[s] that certain property ... theretofore exempt from taxation (the motor vehicle excise tax) shall thereafter be subject to taxation. Such amendments do not constitute a revenue bill."[38] Far from levying a new tax, the bill at issue in *Leveridge* removed an exemption from a tax that already existed—just like the bill at issue in this case.

Contrary to Petitioner's attempts to distinguish *Leveridge*, the Court's decision did not turn on the supposed intent of the bill being solely to correct an "unintended loophole" in tax treatment, nor was the Court's decision based on the fact that the bill was not for "the avowed purpose of raising revenue sufficient to plug a multi-million dollar budget shortfall."[39] These were simply not considerations relied upon by the Court in deciding *Leveridge*. Rather, the Court's decision was premised on the fact that the bill did not "levy a tax" (the second element of the Article V, § 33 analysis) because it "merely declare[d] that certain property ... theretofore exempt

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[34] *Id.* at ¶¶ 10-11, 140 P. at 1189.
[35] *Trustees', Executors' & Secs. Ins. Corp. v. Hooton, LRA*, 1915 OK 1059, ¶¶ 24-26, 157 P. 293, 294, 298.
[36] *Leveridge v. Oklahoma Tax Comm'n*, 1956 OK 77, ¶¶ 5-7, 294 P.2d 809, 811.
[37] *Id.* at ¶ 12, 294 P.2d at 811.
[38] *Id.* at ¶ 13, 294 P.2d at 812.
[39] Pet. Br. 11-12.

from taxation ... shall thereafter be subject to taxation."[40] Precisely the same is true here. Before H.B. 2433, sales of motor vehicles were at least partially exempt from taxes, while sales of other personal property were subject to a 4.5% tax. Now, the sales of motor vehicles are subject to taxes totaling 4.5%, just like sales of most other personal property. Accordingly, Article V, § 33 does not apply to the challenged bill.

The Court's cases holding that the reduction or removal of a tax exemption does not "levy taxes in the strict sense of the word" is justified by two sound legal principles.

First, the elimination or reduction of a tax exemption does not "levy" a tax due to the fact that tax exemptions, like tax credits, are a form of government spending known as a "tax expenditure."[41] As consistently recognized by scholars and the U.S. Supreme Court, when a tax exemption is granted, the State is engaging in spending or expenditures.[42] Tax exemptions have "much the same effect as a cash grant to the organization [or individual] of the amount of the tax it would have to pay[.]"[43] "Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."[44] Thus, exemptions function as a form of government spending, and the reduction of an exemption is not a new tax levy, but rather a reduction in

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[40] *Leveridge*, 1956 OK 77, ¶ 13, 294 P.2d at 812.

[41] *See generally* S. SURREY & P. MCDANIEL, TAX EXPENDITURES 3 (1985) (tax expenditures (such as tax credits, exemptions, and deductions) "represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance"); *see also* 2 U.S.C. § 622 (defining "tax expenditures" under federal budgetary law as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability; and the term 'tax expenditures budget' means an enumeration of such tax expenditures").

[42] *See Rosenberger v. Visitors of Univ. of Virginia*, 515 U.S. 819, 859 (1995) (Thomas, J., concurring) (stating that "[a] tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy"); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-44 (2006) ("This logic is equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called 'tax expenditures,' which reduce amounts available to the treasury by granting tax credits or exemptions.").

[43] *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983).

[44] *Id.*

government spending. In line with this view, this Court in *Ali v. Fallin* upheld against an Article V, § 33 challenge a law that reduced another form of tax expenditure—there, the reduction in the Earned Income Tax Credit by making it nonrefundable.[45] Accordingly, this Court's precedent is consistent with the view that laws which reduce tax expenditures (like credits, exemptions and deductions) are not "revenue bills" because they are a form of reduced government spending, as opposed to levying a new tax.

Second, the elimination or reduction of an exemption does not operate to levy a new tax because it functions as a tax equalization or tax equity measure. In other words, the reduction of a tax exemption merely has the effect of making existing taxes more equally applicable. Whereas a tax exemption privileges certain persons or transactions over others—as vehicle sales were privileged with a lower rate than other sales—the removal of that privilege is not "levying taxes in the strict sense of the word," but rather the application of an existing tax levy more equitably. Thus, the effect of tax equity bills like H.B. 2433 is not to levy a new tax, but to make existing taxes more evenly applied, and reduce tax breaks and incentives granted to favored persons or activities. Such measures comport with the spirit of Article V, § 59 that commands: "Laws of a general nature shall have a uniform operation throughout the State...."[46] Measures intended to eliminate tax subsidies are not the sort of bill intended to be restricted by Article V, § 33.

This principle is found throughout Article V, § 33 jurisprudence. For example, in *Anderson v. Ritterbusch*, the Court refused to apply Article V, § 33 to an "act for the discovery of property not listed for taxation, providing for its assessment and the collection of taxes thereon."[47] Although the effect of the law was to collect taxes on more property and thereby raise revenue, the operation of the law was not to levy a new tax, but rather to enforce existing taxes more

[45] *Ali v. Fallin*, 2017 OK 39; *see also* Pet. App'x Tab 10.
[46] OKLA. CONST. Art. V, § 59.
[47] *Anderson v. Ritterbusch*, 1908 OK 250, ¶ 1, 98 P. 1002, 1004.

equally. The Court explained that existing law already provided "a complete revenue law for the purpose of raising money" and the new bill only was "necessary to provide a means for reaching property which ... was omitted from taxation, whereby such property and the owners thereof would be required to pay their just share of the burdens of government."[48] The Court concluded: "such a law is in no sense a bill for raising revenue, although it incidentally may have that effect."[49]

The same is true here. An existing law already provides "a complete revenue law for the purpose of raising money": Section 1354 of Title 68 levies "upon all sales not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four and one-half percent (4.5%)." This levy predated H.B. 2433 and was not altered by it. Like the legislation considered in *Anderson v. Ritterbusch*, H.B. 2433 levies no tax; it merely reaches property which was omitted, or exempted, from taxation. By doing so, the new law makes taxes on sales of personal property more equally applicable to *all* sales; it does not levy a new tax. The fact that revenue is raised in conjunction with modification of the existing exemption is, without more, insufficient to subject H.B. 2433 to the restrictions of Article V, § 33.

For these reasons, it has been well-understood for many years that, under this Court's jurisprudence, changes to existing tax exemptions do not constitute "revenue bills" for the purposes of Article V, § 33. Commentators upon whom this Court has previously relied[50] agree that legislation that removes a tax exemption is not a revenue bill.[51] Courts in other jurisdictions

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[48] *Id.* at ¶ 15, 98 P. at 1007.

[49] *Id.*; *see also Walters v. State*, 1996 OK CIV APP 154, ¶¶ 3-9, 935 P.2d 398, 399-401 (concluding that a "tax equity" bill relating to calculating the state income tax rate for nonresidents was not a revenue bill even though it would raise $18 million in revenue).

[50] *Calvey*, 2000 OK 17, ¶ 10 & n.11, 997 P.2d at 168 (relying on Ramsey article, cited *infra*, to determine proper interpretation of Article V, § 33 as amended); *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 12, 984 P.2d 200, 209 (same); *see also Fent v. Fallin*, 2014 OK 105, ¶¶ 10-13, 345 P.3d 1113, 1116-17 (relying on public interpretations of Article V, § 33 contemporaneous with its 1992 amendment).

[51] *See* App'x Tab 1, Ramsey, *What is a 'Revenue Bill'*, at 1572 (noting that Article V, § 33 does not apply to the "Elimination of Exemptions").

have reached the same conclusion.[52] Legislators specifically relied on this Court's precedent on tax exemptions in determining that H.B. 2433 was not subject to Article V, § 33.[53] Even petitioners in a companion case to this suit have acknowledged that removal of a tax exemption does not levy a tax for purposes of Article V, § 33.[54] Petitioners in this case chose to focus on the first prong of the Article V, § 33 test—whether the bill's "principal object is the raising of revenue"—but ignore almost entirely the second, and equally necessary, prong that asks whether a bill "lev[ies] taxes in the strict sense of the word."[55] In other words, even if a bill has as its principal object the raising of revenue, it is not subject to Article V, § 33 if it does not levy taxes in the strict sense of those words. The precedent discussed above establishes that removal or reduction of a tax exemption does not constitute such a "levy" of a tax. Indeed, Petitioners cannot point to a *single case* where this Court has invalidated a bill like H.B. 2433.

If, at this stage of Article V, § 33's history, the Court abruptly changes course, and finds that modifications to existing tax exemptions are in fact revenue raising bills, the Court would "replace certainty and progress with legal chaos in which state government [] would come to a standstill while the political branches painfully try to sort out the consequences of a change in the Court's jurisprudence."[56] This the Court should not do. H.B. 2433, like other changes to tax exemptions, is not a revenue-raising bill subject to Article V, § 33 of the Constitution.

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[52] *See, e.g., City of Seattle v. Dep't of Revenue*, 357 P.3d 979, 985-88 (Or. 2015) (law repealing a tax exemption not a "bill for raising revenue" under the Oregon Constitution, which is judged by nearly identical standards as Oklahoma's Article V, § 33); *Louisiana Chemical Ass'n v. State*, 217 So.3d 455, 463 (La. Ct. App. 2017) ("The levy of the initial tax, preceding the decision to grant an exemption, is the manner in which the Legislature raises revenue. Since the tax levy raises the revenues and since the granting of the exemption does not change the underlying tax levy, we find that suspending an exemption is not a revenue raising measure.").

[53] *See* Pet. Br. 11 (noting that legislators supporting the bill "considered [it] constitutional under this Court's prior holding in *Leveridge*").

[54] *See Naifeh et al. v. Oklahoma*, No. 116,102, Pet. Br. 13 n.5 (citing *Leveridge* for the proposition that "removing exemptions to an existing tax is not a revenue bill").

[55] *Leveridge*, 1956 OK 77, ¶ 8, 294 P.2d at 811.

[56] *In re Okla. Capitol Improvement*, 1998 OK 25, ¶ 45, 958 P.2d 759, 773.

III. No weight should be accorded to statements of individual legislators and other statements regarding H.B. 2433 upon which Petitioners heavily rely.

Petitioners spend much of their brief recounting the statements of various legislators in debate over H.B. 2433 and other legislative history.[57] Petitioners also turn to various news articles to support their position. But statements of members of the Legislature—much less news reporters—are not competent evidence of what the Legislature intended by an Act, "since that body speaks solely through its concerted action as shown by its vote."[58] Rather, this Court has always held that "the testimony of individual lawmakers" and other similar pieces of legislative history "are ***never*** probative of legislative intent."[59] Moreover, legislative history could only be relevant, if ever, when "construction of the act is necessary."[60] No interpretation or construction of the bill is required here, however, because there is no dispute as to the bill's meaning.[61] The Court disregards the type of legislative history materials offered by Petitioners with good reason.

First, as noted above, statements by individual legislators have no constitutional import because the Legislature "speaks solely through its concerted action as shown by its vote."[62] Giving any legal significance to a legislator's statements circumvents the lawmaking process, which only

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[57] *See* Pet. Br. 2-9, 15.

[58] *Haynes v. Caporal,* 1977 OK 166, ¶ 10, 571 P.2d 430, 434 (citing *Davis v. Childers*, 1938 OK 728, 74 P.2d 930); *see also State v. Sandfer*, 1951 OK CR 4, 226 P.2d 438, 235; *Kinney v. Board of Comm'rs of Tulsa Cty.*, 1995 OK CIV APP 49, ¶ 9, 894 P.2d 444, 447.

[59] *Allen v. State ex rel. Bd. of Trustees of Okla. Uniform Retirement Sys. For Justices & Judges*, 1988 OK 99, ¶ 11, 769 P.2d 1302, 1306 (emphasis added) (citing *Brigance v. Velvet Dove Restaurant, Inc.*, 1986 OK 41, 725 P.2d 300, 303 and *Parker v. Blackwell Zinc Co.*, 1958 OK 41, 325 P.2d 958, 960); *see also Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 13, 369 P.3d 374, 378; *Keating v. Edmondson*, 2001 OK 110, ¶ 15, 37 P.3d 882, 888.

[60] *Kinney*, 1995 OK CIV APP 49, ¶ 9, 894 P.2d at 447.

[61] *Heath*, 2016 OK 18, ¶ 13, 369 P.3d 374, 378 (holding that "when confronted with a statute that is plain and unambiguous on its face, we would not look to such legislative history as a guide to its meaning").

[62] *Haynes,* 1977 OK 166, ¶ 10, 571 P.2d at 434; *see also State v. Gaines*, 206 P.3d 1042 (Or. 2009) (when addressing challenge to law alleged to be a revenue bill, "[t]he formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law")

happens through votes of both houses and (usually) approval by the Governor. "Legislative intentions that have not been reduced to writing and subjected to the constitutional approval process are not law, and for the judiciary to give legal effect to such inchoate intentions would amount to an end-run around the constitutional enactment process."[63]

Second, statements by individual legislators do not provide an accurate guide to legislative intent. Even if it were possible, Petitioners have not offered a comprehensive survey of each legislator's belief about the challenged bill, their objective in voting for it, or their opinion of its constitutionality.[64] Thus, at most, Petitioners can only offer select quotes from select legislators—an exercise of merely "looking over a crowd and picking out [their] friends."[65] This is no reliable guide to legislative intent, but rather solely the ruminations of a few legislators. Even if every legislator could be surveyed, it is likely that any given legislator has multiple motivations for voting for a bill. It would be impossible to sort out which might be their "principal" object. Accordingly, the legislative history advanced by Petitioners is no indication of legislative intent.

Third, Petitioners mainly focus on statements by legislators giving their opinion as to whether H.B. 2433 is subject to Article V, § 33. But this is irrelevant to this Court's independent duty to adjudicate the constitutionality of laws, lest the separation of powers be violated.[66] Even if every legislator proclaimed a bill constitutional, this Court would exercise its independent

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[63] *Young v. State*, 983 P.2d 1044, 1049 (Or. App. 1999) (Landau, J., concurring).

[64] *Cf.* ANTONIN SCALIA & BRIAN GARNER, READING LAW 392 (2012) ("Each member voting for the bill has a slightly different reason for doing so. There is no single set of intentions shared by all. The state of the assembly's collective psychology is a hopeless stew of intentions."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

[65] *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also* Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 Harv. J.L. & Pub. Pol'y 43, 43 (1988) ("attorneys and judges can manipulate the interpretive process by carefully selecting and endowing with undue weight some statements uttered in the course of the lawmaking process").

[66] *See* OKLA. CONST. art. IV, § 1.

judgment on the matter. The same is true when legislators denounce a bill as unconstitutional. Beyond the high deference owed to the Legislature by presuming that all enacted bills are constitutional,[67] this Court's duty to adjudicate constitutional issues should not be swayed by what is said on the House and Senate floor or in the press.

Fourth, allowing a bill's constitutionality to turn on its legislative history, rather than its text, would lead to absurd results. It would mean that one bill would be unconstitutional because of statements made about it on the floor or because of the budget situation that happened to be occurring when it was passed, but another bill with the exact same text—passed without legislative debate and in a different fiscal scenario—would be entirely constitutional. Our fundamental constitutional law should not turn on such mercurial considerations rather than the *substance* of the law enacted.[68] The only result of relying on legislative history would be unending uncertainty on the part of government officials concerning what the Constitution requires of them.

Fifth, Petitioners also rely principally on statements of legislators voting *against* the bill.[69] This is perhaps the poorest indication of legislative intent, since the intent and opinion of those who voted against a measure cannot rationally be used as a barometer to determine the purpose, interpretation, or constitutionality of the bill.

Even if the extra-statutory materials to which Petitioners point were relevant, they hardly present a convincing case that H.B. 2433 is subject to Article V, § 33. Petitioners' citation to news articles may show that the legislature struggled to formulate a budget, but they have no bearing on

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[67] *See* authorities cited *supra* nn.12-14.

[68] *See Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 21, 373 P.3d 1057, 1068 ("[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." (emphasis in original)).

[69] Pet. Br. 7-9, 15 (relying on statements of Reps. Virgin, Dunnington, Bennett (Forrest), Stone, and Walke); Resp. App'x Tab 2 (listing each of these Representatives as having voted against the bill).

whether one bill in particular "levies taxes in the strict sense of the word" as contemplated by this Court's Article V, § 33 precedent. That can be determined only by the language of the bill itself.

As for statements during legislative debates on H.B. 2433, Petitioners' evidence suggests, in fact, that legislators voting for the bill considered this Court's precedent, understood that modification of a tax exemption is not subject to Article V, § 33, and then acted in conformity therewith.[70] Examining this Court's precedent and then acting accordingly is precisely what legislators *should* do. A bill should not be invalidated on the basis that the Legislature deliberately legislated within the bounds of this Court's decisions. The legislative debate may show the depth of conflicts between proponents of H.B. 2433 and its opponents, but it certainly should have no bearing on the legal merits of this constitutional challenge.[71]

Finally, as noted initially and worth repeating, to the extent there is any doubt about whether H.B. 2433 can be interpreted as a revenue raising bill for the purposes of Article V, § 33, "this Court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision."[72] "If there are two possible interpretations—one of which would hold the legislation unconstitutional, the construction must be applied which renders them constitutional."[73] This Court should apply the construction offered by Respondent and, out of respect for *stare decisis*, hold that H.B. 2433 is not a revenue bill subject to Article V, § 33.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

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[70] *See generally* Pet. App'x Tabs 4A & 4B; *see also* Pet. Br. 11 (noting that legislators supporting the bill "considered [it] constitutional under this Court's prior holding in *Leveridge*"); Pet. App'x Tab 4B at 3 (Rep. Walke stating "I don't necessarily disagree with you about removing the exemption requiring 51 votes").

[71] "[P]olitical controversies[,] which are quite proper in the enactment of a bill[,] should have no place in its interpretation." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

[72] *Calvey*, 2000 OK 17, ¶ 24, 997 P.2d at 172.

[73] *Id.*

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CERTIFICATE OF MAILING

I certify that on this 17th day of July, 2017, a true and correct copy of the foregoing instrument was forwarded via U.S. mail, postage prepaid to the following:

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