



ORIGINAL

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,

vs.

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

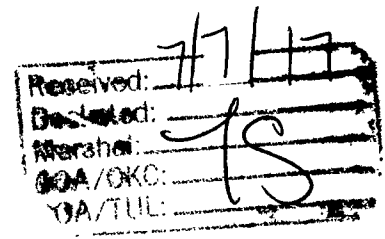
Respondents,

SUPREME COURT
STATE OF OKLAHOMA

JUL 7 2017

MICHAEL K. VELCHIK
CLERK

No. 116,102



**RESPONDENTS' RESPONSE TO PETITIONERS' APPLICATION TO
ASSUME ORIGINAL JURISDICTION AND PETITION FOR
DECLARATORY RELIEF AND WRITS OF PROHIBITION AND/OR MANDAMUS**

MITHUN MANSINGHANI, OBA No. 32453
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 522-4392
F: (405) 522-4518
E: Mithun.Mansinghani@oag.ok.gov

Of Counsel:

MICHAEL K. VELCHIK, Va. Bar #91142
Assistant Solicitor General
(Motion to Associate Counsel forthcoming)

JULY 7, 2017

COUNSEL FOR THE RESPONDENT

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INTRODUCTION

Petitioners in this case do what they have always done: ignore the harms caused by the sale of their product to Oklahoma citizens. By failing to acknowledge the societal costs of smoking cigarettes and completely ignoring the multifaceted approach that Oklahoma has chosen to combat these costs, Petitioners erroneously conceive of S.B. 845 solely as a “bill for raising revenue,” just like an income or sales tax where all or most citizens contribute to the general costs of government. But S.B. 845 is not a revenue bill. Rather, it imposes a fee as but one part of a comprehensive regulatory program designed to reduce and compensate for the health-related costs of permitting the sale of tobacco in Oklahoma.

Pursuant to this Court’s longstanding precedent, the Legislature may enact regulatory programs that include taxes or fees without being subject to the procedures required for the passage of “bills for raising revenue” under Article V, § 33 of the Oklahoma Constitution. Just as this Court upheld taxes on motor carriers to compensate for upkeep of Oklahoma roads damaged by those carriers, so may the Legislature impose a fee on tobacco companies to discourage harmful practices and compensate the State for damage caused by the sale of tobacco to its citizens. Perhaps knowing that S.B. 845 objectively advances a regulatory purpose, the tobacco companies instead rely upon subjective factors, such as statements of individual legislators, to support their claims. But it is up to this Court alone to adjudicate the constitutional issue from the text of the bill, not from the opinions of individual legislators. On this basis, the Court should deny relief.

BACKGROUND

“[T]he epidemic of smoking-caused disease in the twentieth century ranks among the greatest public health catastrophes of the century.”¹ Smoking is the leading cause of preventable

¹ Resp. App’x A, Exhibit 14, at 33.

deaths in the United States, responsible for 480,000 deaths per year (roughly 20% of all deaths).² Smoking increases the risk of heart disease, stroke, lung cancer, prenatal defects, fertility loss, bone disease, dental disease, cataracts, diabetes, arthritis, immunodeficiency, and many other diseases, affecting nearly every organ of the body.³ Smoking is also responsible for the deaths from secondhand smoke.⁴ It has significant economic costs as well: over \$250 billion in healthcare costs per year in the United States.⁵ The estimated cost of smoking to Oklahoma is \$9.23 per pack.⁶

Given the scope of harms caused by smoking, Oklahoma has developed a comprehensive regulatory approach to tobacco. For instance, manufacturers of tobacco products must provide certain information to the Oklahoma Tax Commission (“OTC”) and the Attorney General and have their cigarettes listed on the State’s directory before their cigarettes may be sold in the State.⁷ Moreover, any establishment selling tobacco products must obtain a license from OTC;⁸ limit the sale of such products to adults over 18 years old; and post signage to this effect.⁹ Oklahoma Statutes prohibit smoking in workplaces, restaurants, schools, and other areas open to the public, on the grounds that “[t]he possession of lighted tobacco in any form is a public nuisance and dangerous to public health.”¹⁰ The Alcoholic Beverages Law Enforcement Commission (“ABLE”) enforces some of these provisions.¹¹ The Board of Public Health and Safety oversees the Tobacco Use Reduction Fund.¹² The Tobacco Settlement Endowment Trust Fund (“TSET”) promotes

² Resp. App’x A, Exhibit 16.

³ Resp. App’x A, Exhibit 16.

⁴ Resp. App’x A, Exhibit 14, at 7.

⁵ Resp. App’x A, Exhibit 15.

⁶ *Id.*

⁷ 68 O.S.2011, § 360.4.

⁸ *Id.* § 304.

⁹ 37 O.S.2011 §§ 600.5, 600.6, 600.7, 600.8, 600.13.

¹⁰ 21 O.S.2011 § 1247; *see also* 63 O.S.2011 § 1-1523.

¹¹ *See, e.g.*, 47 O.S. § 200.11.

¹² 63 O.S. § 1-229.3.

public awareness campaigns and funds research on the public health effects of tobacco.¹³ And the Attorney General is responsible for enforcing the provisions of the Prevention of Youth Access to Tobacco Act and the Master Settlement Agreement Complementary Act, which includes the authority to inspect “premises and records related to the manufacture, production, storage, transportation, sale or exchange of cigarettes and tobacco products[.]”¹⁴

Despite this comprehensive regulatory structure, tobacco use still causes immense harm in Oklahoma.¹⁵ Smoking remains the #1 preventable cause of death.¹⁶ Oklahoma ranks 47th among States in adult smoking rate (*i.e.*, among the highest smoking rates) and 48th in youth smoking rate.¹⁷ Oklahoma’s average annual smoking-attributable mortality rate is 332.1 per 100,000 adults (47th among States).¹⁸ As much as 9% of Oklahoma minors are expected to die prematurely because of tobacco use.¹⁹ In Oklahoma alone, smoking results in about \$1.5 billion annually in healthcare costs.²⁰

Concerned about these ongoing problems, state and local health officials began exploring options for more effective tobacco regulation. Public health authorities agree that increasing the “price of tobacco products is the single most consistently effective tool for reducing tobacco use.”²¹ Higher prices prompt some smokers to quit, deters non-smokers from starting in the first place, and reduces the number of cigarettes continued smokers will use.²² Even Petitioner Philip

¹³ OKLA. CONST. art. X, § 40(E).

¹⁴ 68 O.S.Supp.2014, § 360.10(D).

¹⁵ Resp. App’x A, Exhibit 14, at 1 (“[T]he current rate of progress in tobacco control is not fast enough, and much more needs to be done to end the tobacco epidemic.”).

¹⁶ Resp. App’x A, Exhibit 14, at 11; Exhibit 15.

¹⁷ Resp. App’x A, Exhibit 14, at 692.

¹⁸ Resp. App’x A, Exhibit 18.

¹⁹ Resp. App’x A, Exhibit 14, at 697.

²⁰ *See, e.g.*, Resp. App’x A, Exhibits 17, 19.

²¹ Resp. App’x A, Exhibit 39; *see also* Resp. App’x A, Exhibit 14, at 869; Exhibit 27.

²² *See* Resp. App’x A, Exhibits 9-11.

Morris acknowledge as much.²³ The positive effects of increased prices are likely to be especially pronounced in Oklahoma where cigarette prices are among the lowest in the nation.²⁴ A \$1.50 increase in the price of a pack of cigarettes in Oklahoma is projected to prevent 32,000 Oklahoma kids from starting to smoke, prompt nearly as many adults to quit, prevent approximately 18,000 tobacco-related deaths, and save over \$1.25 billion healthcare costs.²⁵

In 2015, the State’s three major health regulators—the Oklahoma State Board of Health, the Oklahoma City-County Board of Health, and the Tulsa City-County Board of Health (the “Tri-Board”)—began exploring such enhancements to the State’s tobacco regulation to improve the State’s health outcomes as part of a five-year initiative, the Oklahoma Health Improvement Plan 2020 (“OHIP”).²⁶ OHIP is a comprehensive regulatory program, including improvements to health systems, health education, tobacco use, obesity, child health, behavioral health, and social factors of health.²⁷ One component of OHIP was a legislative proposal to increase the assessment²⁸ on cigarettes because “price increases reduce both adult and underage smoking,” resulting in numerous health benefits such as lower rates of cancer, heart disease, miscarriages, and illnesses in newborns.²⁹ The Tri-Board estimated that a \$1.50 increase in price for a pack of cigarettes would save the State \$1.4 billion in long-term healthcare costs.³⁰

²³ Resp. App’x A, ¶¶ 15-16 & Exhibit 12, Philip Morris document (“Of all the concerns, there is one—taxation—that alarms us the most. While marketing restrictions and public and passive smoking [restrictions] do depress volume, in our experience taxation depresses it much more severely.”).

²⁴ Resp. App’x A, Exhibit 17.

²⁵ See Resp. App’x A, Exhibits 9-10, 28.

²⁶ Resp. App’x A, ¶ 4 & Exhibit 2.

²⁷ Resp. App’x A, Exhibit 2.

²⁸ Although the Tri-Board uses the word “tax,” as explained below, the label that happens to be assigned to a particular assessment is not legally relevant.

²⁹ Resp. App’x A, Exhibit 3.

³⁰ Resp. App’x A, Exhibit 3.

As the State Board of Health was considering proposing to the Legislature an assessment on cigarettes, it desired to make clear that the assessment “is not for the purpose of generating revenue but rather a public health policy measure with the purpose of reducing the consumption of cigarettes.”³¹ Again, this measure was part of a broader regulatory initiative, which included expanding health insurance coverage, focusing on health outcomes, supporting the healthcare workforce, and empowering patients.³² OHIP meetings also reflected that the proposed legislation had “the overwhelming benefit for everyone involved in health [through] simply the reduction in our smoking rates; [it is a] victory no matter where the money goes.”³³ In addition, TSET passed a resolution calling for “a significant increase in the price on tobacco products, to save lives and save money within the State of Oklahoma.”³⁴

The State Department of Health then went to the Governor and legislative leadership from both parties with the \$1.50 per pack fee proposal, detailing its numerous public health benefits and providing survey data showing that most voters supported the idea “primarily” because it would “decrease usage” of cigarettes and/or “improve health,” with only a small minority supporting the proposal because it help “fund services.”³⁵ The Health Commissioner then sent letters to each and every legislator urging them to take this “opportunity . . . to better the health of our great state.”³⁶ After several different proposed bills, on May 29, 2017, the Governor signed into law S.B. 845, titled the “Smoking Cessation Act of 2017.”³⁷

³¹ Resp. App’x A, Exhibit 7, at 5.

³² Resp. App’x A, Exhibit 7.

³³ Resp. App’x A, Exhibit 5, at 7.

³⁴ Resp. App’x B, Exhibit 18.

³⁵ Resp. App’x A, ¶¶ 6-7 & Exhibit 4, Presentation to Legislative Leadership, Slides 10-12.

³⁶ Resp. App’x A, ¶ 9 & Exhibit 6.

³⁷ Pet. App’x 1, at 2, § 1.

The title of the bill states that it is “An Act relating to public health” and the first section explains that it is “necessary for the health and welfare of the people of the State of Oklahoma that smoking rates be reduced and that children be warned of and protected from the dangers of smoking.”³⁸ The law requires improved signage where smoking is prohibited, requires the Department of Health and TSET to “work together to inform the public about the dangers of smoking in motor vehicles where children are present,” requires the Department of Health and Department of Mental Health and Substance Abuse Services to “develop new and innovative strategies to prevent tobacco use by minors,” and prohibits smoking on State property.³⁹

S.B. 845 details the numerous public health benefits that result from reduced rates of smoking resulting from higher prices and therefore provides that “in furtherance of the stated purpose of this act, there shall be assessed by the Oklahoma Tax Commission a smoking cessation fee on cigarettes” of \$1.50 per pack of cigarettes.⁴⁰ The funds generated by the fee are directed to public health programs to help alleviate the myriad health problems created by tobacco use. The first \$1 million is appropriated to the ABLE Commission “for the purpose of enhanced enforcement of” laws prohibiting the sale of tobacco to minors.⁴¹ The rest of the funds are placed in a new “Health Care Enhancement Fund,” dedicated to “the purpose of enhancing the health of Oklahomans.”⁴²

³⁸ *Id.* at 1-2 & § 1.

³⁹ *Id.* at 3, §§ 4-6.

⁴⁰ *Id.* at 3-4, § 7(A).

⁴¹ *Id.* at 4, § 7(C)(a)

⁴² *Id.* at 4, §§ 7(C)(b), 8.

Petitioners' only claim for relief is that S.B. 845 is invalid because it was not passed pursuant to the procedures required for "bills for raising revenue" under Article V, § 33 of the Oklahoma Constitution. The sole dispute in this case is whether S.B. 845 is such a bill.

I. Under this Court's longstanding precedent, taxes and fees that are regulatory and compensate the public for harm caused by a business enterprise do not constitute "revenue bills" for the purposes of Article V, Section 33.

This Court has consistently taken a narrow view of what constitutes a "revenue bill," and consistently declined to apply Article V, § 33 to invalidate legislation.⁴³ Since the year after statehood, this Court has interpreted "bills for raising revenue" for the purposes of Article V, § 33 as "those laws whose principal object is the raising of revenue and which levy taxes in the strict sense of the word."⁴⁴ Conversely, "laws under which revenue may incidentally arise are not 'revenue bills' or 'bills for raising revenue' within the meaning of art. 5, § 33."⁴⁵ Pursuant to this test, "[i]t is well settled . . . that laws imposing a tax or a license fee incidental thereto are not revenue raising laws under art. 5, § 33."⁴⁶

For example, the Court in *In re Lee* considered whether a docket fee of \$25 "taxed" on those filing cases in this Court was a revenue bill under Article V, § 33.⁴⁷ This fee was to be paid "into the state treasury . . . for the use and benefit of the state."⁴⁸ The Court recognized that such

⁴³ See authorities cited *infra* n.72; accord Resp. App'x B, Exhibit 17, *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"); 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.").

⁴⁴ *Calvey*, 2000 OK 17, ¶¶ 10, 14, 997 P.2d at 168, 170.

⁴⁵ *Id.*

⁴⁶ See *id.* at ¶ 18, 997 P.2d at 171 & n.24 (collecting cases).

⁴⁷ *In re Lee*, 1917 OK 458, ¶ 1, 168 P. 53, 54.

⁴⁸ *Id.* at ¶ 2, 168 P. at 54.

fees are often “prescribed for the purposes of revenue” and operate as “a uniform tax on litigation” to avoid “impos[ing] upon the public the entire burden of the expense of the maintenance of the courts.”⁴⁹ These fees include not only those paid to court officers “for a particular service rendered,” but also those “paid into the public treasury to reimburse the public for the expense incurred” by maintenance of the courts more broadly.⁵⁰ This Court held that the docket fee was not a revenue bill because it “is not exacted for revenue, but as compensation.”⁵¹

In *Ex parte Ambler*, the Court of Criminal Appeals considered a law regulating the medical profession that included a license fee on those peddling drugs used the revenue to fund county roads and bridges.⁵² The Court rejected the claim that the challenged act was a revenue bill subject to Article V, § 33: “The business of peddling is a legitimate one, but, unless regulated and wisely policed, it is liable to become a nuisance, especially in the large cities of the state. Therefore the amount of the license fee is not limited to an amount which will cover the expense of issuing it, but it may include the reasonable cost of policing the business”⁵³ Given that the law was meant to “protect its citizens against . . . harmful practices,” the court held that “a reasonable license fee imposed under the police power to regulate is not invalid because it produces revenue.”⁵⁴ The Court also rejected the argument that “the fees provided for are to be used for other purposes, and not for the purpose of enforcing the law under which they are imposed.”⁵⁵

Beginning with *Ex parte Tindall*, this Court has repeatedly upheld laws that imposed a “mileage tax” on commercial carriers that use public intercity roadways. The tax was collected “for

⁴⁹ *Id.* at ¶¶ 12-17, 168 P. at 55.

⁵⁰ *Id.* at ¶¶ 18-21, 168 P. at 56.

⁵¹ *Id.* at ¶ 32, 169 P. at 57.

⁵² *Ex parte Ambler*, 1914 OK CR 154, 148 P. 1061, 1065.

⁵³ *Id.* at 148 P. at 1068 (citation omitted).

⁵⁴ *Id.* at 148 P. at 1068 (citation omitted).

⁵⁵ *Id.* at 148 P. at 1069 (citation omitted).

the maintenance of public highways” and was part of a series of laws that provided “for the supervision, regulation, and conduct” of for-profit transportation services, including the setting of rates and regulation of schedules and safety.⁵⁶ The Court began by noting that the State’s “supervisory control over the public highways is too clear to be seriously questioned,” and that those who are given the “privilege” of conducting business on those highways “do[] not stand before the law in the capacity of a private citizen, seeking a private right of citizenship.”⁵⁷ The Court found that regulation of highways was part of the State’s “police power,” which is flexible to allow the “government to respond to public needs.”⁵⁸ Whether providing a public service or conducting a purely private business, when “such business affects the public welfare” for profit, that business is subject to the police power of the State.⁵⁹ Based on these considerations, the Court rejected the argument that the bill imposing the mileage tax was a revenue bill subject to Article V, § 33,⁶⁰ concluding that “[t]he real purpose of the act [was] to regulate the use of public highways” and the “tax [was] merely incidental to the enforcement of” this purpose.⁶¹

The Court further explained its decision in the sister case of *Ex parte Sales*, stating:

The act in question is not one for the purpose of raising revenue. It is one for the purpose of regulating 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. It is true that the act provides for a tax in the nature of a license fee to be paid by operators of such transportation lines, but such fee or tax, if it may be so called, is merely incidental to the attainment of the real purpose of the act, and is not a revenue law, whose principal object is the raising of revenue⁶²

The Court again considered an amendment to the mileage tax in *Pure Oil Co.*, again

⁵⁶ *Ex parte Tindall*, 1924 OK 669, ¶¶ 4, 15-16, 229 P. 125, 127, 129-30.

⁵⁷ *Id.* at ¶¶ 7-8, 229 P. at 128.

⁵⁸ *Id.* at ¶¶ 25-26, 229 P. at 130.

⁵⁹ *Id.* at ¶¶ 39-42, 229 P. at 131-32.

⁶⁰ *Id.* at ¶ 60, 229 P. at 134

⁶¹ *Id.* at Syllabus 15.

⁶² *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. 186, 187.

concluding that the legislation was not a revenue raising measure based on its regulatory purpose and the State's legitimate exercise of its police power.⁶³ As with the Fee here, the tax was collected by the Oklahoma Tax Commission, and the law was amended to include certain industrial pursuits not previously taxed.⁶⁴ The petitioner there first objected to the tax as arbitrarily imposed on intercity travel only, but the Court justified this classification by noting that these "sections of the public highways carr[y] the most and heaviest traffic, and [are] subject to the greatest amount of wear and tear."⁶⁵ Examining the existing and new regulatory law as a whole, rather than the particular tax amendment at issue, the Court then affirmed the validity of the new mileage tax as not a revenue raising measure, noting its regulatory purpose and the State's legitimate exercise of its police power.⁶⁶

More recently, the Court considered the legality of "self-liquidating" bonds to fund highway construction and maintenance, to be repaid using a "combination of taxes and fees" that were imposed on transportation activities.⁶⁷ In a footnote, the Court noted that Article V, § 33 was "inapplicable" to this measure⁶⁸—consistent with the Court's previous rulings that such regulatory taxes and fees are not "revenue bills."

The few cases in which Oklahoma courts have held that legislation falls within the narrow definition of a "revenue bill" are readily distinguishable. For example, in *Ex Parte Fuller*, the Court of Criminal Appeals found a bill that imposed a "license tax" on vending machines to be a "revenue bill" because the tax was "not directed at any business which affects the public welfare."⁶⁹

⁶³ *Pure Oil Co. v. OTC*, 1936 OK 516, 66 P.2d 1097.

⁶⁴ *Id.* at ¶¶ 1-2, 66 P.2d at 1098.

⁶⁵ *Id.* at ¶ 7, 66 P.2d at 1099.

⁶⁶ *Id.* at ¶¶ 10, 12, 66 P.2d at 1100.

⁶⁷ *Application of Okla. Capitol Imp. Auth.*, 1998 OK 25, ¶¶ 3, 11-12, 958 P.2d 759, 762, 764.

⁶⁸ *Id.* at ¶ 3 n.5, 958 P.2d at 762 n.5.

⁶⁹ *Ex parte Fuller*, 1925 OK CR 422, 238 P. 512, 513.

Though recognizing that “[i]t is not easy in every case to determine whether a given act is an exercise of the police power or an exercise of the taxing power,” the court noted that “the exercise of police power is directed towards some business which might affect the public morals, health, or the general welfare of society,” and the “exercise of police power is regulatory in its nature.”⁷⁰ Because operation of vending machines is “no more detrimental to the good order of society” than any other types of sales, and because the tax was not coupled with any form of regulation anywhere else in law, the tax was considered a “revenue measure.”⁷¹

The broad lesson of these cases is that, legislation that imposes a regulatory fee is *not* subject to Article V, § 33, if the fee has one or more of the following objective characteristics: (1) it can be justified by a regulatory purpose within the State’s police power beyond the bare desire to raise revenue;⁷² (2) it is part of a broader regulatory program;⁷³ (3) it is imposed on specific actors (as opposed to the public at large) profiting from harms or costs imposed on society;⁷⁴ or (4) the funds generated by that fee are used to compensate for or regulate such harms.⁷⁵

An assessment need not have all four characteristics in order to be considered a regulatory fee,⁷⁶ but if it does, it is strong evidence that the law imposing the assessment is not a “revenue

⁷⁰ *Id.* at 238 P. at 513.

⁷¹ *Id.* at 238 P. at 513.

⁷² See *Ex parte Ambler*, 1914 OK CR 154, 148 P. at 1068; *Ex Parte Tindall*, 1924 OK 669, ¶¶ 25-26, 39-42, 229 P. at 127, 130-32; *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. at 187; *Ex parte Fuller*, 1925 OK CR 422, 238 P. 512, 513; *Meeke v. State*, 1933 OK CR 30, 22 P.2d 993, 934-35; *Pure Oil Co. v. OTC*, 1936 OK 516, ¶¶ 10-12, 66 P.2d 1097, 1100.

⁷³ See *Ex parte Ambler*, 1914 OK CR 154, 148 P. at 1062-65; *Ex Parte Tindall*, 1924 OK 669, ¶¶ 4, 15-16 & Syllabus 15, 229 P. 125, 127, 128-32; *Ex parte Fuller*, 1925 OK CR 422, 238 P. 512, 513; *Meeke v. State*, 1933 OK CR 30, 22 P.2d 993, 934;

⁷⁴ See *Ex parte Ambler*, 1914 OK CR 154, 148 P. at 1068; *In re Lee*, 1917 OK 458, ¶¶ 12-21, 168 P. 53, 55-56; *Ex Parte Tindall*, 1924 OK 669, ¶¶ 7-8, 39-42, 229 P. 125, 128, 131-32.; *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. 186, 187; *Pure Oil Co. v. OTC*, 1936 OK 516, ¶ 7, 66 P.2d 1097, 1099.

⁷⁵ See *In re Lee*, 1917 OK 458, ¶ 32, 168 P. 53, 57; *Ex Parte Tindall*, 1924 OK 669, ¶¶ 15-16, 229 P. 125, 129-30; *Meeke v. State*, 1933 OK CR 30, 22 P.2d at 935; *Pure Oil Co. v. OTC*, 1936 OK 516, ¶ 7, 66 P.2d at 1099.

⁷⁶ See, e.g., *Ex parte Ambler*, 1914 OK CR 154, 148 P. at 1065, 1069 (drug peddling license fee

bill” subject to the requirements of Article V, § 33 because the principal purpose is regulatory and it does not levy a tax in the strict sense of the word. This is true regardless of the label attached to an assessment—be it called a “tax” or a “fee”—as evidenced by the many times this Court has held that the imposition of a “tax” is not subject to Article V, § 33 due to the tax’s regulatory nature.⁷⁷ Finally, interpretations of Article V, § 33 in Attorney General Opinions confirm the propriety of considering these four objective characteristics,⁷⁸ as have interpretations by commentators⁷⁹ on which this Court has repeatedly relied.⁸⁰ Indeed, Petitioners largely agree that

directed to county roads and bridges); *In re Lee*, 1917 OK 458, ¶¶ 2, 18-21, 168 P. 53, 54, 56 (docket fee paid into public treasury, but not necessarily dedicated to support of the Courts); *MEEK v. State*, 1933 OK CR 22 P.2d 993 (securities fee imposed regardless of whether particular business is engaging in fraud or public harm); *Calvey v. Daxon*, 2000 OK 17, ¶¶ 16-18, 997 P.2d at 170-71 (when taxes and fees redirected towards general fund, that transfer does not render those taxes and fees revenue bills); *see also* Resp. App’x B, Exhibit 17, *What is a ‘Revenue Bill’* at 1569 (“It is not necessary to have a comprehensive regulatory scheme in order to find a principal object other than the raising of revenue.”).

⁷⁷ *See In re Lee*, 1917 OK 458, ¶ 1, 168 P. 53, 54 (docket fee that is “taxed” not revenue bill); *Ex parte Tindall*, 1924 OK 669, ¶ 18, 229 P. 125, 130 (“mileage tax” not revenue bill); *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. 186, 187 (same); *Pure Oil Co. v. OTC*, 1936 OK 516, ¶¶ 10, 12; 66 P.2d at 1100 (same). Petitioners appear to agree. *See* Pet. Br. 11.

⁷⁸ A.G. Opin. 1977-202, ¶ 24 (opining that bill raising motor vehicle registration fees was not a revenue bill because “the Bill deals with many other aspects of administration of motor vehicle licensing and registration” and “is the result of the Legislature’s exercise of the State’s police power”); A.G. Op. 1983-189, ¶¶ 2, 10-12 (opining that a bill that “clearly increases employment security taxes on employers” is not a “revenue raising bill” because the bill “in revamping the employment security program deals with many aspects of the administration of that program”); A.G. Op. 1995-58, ¶¶ 2, 21 (act funding compensating facilities that recycle tires through a “waste tire and recycling fee” not a revenue bill because its “principal purpose is the protection of the environment by facilitating the reduction of waste tires through proper recycling”).

⁷⁹ *See* Resp. App’x B, Exhibit 17, *What is a ‘Revenue Bill’* at 1576 (noting that relevant questions to determine whether an act is a “revenue bill” include whether “the bill, when read in its entirety, seek[s] to accomplish some legitimate governmental purpose other than to impose a tax and collect it,” “the bill seek[s] to regulate persons or activities,” and “the bill seek[s] to raise money for the operation of state government generally or for only a discrete part of the government”).

⁸⁰ *Calvey*, 2000 OK 17, ¶ 10 & n.11, 997 P.2d at 168 (relying on above-quoted Ramsey article 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 § 33 contemporaneous with its 1992 amendment).

these are characteristics of a regulatory fee, the imposition of which would not be subject to Article V, § 33.⁸¹

II. Because the fee imposed by S.B. 845 is regulatory, the bill is not subject to the requirements of Article V, § 33.

The Smoking Cessation Fee provided in S.B. 845 has all four characteristics described above. Because its principal object is to promote public health by curtailing cigarette use, the fact that it may also raise revenue does not convert S.B. 845 into a “revenue bill” that is subject to Article V, § 33.

First, the Fee is justified by a regulatory purpose that is undoubtedly within the State’s police power. By selling cigarettes in Oklahoma, engage in a “business [that] affects the public welfare”⁸² to the “detriment of the public.”⁸³ While Petitioners claim that the Fee is “completely untethered from any regulatory aim,”⁸⁴ they ignore the broadly-accepted fact that such a fee is the *single best* smoking deterrent.⁸⁵ Public and nonprofit health organizations throughout the State proposed the Fee on cigarette sales to reduce smoking rates and thereby improve public health.⁸⁶ Petitioners even admit that the Fee will “decrease sales of cigarettes in Oklahoma.”⁸⁷ Indeed, this was the Legislature’s express object in enacting the Fee.⁸⁸ There is no need for the Legislature to rely on its taxing power to enact this Fee, because its police power is more than sufficient and

⁸¹ See, e.g., Pet. Br. 9-11 (fees are generally (1) dedicated “to a specific regulatory aim” as opposed to being “completely untethered from any regulatory aim,” (2) part of a “comprehensive regulatory scheme”, (3) imposed on specific segment of society imposing public costs; and (4) used as compensation for those costs).

⁸² *Ex parte Tindall*, 1924 OK 669, ¶ 42, 229 P. at 132.

⁸³ *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. at 187.

⁸⁴ Pet. Br. 11.

⁸⁵ See, e.g., Resp. App’x B, ¶21; see also *supra* n.22.

⁸⁶ See, e.g., Resp. App’x B, ¶¶ 20-21; see also *supra* n.25.

⁸⁷ Pet. Appl. to Assume Original Jur. 3, ¶ 10; see also *id.* at 5.

⁸⁸ Pet. App’x 1, at §§ 1, 7.

“too clear to be seriously questioned.”⁸⁹ Far from being justified only by the bare desire to raise revenue, the Fee serves a vital and compelling regulatory purpose.

Second, the Fee is part of a broader regulatory program for improving public health and reducing the harms caused by smoking. The Fee originated as part of a comprehensive regulatory and public policy effort by the State and county boards of health, working in conjunction with nonprofit organizations, through the OHIP initiative.⁹⁰ Moreover, the Fee must also be viewed in the context of the State’s comprehensive regulations of the tobacco industry.⁹¹ Finally, S.B. 845 includes new or strengthened measures aimed at reducing smoking rates such as prohibiting smoking in certain locations, creating public awareness campaigns, and other innovative measures.

Ignoring the State’s comprehensive regulation of tobacco products, Petitioners argue that in fact there exists no broader regulatory program for tobacco and that the Fee thus stands alone.⁹² Petitioners cite *Red Slipper Club* (a case not about Article V, § 33),⁹³ but omit the very next sentence of that case, which notes that a fee in a new bill, even if it stands alone, must be viewed in context with the preexisting regulatory regime.⁹⁴ Here, the Fee is just one of many public health measures

⁸⁹ *Ex parte Tindall*, 1924 OK 669, ¶ 7, 229 P. at 128; *see also* Resp. App’x B, Exhibit 17, *What is a Revenue Bill* at 1574-75 (recommending that cases on Article V, § 33 “can be harmonized” by the distinction between whether a bill could have been passed pursuant to the State’s “police power” as opposed to its “taxing power”).

⁹⁰ *See* Resp. App’x B, ¶¶ 20-21; *see also* Background, nn.26-30 and accompanying text.

⁹¹ *See* Background, n.21 and accompanying text.

⁹² Pet. Br. 11-12

⁹³ Pet. Br. 11.

⁹⁴ *Red Slipper Club, Inc. v. City of Oklahoma City*, 1979 OK 118, 599 P.2d 406, 409 (noting that fee was passed in context of preexisting “voluminous restrictions and regulations,” demonstrating that “the fee charged is a regulatory enactment under the police power”); *see also Pure Oil Co.*, 1936 OK 516, ¶¶ 10, 12, 66 P.2d 1097, 1100 (examining new application of mileage tax in context of existing regulatory program); Resp. App’x B, Exhibit 17, *What is a Revenue Bill* at 1570 (noting that in *Pure Oil* “[t]he challenged act contained only one section” but that the “holding of this case [is] that the “principal object” can be found outside the act itself,” since “a bill need not create nor revise a statutory regulatory program in order to find a principal object other than the creation of revenue”).

aimed at reducing and compensating for the costs of smoking. The Fee is also part of a multifaceted approach to preventing, reducing, and eliminating smoking habits.

Third, the Fee is imposed on a particular industry (tobacco) that profits from Oklahomans' use of its products. S.B. 845 is thus no different from the laws imposing a "mileage tax" on carriers using the public highways and causing wear and tear on State roads, which this Court repeatedly held were *not* revenue bills under Article V, § 33.⁹⁵ Petitioners cannot expect to "impose on the public the entire burden" of the activity from which they profit⁹⁶ without being subject to regulatory fees for the harm they cause. For the same reason, Court should not view the Fee as it would any general tax. Unlike the Fee, income taxes and the like are not imposed to discourage or compensate for harmful behavior. This stands in sharp contrast with regulatory fees like this one, which have the avowed regulatory purpose of discouraging harmful practices, with the potential of raising revenue being only incidental to its deterrent effects. Unlike the general public, Petitioners have been given the privilege of conducting business that harms the State and thus "do[] not stand before the law in the capacity of a private citizen, seeking a private right of citizenship."⁹⁷

Fourth, the monies generated by the Fee are directed towards compensating for the toll that smoking has taken on the health of Oklahomans. The health problems caused by smoking are vast and require funding to a broad spectrum of health initiatives. Accordingly, the Legislature in S.B. 845 placed the monies generated by the Fee into a fund dedicated to "the purpose of enhancing the health of Oklahomans,"⁹⁸ directed another portion of the monies to the ABLE

⁹⁵ See *Ex parte Tindall*, 1924 OK 669, Syllabus 15 & ¶¶ 18, 39-42, 229 P. at 130-32; *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. at 187; *Pure Oil Co. v. OTC*, 1936 OK 516, ¶ 7, 66 P.2d at 1099.

⁹⁶ *In re Lee*, 1917 OK 458, ¶ 17, 168 P. at 55.

⁹⁷ *Ex parte Tindall*, 1924 OK 669, ¶¶ 7-8, 229 P. 125, 127, 128.

⁹⁸ S.B. 845 at 4, §§ 7(C)(b), 8.

Commission “for the purpose of enhanced enforcement of” laws prohibiting the sale of tobacco to minors,”⁹⁹ and definitively expressed its intent that the funds also be used for preventive public health purposes aimed at preventing and discouraging smoking.¹⁰⁰ Just as there was a significant nexus between the “mileage tax” and highway maintenance, so too is there a significant nexus between the Fee and the initiatives that the Fee supports.

Petitioners contend that the Fee cannot be to compensate for public costs imposed because “the money is [not] spent on smoking-related costs” and is “wholly out of proportion to the expenses involved.”¹⁰¹ They are wrong on both counts. First, smoking has such broad effects on public health—heart disease, stroke, lung cancer, prenatal defects, fertility loss, bone disease, dental disease, cataracts, diabetes, arthritis, immunodeficiency¹⁰²—that it would be unworkable and inconceivable to expect the exact dollar-for-dollar tailoring Petitioners demand. Instead, the Legislature recognized the broad-based harm inflicted by smoking and dedicated the funds to comprehensive public health programs. Second, Petitioners do not offer a single piece of evidence that \$1.50 per pack fee is in any sense “out of proportion” to the costs of smoking. The Fee amount was proposed by health agencies because of its effects on smoking rates,¹⁰³ since smaller fees would not have a significant effect on smoking even though they would raise revenue.¹⁰⁴ The evidence also demonstrates that the \$1.50 Fee is wholly in proportion to the \$9.23 per pack that smoking imposes on the Oklahoma healthcare system.¹⁰⁵ Similarly, the \$200 million or so generated by the Fee is dwarfed by the \$1.5 billion in annual costs on our society created by

⁹⁹ *Id.* at 4, § 7(C)(a)

¹⁰⁰ *Id.* at 2, § 2.

¹⁰¹ Pet. Br. 10-11.

¹⁰² See Resp. App’x A, Exhibit 3.

¹⁰³ See Resp. App’x A, ¶ 4.

¹⁰⁴ Resp. App’x B, Exhibit 8.

¹⁰⁵ Resp. App’x B, Exhibit 4.

smoking¹⁰⁶ and the \$1.4 billion that the State is likely to save based on the Fee's deterrent effect.¹⁰⁷ In short, the real benefits generated by the Fee are the *16,700 lives saved* and the *billions of dollars* the State will not have to spend on healthcare because people reduce, stop, or never start smoking due to increased prices. Any revenue generated by the Fee is merely incidental to that larger public benefit. Accordingly, S.B. 845 is a classic regulatory measure within the police power of the State, not a "revenue bill" for the purpose of Article V, § 33.

Despite these considerations, Petitioners make two final arguments that S.B. 845 should be considered a "revenue bill." First, they argue that the Fee is akin to the assessment invalidated by the Court's one-sentence order in *Holland*.¹⁰⁸ But the assessment at issue in *Holland* contains none of the classic characteristics of a regulatory fee described by this Court's precedent. Instead, the challenged "access payments" were 1% assessments on all claims paid by health insurance carriers "to be used to fund the state's Medicaid program and make full use of any federal matching funds."¹⁰⁹ No regulatory purpose justified the bill beyond the mere desire to raise revenue, receive more matching funds from the federal government, and thereby fund the State's Medicaid program. Unlike with the highway mileage tax or the Smoking Cessation Fee, no rational argument could be made that the assessment was levied to discourage or compensate for insurance claim payments because they were somehow harmful or costly to the public. Thus, *Holland* is consistent with Respondent's argument here and the legality of the challenged Fee.

Second, Petitioners claim that if they do not prevail in this case, the provisions of Article V, § 33 will be rendered illusory.¹¹⁰ This is a common argument by those challenging a bill under

¹⁰⁶ See, e.g., Resp. App'x A, Exhibits 4 & 7.

¹⁰⁷ See Resp. App'x A, ¶ 4.

¹⁰⁸ Pet. Br. 8, 11, 14 (citing *Holland v. State*, 2010 OK 60, 240 P.3d 665).

¹⁰⁹ See 2010 Okla. Sess. Laws, c. 300, § 1(1); see also *id.* at § 2(A), (B), (C).

¹¹⁰ Pet. Br. 14-15.

Article V, § 33.¹¹¹ Nevertheless, the Court has repeatedly favored the strict¹¹² definition of revenue bills and upheld challenged fees in case after case after case.¹¹³ This trend is fully consistent with the Court’s well-established rule that only those laws that are “clearly, palpably, and plainly inconsistent with the Constitution” will be overturned.¹¹⁴ Indeed, as this Court held in the context of a previous Article V, § 33 challenge, “[i]f 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.”¹¹⁵

III. This Court should give no weight to the statements of individual legislators and others regarding S.B. 845 upon which the tobacco companies heavily rely.

Recognizing that they cannot prevail on the *objective* characteristics of the Smoking Cessation Fee, Petitioners attempt to rely on *subjective* considerations—statements of individual legislators and news reporters, speculation regarding unpassed bills, etc.—to demonstrate that S.B.

¹¹¹ See, e.g., *Ali v. Fallin*, No. 115,933, Pet. Br. 9-10. (making the argument, which the Court rejected, that if the challenged bill was not invalidated, Article V, § 33 would be reduced “to a mere technicality, and allow the Legislature to circumvent § 33’s requirements and restrictions with impunity”).

¹¹² See *supra* n.43.

¹¹³ 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, 147; *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.

¹¹⁴ *Lafalier v. Lead-Impact Cmty. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188; see also *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 12, 152 P.3d 861, 866.

¹¹⁵ *Calvey v. Daxon*, 2000 OK 17, ¶ 24, 997 P.2d 164, 172 (citations and internal marks omitted).

845 is a “revenue bill” subject to Article V, § 33. But this Court refuses to “look to the testimony of individual lawmakers.”¹¹⁶ The intent of one member of the Legislature is 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.”¹¹⁷ Moreover, “[b]ills that fall short of passage, much like the testimony of individual lawmakers, are *never* probative of legislative intent. A legislature’s failure to express its will through enacted law constitutes its official silence. No intent may be divined from a lawmaking body’s silence.”¹¹⁸

Petitioners essentially ask this Court to invalidate S.B. 845 based on whether a handful of legislators believed it to be a “revenue bill.” Reliance on such statements or actions unconstitutionally deprives this Court of its “emphatic[] province and duty . . . to say what the law is.”¹¹⁹ Moreover, the full history of S.B. 845 runs counter to Petitioners’ desired narrative. While Petitioners are merely “looking over a crowd and picking out [their] friends,”¹²⁰ they ignore the public health origins of S.B. 845 and the many public statements to that effect.¹²¹ The Fee began as an initiative from the State Department of Health and was proposed to the Legislature based overwhelmingly on its deterrent effect. Legislators voting for the measure publicly touted its health benefits, stating that “[t]he central focus of this policy” is to reduce smoking rates.¹²² Legislators were also informed that the majority of their constituents supported the fee primarily

¹¹⁶ *Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 13, 369 P.3d 374, 378.

¹¹⁷ *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.

¹¹⁸ *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).

¹¹⁹ *State v. Huston*, 1910 OK 259, ¶ 57, 113 P. 190, 198 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

¹²⁰ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

¹²¹ See, e.g., Resp. App’x B, Exhibits 9-11.

¹²² See Resp. App’x B, ¶¶ 20-21 (compilation of statements from House and Senate debate).

because of its public health benefits, not because it raised revenue.¹²³ And public support over the proposed fee in newspaper articles and other circulated materials focused primarily on the public health rationale.¹²⁴

To the extent that this Court will attempt to discern the “intent” of the Legislature in enacting the law rather than relying on the law’s objective characteristics, the Court should rely only on those expressions of intent actually approved by the Constitutional process—the text of the bill itself. The title of the bill states that it is an “Act relating to public health” (not one for raising revenue).¹²⁵ The Fee is codified in Title 63—“Public Health and Safety.”¹²⁶ The bill then expresses its purpose by stating it is “necessary for the health and welfare of the people of the State of Oklahoma that smoking rates be reduced.” Section 7 of S.B. 845 details numerous legislative findings justifying the public health purpose of the bill. Beyond its objective effects, these are the only Constitutional expressions of legislative intent. They all indicate that the principle object of S.B. 845 is to promote public health, and it is not a law “whose principal object is the raising of revenue” even if “revenue may incidentally arise.”¹²⁷

CONCLUSION

For the foregoing reasons, this Court should assume original jurisdiction and deny the Petition on the merits.

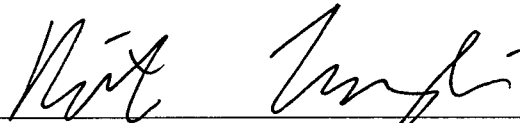
¹²³ Resp. App’x A, ¶¶ 6-7, Exhibit 4; *see also* Resp. App’x B, Exhibit 4.

¹²⁴ Resp. App’x B, Exhibits 1-11.

¹²⁵ *Fent v. Fallin*, 2014 OK 105, ¶ 8, 345 P.3d 1113, 1116 (“The title of an act is used to determine legislative intent.”).

¹²⁶ *See Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 17, 176 P.3d 1204, 1214 (using title in which bill was codified to discern legislative intent).

¹²⁷ *Calvey*, 2000 OK 17, ¶¶ 10, 14, 997 P.2d at 168, 170.



MITHUN MANSINGHANI, OBA #32453

Solicitor General

OFFICE OF THE ATTORNEY GENERAL

313 N.E. 21st Street

Oklahoma City, OK 73105

Phone: (405) 522-4392

Fax: (405) 521-4518

Email: Mithun.Mansinghani@oag.ok.gov

Of Counsel:

MICHAEL K. VELCHIK, Va. Bar #91142

Assistant Solicitor General

(Motion to Associate Counsel forthcoming)

COUNSEL FOR THE RESPONDENT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 7th day of July 2017, a true and correct copy of this document was forwarded via First Class U.S. Mail, postage prepaid, to the following persons.



MITHUN MANSINGHANI

