

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**FILED**  
SUPREME COURT  
STATE OF OKLAHOMA  
JUL 21 2014  
MICHAEL RICHIE  
CLERK

JERRY R. FENT, as a resident oil and gas  
taxpayer of the State of Oklahoma, and all  
other similar persons,

Petitioner,

v.

MARY FALLIN, Governor of the State of  
Oklahoma, and STATE OF OKLAHOMA,  
ex. rel., Oklahoma Tax Commission,

Respondents.

Case No. 112976

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*AMICUS CURIAE* BRIEF OF STEVEN H. DOW

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## INDEX

|  |          |
|--|----------|
| <b>INTEREST OF <i>AMICUS CURIAE</i> .....</b>  | <b>2</b> |
| <i>DG v. Yarbrough</i> ,<br>No. 08-CV-074 (N.D. Okla.) .....   | 2        |
| Okla. Const., Art. V, § 33 .....   | 2        |
| Sup. Ct. Rule 1.12 .....   | 2        |
| 12 Okla. Stat. Ch. 15, App. 1 .....  | 2        |
| <b>INTRODUCTION .....</b>  | <b>3</b> |
| <i>Anderson Ritterbusch</i> ,<br>1908 OK 250, 98 P. 1002.....  | 3        |
| <i>In re Initiative Petition No. 348, State Question No. 640</i> ,<br>1991 OK 110, 820 P.2d 772..... | 3, 4     |
| <i>In re Oneok Field Servs. Gathering, LLC</i> ,<br>2001 OK 116, 38 P.3d 900.....                    | 4        |
| <i>Marbury v. Madison</i> ,<br>1 Cranch 137, 176-180, 5 U.S. 137 (1803).....                         | 4        |
| <i>Zeier v. Zimmer, Inc.</i> ,<br>2006 Ok 98, 125 P.3d 86, 866.....                                  | 4        |
| Okla. Const., Art. V, § 33 .....   | 3        |
| Okla. Const., Art. V § 33(B).....  | 3        |
| Okla. Const., Art. V § 33(D).....  | 4        |
| <b>SUMMARY OF HB 2562 AND ITS ENACTMENT .....</b>  | <b>5</b> |
| Okla. Const., Art. V, § 33(B).....   | 7        |

|   |      |
|---|------|
| Okla. Const., Art. V, § 33(C) .....   | 7    |
| Okla. Const., Art. V, § 33(D) .....   | 7    |
| 68 Okla. Stat. § 1001 .....   | 5    |
| 68 Okla. Stat. § 1001(B)(3) .....   | 6    |
| 68 Okla. Stat. § 1001(D)(1) .....   | 6    |
| 68 Okla. Stat. § 1001(D)(2) .....   | 6    |
| 68 Okla. Stat. § 1001(E) .....  | 6    |
| 68 Okla. Stat. § 1001(F) .....  | 6    |
| 68 Okla. Stat. § 1001(G) .....  | 6    |
| 68 Okla. Stat. § 1001(H)(2) .....   | 6    |
| 68 Okla. Stat. § 1001(I) .....  | 6    |
| 68 Okla. Stat. § 1001(J) .....  | 6    |
| 68 Okla. Stat. § 1004 .....   | 5, 7 |
| 68 Okla. Stat. § 1004(A)(9) .....   | 7    |
| David Blatt, Oklahoma Policy Institute,<br>“Unnecessary and Unaffordable,” October 2012, available at:<br><a href="http://okpolicy.org/wp-content/uploads/2012/10/Unnecessary-and-Unaffordable.pdf">http://okpolicy.org/wp-content/uploads/2012/10/Unnecessary-and-Unaffordable.pdf</a> ..... | 7    |
| “Historical Highlights of the Energy Industry in Oklahoma,”<br>available at: <a href="http://petroenergyii.com/oklahoma-highlights/">http://petroenergyii.com/oklahoma-highlights/</a> .....  | 7    |

**ARGUMENT .....8**

*In re: Initiation Petition No. 348, State Question No. 640,*  
1991 OK 10, 820 P.2d 772.....9, 10, 11

Ala. Const., Art. IV, § 70 .....9

Okla. Const., Art. V, § 33 .....*passim*

Okla. Const., Art. VI, § 33(A) and (B) .....9, 10

Okla. Const., Art. VI, § 33(C) and (D) .....9, 10, 11

U.S. Const. art I, § 7, cl. 1 .....9

UNITED STATES STATUTES AT LARGE,  
59 Cong. Ch. 3335, June 16, 1906, 34 Stat. 267.....8

Oklahoma Historical Society’s Encyclopedia of Oklahoma History  
& Culture, “Constitutional Convention,” available at:  
<http://digital.library.okstate.edu/encyclopedia/entries/C/CO047.html>.....9

**I. HB 2562 IS A “REVENUE BILL” THAT HAD TO BE ENACTED  
IN COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS  
OF SECTION 33 .....11**

*Anderson v. Ritterbusch,*  
1908 OK 250, 98 P. 1002.....11, 12, 13, 14

*Calvey v. Daxon,*  
2000 OK 17, 997 P.2d 164.....11, 12, 13, 14

*Ex parte Sales,*  
1924 OK 29, 233 P.186.....14

*Fent v. Oklahoma Capital Improvement Auth.,*  
1999 OK 64, 984 P.2d 200.....14

*In re: Initiation Petition No. 348, State Question No. 640,*  
1991 OK 10, 820 P.2d 772.....12

|  |                |
|--|----------------|
| <i>Millard ARD v. Roberts</i> ,<br>202 U.S. 429 (1906).....  | 13, 14         |
| <i>Twin City Nat. Bank of New Brighton v. Nebecker</i> ,<br>167 U.S. 196 (1897).....   | 13, 14         |
| <i>U.S. Fid. &amp; Guar. Co. v. State ex rel. Oklahoma Tax Commission</i> ,<br>2002 OK 42, 54 P.3d 1010, 1013<br>(citing Black’s Law Dictionary at 1307 (5 <sup>th</sup> ed. 1979)).....     | 12             |
| <i>United States v. Mayor</i> ,<br>26 F. Cas. 1230 (C.C.D. Mass. 1813) .....   | 12             |
| <i>United States v. Munoz-Flores</i> ,<br>495 U.S. 385 (1990).....   | 13             |
| <i>Walters v. State, ex rel Oklahoma Tax Comm’n</i> ,<br>1996 OK CIV APP 154, 935 P.2d 398,<br><i>cert. denied</i> , 522 U.S. 908 (1997),<br><i>reh’g denied</i> , 522 U.S. 1009 (1997)..... | 14             |
| Okla. Const., Art. V, § 33 .....   | 11, 12, 14     |
| Okla. Const., Art. V, § 33(A),(B),(C) and (D).....   | 11             |
| 68 Okla. Stat. § 1004.....   | 15             |
| <b>II. WHETHER THE TAXES LEVIED IN HB 2562 INCREASE OR<br/>DECREASE REVENUES IS NOT GERMANE TO DETERMINING<br/>THE CONSTITUTIONALITY OF THE LEGISLATION.....</b>                             | <b>15</b>      |
| <i>Anderson v. Ritterbusch</i> ,<br>1908 OK 250, 98 P. 1102.....   | 15, 16, 17, 19 |
| <i>Armstrong v. United States</i> ,<br>759 F.2d 1378 (9 <sup>th</sup> Cir. 1985).....  | 17             |
| <i>Calvey v. Daxon</i> ,<br>2000 OK 17, 997 P.2d 164.....  | 19             |

|   |            |
|---|------------|
| <i>In re Opinions of the Justices,</i><br>190 So. 824, 825 (Ala. 1939).....   | 17         |
| <i>In re Opinions of the Justices,</i><br>31 So. 2d 558, 559 (Ala. 1947).....   | 17         |
| <i>In re Opinions of the Justices,</i><br>379 So. 2d 1267 (Ala. 1980).....  | 17         |
| <i>Perry County v. Selma,</i><br>58 Ala. 546 (1877) .....   | 16, 17     |
| <i>Texas Ass’n of Concerned Taxpayers, Inc. v. United States,</i><br>772 F.2d 163 (5 <sup>th</sup> Cir. 1985).....  | 18         |
| <i>Walters v. State, ex rel. Oklahoma Tax Commission,</i><br>1996 OK CIV APP, 395 P.2d 398 .....  | 17         |
| <i>Wardell v. United States,</i><br>757 F.2d 203 (8 <sup>th</sup> Cir. 1985) (per curiam).....  | 17         |
| Okla. Const., Art. V, § 33 .....  | 16, 18, 19 |
| HB 2562 Conference Committee Report, available at:<br><a href="http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB2562%20CCR%20A%20BILLSUM.PDF">http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB2562%20CCR%20A%20BILLSUM.PDF</a> ..... | 19         |
| <i>Black’s Law Dictionary</i> 1133 (Rev. 5 <sup>th</sup> ed. 1979).....   | 17, 18     |
| 2 A. Hinds,<br><i>Precedents of the House of Representative of the United States</i> § 1489 (1907).....   | 18         |

|  |           |
|--|-----------|
| <b>III. THE STATE OF OKLAHOMA TOGETHER WITH NINETEEN<br/>(19) OTHER STATES HAVE VIGOROUSLY URGED “BILLS<br/>FOR RAISING REVENUE” INCLUDES BILLS THAT HAVE<br/>“REVENUE AFFECTING POTENTIAL.”</b>   | <b>20</b> |
| <i>Anderson v. Ritterbusch,</i><br>1908 OK 250, 98 P. 1002   | 21        |
| <i>Steven F. Hotze, M.D., and Braidwood Management, Incorporated,<br/>Appellants, v. Kathleen Sebelius, Secretary, Department of Health<br/>and Human Services; Jacob J. Lew, Secretary, Department of<br/>Treasury, Appellees,</i><br>2014 WL 2158681 | 20, 21    |
| Okla. Const., Art. V, § 33   | 21        |
| 68 Okla. Stat. § 1001 B(3), E(3), I and J  | 22        |
| 68 Okla. Stat. § 1001 H(2)(f)  | 22        |
| 68 Okla. Stat. § 1004  | 22        |
| Patient Protection and Affordable Care Act,<br>Pub. L. No. 111-148, 124 Stat. 119 (2010)   | 20        |
| James V. Saturno,<br>The Origination Clause of the U.S. Constitution:<br>Interpretation and Enforcement<br>(Cong. Research Serv., RL31399) (Mar. 15, 2011)   | 21        |
| <b>CONCLUSION</b>  | <b>22</b> |
| Okla. Const., Art. V § 33  | 22        |

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

|  |   |                 |
|--|---|-----------------|
| JERRY R. FENT, as a resident oil and gas   | ) |                 |
| taxpayer of the State of Oklahoma, and all | ) |                 |
| other similar persons,                     | ) |                 |
|  | ) |                 |
| Petitioner,                                | ) |                 |
|  | ) |                 |
| v.   | ) | Case No. 112976 |
|  | ) |                 |
| MARY FALLIN, Governor of the State of      | ) |                 |
| Oklahoma, and STATE OF OKLAHOMA,           | ) |                 |
| ex. rel., Oklahoma Tax Commission,         | ) |                 |
|  | ) |                 |
| Respondents.                               | ) |                 |

**AMICUS CURIAE BRIEF OF STEVEN H. DOW**

This *Amicus Curiae* Brief is respectfully submitted on behalf of Steven H. Dow in support of the Petitioner's Application to Assume Jurisdiction and Petition for Declaratory Relief and Writ of Injunction and/or Mandamus. House Bill No. 2562 ("HB 2562") is a revenue bill which levies taxes on oil and gas production to fund core government services. HB 2562 was enacted in contravention of the mandates and restrictions of Article V, Section 33 ("Section 33") of the Oklahoma Constitution. For the reasons set forth below, this Court should accept jurisdiction of Petitioner's Application and declare HB 2562 constitutionally invalid. A writ of prohibition should issue.



### INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Steven H. Dow (“Mr. Dow”) has lived in Oklahoma continuously since 1990. Mr. Dow is a former member of the Commission for the Oklahoma Department of Human Services (“OKDHS”) and is currently one of five members of the OKDHS Family and Children Advisory Committee, having been appointed by the President Pro Tempore. For more than twenty years, he has been involved in public policy issues and worked to provide direct services to many of Oklahoma’s most vulnerable children and adults as the executive director of a Tulsa anti-poverty agency. Mr. Dow was directly instrumental in the resolution reached in the class action litigation brought by the Children’s Rights organization challenging the treatment and care of abused and neglected children in the OKDHS child welfare system. *See DG v. Yarbrough*, No. 08-CV-074 (N.D. Okla.). That settlement agreement, known as the Pinnacle Plan, is designed to improve the child welfare system’s care and treatment of children. State officials, including OKDHS, the Governor and legislative leadership, agreed to a five-year plan to improve child welfare services with commitments and initiatives to secure the safety and care of Oklahoma’s children in the child welfare system requiring significant increases in funding.

For these reasons, Mr. Dow has a continuing interest in ensuring that the procedural requirements of Section 33 of the Oklahoma Constitution affecting revenue

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<sup>1</sup> In accordance with Sup. Ct. Rule 1.12, 12 Okla. Stat. Ch. 15, App. 1, Mr. Dow sought and secured the consent of Petitioner Jerry Fent and Respondents’ counsel Patrick Wyrick, Solicitor General, as reflected in the Application filed on July 16, 2014. The filing of this *Amicus Curiae* Brief was approved by this Court on July 18, 2014.

bills are faithfully and vigorously enforced and the taxing power of the Legislature is exercised consistent with the Oklahoma Constitution.

### **INTRODUCTION**

Section 33 provides four limitations which control the passage of revenue bills by the Oklahoma legislature. *See* Okla. Const., Art. V § 33. HB 2562 levies taxes, raising tax rates for some taxpayers while lowering tax rates for others and imposing new taxes on still other taxpayers. These gross production taxes are levied for the purpose of funding the General Revenue Fund as well as schools and roads making the bill a revenue bill the passage of which is subject to the restrictions of Section 33. *See Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002, 1005-1006. Contrary to the Constitution, in passing HB 2562 the legislature violated three of these restrictions.

HB 2562's passage on May 22, 2014, the day prior to the legislature's adjournment on May 23, 2014, violated Section 33's prohibition against the passage of revenue bills during the last five days of the legislative session rendering the Act constitutionally invalid and totally unenforceable. *See* Okla. Const., Art. V § 33(B). By passing this bill in the hectic last days of the legislative session, the legislature impaired the transparency and accountability clearly intended by Section 33(B). The enactment of this revenue bill by a simple majority of both the House of Representatives and the Senate without any mechanism for submitting the bill to a vote of the people defeated the clear requirements of the 1992 Amendments to Section 33. *See In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, 820 P.2d 772, 779. Under these provisions until and unless this bill is approved by a vote of the people at a general

election, it is void and cannot be enforced. And finally, this revenue bill was made subject to an emergency provision in direct violation of Section 33(D). By this action the voters were denied their right to consider this revenue bill prior to its effective date.

It is not for this Court to determine the wisdom of HB 2562's taxation scheme. *See Zeier v. Zimmer, Inc.*, 2006 Ok 98, 125 P.3d 86, 866-67. Tax legislation often provides incentives and burdens which are intended to affect future taxpayer activities or conduct. The wisdom or effectiveness of the legislature's choices in exercising its plenary power of taxation is not reviewable by this Court. In fact, under Oklahoma's constitutional scheme, barring a super majority in both houses of the legislature, the voters have reserved for themselves the right to judge the wisdom of revenue bills passed by the legislature. *See In re Initiative Petition No. 348*, 820 P.2d at 779. The role of this Court is only to ensure that the process of enacting revenue bills, including the right of the citizens to be heard on such matters, fully complies with the requirements mandated by the Oklahoma Constitution. *See In re Oneok Field Servs. Gathering, LLC*, 2001 OK 116, 38 P.3d 900, 903.

Where a law has been enacted in violation of the Constitution, this Court must declare it invalid. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176-180, 5 U.S. 137 (1803). Given the substantive constitutional violations which attended the passage of HB 2562, this Court must find that it is invalid and cannot be enforced.

## **SUMMARY OF HB 2562 AND ITS ENACTMENT**

1. On May 28, 2014, the Secretary of State filed an Act of Legislature, approved by the Governor on May 28, 2014, known as HB 2562, amending 68 Okla. Stat. §§ 1001 and 1004.

2. HB 2562 passed the House of Representatives on May 22, 2014, on a vote of 61 Ayes and 34 Nays. HB 2562 failed to receive the approval of three-fourths of the 101 members of the House of Representatives.

3. HB 2562 passed the Senate on May 22, 2014, on a vote of 30 Ayes and 14 Nays. HB 2562 failed to receive the approval of three-fourths of the 48 members of the Senate.

4. An emergency provision was also passed by the House of Representatives and Senate on May 22, 2014. HB 2562 became effective July 1, 2014. *See* HB 2562 §§ 4 and 5.

5. HB 2562 was passed by the House of Representatives and the Senate on May 22, 2014, one day before the end of the legislative session. The legislative session ended on May 23, 2014.

6. HB 2562 levies gross production taxes on oil and gas and changes the tax code. Relevant to the issues in this litigation, HB 2562 makes substantive changes to the tax code affecting tax rates for all wells spudded after July 1, 2015, as well as many existing wells. HB 2562 levies taxes on oil and gas production; raises some tax rates and lowers other tax rates; and, eliminates and extends exemptions.

- HB 2562 sets a standard severance tax rate for all production from wells spudded after July 1, 2015 at a rate of two percent (2%) for the first 36 months of production. 68 Okla. Stat. § 1001(B)(3). After 36 months of production, the tax rate is seven percent (7%). *Id.*
- Production from horizontally drilled wells spudded after July 1, 2015 will no longer receive the preferential tax rate of one percent (1%) for the first 48 months of production. 68 Okla. Stat. § 1001(E).
- The exemption from taxes, set to expire on July 1, 2014, for production for secondary recovery projects for a period of up to five years, is extended until July 1, 2020. 68 Okla. Stat. § 1001(D)(1).
- The exemption from taxes, set to expire on July 1, 2014, for production from tertiary recovery projects for a period of up to ten years, is extended until July 1, 2020. 68 Okla. Stat. § 1001(D)(2).
- Deep wells spudded after July 1, 2015 are no longer given a specific tax exemption or a reduced tax rate. 68 Okla. Stat. § 1001(H)(2).
- Taxes are levied on production from “newly discovered wells” spudded after July 1, 2015. These wells were previously exempt from gross production tax. 68 Okla. Stat. § 1001(I).
- Taxes are levied on production from 3-D seismic wells spudded after July 1, 2015. These wells were previously exempt from gross production tax. 68 Okla. Stat. § 1001(J).
- The exemption from taxes on production from an “inactive well,” which was set to expire on July 1, 2014, is extended until July 1, 2020. 68 Okla. Stat. § 1001(F).
- The exemption from taxes on production from “enhanced recovery projects,” which was set to expire on July 1, 2014, is extended until July 1, 2020. 68 Okla. Stat. § 1001(G).

7. Gross production taxes (more than \$800 million in FY 2012) account for more than ten percent (10%) of Oklahoma’s tax revenues and are the third leading source of tax revenues used to fund general government services, including schools and roads.

David Blatt, Oklahoma Policy Institute, “Unnecessary and Unaffordable,” October 2012, at 3, available at: <http://okpolicy.org/wp-content/uploads/2012/10/Unnecessary-and-Unaffordable.pdf>. In FY 2008 Oklahoma gross production taxes collected were nearly \$1.2 billion. *Id.* at 3. In 1921, gross production taxes constituted more than seventy percent (70%) of state tax revenues. “Historical Highlights of the Energy Industry in Oklahoma,” available at: <http://petroenergyii.com/oklahoma-highlights/>.

8. Fifty percent (50%) of the revenues generated from the two percent (2%) gross production tax levied by HB 2562 will be paid to the General Revenue Fund. The remaining fifty percent (50%) will be distributed to county roads, local school districts, and various other state funds. 68 Okla. Stat. § 1004(A)(9). Other severance tax revenues are allocated to the General Revenue Fund, educational funds, county roads, school districts, bridge and road improvements, and other small funds. *See* 68 Okla. Stat. § 1004.

9. HB 2562 passed the House of Representatives and Senate within the last five days of the legislative session, in violation of Section 33(B).

10. HB 2562 passed with an emergency clause and became effective July 1, 2014, in violation of Section 33(D).

11. HB 2562 did not receive the approval of three-fourths of neither the House of Representatives nor the Senate and became law without the approval of the Oklahoma voters, in violation of Section 33(C) and (D).

HB 2562 substantively changes the tax code, levying taxes on oil and gas production for the purpose of raising revenues for core government services. HB 2562

was enacted in violation of Section 33 mandates for the enactment of revenue bills. HB 2562 is constitutionally invalid and Respondents should be prohibited from applying it.

### **ARGUMENT**

Upon passage of the Oklahoma Enabling Act, delegates met in Guthrie to frame the Oklahoma Constitution. *See* UNITED STATES STATUTES AT LARGE, 59 Cong. Ch. 3335, June 16, 1906, 34 Stat. 267. The delegates sought advice and direction from William Jennings Bryan. Upon completion of their task in 1907, “Bryan told members of the Oklahoma Constitution Committee that they had borrowed the best provisions of the existing state and national constitutions and had, in the process, created the best Constitution ever written.” *See* Oklahoma Historical Society’s Encyclopedia of Oklahoma History & Culture, “Constitutional Convention,” available at: <http://digital.library.okstate.edu/encyclopedia/entries/C/CO047.html>.

Section 33, as adopted in 1907, reflects this history. Section 33 borrowed and mirrored the procedural restrictions of the federal Origination Clause and the Alabama Constitution. As adopted and until amended in 1992,<sup>2</sup> Section 33 read:

All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills. No revenue bill shall be passed during the last five days of the session.

The first two sentences mirror the United States Constitution Origination Clause:

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

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<sup>2</sup> In 1931, “last five days” was restated as “five last days.”

U.S. Const. art. I, § 7, cl. 1. While many states' constitutions include the origination restriction, only Alabama and Oklahoma prohibit passage of revenue bills in the last five days of the session.

The last sentence of Section 33 is identical to a previously adopted provision of Alabama's Constitution prohibiting the passage of revenue bills in the final five days of a legislative session. *See* Ala. Const., Art. IV, § 70 ("No revenue bill shall be passed during the last five days of the session.").

In 1992, Section 33 was amended as a result of the voters' approval of Initiative Petition No. 348, State Question No. 640. The 1907 procedural restrictions of Section 33 were restated. Under the 1992 amendments, the revenue bill restrictions as to origination appear in subsection A, and the restrictions prohibiting passage in the final five days of a legislative session are set forth in subsection B. *See* Okla. Const., Art. V, § 33(A) and (B). Additional procedural restrictions on the passage of revenue bills were added restricting the method by which such bills become law. Section 33 now requires voter approval at a general election unless the revenue bill receives approval of three-fourths of the members of the House of Representatives and Senate. It also prohibits emergency measure provisions being attached to revenue bills. *Id.* at (C) and (D). The passage of State Question 640 requires that revenue bills cannot be passed in the last five days of the legislative session, cannot include an emergency provision and unless passed by a super majority in both houses, the voters must approve such bills.

"Bills for raising revenue" or "revenue bills," such as HB 2562, are now subject to four constitutional restrictions:



A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.

B. No revenue bill shall be passed during the five last days of the session.

C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths ( $\frac{3}{4}$ ) of the membership of the House of Representatives and three-fourths ( $\frac{3}{4}$ ) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

Okla. Const., Art. V, § 33.

The 1992 amendments were intended to “change the method by which state government makes laws that raise revenue.” See *In re Initiative Petition No. 348*, 820 P.2d at 779. In rejecting a challenge to Initiative Petition No. 348, this Court approved the description in the title of the Petition as an accurate representation of the effect of the Section 33 amendments. The approved language stated:

The measure requires that a bill to raise revenue be voted upon by the people at the next general election. A bill would not be effective until it was approved by a majority of the voters. The measure also provides a way that a revenue bill could become law without a vote of the people. A bill would have to be approved by a  $\frac{3}{4}$  vote of each house of the legislature and go to the Governor for proper action. A revenue bill approved by a  $\frac{3}{4}$  vote of each house of the legislature would not become effective until ninety days after the approval date. Such a bill would not be subject to the emergency measure provision.

*Id.* 820 P.2d at 778-79 (quoting the ballot title prepared by the Oklahoma Attorney General). By passing these amendments, Oklahoma voters made explicit their intention to exercise the power to approve or reject revenue bills unless such measures were passed by a super majority of both legislative houses.

HB 2562 violates three provisions of Section 33. First, in violation of subsection B, the tax legislation was passed during the last five days of the session. Second, HB 2562 neither received the approval of three-fourths of the members of both the House of Representatives and the Senate nor has it been approved by the voters in a general election violating subsections C and D. Finally, an emergency measure provision was attached to the bill in violation of subsection D. HB 2562 is a revenue bill clearly enacted in violation of Section 33. It must be declared invalid and should not be enforced.

**I. HB 2562 IS A “REVENUE BILL” THAT HAD TO BE ENACTED IN COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF SECTION 33.**

By its terms, Section 33 mandates specific procedural requirements for the enactment of “revenue bills.” Subsection A refers to “bills for raising revenues,” language identical to the federal Origination Clause language, and subsections B, C and D refer to “revenue bills.” *See* Okla. Const., Art. V, § 33. This Court has consistently held for more than 100 years that the terms “bills for raising revenue” and “revenue bills” are interchangeable and co-extensive. *See Anderson*, 98 P. at 1005. *See also Calvey v. Daxon*, 2000 OK 17, ¶¶ 8-11, 997 P.2d 164, 169. Moreover, this Court has held that in

passage of the 1992 Amendments, the voters “did not change the clearly settled meaning of the terms, ‘revenue bill’ or ‘bill for raising revenue.’” *See Calvey*, 2000 OK 17, ¶ 10, 997 P.2d at 168; and *In re Initiation Petition No. 348*, 1991 OK at ¶ 3, 820 P.2d at 774. HB 2562 is clearly a revenue bill enacted in violation of the requirements of Section 33.

One year after statehood, this Court traced the origins, history, fears and advantages of Section 33’s restrictions on revenue bills which were intended to ensure the levying of taxes was responsive to the will of the people. *See Anderson*, 1908 OK 250, 98 P. at 1005-06. Based upon its review of this history and analysis of state and federal cases, as well as Justice Joseph Story’s *Commentaries on the Constitution*, this Court defined “revenue bills” as legislation enacted:

“for the direct and avowed purpose of creating and securing revenue or public funds for the service of government. No laws, whose collateral or indirect operation might possibly conduce to the public or fiscal wealth, are within the scope of this provision.”

*Id.* at 1006, quoting *United States v. Mayor*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813).

Accordingly, revenue bills are those acts that levy taxes for the primary purpose of raising revenue for the funding of core government services.

The *Anderson* Court’s definition of “revenue bill” has been consistently applied and was reaffirmed by this Court in 2000 in *Calvey*. For purposes of Section 33:

- 1) revenue bills are those laws whose principal object is the raising of revenue and which levy taxes in the strict sense of the word<sup>3</sup>; and

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<sup>3</sup> The definition or “strict sense” of tax is: “a pecuniary burden imposed upon a class of individuals, businesses, or other entities for support of government.” *U.S. Fid. & Guar. Co. v. State ex rel. Oklahoma Tax Commission*, 2002 OK 42, 54 P.3d 1010, 1013 (citing Black’s Law Dictionary at 1307 (5<sup>th</sup> ed. 1979)).

2) laws under which revenue may incidentally arise are not “revenue bills” or “bills for raising revenue” within the meaning of the Oklahoma Constitution.

*Calvey*, 2000 OK at ¶ 9, 997 P.2d at 168. This Court’s understanding of the term “revenue bills” is also consistent with and supported by federal case law.

The United States Supreme Court, like this Court’s decision in *Anderson*, relies on Justice Story’s *Commentaries on the Constitution* in defining the term “revenue bills.” For purposes of the Origination Clause, the primary purpose of revenue bills must be to levy taxes to meet the general obligations and expenses of the government and not levied incident to specific purposes provided for in a bill. *See Twin City Nat. Bank of New Brighton v. Nebecker*, 167 U.S. 196, 202 (1897). In applying this standard, the United States Supreme Court held that fees imposed on banks, by legislation enacted for the purpose of establishing a national currency backed by bonds, were incidental to that purpose and did not “raise revenue to be applied to meeting the expenses or obligations of the government.” *Id.* at 204. As a result, the act and its taxes were not subject to the Origination Clause. *See also Millard ARD v. Roberts*, 202 U.S. 429 (1906) (Law imposing taxes on Washington, D.C. property for the specific purpose of funding railroad terminals not a revenue bill.).

More recently, the United States Supreme Court considered whether the assessment imposed by the Victims of Crime Act on persons convicted of misdemeanors was a revenue bill. *United States v. Munoz-Flores*, 495 U.S. 385 (1990). Although excess funds collected from the assessment would be paid into the United States Treasury, the Supreme Court, relying on Justice Story’s treatise and its decisions in

*Nebecker* and *Millard*, held that a bill assessing fees for the purpose of funding “a particular government program and that raises revenue to support that program, as opposed to a statute that raises revenue to support government generally,” is not a revenue bill subject to the mandate of the Origination Clause. *Id.* at 398. The United States Supreme Court’s test for revenue bills is consistent with the standard of this Court announced in *Anderson*. Revenue bills must levy taxes for the primary purpose of raising revenue generally and not be incidental to another purpose.

Oklahoma has consistently applied this standard in analyzing whether legislation is subject to the requirements of Section 33. In *Calvey v. Daxon*, this Court found that bills authorizing the Director of State Finance to transfer license fees and taxes enacted incidental to a regulatory scheme between state funds were not revenue bills for purposes of Section 33. The challenged bills did not impose “a tax in the strict sense of the word.” *Calvey*, 2000 OK ¶ 17, 997 P.2d at 170. *See also Fent v. Oklahoma Capital Improvement Auth.*, 1999 OK 64 ¶ 13, 984 P.2d 200, 209 (A bill authorizing the issuance of bonds to fund particular governmental facilities is not subject to Section 33 because no taxes are levied in bill.); *Ex parte Sales*, 1924 OK 29, 233 P.186 (Bills levying fees incidental to regulation of public highways are not revenue bills.); and *Walters v. State, ex rel Oklahoma Tax Comm’n*, 1996 OK CIV APP 154, 935 P.2d 398, 401, *cert. denied*, 522 U.S. 908 (1997), *reh’g denied*, 522 U.S. 1009 (1997) (Bill altering methodology for calculating state income tax for non-residents is not a revenue bill.).

HB 2562 clearly falls within this Court’s definition of “revenue bill.” First, it imposes a tax in the strictest sense of the word. By its explicit terms, HB 2562 levies

taxes on the production of oil and gas and substantively changes the tax code. HB 2562 raises some rates while lowering others; exempts some production from taxation; and repeals some previous tax exemptions for the production from certain types of wells. HB 2562 clearly imposes a pecuniary burden on royalty owners and producers of oil and gas.

Second, the primary purpose of HB 2562 is to generate revenue for the general funding of the government and the revenues are not incidental to some other purpose. While gross production taxes are no longer Oklahoma's largest source of tax revenue as they were in the early 1980s, nonetheless, oil and gas severance taxes currently provide more than ten percent (10%) of the state's tax revenues and are the third highest source of revenues for core government services. *See Blatt at 3.* HB 2562 amends the tax code and directly levies taxes on gross production to raise revenues for general government services. *See 68 Okla. Stat. § 1004.* The taxes levied are not incidental to some new regulatory scheme or merely a change in the administration of severance taxes. The primary purpose for collection of gross production revenues is to fund government services.

As a revenue bill, HB 2562's enactment was subject to the restrictions provided in Section 33 of Article V of the Constitution of the State of Oklahoma.

## **II. WHETHER THE TAXES LEVIED IN HB 2562 INCREASE OR DECREASE REVENUES IS NOT GERMANE TO DETERMINING THE CONSTITUTIONALITY OF THE LEGISLATION.**

Whether substantive changes to Oklahoma's tax code levying severance taxes on oil and gas production will increase or decrease tax revenues is not relevant to whether HB 2562 is a revenue bill and subject to the mandates of Section 33. Under the *Anderson*

test, HB 2562 is a revenue bill, regardless of the fact that on its face it reduces *some* tax rates and raises other tax rates or ultimately whether it will reduce or increase tax revenues either immediately or at some time in the future. Increasing revenues is not a requirement for the determination of whether an act is a “bill for raising revenue.”

In *Anderson*, this Court considered the specific question of whether a legislative act which imposed a lower tax rate and reduced tax receipts nonetheless fell within the definition of “revenue bills” subject to the restrictions in Section 33. In doing so, this Court concurred with Alabama Supreme Court’s decision in *Perry County v. Selma*, 58 Ala. 546 (1877), holding that legislation which “actually lowers the rate of taxation of the state” is a bill for raising revenue. *Anderson*, 98 P. at 1006. This Court held the *Perry* Court “was clearly right” in its analysis that “increase of revenue” is not implied in the language “to raise revenue.” *Id.* at 1006. *Anderson* held:

It is clear to our minds that “increase of revenue” is not implied in the language “to raise revenue.” The transitive verb “to raise” in this connection means “to bring together; to collect; to levy; to get together for use or service, as to raise money.” Webster’s Dictionary. The precise meaning in this clause is to levy a tax as a means of collecting revenue ... The act in question in one sense reduced the taxes, for it assumed to relieve certain railroad property from county taxation. But it was nevertheless a bill to raise revenue.

*Id.* at 1006 (quoting *Perry*, 58 Ala. at 557). Revenue raising bills are not required to increase tax rates or tax receipts.

Since *Anderson*, this Court has not had an occasion to address Section 33's application to an act which levies taxes while reducing tax rates.<sup>4</sup> However, the State of Alabama has a rich history building upon its holding in *Perry v. Selma*, cited by this Court with approval in *Anderson*. In 1939, the Alabama Supreme Court found an act decreasing sales tax rates was a revenue raising bill, holding: "Any bill, we think, whose chief purpose is to create revenue, or to increase or decrease revenue as created in another act is one to raise revenue ..." *In re Opinions of the Justices*, 190 So. 824, 825 (Ala. 1939). See also *In re Opinions of the Justices*, 31 So. 2d 558, 559 (Ala. 1947) ("[A]n act to amend an existing act whose purpose is to raise revenue by which the amount to be collected under the latter act as amended is decreased or increased, is an act to raise revenues."); and *In re Opinions of the Justices*, 379 So. 2d 1267, 1269 (Ala. 1980) ("If the proposed act affects the amount of revenue which flows into the State Treasury, either as an original measure, or as an amendment to one already in existence, it is one to raise revenue.").

Federal courts have also rejected limiting revenue bills to acts which increase revenues. In *Armstrong v. United States*, 759 F.2d 1378, 1381 (9<sup>th</sup> Cir. 1985), the court held:

The term "Bills for raising Revenue" does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating to taxes*. *Wardell v. United States*, 757 F.2d 203 at 205 (8<sup>th</sup> Cir. 1985) (per curiam); *Black's*

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<sup>4</sup> In a Court of Appeals decision predating *Calvey*, there is *dicta* suggesting that "revenue raising" requires bills to "increase state tax revenue." See *Walters v. State, ex rel. Oklahoma Tax Commission*, 1996 OK CIV APP at ¶ 7, 935 P.2d at 401. The Court of Appeals provides no analysis or support for rejecting this Court's holding in *Anderson* and this language is clearly contrary to established law.



*Law Dictionary* 1133 (Rev. 5<sup>th</sup> ed. 1979) (defining “raise” in the revenue context to mean “to collect, to levy, as to raise money by levying taxes”); see also 2 A. Hinds, *Precedents of the House of Representative of the United States* § 1489 at 949-53 (1907).

(Emphasis in original). In *Texas Ass’n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163 (5<sup>th</sup> Cir. 1985), the Fifth Circuit also rejected the argument that “raising revenue” equates with “increasing revenues” and cautioned that identification of a bill as “increasing revenue” is a “slippery and potentially chameleonic one. The same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others.” *Id.* at 166.

Adding a new requirement limiting revenue bills to only include acts which increase revenues is unworkable and threatens to render the Section 33 protections impotent. Given that numerous factors will impact whether a bill will raise or lower revenue in the immediate or long term, it can be impossible to accurately predict if an act will increase revenues. HB 2562 provides a clear example of the impossibility of applying such a test. In the process of levying taxes, HB 2562 imposes new and higher taxes on some production and lower taxes on other production. HB 2562 both raises and decreases rates and attempts to incentivize some types of oil and gas extraction methods. However, the overall impact on tax revenues from these different tax rates will be a function of the amount of oil and gas drilling, when such drilling occurs, the success of such activity, and the price of oil and gas (which fluctuates frequently and widely). It is impossible to determine with any certainty whether revenues generated as the result of HB 2562 will increase or decrease in the immediate or long term.

In its review of HB 2562, the Oklahoma Tax Commission provided the following fiscal analysis to the Legislature:

The fiscal impact of replacing the existing gross production taxing system in future years is difficult due to the constant price fluctuation upon which the tax is based and other variables.

HB 2562 Conference Committee Report, available at: [http://webserver1.lsb.state.ok.us/cf\\_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB2562%20CCR%20A%20BILLSUM.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB2562%20CCR%20A%20BILLSUM.PDF). Perhaps, due to the fact that this tax scheme phases in over time, the Oklahoma Tax Commission concluded that while HB 2562 is revenue neutral for FY 2016 and does not require decertification in tax revenue collections for FY 2015, its ultimate impact on the state treasury remains uncertain. However, as the Oklahoma Tax Commission's fiscal analysis states, predicting whether HB 2562 increases or decreases revenue is at best a guess. Subjecting Section 33 to such uncertainty, risks the evisceration of the people's intent to require voter approval of revenue bills<sup>5</sup> unless such bills are passed by a super majority.

The application of the *Anderson* standard to legislation makes the scope of Section 33 restrictions clear. The wisdom of this Court's decision in *Anderson* should prevail. All bills which levy taxes in the strict sense of the word fall under the protections of Section 33.

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<sup>5</sup> In amending Section 33 in 1992, the voters could have but did not change the scope of revenue bills. See *Calvey*, 2000 OK at ¶ 14, 997 P.2d at ¶ 170.

**III. THE STATE OF OKLAHOMA TOGETHER WITH NINETEEN (19) OTHER STATES HAVE VIGOROUSLY URGED THAT “BILLS FOR RAISING REVENUE” INCLUDES BILLS THAT HAVE “REVENUE AFFECTING POTENTIAL.”**

The Honorable Oklahoma Attorney General Scott Pruitt, on behalf of the State, filed an *Amici Curiae* Brief in the United States Fifth Circuit Court of Appeals on May 15, 2014, addressing whether the Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), is a “bill for raising revenue” and therefore subject to the requirements of the Origination Clause in the United States Constitution. *See Steven F. Hotze, M.D., and Braidwood Management, Incorporated, Appellants, v. Kathleen Sebelius, Secretary, Department of Health and Human Services; Jacob J. Lew, Secretary, Department of Treasury, Appellees*, 2014 WL 2158681. Joining with attorneys general of nineteen (19)<sup>6</sup> other states, Oklahoma urged the adoption of a broader interpretation of what constitutes a revenue bill than it advances before this Court. Before the Fifth Circuit Oklahoma sought to have all bills which *potentially affect revenue* included within the definition of revenue bills under the Origination Clause. *See Oklahoma Amici Brief* at 14-18. In support of this definition, Oklahoma argued that “bills for raising revenue” was understood by the Framers of the United States Constitution and Congress to include any bill which *potentially affects revenue*. In the brief, Oklahoma acknowledges direct changes to the tax code are revenue bills but also advocates for the adoption of a definition of “bills for raising revenue” much broader than

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<sup>6</sup> The twenty (20) states that jointly filed the *Amicus Curiae* Brief are: Oklahoma, Texas, Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Utah and West Virginia.

urged by the Petitioner or Mr. Dow in this matter. According to the State of Oklahoma’s brief, the standard for defining a bill raising revenue should be:

[B]ased on whether the measure in question has revenue-affecting potential, and not simply whether it would raise or lower revenues directly. As a result, . . . the definition of revenue legislation not only [includes] direct changes in the tax code, but also any fees paid to the government that are not payments for a specific service. . . .

*Id.* at 17, quoting James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (Cong. Research Serv., RL31399) (Mar. 15, 2011). The critical issue common to both *Hotze* and the case before this Court is: what constitutes a “bill raising revenue” for purposes of Section 33 of the Oklahoma Constitution and the Origination Clause of the United States Constitution. Under the test urged by Oklahoma in *Hotze*, HB 2562 would unquestionably be a “bill for raising revenue” since it clearly has the potential of affecting revenue. However, such a definition would also expand revenue bills to include legislation which only incidentally raises revenue in contravention of *Anderson*.

This Court need not consider whether to broaden the *Anderson* standard as urged by the Attorney General before the Fifth Circuit. Pursuant to this Court’s standards enunciated in *Anderson*, HB 2562 is clearly a revenue raising bill. HB 2562 clearly makes direct and substantial changes to Oklahoma tax code’s levy of taxes on oil and gas production. It sets a new standard severance tax rate for all wells spudded after July 1, 2015. The tax rates set in HB 2562 are *higher* for some types of production, e.g. new horizontal wells will be taxed at a rate of two percent (2%) for a period of 36 months rather than one percent (1%) for a period of 48 months. At the same time, it levies *new*

*taxes* on production from “newly discovered wells” and 3-D seismic wells spudded after July 1, 2015. This production was previously exempt from taxation. *See* 68 Okla. Stat. § 1001 B(3), E(3), I and J. Tax rates will be lower in the short term for other types of production, e.g. deep wells drilled to a depth greater than 15,000 feet will pay taxes at a rate of two percent (2%) for 36 months rather than four percent (4%) for the first 48 or 60 months, depending on the depth of the well. *See* 68 Okla. Stat. § 1001 H(2)(f). Regardless of these intricacies, the primary purpose of HB 2562 is clearly directed at levying taxes to fund core government services. *See* 68 Okla. Stat. § 1004. As a revenue bill the mandates of Section 33 should be enforced regarding its passage.

### **CONCLUSION**

Mr. Dow respectfully urges this Court assume jurisdiction and declare HB 2562 was enacted in violation of Section 33, is unconstitutional and may not be enforced.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned does hereby state that on the 21<sup>st</sup> day of July, 2014, I deposited in the U.S. Mail, with sufficient postage thereon fully prepaid, a true and correct copy of the above document to the following:

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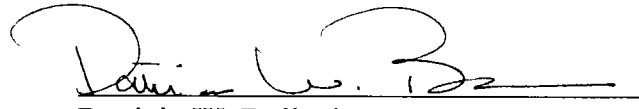
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