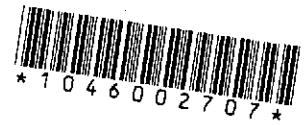


ORIGINAL



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) THE HONORABLE GREG TREAT,)
Senate President Pro Tempore, in his)
official capacity;)
(2) THE HONORABLE CHARLES MCCALL,)
Speaker of the House, in his official capacity;)
(3) THE HONORABLE ROGER THOMPSON,)
Senate Appropriations Chair, in his official)
capacity; and)
(4) THE HONORABLE KEVIN WALLACE,)
House Appropriations Chair, in his official capacity;)

Petitioners,)

v.)

OKLAHOMA STATE BOARD OF)
EQUALIZATION;)

Respondent.)

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

APR 14 2020

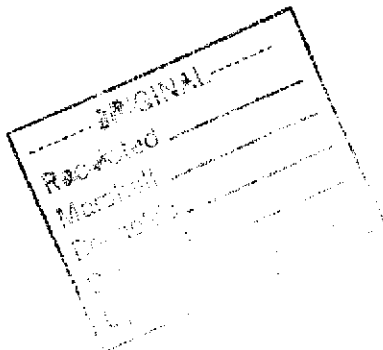
**JOHN D. HADDEN
CLERK**

No. **#118755**

**BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND PETITION FOR WRIT OF MANDAMUS**

V. GLENN COFFEE, OBA # 14563
CARA RODRIGUEZ, OBA #21794
DENISE LAWSON, OBA #31532
GLENN COFFEE & ASSOC., PLLC
P.O. Box 437
Oklahoma City, OK 73101
Phone: (405) 601-1616
gcoffee@glenncoffee.com
cara@glenncoffee.com
denise@glenncoffee.com

ATTORNEYS FOR PETITIONERS



APRIL 14, 2020

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On April 9, 2020, the Honorable J. Kevin Stitt, Governor of the State of Oklahoma (“Governor Stitt”), considered a trio of bills—Senate Bill 1053 (“SB1053”), Senate Bill 617 (“SB617”), and Senate Bill 199 (“SB199”)—and signed SB1053 and SB617 into law. Governor Stitt refused to take action on SB199, contending that it was “null and void.” But Governor Stitt was mistaken, and by failing to act on SB199, that bill has now become law. To trigger the provisions of SB199, however, the Board of Equalization (or “Board”) must meet—a meeting that Governor Stitt has cancelled or postponed.

Petitioners the Honorable Greg Treat, Senate President Pro Tempore; the Honorable Charles McCall, Speaker of the House; the Honorable Roger Thompson, Senate Appropriations Chair; and the Honorable Kevin Wallace, House Appropriations Chair, thus request this Court assume original jurisdiction and issue a writ of mandamus directing the Board to meet and to determine the revenue failure already declared by Governor Stitt and Director Steven Harpe of the Office of Management and Enterprise Services (“OMES”) who previously notified Oklahoma agencies of the budget shortfall pursuant to 62 O.S. § 34.49.

I. INTRODUCTION

As we all now know, a novel coronavirus known as SARS-CoV-2 (“COVID-19”) was first detected in Wuhan, Hubei Province, People’s Republic of China in December 2019.¹ On January 31, 2020, the Secretary of the United States (“U.S.”) Department of Health and Human Services declared a public health emergency,² and on March 14, 2020, President Donald J. Trump declared

¹ Proclamation, Donald J. Trump, President of the United States, Proclamation on Declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

² Press Release, Alex Azar, Secretary, United States Department of Health and Human Services, Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

a national emergency as a result of the national spread of COVID-19.³ On March 15, 2020, Governor Stitt then declared an emergency caused by the impending threat of COVID-19 to the people of the State of Oklahoma and the public's peace, health, and safety.⁴

Since these declarations were made and as our collective understanding of COVID-19 has taken root, bold, unified action has occurred at the local, state, and federal levels in big and small ways to help all Americans as we face the impact of COVID-19, with the removal of impediments to that help often presaging the help to come. For example, on March 21, 2020, the U.S. Department of the Treasury and the Internal Revenue Service extended the federal tax deadline from April 15 to July 15, and on March 27, 2020, President Trump signed into law the Coronavirus, Aid, Relief, and Economic Security—or CARES—Act, the largest economic relief bill in U.S. history. Stimulus checks are beginning to hit Americans' bank accounts. At the state level, licensing rules impacting medical professionals have been relaxed so that doctors can cross state lines to provide assistance in COVID-19-impacted areas. Here locally, municipalities have issued directives that Oklahomans unable to pay their utility bills will not have their utilities disconnected. Americans—Oklahomans among them—are working together to render aid to one another in this trying time.

And in an unprecedented show of solidarity and by overwhelming majorities, Senators and Representatives from both sides of the political spectrum passed SB1053, SB617, and SB199 to access monies from the Constitutional Reserve Fund (commonly known as “Rainy Day Funds”) necessary to fill a \$416 million budget shortfall for Fiscal Year 2020 (“FY2020”) due in large part

³ Proclamation, *supra* note 1.

⁴ Executive Order 2020-07, J. Kevin Stitt, Governor of the State of Oklahoma (Mar. 15, 2020), <https://www.sos.ok.gov/documents/executive/1913.pdf>.

to the catastrophic impact of COVID-19.⁵ Indeed, on April 3, 2020, Governor Stitt publicly announced a revenue failure, indicating that it was “not unexpected given the significant impacts of the COVID-19 pandemic.”⁶

But on April 9, 2020, Governor Stitt, after signing SB1053 and SB617, refused to consider SB199, contending SB199 was “null and void.”⁷ Apparently affronted by the Legislature’s exclusion of Governor Stitt’s Digital Transformation Revolving Fund from SB617, a Fund it is believed will still hold \$12 million by the end of FY2020,⁸ Governor Stitt took no action on a bill that would appropriate \$302,339,481 in Rainy Day Funds to address the budget shortfall.⁹

But Governor Stitt was mistaken—SB199 was not “null and void” at the time of its presentment. And by the Governor failing to act, SB199 has become law. But to trigger SB199, the Board must meet to determine that a revenue failure has occurred—a revenue failure Governor Stitt already declared. Unfortunately, Governor Stitt cancelled the Board’s April 6, 2020, meeting at which the Board would have made the vital determination regarding the revenue failure (“April 6 Board Meeting”). This impediment to fully funding the State’s core services must be removed in this uncertain time, and the Board must be commanded to act.

⁵ History for SB1053, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB1053&Session=2000>; History for SB617, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB617&Session=2000>; History for SB199, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB199&Session=2000>. SB1053, SB617, and SB199 all passed in the House of Representatives with 100 ayes and 0 nays and in the Senate with 39 ayes and 1 nay. *See id.*

⁶ K. Querry, *Stitt: Oklahoma expected to experience revenue failure*, KFOR-TV (Apr. 3, 2020), <https://kfor.com/news/local/stitt-oklahoma-expected-to-experience-revenue-failure/>.

⁷ Carmen Forman, *Budget battle: Stitt, legislators spar over digital transformation fund*, THE OKLAHOMAN (Apr. 10, 2020), <https://oklahoman.com/article/5659870/budget-battle-gov-kevin-stitt-legislators-spar-over-digital-transformation-fund>.

⁸ Tres Savage, *Stitt signs 2 of 3 bills to avoid April cuts, blames #okleg for ‘politics’*, NonDoc (Apr. 9, 2020), <https://nondoc.com/2020/04/09/stitt-avoids-april-cuts-blames-legislature-for-politics/>.

⁹ Carmen Forman, *supra* note 7.

II. BACKGROUND

The Board of Equalization met on December 19, 2018, to certify the amount available for appropriation in FY2020. The Board met again on February 20, 2019, to adjust the certification. Based on the Board's various certifications, the Legislature appropriated \$8.2 billion to fund state government. The Board then met a final time on June 27, 2019, to formalize changes to the previous estimates based on legislative enactments. All such meetings were in accord with and followed the strictures of Article 10, Section 23 of the Oklahoma Constitution ("Article 10, Section 23") which identifies the Board's responsibilities for the purpose of ensuring a balanced annual budget.

But on March 14, 2020, President Trump declared a national emergency as a result of the national spread of COVID-19,¹⁰ and Governor Stitt's emergency declaration followed soon thereafter on March 15, 2020.¹¹ By April 3, 2020, Governor Stitt publicly announced a revenue failure of \$416 million for FY2020.¹² Rather than permit all agencies to face a 6.2 percent (6.2%) budget cut, all to be taken during the last quarter of the fiscal year, the Legislature, working quickly together in a bipartisan fashion, passed three bills to fill this revenue failure, and Governor Stitt was publicly supportive of these measures.¹³

Thus, on April 6, 2020, the Legislature passed SB1053, SB617, and SB199 by overwhelming majorities. Together, these bills pulled sufficient funds from the Constitutional Reserve Fund to fill the gap left by the budget shortfall. SB1053 appropriates \$201,559,654 from the Constitutional Reserve Fund to the Revenue Stabilization Fund, in accordance with Governor

¹⁰ Proclamation, *supra* note 1.

¹¹ Executive Order 2020-07, *supra* note 4.

¹² K. Query, *supra* note 6.

¹³ *Id.*

Stitt's emergency declaration.¹⁴ The bill at issue here—SB199—appropriates \$302,339,481 from the Constitutional Reserve Fund to the General Revenue Fund.¹⁵ And SB617 permits OMES to withdraw up to half the balance of the Revenue Stabilization Fund for distribution to agencies to avoid those budget cuts already announced.¹⁶ All three bills were sent to the Governor on April 6, 2020.

But on April 9, 2020, during a public signing of SB1053 and SB617, Governor Stitt refused to consider SB199.¹⁷ Rather, at the press conference following the signing (“April 9 Press Conference”), Governor Stitt openly discussed his refusal to take up SB199, stating multiple times that he had a deal with the Legislature and that he was “committed to that deal to fully fund state government for April, May, and June” if the Legislature were to return and ensure that his Digital Transformation Revolving Fund received \$930,000 which had not been appropriated from Rainy Day Funds.¹⁸ Had Governor Stitt signed SB199, however, the total reduction to the Digital Transformation Revolving Fund for FY2020 appropriations would have amounted to \$247,300,¹⁹ while the Fund will purportedly still hold \$12 million by the end of FY2020.

Regardless, Governor Stitt declared that SB199 was “null and void” and that he did not have to “veto or sign it” because the Board had not met to declare a revenue failure.²⁰ While a Special Meeting of the Board was scheduled for 1 p.m. on April 6, 2019—the same day the Bills

¹⁴ Enrolled S.B. 1053,

http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB1053%20ENR.PDF.

¹⁵ Enrolled S.B. 199, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB199&Session=2000>.

¹⁶ Enrolled S.B. 617,

http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB617%20ENR.PDF.

While together SB1053 and SB199 appropriated approximately \$500 million from the Constitutional Reserve Fund, only \$416 million of that will be available due to the manner in which distributions are made from the Revenue Stabilization Fund. The total amounts taken from the Constitutional Reserve Fund thus fill, but do not exceed, the budget shortfall.

¹⁷ See Carmen Forman, *supra* note 7. *A video of the April 9 Press Conference is available at the link provided.*

¹⁸ *Id.*

¹⁹ See Tres Savage, *supra* note 8.

²⁰ See Carmen Forman, *supra* note 7.

were approved by the Legislature—the meeting was abruptly cancelled minutes before it was set to occur by Governor Stitt’s Budget Secretary, Mike Mazzei.

Because SB1053 and SB617 have now taken effect and require no further triggering event, state agencies should not yet feel the impact of the budget shortfall due in large part from the COVID-19 pandemic. But May and June still hang in the balance, with the COVID-19 peak not expected to arrive until the end of April.²¹

III. SUMMARY OF THE ARGUMENT

On April 6, 2020, the Legislature presented three appropriations bills to Governor Stitt—SB1053, SB617, and SB199. Governor Stitt signed the first two into law but refused to consider the third, SB199. Instead, Governor Stitt, apparently believing that the law was “null and void” upon its presentment stated at the April 9 Press Conference that he neither had to sign nor veto the law. But Governor Stitt was mistaken, and pursuant to Article 6, Section 11 of the Oklahoma Constitution, the failure of Governor Stitt to act by the fifth day following the bill’s presentment was tantamount to SB199’s approval. Consequently, SB199 is law.

Nevertheless, because SB199 was passed to address a budget shortfall, a determination by the Board was necessary to trigger the law’s effect. That is, pursuant to Subsection 7 of Article 10, Section 23, before the funds appropriated in SB199 may be expended, the Board must determine a revenue failure has occurred. Governor Stitt, as Chair of the Board, abruptly cancelled or postponed the April 6 Board Meeting set for this purpose.

But the Board has a duty to meet, and the Governor, as Chief Magistrate of the State of Oklahoma and Chair of the Board, must cause the laws of the State to be faithfully executed. *See* OKLA. CONST. art. 6, § 2; art. 10, § 21, art. 8, § 8. Holding hostage \$302,339,481 in Rainy Day

²¹ Nolan Clay, *Coronavirus in Oklahoma: Pandemic peak project for April*, THE OKLAHOMAN (Apr. 11, 2020), <https://oklahoman.com/article/5659924/coronavirus-in-oklahoma-pandemic-peak-projected-for-april-21>

Funds necessary for the full funding of core services through the end of FY2020 is in contravention of the Board's duties. The Board should be commanded to meet at the earliest possible time.

IV. ARGUMENTS AND AUTHORITIES

A. By failing to act on SB199, that bill became law on Saturday, April 11, 2020, five days after it was first presented to Governor Stitt.

Article 6, Section 11 of the Oklahoma Constitution provides in relevant part:

Every bill which shall have passed the Senate and House of Representatives, and every resolution requiring the assent of both branches of the Legislature, shall, before it becomes a law, be presented to the Governor; if he approves, he shall sign it; if not, he shall return it with his objections to the house in which it shall have originated If any bill or resolution shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor.

Oklahoma's Constitution is clear. When the Governor is presented with a bill, he has two options: sign it into law or return it to the Legislature with objections noted. There is no third option. On the contrary, unless the Legislature is no longer in session, inaction by the fifth day, excluding only Sundays, is tantamount to the Governor's approval.

Here, the Second Regular Session of the 57th Legislature convened on February 3, 2020, and is still in session, albeit under extraordinary and unprecedented circumstances. And by an overwhelming, bipartisan majority, the Legislature presented SB199 to Governor Stitt on April 6, 2020. With no intervening Sundays, Governor Stitt then had until April 11, 2020, to sign SB199 or to send it back to the Legislature with objections noted. Governor Stitt elected to do neither. SB199 is now law due to the Governor's inaction.

B. As SB199 is now law, the Board of Equalization must meet to determine a revenue failure so that the conditions precedent to the law's fulfillment may be triggered.

Because SB199 is an appropriations bill, it must comport with Article 10, Section 23—the constitutional provision providing for a balanced budget. *See Fent v. State ex rel. Off. of State Finance*, 2008 OK 2, ¶ 11. That provision sets forth the manner for appropriating two distinct sets of appropriations—(1) general appropriations from revenues which accrue each fiscal year to the General Revenue Fund and each Special Revenue Fund, OKLA. CONST. art. 10, § 23(1)-(3); and (2) appropriations of surplus funds placed in the Constitutional Reserve Fund known as “special appropriations,” OKLA. CONST. art. 10, § 23(4)-(8); *see also* 2017 OK AG 6, ¶¶ 1-5 (describing these distinct appropriations).

1. *SB199 was a special appropriation from the Constitutional Reserve Fund to ensure that state agencies are fully funded for the remainder of FY2020.*

As to the second set of appropriations, “special appropriations” are expenditures of “[s]urplus funds or monies . . . accruing to the General Revenue Fund of the State of Oklahoma over and above the itemized estimate made by the State Board of Equalization,” OKLA. CONST. art. 10, § 23(4). SB1053 (already signed into law and which appropriated \$201,559,654) and SB199 (which became law through inaction and appropriates \$302,339,481) constitute special appropriations of surplus funds from the Constitutional Reserve Fund.

SB1053 was an appropriation acknowledging the existence of emergency conditions.

Subsection 8 of Article 10, Section 23 provides, in relevant part, that

[u]p to one-quarter (1/4) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated, upon a declaration by the Governor that emergency conditions exist, with concurrence of the Legislature by a two-thirds (2/3) vote of the House of Representatives and Senate for the appropriation.

SB1053 states that it was made “[i]n accordance with the Governor’s declaration of emergency by Executive Order 2020-12, and pursuant to Subsection 8 of Section 23 of Article X of the Oklahoma Constitution” and appropriated a sum totaling one-quarter of the beginning year

balance in the Constitutional Reserve Fund.²² Governor Stitt signed SB1053 into law on April 9, 2020, and as nothing is left to be done for it to take effect, these funds are now available and will prevent budget cuts from impacted agencies in April.

But SB199 was an appropriation made specifically to address the budget shortfall and appropriated the sum necessary to prevent budget cuts for the remainder of FY2020. Subsection 7 of Article 10, Section 23 provides, in relevant part, that

[u]p to three-eighths (3/8) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated for the current fiscal year *if the State Board of Equalization determines that a revenue failure has occurred* with respect to the General Revenue Fund of the State Treasury. In no event shall the amount of monies appropriated from the Constitutional Reserve Fund pursuant to this paragraph be in excess of the amount of the projected revenue failure in the General Revenue Fund, which total amount shall be computed by the State Board of Equalization, for the entire fiscal year.

Id. (emphasis added). SB199 states that the sum of \$302,339,481—a sum totaling three-eighths of the beginning year balance in the Constitutional Reserve Fund—

is hereby appropriated to the General Revenue Fund of the State Treasury for the fiscal year ending June 30, 2020, from any monies not otherwise appropriated from the Constitutional Reserve Fund . . . for the purpose of fulfilling General Revenue Fund appropriations made during the 1st Session of the 57th Oklahoma Legislature.²³

But unlike SB1053 which fell under the provision for special appropriations for emergency conditions and which was triggered by Governor Stitt's emergency declaration and now requires nothing further to take effect, SB199 fell within the budget shortfall provision which requires the Board to determine a revenue failure. This highlights the second aspect of Oklahoma's balanced-budget provision—the role of the Board.

2. *As a special appropriation specifically made to address a budget shortfall, SB199's effect is triggered by the Board of Equalization's determination of a revenue failure.*

²² Enrolled S.B. 1053, *supra* note 14, § 1.

²³ Enrolled S.B. 199, *supra* note 15, § 1.

As indicated above, while SB199 is now law, its effect is triggered by the Board's determination "that a revenue failure has occurred with respect to the General Revenue Fund." OKLA. CONST. art. 10, § 23(7). That the Board's determination is a condition precedent to the law's effect is plain, but the Board's role is also plainly ministerial. And contrary to Governor Stitt's apparent belief, this determination may be made after the Legislature makes the appropriation.

By contrast, for example, Subsection 1 of Article 10, Section 23 is applicable to general appropriations and provides that

[n]ot more than forty-five (45) days or less than thirty-five (35) days prior to the convening of each regular session of the Legislature, the . . . Board . . . shall certify the total amount of revenue which accrued during the last preceding fiscal year to the General Revenue Fund and to each Special Revenue Fund appropriated directly by the Legislature.

This certification must be filed with the Governor, the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives. *Id.* And unless the Board fails to make this certification, "[t]he Legislature shall not pass or enact any bill, act or measure making an appropriation of money for any purpose until such certification is made and filed . . ." *Id.* But the Board's role even with respect to this duty is not unfettered.

The certification is a mandatory duty of the Board which it must perform. *See Smith ex rel. State v. State Board of Equalization*, 1981 OK 57, ¶ 10. The Board cannot hold up the Legislature in its appropriations power, and if the Board fails to act in the timeframe set by the constitutional provision, the Legislature can bypass it. OKLA. CONST. art. 10, § 23.

Further, even though the Board makes this certification, the Board's certification does not act to nullify an appropriations bill *in toto*. Rather, Article 10, Section 23(1) of the Oklahoma Constitution states that "[a]ll appropriations made in excess of such certification shall be null and void . . ." But appropriations bills—like all other acts of the Legislature—are "presumptively valid *until the total amount of funds appropriated reach the total amount certified by the Board.* Because excess

appropriations are of no effect, the appropriations appearing in bills would need to be disregarded in reverse order of the sequence in which they were signed until the excess is eliminated.” 1991 OK AG 19, ¶ 3. Thus, even if an appropriations bill contained excess appropriations, the Board’s certification duty would not necessarily act to nullify or void the entire bill.

But here, the Legislature made a special appropriation from the Constitutional Reserve Fund, not a general appropriation falling within the certification requirement. While the provision governing general appropriations plainly provides a timeline at Subsection 1 of Article 10, Section 23 for the Board’s action and directs the Legislature not to act prior to the fulfillment of the Board’s duty, nothing in Subsection 7 of Article 10, Section 23 applicable to the special appropriation in this case restricts the passage of a special appropriation bill prior to the Board’s determination. *Compare* Okla. Const. art. 10, § 23(1) *with* Okla. Const. art. 10, §23(7). The maxim of statutory construction “*expressio unius est exclusio alterius*” means that the expression of a thing is the exclusion of another. As applied here, by failing to include the restrictions from Subsection 1 at Subsection 7 of Article 10, Section 23, a strong inference can be drawn that the people who passed Article 10, Section 23 intended to exclude this restriction and that the sequencing of events as between the Legislature and the Board is not so regimented for special appropriations.

Indeed, as this special appropriation serves to address a budget shortfall, it makes good sense that Subsection 7 of Article 10, Section 23 recognizes flexibility in this sequencing. And Governor Stitt would seem to support this interpretation. At his April 9 Press Conference, Governor Stitt stated both that SB199 was “null and void” and that he was committed to the budget deal he believed his team reached with the Legislature and that the “Legislature needs to come in and fix it for May and June.”²⁴ This begs the question: had Governor Stitt’s Digital

²⁴ Carmen Forman, *supra* note 7.

Transformation Revolving Fund not seen a *de minimus* \$247,000 cut, would he have contended that SB199 was “null and void” at all?

In any event, Governor Stitt’s assertion that SB199 was “null and void” upon its presentment and that he need not consider it is mistaken for two reasons. First, as explained at Part IV(A) above, the Governor has two choices when considering legislation: sign or veto. Non-action is tantamount to signing—the law takes effect. If the Governor believed a law was null and void, the proper course would be to veto the bill and send it back to the originating house with his objection noted. Second, Governor Stitt appears to apply the “null and void” language from Subsection 2 of Article 10, Section 23 to this special appropriation. This interpretation is flawed.

As intimated above, Article 10, Section 23 “restricts appropriations of estimated revenues, but it does not restrict appropriations of actual collected surplus monies.” *Fent*, 2008 OK 2, ¶ 13. Surplus funds are not within the formula—or estimate—certified by the Board for the Legislature’s benefit in making general appropriations pursuant to Subsections 1 through 3 of Article 10, Section 23. *See Draper v. State Bd. of Equalization*, 1966 OK 87, ¶ 9. “Null and void” does not apply to the special appropriation here.

And even if Subsection 2 of Article 10, Section 23 has any application whatsoever in this case, that application is limited and rather supports the duty of the Board to meet. It provides:

All appropriations made in excess of such certification shall be null and void; ***provided, however***, that the Legislature may at any regular session or special session, called for that purpose, enact laws to . . . transfer[] . . . unappropriated cash on hand from one fund to another . . . [w]hereupon, it shall be the ***duty*** of the Board of Equalization to make a determination of the revenues that will accrue under such laws ***The State Board of Equalization shall file the amount of such*** adjusted certification, or ***additional certification*** for funds not previously appropriated directly by the Legislature, with the Governor, with the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives

Id. (emphasis added). Thus, to the extent Subsection 2 of Article 10, Section 23 applies, it only applies to require the Board to meet after the Legislature transfers unappropriated cash on hand.

Any holding to the contrary would mean that the Governor could effectively hold up any allocation of funds from the Constitutional Reserve Fund by merely refusing to convene the Board. The Governor clearly has a right to effect legislative outcomes through exercise of a veto (which would then provide the Legislature an opportunity to override that veto)—but that is where his power ends. The constitutional mandates placed upon the Board under Subsection 7 of Article 10, Section 23 are clear, and the Governor is not within his authority to ignore those demands when he is displeased with a legislative outcome.

Indeed, the Board has a duty to make a determination regarding a revenue failure as that determination is a triggering event for the law's effect. The Board thus could meet before or after the law's passage, but it must meet and make that vital determination. And to be clear, there is no controversy regarding the revenue failure. On April 3, 2020, the Governor issued a press release stating that he expected a revenue failure of approximately \$416 million for the remainder of fiscal year 2020.²⁵ He further explained the impact of such failure, noting that absent legislative action and certification from the Board, "this revenue failure would automatically result in 6.2% budget cuts to all state agencies," but reports regarding this announced revenue failure noted that Governor Stitt had called for a special virtual meeting of the Board to begin the formal procedures necessary for the Legislature to use Rainy Day Funds.²⁶

But Governor Stitt abruptly canceled or postponed the April 6 Board Meeting after he learned that SB617 excluded funding to his Digital Transformation Revolving Fund—a determination the Legislature was authorized to make.²⁷ Governor Stitt is but one member of this seven-person Board, OKLA. CONST. art. 10, § 21, and all members labor under the same duty to

²⁵ K. Query, *supra* note 6.

²⁶ *Id.*

²⁷ "Monies appropriated to any state governmental entity from the Constitutional Reserve Fund pursuant to this paragraph may only be made in order to ensure that the monies actually received by the entity for the then current fiscal year are equal to *or less than*, but not in excess of, the total appropriation amount for such entity in effect at the beginning of the then current fiscal year." OKLA. CONST. art. 10, § 23(7) (emphasis added).

meet. Were Governor Stitt, as Chair, permitted to hold up the Board's meeting, this power would be tantamount to a super veto over the appropriations process—that is not a power acknowledged in our Constitution. The Board must meet, and it has a duty to do so.

C. Mandamus is the appropriate remedy.

Consequently, given Governor Stitt's postponement or cancellation of the Board's meeting until his appropriation demands are met, mandamus is the only proper remedy. A writ of mandamus issues (1) when the party seeking the writ (a) has no plain and adequate remedy in the ordinary course of the law and (b) possesses a clear legal right to the relief sought and (2) when the respondent (a) has a plain legal duty regarding the relief sought; (b) has refused to perform that duty; and (c) the duty does not involve the exercise of discretion. *Maree v. Neuwirth*, 2016 OK 62, ¶ 6 (citing *Chandler (U.S.A.) Inc. v. Tyree*, 2004 OK 16, ¶ 24). These elements are met here.

First, the Legislature cannot call a meeting of the Board to order and has no other remedy available to it. And second, the Board—and Governor Stitt specifically—have a plain legal duty to convene. Subsection 7 of Article 10, Section 23 provides:

[u]p to three-eighths (3/8) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated for the current fiscal year ***if the State Board of Equalization determines that a revenue failure has occurred*** with respect to the General Revenue Fund of the State Treasury. In no event shall the amount of monies appropriated from the Constitutional Reserve Fund pursuant to this paragraph be in excess of the amount of the projected revenue failure in the General Revenue Fund, **which total amount shall be computed by the State Board of Equalization, for the entire fiscal year.**

In *Smith ex rel. State v. State Board of Equalization*, 1981 OK 57, two Oklahoma Senators brought an application to assume original jurisdiction and a petition for a writ of mandamus seeking to compel the Board of Equalization to certify the total amount of revenue accruing to the state's special funds under Article 10, Section 23(1). *Id.* at ¶ 1. The Court issued a writ of mandamus against the Board of Equalization to do so, reasoning that the commands of Article 10, Section 23(1) were clear, *id.* at ¶ 10, holding that “**shall**” is commonly understood to be a word of command which

must be given a compulsory meaning,” *id.* at ¶ 5 (emphasis added). The Board shall meet here, too. And Governor Stitt has a responsibility to ensure that the Board fulfills its duty. *See* OKLA. CONST. art. 6, § 2; art. 6, § 8 (providing that as Chief Magistrate, it is the Governor’s duty to see that the laws be faithfully executed).

Further, by cancelling or postponing the April 6 Board Meeting, Governor Stitt has refused to perform his duty in ensuring that the Board performs its own. But the Board still has an obligation to meet and should be directed to convene a meeting, even if on the call of the Board’s Secretary. And finally, the role of the Board in certifying a revenue failure is not discretionary—it is a mandatory, ministerial function which serves to protect fiscal responsibility. The Board cannot stymie the Legislature’s ability to act in times of crisis by its refusal to meet and complete the appropriations process through its vital determination of a revenue failure.

Thus, Petitioners respectfully request this Court issue a writ of mandamus, compelling the Board of Equalization to meet to fulfill its constitutional duty to determine a revenue failure, thereby allowing SB199, which is now law, to take effect.

V. CONCLUSION

For these reasons, Petitioners ask this Court to assume original jurisdiction and to issue a writ of mandamus, directing the Board of Equalization to meet and to determine whether a revenue failure has occurred.

Respectfully submitted,



V. GLENN COFFEE, OBA # 14563
CARA RODRIGUEZ, OBA #21794
DENISE LAWSON, OBA #31532
GLENN COFFEE & ASSOCIATES, PLLC
P.O. Box 437

Oklahoma City, OK 73101
Phone: (405) 601-1616
gcoffee@glenncoffee.com
cara@glenncoffee.com
denise@glenncoffee.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2020, a true and correct copy of the foregoing was mailed by Certified Mail, Return Receipt Requested and electronic mail to the following:

The Honorable J. Kevin Stitt Governor, State of Oklahoma Oklahoma State Capitol 2300 North Lincoln Boulevard, Room 212 Oklahoma City, OK 73105 <i>Chair, State Board of Equalization</i>	The Honorable Cindy Byrd Oklahoma State Auditor and Inspector Oklahoma State Capitol 2300 North Lincoln Boulevard, Room 123 Oklahoma City, OK 73105 <i>Secretary, State Board of Equalization</i>
With copy mailed to: Oklahoma State Board of Equalization Oklahoma State Capitol 2300 North Lincoln Boulevard., Room 100 Oklahoma City OK 73105	

