



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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RICK WARREN
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DON KEENAN,
Plaintiff,

v.

TODD RUSS, in his capacity as the
TREASURER OF THE STATE OF
OKLAHOMA,
Defendant.

Case No: CV-2023-3021

**ORDER AS TO PLAINTIFF'S
MOTION FOR TEMPORARY INJUNCTION**

On February 13, 2024, Plaintiff's Motion for Temporary Restraining Order and/or Motion for Temporary Injunction came before this Court for consideration. Plaintiffs appeared by and through Collin Walke of Hall Estill. Defendant appeared by and through Cheryl Plaxico of Plaxico Law Firm, PLLC. Following oral argument of counsel and review of the pleadings and exhibits submitted, the Court took the matter under advisement. Having considered the arguments and evidence presented, for the reasons set forth below, the motion is GRANTED.

I. FINDINGS OF FACT

1. The Oklahoma Energy Discrimination Elimination Act of 2022 ("Act"), 74 O.S. §12001, et seq., was enacted by HB 2034 of the 58th Oklahoma Legislature and became effective on November 1, 2022.

2. The Act prohibits government retirement systems from investing in companies that boycott energy companies. A "Boycott energy company" is defined as a company:

[W]ithout an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company:

- a. engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil-fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law, or
- b. does business with a company described by subparagraph a of this paragraph.

74 O.S. 12002(A)(1).

3. The Oklahoma State Treasurer is directed to “prepare and maintain and provide to each state governmental entity a list of financial companies that boycott energy companies. In maintaining the list, the Treasurer may:

- a. review and rely, as appropriate in the Treasurer's judgment, on publicly available information regarding financial companies including information provided by the state, nonprofit organizations, research firms, international organizations, and governmental entities, and

- b. request written verification from a financial company that it does not boycott energy companies and rely, as appropriate in the Treasurer's judgment and without conducting further investigation, research, or inquiry, on a financial company's written response to the request.”

74 O.S. 12003(A)(1)

4. Under the Act, any financial institution that does business with the State must verify in writing that it does not boycott energy companies and will not boycott energy companies during the institution's contract with the State. See 74 O.S. 12003(A)(2).

5. A financial company that fails to provide to the Treasurer a written verification before the 61st day after receiving the request from the Treasurer is presumed to be boycotting energy companies. See 74 O.S. §12003(A)(2)

6. The governmental entity is to send a written notice to the financial company warning that it may become subject to divestment and offer the company the opportunity to clarify its activities. If the financial company fails to divest from boycotting energy companies, then the State of Oklahoma will terminate its relationship with the financial company and sell, redeem,

divest, or withdraw State's funds held by the company in a staggered schedule. See 74 O.S. §12003(C).

7. A state government entity may "delay the schedule for divestment" only to the extent that the state governmental entity determines, in the state governmental entity's good-faith judgment, and consistent with the entity's fiduciary duty, that divestment from listed financial companies will likely result in a loss in value or an aggregate expected deviation from its benchmark-aware strategy. See 74 O.S. §12003(D)(3). Before the state government entity may cease divesting due to a loss in value, it must notify the State Treasurer, the presiding officer of each house of the legislature, and the Attorney General, and the entity must set forth, by clear and convincing evidence, its reason and justification. See 74 O.S. §12003(F).

8. The Act applies to contracts between a governmental entity and a company with ten or more full-time employees, and only to contracts for goods or services in which \$100,000.00 or more is payable to the company. If the requirements of the contract are met, the contract shall state the company does not and will not boycott energy companies during the term of the contract. See 74 O.S. §12005. This section of the Act does not apply if the governmental entity determines the requirements are inconsistent with the governmental entity's constitutional or statutory duties as to debt obligations or funds. See 74 O.S. §12005(B)(4)(a).

9. Exceptions to the Act are additionally addressed in 74 O.S. §12002(D)(3), §12003(D)(3), §12003(F), and §12005(4) all contain different language, requirements, and necessary evidentiary standards for the state governmental entity to be exempt from the divesting requirements.

10. On May 3, 2023, the Treasurer placed thirteen companies on the Oklahoma State Treasurer's Restricted Financial Companies List. See Plaintiff's Exhibit 2.

11. The Treasurer revised the Restricted Financial Companies list on August 15, 2023, to six companies, including the following: (1) BlackRock, Inc., (2) Wells Fargo & Co., (3) JPMorgan Chase & Co., (4) Bank of America, N.A., (5) State Street Corp., and (6) Climate First Bank. See Plaintiff's Exhibit 4.

12. The OPERS Board of Trustees ("Board") estimated the cost of commissions, taxes, and fees related to divestment activity mandated under the Act to be \$9,700,000.00 to OPERS. See Plaintiff's Exhibit 2. On August 23, 2023, the Board voted to exercise an exemption to the Act. See Plaintiff's Exhibit 1, pg. 1.

13. On September 14, 2023, the Treasurer notified the Board and the Executive Director of OPERS that the "Board's actions were in opposition to the letter and spirit of the [Act], because the situation presented did not fall within the [Act's] narrow exceptions." See Plaintiff Exhibit 1, pg. 2. As Chairman of the State Pension Oversight Commission, the Treasurer stated that asset managers used OPERS assets to "help push a political agenda on energy companies." See Plaintiff's Exhibit 1, pg. 14. He also stated the companies like "BlackRock and State Street have openly made commitments to use all assets under management-including OPERS' assets-not for the benefit of OPERS, but for their own ideological objectives." See Plaintiff's Exhibit 1, pg. 15. He requests the Board to reconsider its decision. See Plaintiff's Exhibit 1, pgs. 16-17.

14. Plaintiff is an Oklahoma taxpayer and beneficiary of the Oklahoma Public Employees Retirement System ("OPERS"). See Petition at ¶¶1 and 8. He brings this suit as a taxpayer of Oklahoma. See *Thomas v. Henry*, 2011 OK 53, ¶¶6-7.

15. Plaintiff filed suit on December 21, 2023, and requested a Temporary Restraining Order and/or Motion for Temporary Injunction. Plaintiff alleges 1. The Act violates Oklahoma Constitution Art. 23, §12 (Exclusive Purpose of Benefits). 2. The Act violates Oklahoma

Constitute Art. 2 §22 (Freedom of Speech), 3. The Act violates Oklahoma Constitution Art. 2, §7 (Due Process) by being unconstitutionally vague, 4. The Act violates Oklahoma Constitution Art. 5, §46 (Special Law) and Art. 2, §6 as an impermissible barrier to the courts.

II. CONCLUSIONS OF LAW

1. TEMPORARY INJUNCTION

16. The purpose of a temporary injunction is to preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured, or endangered. Edwards v. Bd. of Cnty. Comm'rs of Canadian Cnty., 2015 OK 58, ¶ 10, 378 P.3d 54, 58. A temporary injunction protects a court's ability to render a meaningful decision on the merit of the controversy. Okla. Pub. Emps. Ass'n v. Okla. Military Dep't, 2014 OK 48, ¶15, 330 P.3d 497, 504.

17. The Court must consider four factors in granting the temporary injunction: 1. Whether the plaintiff is likely to prevail upon the merits of the action, 2. Whether the plaintiff will suffer irreparable harm in the absence of injunctive relief; 3. Whether the irreparable harm which would be suffered by plaintiff if injunctive relief is withheld outweighs the irreparable harm which would be suffered by the defendant if injunctive relief is granted, and 4. Advancement of the public interest. Edwards, 2015 OK 58, ¶12.

18. The right to injunctive relief must be established by clear and convincing evidence and the nature of the injury must not be nominal, theoretical, or speculative. Dowell v. Pletcher, 2013 OK 50, ¶ 7, 304 P.3d 457.

A. LIKELIHOOD OF SUCCESS

i. VIOLATION OF OKLA. CONST. ART. 23, §12 (EXCLUSIVE BENEFIT)

19. The Oklahoma Constitution provides:

All the proceeds, assets and income of any public retirement system administered by an agency of the State of Oklahoma shall be held, invested, or disbursed as provided for by law as in **trust for the exclusive purpose of providing for benefits, refunds, investment management, and administrative expenses of the individual public retirement system, and shall not be encumbered for or diverted to any other purposes.**

Okla. Const. Art. 23, §12 [Emphasis added].

20. The OPERS funds are also governed by 74 O.S. §909.1 which require the Board to discharge their duties “solely in the interest of the participants and beneficiaries” and for the exclusive purpose of “providing benefits to participants and their beneficiaries....” §909.1(A)(1). Section 901.1(I) states, “At no time prior to the satisfaction of all liabilities with respect to members and their beneficiaries shall any part of the corpus and income be used for, or diverted to, purposes other than the exclusive benefit of the members and their beneficiaries.”

21. The Act exempts the state governmental entity and the Treasurer from any conflicting statutory or common law obligations including “any obligations with respect to making investments, divesting from any investment, preparing or maintaining any list of financial companies, or choosing asset managers, investment funds, or investments for the state governmental entity’s securities portfolios.” 74 O.S. §12002(B).

22. The Act is, however, not able to exempt the Treasurer or the OPERS Board from the Oklahoma constitutional provision requiring the oversight and management of the assets to be for the exclusive benefit of participants. “The Constitution is the bulwark to which all statutes must yield.” Liddell v. Heavner, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199.

23. As stated by the Treasurer in his notice to the OPERS Board, the purpose of the Act is to counter the “political agenda” of certain financial companies and to assist the economic status of the oil and gas sector. See Plaintiff’s Exhibit 1.

24. The Court finds a substantial likelihood that this stated purpose of countering a “political agenda” is contrary to the retirement system’s constitutionally stated purpose. An attempt by the Treasurer or the Board to divest or transfer funds for any purpose other than the benefit of the members or beneficiaries is contrary to and a violation of Okla. Const. Art. 23, §12.

25. The issue before this Court is whether the Act and the directives of the Treasurer shift the constitutionally mandated exclusive purpose of the OPERS assets. The Court finds a substantial likelihood that Plaintiff will succeed on this issue.

ii. VIOLATION OF OKLA. CONST. ART. 2, §22 (FREEDOM OF SPEECH)

26. Plaintiff asserts the Act is an unconstitutional infringement of freedom of speech.

27. The Oklahoma Constitution states “[N]o law shall be passed to restrain or abridge the liberty of speech...” Okla. Const. Art 2, §22.

28. Plaintiff relies on federal case law primarily involving legislation prohibiting a boycott of Israel. Four of the federal cases relied on by the Plaintiff were dismissed or vacated due to procedural matters or changes in the underlying legislation addressing the class of possible plaintiffs.

29. As Oklahoma caselaw has not addressed this issue, the Court looks to Koontz v. Watson, 283 F.Supp.3d 1007 (D. Kan. 2018) and Arkansas Times LP v. Waldrip as Trustee of University of Arkansas Board of Trustees, 37 F.4th 1386 (8th Cir. 2022). In Arkansas Times, the Eighth Circuit looked to “what the [Act] bans: protected boycott-related activity, or non-expressive

commercial decisions.” Arkansas Times, 37 F.4th at 1392. This Court must look to whether the Act is prohibiting purely commercial, non-expressive conduct. Id at 1394.

30. The Freedom of Speech does not “just prevent outright prohibition on speech; they also prohibit the government from imposing unconstitutional conditions that chill or deter speech.” Id. at 1391. “The government imposes an unconstitutional condition when it requires someone to give up a constitutional right in exchange for a government benefit.” Dolan v. City of Tigard, 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). This includes making government benefits contingent on endorsing a particular message or agreeing not to engage in protected speech. Arkansas Times, 37 F.4th at 1391.

31. The *Koontz* Court addressed the State of Kansas requiring a written verification that Plaintiff did not boycott Israel. The court stated to “determine whether a state is infringing on an independent contractor’s rights under the First Amendment, courts use the same guidelines developed in Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968). See Koontz, 283 F.Supp.3d at 1020.

32. The *Pickering* test requires the plaintiff to show that the First Amendment protects the conduct that results in a denied governmental benefit. If so shown, the government must then present a legitimate countervailing government interest that is sufficiently strong to justify its encroachment. See Koontz, 283 F.Supp.3d at 1021. The government must show “the speech’s ‘necessary impact on the actual operation’ of the government outweighs the interests of the speakers and their audiences.” Id.

33. The U.S. Supreme Court has stated while “States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott” of the subject merchants. NAACP v. Claiborne Hardware Co., 458 U.S.

886, 907, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). A State's "regulatory power over boycotts is limited when the boycott's main purpose is to influence governmental action." Id. at 914.

34. The government can regulate conduct under the First Amendment so long as the conduct is not inherently expressive. Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 65-66, 126 S.Ct. 1297, 164 L.Ed. 156 (2006).

35. When evaluating whether a law affecting free speech serves a compelling governmental purpose, a court must inquire into the circumstances of the law's enactment. Doe v. City of Albuquerque, 667 F.3d 1111, 1132 (10th Cir. 2012).

36. This Court must ultimately consider whether the Act regulates inherently expressive conduct and if the intentions of the Act are for a compelling governmental purpose. At this time, the Court denies Plaintiff's request for a temporary injunction and allows this claim to continue to a final determination on its merits.

iii. VIOLATION OF OKLA. CONST. ART. 2, §7 (VAGUENESS)

37. Plaintiff alleges the Act is unconstitutionally vague. For the Court to sustain Plaintiff's request, it must determine if people of "common intelligence must necessarily guess at its meaning and differ as to its application." Cramp v. Bd. of Pub. Instruction of Orange County, Fla., 368 U.S. 278, 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961).

38. It is only where an act of the Legislature is clearly, palpably, and plainly inconsistent with the terms and provisions of the Constitution that the courts will interfere and declare such act invalid and void. The action of the lawmaking power must in all cases be upheld unless its action is manifestly in contravention of the Constitution. Adwon v. Oklahoma Retail Grocers Ass'n, 1951 OK 43, ¶0, 228 P.2d 376, 377.

39. The accepted federal-law test of vagueness is whether the language of the enactment conveys, with respect to conduct one is expected to follow, sufficiently definite warning so that men “of common intelligence or understanding” will not have to guess at the statute's meaning. Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15. See Matter of Daniel, Deborah & Leslie H., 1979 OK 33, ¶ 11, 591 P.2d 1175, 1177

40. In applying this test and reviewing any statutory language that is challenged as vague, it is proper to consider the purpose of the statute, and the legitimate interest that the state is seeking to protect by the statute. Lodes v. State ex rel. Oklahoma Real Est. Comm'n, 1992 OK CIV APP 23, ¶¶ 2-3, 837 P.2d 925, 926, and Armstrong v. State, 1991 OK CR 34, ¶20, 811 P.2d 593. Additionally, the court in Armstrong held that provisions dealing with business or financial transactions will be judged by whether they are “clearly stated and understandable by an ordinary person in a commercial context.” Id.

41. The Court notes five separate Sections of the Act contain conflicting and vague provisions as to the exemptions/exceptions governmental entities may claim and conflicts to the required evidentiary standards. The Sections also conflict as to the notification process when a governmental entity claims an exemption/exception to the Act. Most sections are silent to the governmental entity's required notification. 74 O.S. §12003(D)(4) sets forth a notification requirement for a delay in divestment, but such notification process does not exist for the exceptions of 74 O.S. §12002(D)(3), §12003(D)(3), §12003(E), §12005(4), and §12005(B)(4)(a).

42. The phrases “without an ordinary business purpose” (Section 12002(A)(1)) and “otherwise taking any action” (Section 12002(A)(1)) are not defined in the Act, but are vital to the function and application of the Act.

43. The Act contains two separate definitions of “governmental entity”. In 74 O.S. §12002(A)(8), “State governmental entity” is defined as “all state retirement systems.” “Governmental Entity” is later defined as a “state agency or political subdivision of this state.” See 74 O.S. §12005(A). The Court is aware §12005 limits its definition to only §12005. However, the Act is unclear if all state retirement systems are included in the definition of “Governmental Entity” of §12005 and permitted to apply the exception of §12005(4), and are therefore excused from the additional requirements of the prior Sections.

44. The Arkansas Times court applied the canon of ejusdem generis and addressed giving effect to both the particular and the general words. Arkansas Times, 37 F.4th at 1393. The Treasurer proposes the Court read “such language in context of the surrounding words...” See Defendant’s Response, pg. 14.

45. Taking into consideration the surrounding words and the particular and general words, the Court finds Plaintiff has established a substantial likelihood of success on the merits as to Okla. Const. Art. 2, §7, and the vagueness of the Act.

iv. VIOLATION OF OKLA. CONST. ART. 5, §46 (SPECIAL LAW)

46. Plaintiff alleges the Act is a special law due to 74 O.S. §12002(D)(2) requirement that any person that files suit for any claim in connection with the Act is liable for paying the costs and attorney fees of the person or governmental entity sued. The provision appears to award attorney fees to the governmental entity or governmental employee regardless of whether judgment is in favor or against the governmental entity or employee.

47. Plaintiff states the Act creates a special category of declaratory judgment law wherein a party who seeks to challenge the Act must pay the Defendant’s attorney fees and costs.

48. Plaintiff also asserts the above provisions create a barrier to the court for all plaintiffs and potentially the financial companies. The Court has previously addressed Plaintiff's standing in this matter, and his ability to pursue legal action under the Act.

49. The Court denies a temporary injunction as to this request but allows this claim to proceed for a final determination on the merits as to the declaratory judgment attorney fee and the barrier to the court issues.

B. IRREPARABLE HARM

50. As to irreparable harm, the Court finds that divesture or transfer of assets and investments has the potential to affect the financial soundness of the investment accounts. If the OPERS Board reconsider their decision and follow the Treasurer's interpretation, the system's assets could decrease or increase in value and potentially substantially alter the stability of the investment funds prior to a final determination by the Court.

51. Oklahoma law defines harm as "irreparable" where it "is incapable of being fully compensated by money damages," or where the measure of damages is too "speculative" to calculate. Tulsa Order of Police Lodge No. 93 v. City of Tulsa, 2001 OK CIV APP 153, ¶28, 39 P.3d 152, 159. For temporary injunction purposes, most courts have held that a threatened deprivation of a constitutional right is itself irreparable harm, and that no further showing of irreparable harm is required. See, e.g., Filrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001).

52. Because Plaintiff's challenges allege a violation of constitutional rights, this Court finds that Plaintiff has established a threat of irreparable harm should the Act be enforced.

C. BALANCE OF HARDSHIPS AND PUBLIC INTEREST

53. Turning to the remaining temporary injunction factors, this Court finds that Plaintiff has established by clear and convincing evidence that the threat of injury outweighs any threatened harm to the Defendant, and further, that a temporary injunction would serve the public interest. See, e.g., ACLU v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999) (holding threatened injury to plaintiffs' constitutionally protected rights outweighed "whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute"); Entm't Merchs. Ass'n v. Henry, No. CIV-06-675-C, 2006 WL 2927884, at *3 (W.D. Okla. Oct. 11, 2006) (noting it is always in the public interest to protect constitutional liberties).


III. CONCLUSION AND ORDER

The Court hereby grants temporary injunction against the enforcement of the Oklahoma Energy Discrimination Act of 2022, based on Plaintiff's claims of Violation of Exclusive Benefit and Vagueness. Temporary injunction is denied as to Plaintiff's claims of Freedom of Speech and Special Law/Barrier to the Court.

Defendant, his employees, agents, and successor in office are hereby temporarily enjoined from enforcing the provisions of the Oklahoma Energy Discrimination Act of 2022 until and unless the Court orders otherwise.

IT IS SO ORDERED.

DATED this 7th day of May 2024.



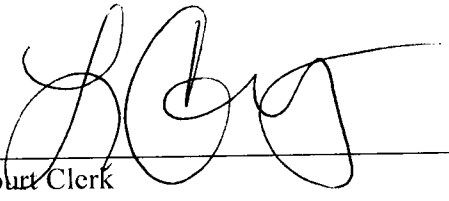
SHEILA D. STINSON
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that on May 7, 2024, I mailed by regular mail a true and correct copy of this Order to the following persons and filed a true and correct copy in this case.

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