

IN THE DISTRICT COURT OF OKLAHOMA COUNTY OCT. 25 2024
STATE OF OKLAHOMA

RICK WARREN
COURT CLERK
85 _____

DON KEENAN,

Plaintiff,

v.

Case No: CV-2023-3021

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

Defendant.

ORDER AS TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

On September 6, 2024, Plaintiff's Motion for Summary Judgment came before this Court for consideration. Plaintiff appeared by and through Collin Walke of Hall Estill. Defendant appeared by and through Garry Gaskins and Will Flanagan of the Office of the Attorney General, State of Oklahoma. Following oral argument of counsel and review of the pleadings and exhibits submitted, the Court took the matter under advisement. The Court additionally requested supplemental briefing due to recent caselaw and set a deadline of September 16, 2024. Having considered the arguments and evidence presented, for the reasons set forth below, Plaintiff's Motion for Summary Judgment is SUSTAINED.

I. INTRODUCTION

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. Plaintiff filed suit on December 21, 2023, and requesting Declaratory Judgment determining the Act unconstitutional

9. The Court previously granted Plaintiff's Motion for Partial Summary Judgment as to the allegations that the Act violates Oklahoma Constitution Art. 23, §12 (Exclusive Purpose of Benefits) and the Act violates Oklahoma Constitution Art. 2, §7 (Due Process) by being unconstitutionally vague.

10. Plaintiff now requests Summary Judgment as to the remaining claims: 1. The Act violates Oklahoma Constitution Art. 2 §22 (Freedom of Speech), 2. the Act violates Oklahoma Constitution Art. 5, §46 (Special Law) and 3. the Act violates Art. 2, §6 (Impermissible Barrier to the Courts).

11. The Court adopts and incorporates its findings contained in its Order as to Plaintiff's Motion for Temporary Injunction filed on May 7, 2024, and the Journal Entry as to Plaintiff's Motion for Partial Summary Judgment filed on September 20, 2024.

II. FINDINGS

A. SUMMARY JUDGMENT

12. Summary judgment is appropriate only when there is no genuine controversy as to any material fact, and the moving party is entitled to judgment as a matter of law. Rickard v. Coulimore, 2022 OK 9, ¶4, 505 P.3d 920.

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

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

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

15. Plaintiff relies on federal case law primarily involving legislation prohibiting a boycott of Israel. 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.

16. 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.

17. 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.

18. 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.*

19. 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.

20. 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).

21. Since the initial briefing in this matter, a permanent injunction was issued in the Western District of Missouri involving environmental, social, and corporate governance administrative rules. Securities Industry and Financial Markets Association v. Ashcroft, No. 23-cv-04154-SRB, 2024 WL 3842112 (W.D. Mon. Aug. 14, 2024). The *Ashcroft* administrative rules

required financial professionals to obtain written consent from their clients using a “social objective” or other “nonfinancial objective” when making investment recommendations or advice. Id. at *1. While the Missouri rules differ from the Oklahoma Act as to procedural requirements and application, the Court finds *Ashcroft* persuasive as to the issue of commercial speech and the objective of similar legislation.

22. The *Ashcroft* court applied the level of scrutiny found in Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 563 (1980), to evaluate whether the Missouri disclosure requirements violated the First Amendment of the U.S. Constitution. The *Ashcroft* applied intermediate scrutiny by finding the administrative rules were not uncontroversial. Id. at pg. 17. Judge Bough cited to Secretary of State of Missouri Ashcroft’s statements as to ESG investments. The *Ashcroft* court found the statements discussing political priorities are not uncontroversial and may be considered in determining the appropriate level of scrutiny to be applied. Id.

23. The *Ashcroft* court applied the level of scrutiny under *Central Hudson*.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central, 447 U.S. 557, 566.

24. Based on the text of the Act and the Defendant’s statements since the enactment of the Act, the Court finds the text and statements are not uncontroversial and should be considered with intermediate scrutiny as set forth in *Central*. See Letter from Defendant dated Sept. 14, 2023,

Exb. 1 to *Plaintiff's Reply to Motion for Summary Judgment*, and Transcript of Interim Study held on Oct. 11, 2023, Exb. 1 to *Plf's Motion for Summary Judgment*.

25. The Court finds the Act is more extensive than is necessary to serve the governmental interest. Defendant asserts the “Act is designed to ensure that the private entities managing State retirement money are focused solely on financial return.” *See Def's Supplemental Brief* filed Sept. 16, 2024, pg. 5.

26. The Court finds for this stated governmental interest, the Act extends beyond what is necessary to serve a governmental interest and does not survive intermediate scrutiny by the limitations imposed on commercial speech.

C. VIOLATION OF OKLA. CONST. ART. 2, §6 (BARRIER TO THE COURT) AND ART.5, §46 (SPECIAL LAW)

27. Article 2, §6 of the Oklahoma Constitution states, “The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.”

28. Art. 5, §46 of the Oklahoma Constitution prohibits special laws “[r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts ...”

29. The Oklahoma Supreme Court has addressed the special laws in relation to barriers to the Court in *Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861.

The clear language of art. 2, §6 requires that the courts must be open to all on the same terms without prejudice. The framers of the Constitution intended that all individuals, without partiality, could pursue an effective remedy designed to protect their basic and fundamental rights. Although we recognize that the Legislature may facilitate speedy resolution of differences, legislation cannot be used to deny the constitutional guarantee

of court access—a fundamental right. Therefore, this Court strictly scrutinizes actions which deny such opportunity.

Access to courts must be available to all through simple and direct means and the right must be administered in favor of justice rather than being bound by technicalities. Claimants may not have the fundamental right of court access withheld for nonpayment of some liability or conditioned on coercive collection devices.

Zeier, 2006 OK 98, ¶¶25-26, 152 P.3d at 872–73

30. Art. 5, §46 of the Oklahoma Constitution prohibits special laws “[r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts ...”

31. Plaintiff alleges the Act is a special law and barrier to the courts 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.

32. Additionally, Plaintiff argues that 74 O.S. §12002(D)(1) prohibits any person or entity from suing under the Act for any claim or private cause of action.

33. 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.

34. The Court must determine if the Act creates a separate class which is treated differently as to declaratory judgments.

The terms of art. 5, § 46 command that court procedure be symmetrical and apply equally across the board for an entire class of similarly situated persons or things. In a special laws attack under art. 5, § 46, the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly

situated persons or things. The test is whether the provision fits into the structured regime of established procedure as part of a symmetrical whole. If an enactment injects asymmetry, the § 46 interdiction of special law has been offended. [Emphasis removed]

Zeier, 2006 OK 98, ¶12.

35. In other classes of declaratory judgment actions, Oklahoma statutes do not authorize the award of an attorney fee to the prevailing party. “There is no controversy that the statutory provisions concerning declaratory judgment, 12 O.S.1981 §§ 1651 through 1657, do not authorize the award of an attorney fee to the prevailing party.” Cory v. City of Norman, 1988 OK CIV APP 7, ¶ 2, 757 P.2d 851, 851

36. The Act prohibits private causes of actions and assesses attorney fees against any individual or entity challenging the statute, with no consideration of whether they are successful or not in their challenge. The Act creates an unconstitutional monetary barrier to the access to courts guaranteed by Art. 2, § 6 of the Oklahoma Constitution.¹

37. Furthermore, the Act creates a special law by creating a class of litigants treated differently than similarly situated persons or entities in violation of Art. 5, §46 of the Oklahoma Constitution.

¹ The Oklahoma courts recognize


[T]hat a statute is the solemn act of the Legislature. In construing the constitutionality of a statute, we are not authorized to consider its propriety, wisdom, or practicability as a working proposition. Those questions are clearly and definitely established by our fundamental law to a certainty as functions of the legislative department. We uphold the legislative enactment unless the statute is clearly, palpably and plainly inconsistent with the constitution. This Court has a duty to interpret statutes to make their application constitutional rather than unconstitutional” *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 866 (Okla. 2007)

III. CONCLUSION

IT IS THEREFORE ORDERED, ADJUGED AND DECREED that, for the reasons and grounds stated herein, the Plaintiff's Motion for Summary Judgment is sustained.

IT IS SO ORDERED.

DATED this 25th day of October 2024.


SHEILA D. STINSON
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that on October 25, 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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