

COMES NOW the Petitioners, through their attorney of record, Brian Ted Jones, of the firm Brian Ted Jones, PLLC, and for reasons set forth in detail below, and in the Petitioner's Brief contemporaneously filed with this Application (incorporated here by reference), the Petitioner respectfully requests this Court assume original jurisdiction, enter declaratory relief, grant writs of prohibition, and any other relief to which they might be entitled.

In support, Petitioners assert:

STANDING

1. Petitioner Linda Carol Best is an Oklahoma citizen and is registered to vote in Logan County, Oklahoma. She is also an Oklahoma cattle producer, a member of R-CALF USA,¹ and a member of the Organization for Competitive Markets.²
2. Petitioner Bryan Keith Best is an Oklahoma citizen and is registered to vote in Logan County. He is also an Oklahoma cattle producer, and a member of R-CALF USA.
3. Petitioner Dennis Dewayne Sweat is an Oklahoma citizen and is registered to vote in Stephens County. He is also an Oklahoma cattle producer, and a member of R-CALF USA.
4. Petitioner John Leroy Johnson is an Oklahoma citizen and is registered to vote in Stephens County. He is also an Oklahoma cattle producer.

GROUND FOR ORIGINAL JURISDICTION

1. This Court's original jurisdiction extends "to a general superintending control over

¹ Petitioner's Appendix (Pet'r App.), Exhibit (Ex.) A, pp. 6-10 (addressing the political controversy of beef checkoff programs generally).

² Pet'r App. at Ex. S (addressing the political controversy of beef checkoff programs generally).

all inferior courts and all Agencies, Commissions and Boards created by law."³

2. The Petitioners seek extraordinary writs to the Oklahoma Department of Agriculture, Food, and Forestry ("ODAFF"), an agency of state government.⁴

3. This Court's original jurisdiction also extends to *publici juris* cases: "causes tendered to the court concern[ing] the entire state or one of its governmental subdivisions."⁵ This Court is inclined to exercise *publici juris* original jurisdiction over a controversy "(a) when its importance and urgency demand immediate attention and (b) when lower courts would be ill-equipped to settle the dispute."⁶

5. The Petitioners' Application is important, because it raises serious constitutional issues, and concerns a proposed new tax on every head of cattle sold in the state of Oklahoma.⁷ This application is urgent, because it concerns a referendum to adopt this new tax, where mail-in voting is already underway, and which is scheduled for completion on November 1, mere weeks from now.⁸ This application also concerns a dispute every lower court would be ill-equipped to settle, both because of the constitutional questions raised,⁹ the statewide nature of the referendum,¹⁰ and because the Petitioners are requesting extraordinary writs be issued to an agency and officer of the Oklahoma government.¹¹

6. For these reasons, and others contained in this Application and the accompanying

³ Okla. Const. Art. 7, §4.

⁴ *Infra* at pp. 3-5.

⁵ *Ethics Com'n of State of Okl v. Cullison*, 1993 OK 37, n.10 (citing BLACK'S LAW DICTIONARY (6th ed. 1990)).

⁶ *Id.*

⁷ *Infra* at pp. 7-10.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* See also 2 O.S. § 5-63.5.

¹¹ *Infra* at pp. 3-5.

Brief, the Court should assume original jurisdiction.

NATURE OF RELIEF AND REMEDY SOUGHT

1. Petitioners assert three causes of action, each one for declaratory relief, and each one requesting a writ of prohibition to the Respondent Reese. Petitioners incorporate by reference the argument and authority in Petitioner’s Brief on each cause of action.

2. First Cause of Action: Declaratory Judgment under Administrative Procedures Act

A. Petitioners respectfully request a declaratory judgment from this Court holding that Respondent Reese’s certification of the results of the 2017 Oklahoma Beef Checkoff referendum (“the Referendum”) would be unauthorized by law, because ODAFF’s implementation of the Commodity Research Enhancement Act (“CREA”)¹² with respect to the Referendum was in violation of the Oklahoma Administrative Procedures Act. Therefore certifying the results (if the Referendum succeeds) will be unauthorized by law.

B. The Petitioners will be irreparably injured if the Referendum succeeds and the results are certified, because as of May 1, 2018, they will be required to pay a new, additional \$1.00-per-head-sold checkoff “assessment” to the Oklahoma Beef Council, and will have to take on a new, continuing burden of record-keeping and refund-requesting to get their money back.

C. No adequate alternative remedy exists, because of the statewide nature of the Referendum, the constitutional claims asserted, and the imminent completion of the

¹² 2 O.S. § 5-63.1 *et seq.*

Referendum. The Petitioners respectfully request this Court issue a writ of prohibition to Respondent Reese, ordering him not to certify the results of the Referendum.

3. Second Cause of Action: Declaratory Judgment Under Article V, Section 33

A. Petitioners respectfully request a declaratory judgment from this Court holding that Respondent Reese’s certification of the results of the Referendum would be unauthorized by law, because the Referendum’s authority derives from the Commodity Research Enhancement Act, a revenue-raising statute originating in the Senate and enacted without three-fourths support in both houses of the Legislature. Therefore certifying the results (if the Referendum succeeds) will be unauthorized by law.

B. The Petitioners will be irreparably injured if the Referendum succeeds and the results are certified, because as of May 11, 2018, they will be required to pay a new, additional \$1.00-per-head-sold checkoff “assessment” to the Oklahoma Beef Council, and will have to take on a new, continuing burden of record-keeping and refund-requesting to get their money back.

C. No adequate alternative remedy exists, because of the statewide nature of the Referendum, the constitutional challenges asserted, and the imminent completion of the Referendum. The Petitioners respectfully request this Court issue a writ of prohibition to Respondent Reese, ordering him not to certify the results of the Referendum.

4. Third Cause of Action: Declaratory Judgment Under Separation of Powers

A. Petitioners respectfully request a declaratory judgment from this Court holding that Respondent Reese’s certification of the results of the 2017 Referendum

would be unauthorized by law, because the Referendum’s authority derives from a scheme of delegation that’s unconstitutional under Oklahoma’s separation of powers doctrine, contained in Article IV, Section 1 and Article V, Section 1 of the state constitution. Therefore certifying the results (if the Referendum succeeds) will be unauthorized by law.

B. The Petitioners will be irreparably injured if the Referendum succeeds and the results are certified, because as of May 1, 2018, they will be required to pay a new, additional \$1.00-per-head-sold checkoff “assessment” to the Oklahoma Beef Council, and will have to take on a new, continuing burden of record-keeping and refund-requesting to get their money back.

C. No adequate alternative remedy exists, because of the statewide nature of the Referendum, the constitutional challenges asserted, and the imminent completion of the Referendum. The Petitioners respectfully request this Court issue a writ of prohibition to Respondent Reese, ordering him not to certify the results of the Referendum.

FACTS ENTITLING PETITIONERS TO RELIEF

BACKGROUND:

THE FEDERAL BEEF CHECKOFF PROGRAM

Since the mid-1980s, the federal government has authorized the imposition of a mandatory “checkoff assessment” on every head of cattle sold in the United States.¹³ The

¹³ *Johanns v. Livestock Marketing Assoc.*, 554 U.S. 550, 553-4 (2005) (Pet’r App. at Ex. AA) (providing a short history of the federal beef checkoff program).

checkoff program is enforced by federal law,¹⁴ but administered largely through state-level entities, who collect the checkoff dollars and remit them to the Cattlemen's Beef Promotion and Research Board (“the Beef Board”) to fund “a program of generic promotion, research and information” about beef.¹⁵ One of these state-level entities is the Oklahoma Beef Council (“OBC” or “the Beef Council”), a domestic not-for-profit corporation¹⁶ authorized under federal law to receive all checkoff dollars assessed in Oklahoma.¹⁷

BACKGROUND:

THE OKLAHOMA COMMODITY RESEARCH ENHANCEMENT ACT

In 2014, the Oklahoma Legislature passed SB 1851, enacted as “the Commodity Research Enhancement Act” (“CREA”).¹⁸ SB 1851 received 36 votes in the Senate (passing by three-fourths of the chamber), but only received 74 votes in the House of Representatives (not quite passing by three-fourths of the chamber).¹⁹

CREA established an initiative-petition process whereby a "nonprofit commodity organization"²⁰ could petition the Oklahoma Department of Agriculture, Food, and Forestry (“ODAFF”) to “request approval to conduct a state assessment [or checkoff]

¹⁴ 7 U.S.C. § 7419 (c)(1) (providing a civil penalty for willful violations of the checkoff program, with up to a \$10,000.00 civil penalty for each violation).

¹⁵ 7 C.F.R. § 1260.172 (2006).

¹⁶ Pet’r App. Ex. B at pp. 1-1/1.

¹⁷ *Id.* at p 1/1.

¹⁸ *Id.* at Ex. C, p. 1/3.

¹⁹ *Id.* at p. 1/4.

²⁰ Defined as “any organization representing commodity producers with the ability to seek a state assessment and designate a federally approved commodity board as the recipient.” 2 O.S. § 5-63.2 (6).

referendum pursuant to [CREA].”²¹

To request this approval under CREA, a nonprofit commodity organization has to present a petition to the ODAFF Commissioner, signed by at least 10% of the commodity producers²² in the state,²³ and specifying, among other things, both the “name of the nonprofit organization that will conduct the referendum”²⁴ and “the federally approved commodity board that will be designated by the nonprofit commodity organization as the recipient of the state assessment[.]”²⁵

Within fifteen days of receiving this petition, the Commissioner is required to schedule a public hearing on the merits, which must be held within forty days of the petition’s receipt.²⁶ Once the hearing is scheduled, the nonprofit commodity organization is responsible for providing “notification of interested commodity producers in the manner, method and locations required by [ODAFF].”²⁷

CREA designates the ODAFF Commissioner as the finder-of-fact at this hearing, and gives him two decisions to make “on the basis of testimony presented”: First, whether “the petitioning nonprofit commodity organization is representative of the producers of the agricultural commodity,” and second, whether “the petition conforms to

²¹ 2 O.S. § 5-63.3 (A)(1).

²² Defined as “a person engaged in the business of producing or causing to be produced for commercial purposes an agricultural commodity” (2 O.S. 5-63.2 (9)) and including both “the owner of a farm on which the commodity is produced and the owner’s tenant or sharecropper[.]” 2 O.S. § 5-63.2 (9). *See also* 2 O.S. § 5-63.2 (7), defining “person” as “an individual, firm, corporation, association, or any other business entity[.]”

²³ 2 O.S. § 5-63.1 (A)(3).

²⁴ 2 O.S. § 5-63.3 (A)(2)(a).

²⁵ *Id. at* § (A)(2)(c).

²⁶ 2 O.S. § 5-63.3 (B)(1).

²⁷ *Id. at* (B)(2).

the purposes and provisions of [CREA.]”²⁸

If the Commissioner makes both these findings, CREA empowers him to “designate the nonprofit commodity organization as representative of the producers of the commodity” and authorize it to conduct a state checkoff referendum.²⁹

CREA came into effect on November 1, 2014.³⁰

FACTS OF THE PRESENT CASE

On September 14, 2015, the Oklahoma Farm Report, an agricultural news service, reported on plans by the Oklahoma Cattlemen’s Association, along with a “task force” of seven groups including “American Farmers and Ranchers, the Oklahoma Beef Council, Oklahoma Cattlemen’s Association, Oklahoma CattleWomen’s Association, Oklahoma Dairy Producers Association, Oklahoma Farm Bureau and the Oklahoma Livestock Marketing Association,” to petition for a new \$1.00 checkoff referendum under CREA.³¹

The Oklahoma Cattlemen’s Association (“OCA” or “the Cattlemen’s Association”) estimated the number of signatures needed at “55-hundred” and stated the “referendum will take place in the first half of 2016.”³² This was prior to the promulgation of any ODAFF administrative regulations implementing CREA.³³

²⁸ *Id.* at (B)(3).

²⁹ *Id.*

³⁰ 2014 O.S.L. 371, § 19.

³¹ Pet’r App. at Ex. D (Ron Hays, *State Beef Checkoff Petition Drive Begins in Oklahoma*, Oklahoma Farm Report, September 14, 2015 (available at http://www.oklahomafarmreport.com/wire/beefbuzz/2015/09/09519_BeefCheckoffPetitionDriveKelsey091415_145035.php#.WeTCZBOPI6j).

³² *Id.*

³³ *But see* Okla. Admin. Code § 35:40-3-1 (2000) *et seq.*

OCA began circulating petitions in September 2015 that were headlined “Petition for a referendum for an Oklahoma Beef Checkoff.”³⁴ The petition recited the facts required under CREA,³⁵ gave an estimate of the number of eligible producers as 51,000,³⁶ and provided spaces for printed names, addresses, cities, signatures, and also an empty block the signer checked to assert they were a “cattle producer, owner or tenant” who had “sold cattle in the past year.”³⁷ The petition also listed the names and number of positions held on the Beef Council by OCA, and the other members of the original “task force.”³⁸ The petition did not contain space to mark the date of the signature.³⁹

On May 15, 2017, the Cattlemen’s Association delivered the petitions and signatures to the ODAFF Commissioner, Respondent Reese.⁴⁰ The ODAFF Commissioner scheduled the required public hearing on OCA’s petition for June 14, 2017 in ODAFF’s Boardroom in Oklahoma City.⁴¹ This triggered the OCA’s obligation to provide notice to “interested commodity producers” in the “manner, method and locations required by [ODAFF].”⁴² However, no ODAFF implementing regulations existed to prescribe the “manner, method and locations” for public notice of the public hearing.⁴³

At the public hearing, commenters supported the petition, provided the history of the referendum request process, outlined the voting procedure, described how the legal

³⁴ Pet’r App. at Ex. E.

³⁵ 2 O.S. § 5-63.3 (A)(2)(a-f).

³⁶ Pet’r App. at Ex. E.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Pet’r App. at Ex. F.

⁴¹ *Id.*

⁴² 2 O.S. § 5-63.3 (B)(2).

⁴³ *But see* Okla. Admin. Code § 35:40-3-1 (2000) *et seq.*

requirements of CREA were met, and indicated the Cattlemen’s Association was representative of cattle producers.⁴⁴ A representative of the Oklahoma Farm Bureau (a member of the original working group) stated the Farm Bureau favors the referendum, and provided written comments.⁴⁵ No comments were received in opposition to the referendum, though one commenter did request that “an unbiased fact sheet identifying both the pros and cons of the referendum be provided to cattle producers prior to the referendum.”⁴⁶

On June 28, 2017, the ODAFF Commissioner executed a document headlined “DESIGNATION OF OKLAHOMA CATTLEMEN’S ASSOCIATION.”⁴⁷ The document asserted that “[t]he petitions were found to be sufficient,” designated OCA representative of the cattle producers in the state, found that “the petition conforms to the purposes and provisions of [CREA]” and authorized OCA to conduct a state checkoff referendum.⁴⁸

CREA provides no direct authority for establishing the “date, hours and polling places for voting in the referendum,” but instead delegates responsibility for providing public notice of the “date, hours and polling places” to the “designated nonprofit commodity organization”--here, the Cattlemen’s Association.⁴⁹

Under the authority provided by CREA and ODAFF, the Cattlemen’s Association has determined that in-person voting will take place on Wednesday, November 1, 2017,

⁴⁴ Pet’r App. at Ex. F.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 2 O.S. 5.63.4 (A)(1).

at “any Oklahoma county extension office during each office’s normal business hours.”⁵⁰

OCA has also determined that mail-in ballots will be valid, if requested by phone during the period running from October 2, 2017 through October 20, 2017, and postmarked no later than October 27, 2017.⁵¹

CREA provides authority to the ODAFF Commissioner to “receiv[e] the report of the returns of the referendum,”⁵² to determine the “number of votes cast for and against the referendum proposition,”⁵³ the “total volume of production of the commodity during the relevant production period,”⁵⁴ and the “percentage of the total volume of production of the commodity that was produced by those voting in favor of the referendum proposition.”⁵⁵

If the ODAFF Commissioner determines that either two-thirds or more of those voting in the referendum supported the new checkoff,⁵⁶ or that more than one-half of those voting in the referendum supported the new checkoff, and those voting in favor produced at least fifty percent of the volume of beef production “during the relevant production period,”⁵⁷ then the Commissioner must “publicly certify” the checkoff referendum has succeeded.⁵⁸

⁵⁰ Pet’r App. at Ex. G.

⁵¹ *Id.*

⁵² 2 O.S. § 5-63.10.

⁵³ *Id.* at (1).

⁵⁴ *Id.* at (2).

⁵⁵ *Id.* at (3).

⁵⁶ 2 O.S. § 5-63.11 (B)(2)(a).

⁵⁷ *Id.* at (B)(2)(b).

⁵⁸ *Id.* at (A).

On the Commissioner's certification of the referendum's success, the Beef Council will be the recipient of the new checkoff dollars,⁵⁹ and shall begin collecting them "in the same manner"⁶⁰ as the federal checkoff on May 1, 2018.⁶¹

WHEREFORE, on premises considered, and incorporating by reference the Petitioners' Brief contemporaneously filed, the Petitioners respectfully request that this Court enter declaratory judgments in one, some, or all of the causes of action asserted here, and in the Brief, and issue writs of prohibition to the Respondent Reese, in his official capacity as ODAFF Commissioner, prohibiting him from certifying the results of the Referendum.

Respectfully submitted,

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⁵⁹ *Id. at (C)*.

⁶⁰ 2 O.S. § 5-63.15

⁶¹ Pet'r App. at Ex. G.

Certificate of Service

This is to certify that on the 23rd day of October, 2017, or within a reasonable time thereafter, this document was served on the following necessary parties:

The Honorable Jim Reese
Oklahoma Department of Agriculture, Food and Forestry
2800 N. Lincoln Blvd.
Oklahoma City, OK 73105

Oklahoma Attorney General
attn.: Office of Solicitor General
313 NE 21st St.
Oklahoma City, OK 73105

Brian Ted Jones, OBA No. 22611

COMES NOW the Petitioners, through their attorney of record, Brian Ted Jones of the firm Brian Ted Jones, PLLC, and respectfully present this Brief in support of their contemporaneously filed Application for Original Jurisdiction.¹ In support, and as a Summary of the Record,² Petitioner incorporates by reference the contents of his contemporaneously filed Application,³ and asserts:

ARGUMENT AND AUTHORITY

Petitioner has three separate causes of action challenging the legality of the Referendum, and they are pled in the alternative.⁴

First Cause of Action Declaratory Judgment Under Administrative Procedures Act

PROPOSITION: The Referendum is illegal because ODAFF implemented CREA and applied it to the Referendum using internal policymaking, in clear violation of the Administrative Procedures Act--what's more, ODAFF used internal policymaking to approve the Referendum even though the signature-gathering period lasted twenty months, petition-signers were not required to verify their eligibility by proof of sale, and the signatures approved were patently flawed, all in violation of ODAFF's own precedent.

The Oklahoma Administrative Procedures Act (“APA”) prohibits state agencies from implementing a statute by “internal policy, memorandum, or other form of action.”⁵ Here, ODAFF did not implement CREA through the agency rule-making process, and instead, rendered critical decisions about the Referendum through internal policies, memoranda,

¹ Petitioners’ Application to Assume Original Jurisdiction, with Petitions for Declaratory Relief and Writs of Prohibition, Filed October 23, 2017.

² Oklahoma Supreme Court Rule 1.11 (e).

³ *See Id.* at pp. 1-12

⁴ *Id.*

⁵ 75 O.S. § 302 (D)(1) (“An agency shall not by internal policy, memorandum, or other form of action not otherwise authorized by the [APA]: amend, interpret, **implement**, or repeal a statute or a rule[.]”) (emphasis supplied).

or other prohibited forms of statutory implementation.⁶ What's worse, in making the June 28, 2017 determination that the signatures were sufficient, and that the petition conformed to the purposes and provisions of CREA, the ODAFF Commissioner ignored ODAFF's own precedents.

1. ODAFF applied CREA to the Referendum not through rules promulgated under the APA, but instead through internal policies, memoranda, or other prohibited forms of action.

ODAFF did not implement CREA under the APA following the statute's enactment in November 2014.⁷ Instead, the only governing standards ODAFF applied to the process were developed entirely internally, and therefore prohibited under the APA.⁸

ODAFF provides, on its website, as a public record, the packets received by members of the Board of Agriculture in advance of Board meetings.⁹ These packets show, among other things, an accounting of the activities of the ODAFF Office of General Counsel ("OGC").¹⁰ These accountings demonstrate that ODAFF, through OGC, implemented CREA and applied it to the Referendum internally, in violation of the APA.¹¹

Indeed, these packets make it clear that throughout the past year, the ODAFF OGC has been "Review[ing] Cattlemen's Association check off referendum numbers,"¹²

⁶ *Id.*

⁷ *But see* Okla. Admin. Code § 35:40-3-1 (2000) *et seq.*

⁸ 75 O.S. § 302 (D)(1).

⁹ Pet'r App. Ex.'s H, I, and J.

¹⁰ E.g., Pet'r App. Ex. H *at* p. J-1.

¹¹ 75 O.S. § 302 (D)(1).

¹² Pet'r. App Ex. H *at* p. J-7.

holding “Cattlemen’s Referendum Conference Call[s],”¹³ as well as “Discuss[ing the] Cattlemen’s referendum on checkoff and voter eligibility”¹⁴ and “Review[ing] Oklahoma Beef Council voting method.”

What’s more, every decision made regarding this Referendum by ODAFF or the ODAFF Commissioner--including how notice was to be given to interested producers,¹⁵ for instance, or to approve OCA’s selection of the number of “cattle farms” in Oklahoma as the universe of producers for calculating the number of signatures required¹⁶--has been an internal implementation of CREA in violation of the APA.

The Court of Civil Appeals faced a similar problem in *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Comm.*¹⁷ There, the court overturned a ruling by the Oklahoma Tax Commission (“OTC) denying a sales tax refund based on a legal determination by its general counsel.¹⁸ This was challenged, and the court said, “OTC’s action in changing the statutory requirements by internal policy violates the [APA].”¹⁹

These kinds of violations are serious for several reasons, but also because they involve constitutional separation of powers.²⁰ Before an agency implements a statute, it is required to conduct administrative rulemaking under the APA, including public notice,²¹ hearing,²² and weigh-in by the political branches.²³ At this Court noted in *Musgrove Mill,*

¹³ Pet’r. App Ex. I at p. J-4.

¹⁴ Pet’r. App Ex. J at p. J-10.

¹⁵ 2 O.S. § 5-63.3 (B)(2).

¹⁶ Pet’r App. at Ex. F. Cf. Pet’r App. at Ex. K and Ex. E.

¹⁷ 2006 OK CIV APP 68, 136 P.3d 1072.

¹⁸ *Id.* at ¶6.

¹⁹ *Id.* at ¶14. See also 75 O.S. § 302 (D)(1) (prohibiting both “amend[ing]” and “implement[ing]” either a statute or a rule.)

²⁰ See *infra* pp. 12-14.

²¹ 75 O.S. § 303 (A)(1).

²² *Id.* at. 303 (A)(3).

LLC v. Capitol-Medical Center Improvement & Zoning Comm., these requirements are substantive, and not merely procedural, because they are essential to maintaining separation of powers between executive agencies--especially unelected executive officers, like the Commissioner of Agriculture²⁴--and the people's legislative representatives.²⁵

ODAFF's internal implementation of CREA violated the APA, and ODAFF's application of that internal implementation to authorize the Referendum should be held "null, void, and unenforceable."²⁶

2. *ODAFF ignored its own precedents in approving the Referendum.*

A. The Signature-Gathering Period Lasted Twenty Months

The signature-gathering process resulting in this Referendum lasted twenty months--from mid-September 2015²⁷ until mid-May 2017.²⁸ That's nearly seven times as long as signature-gatherers are given for both statewide petition-initiative drives²⁹ and municipal petition-initiative drives.³⁰

Moreover, it's also nearly seven times as long as ODAFF's own regulations give

²³ 75 O.S. § 303.1.

²⁴ 74 O.S. § 10.3.

²⁵ *Musgrove Mill, LLC v. Capitol-Medical Center Improvement & Zoning Comm.*, 2009 OK 19, ¶2, ¶10, 210 P.3d 835.

²⁶ 75 O.S. § 302 (E) ("Any agency memorandum, internal policy, or other form of action violative of this section [following 75 O.S. 302 (D)] or the spirit thereof is null, void, and unable.")

²⁷ Pet'r App. at Ex. D.

²⁸ Pet'r App. at Ex. F.

²⁹ 34 O.S. § 8 (E) (establishing ninety days as the allowable time period for a statewide signature-gathering drive).

³⁰ 11 O.S. § 15-103 (C) (establishing ninety days as the allowable time period for a municipal signature-gathering drive).

signature-gatherers in a near-identical context.

Under the Oklahoma Agricultural Commodity Act³¹ of 1999 (“OACA”), nonprofit commodity organizations are authorized to petition the ODAFF Commissioner for approval to conduct referendums to establish new checkoff assessments.³² Unlike with CREA, ODAFF implemented OACA through the APA rulemaking process--and gave petitioners a ninety-day deadline to complete a signature drive.³³

Not only did ODAFF (and the Legislature, in passing CREA) fail to implement any workable standard for determining the appropriate length of a signature-gathering drive,³⁴ but the ODAFF Commissioner approved a petition which had been circulating for twenty months.³⁵ All available points of law--at the statewide level,³⁶ the municipal level,³⁷ and the administrative level³⁸--should have compelled the conclusion that twenty months was simply too long.

B. There Was No Proof of Eligibility Requirement for Petition Signers

During the signature drive, the Cattlemen’s Association did not require proof of verification the signer was in fact a cattle producer,³⁹ and the election process--which

³¹ 2 O.S. 5-60.10 *et seq* (enacted in 1999).

³² 2 O.S. § 5-60.13 (A)(1).

³³ Okla. Admin. Code § 35:40-3-51 (b)(1) (2000).

³⁴ *Cf. Democratic Party of Oklahoma v. Estep*, 1982 OK 106, 652 P.2d 271 (finding that a challenge to agency authority was not justiciable because the Legislature had not set clear enough standards to guide the agency).

³⁵ Pet’r App. at Ex. D.

³⁶ 34 O.S. § 8 (E).

³⁷ 11 O.S. § 15-103 (C).

³⁸ Okla. Admin. Code § 35:40-3-51 (b)(1).

³⁹ Pet’r App. at Ex. E.

OCA is conducting--does not require such verification as a requirement to vote.⁴⁰ (Proof of verification is, however, required to get a checkoff assessment refunded under CREA.)⁴¹

By approving OCA's determination that CREA did not require proof of verification to sign the petition, the ODAFF Commissioner not only violated the APA (by implementing CREA through internal policymaking and not APA rulemaking),⁴² but the Commissioner also ignored ODAFF's own precedent under OACA, where proof of a qualifying sale was required.⁴³

C. The Signatures, and Signature Count, Approved by ODAFF are Flawed

ODAFF did not provide any opportunity to challenge signatures or the signature count, as it did under OACA.⁴⁴ The signatures presented to ODAFF by the Cattlemen's Association contained signatures from children,⁴⁵ non-Oklahomans,⁴⁶ and "signatures" from people who did not actually "sign" the petition.⁴⁷ The ODAFF Commissioner approved all these signatures,⁴⁸ as well as OCA's determination that 51,043 was the correct number of cattle producers for calculating the number of signatures required under CREA.⁴⁹

⁴⁰ Pet'r App. at Ex. L.

⁴¹ 2 O.S. § 5-63.16. *See also* pp. 14-15 *infra*.

⁴² 75 O.S. § 302 (D)(1).

⁴³ Okla. Admin. Code § 35:40-3-72 ("A valid voter shall indicate his eligibility to vote by providing a sales receipt of the referendum commodity dated within the last year.")

⁴⁴ Okla. Admin. Code § 35:40-3-51 (c)(3).

⁴⁵ Pet'r App. at Ex. M, set 1, p. 50 (sequential).

⁴⁶ Pet'r App. at Ex. N, set 1, p. 82 (sequential).

⁴⁷ Pet'r App. at Ex. O, set 3, p. 10 (sequential).

⁴⁸ Pet'r App. at Ex. F.

⁴⁹ Pet'r App. at Ex. E.

However, that 51,043 number is the number of cattle farms in Oklahoma according to the U.S. Census of Agriculture.⁵⁰ Since that was the number OCA used, every person who signed the petition could only legally sign for a single “Oklahoma cattle farm:” one farm, one signature.

Put another way, if one imagines the “10% of producers” calculation under CREA as a fraction, then the kind of entity defined in the denominator (“Oklahoma cattle farms”) has to match the entities counted toward 10% in the numerator: they all have to be “Oklahoma cattle farms,” too.

This means non-Oklahomans--even if they sold cattle in the state--could not sign, because then the numerator would not match the denominator. The same problem applies to children--since “cattle farms” formed the denominator, only one signature could be taken from each farm to make up the numerator (10% of “Oklahoma cattle farms”). An owner-operator could sign for the entire farm, but a spouse or a child could not, because then the farm would be overrepresented (again, the numerator would not match the denominator).

But that is patently what occurred here, and ODAFF approved it.⁵¹

ODAFF did not provide an opportunity for any of these issues to be raised (the way ODAFF did when it implemented OACA).⁵² Instead, ODAFF implemented CREA internally,⁵³ and determined that all of this--the twenty-month signature drive, the lack of verification, and the flawed count--was acceptable.

Given the preceding, the only appropriate remedy is for this Court to assume

⁵⁰ Pet’r App. at Ex. K.

⁵¹ Pet’r App. at Ex. F.

⁵² Okla. Admin. Code § 35:40-3-51 (c)(3).

⁵³ 75 O.S. § 302 (D)(1).

original jurisdiction, enter a declaratory judgment that the Referendum is in violation of the APA, and issue a writ of prohibition to the ODAFF Commissioner preventing him from certifying the results of this illegal Referendum.

Second Cause of Action
Declaratory Judgment Under Article V, Section 33

PROPOSITION: The Referendum is unconstitutional because it derives its authority solely from CREA, a revenue-raising bill originating in the Senate and enacted without three-fourths support in the Oklahoma House of Representatives.

Article V, Section 33 of the Oklahoma Constitution means Oklahoma citizens cannot be subjected to a tax increase unless the proposal gets legislative supermajorities or wins a vote of the people.

The authority of the Referendum is derived entirely from CREA, a revenue-raising statute enacted with less than three-fourths support in the House of Representatives, and never referred to the people.⁵⁴

Therefore the Referendum is unconstitutional, because CREA is unconstitutional.

1. *CREA's principal object is providing a method of raising revenue.*

As this Court noted in *Naifeh v. State ex rel. Oklahoma Tax Com'n*, “Whether an assessment is a fee or a tax . . . is not ‘determined by the name given it’ but rather ‘according to the mission given it by the law under which it is levied.’”⁵⁵

CREA’s sole purpose was to establish a procedure whereby “[a]ny nonprofit

⁵⁴ Pet’r App. at Ex. C, p. 1/4.

⁵⁵ 2017 OK 63, ¶43, 400 P.3d 759 (citing *Red Slipper Club, Inc. v. City of Oklahoma City*, 1979 OK 118, ¶ 4, 599 P.2d 406, 408).

commodity organization may petition the [ODAFF Commissioner] to request approval to conduct a **state assessment** referendum.”⁵⁶ As in *Naifeh*, the use of the word “assessment” does not close off discussion of whether the proposed assessment is in fact a tax.⁵⁷ Instead, this Court’s function is to “examine the true nature and effect” of CREA’s checkoff assessment, to determine whether it’s merely an “assessment,” or truthfully “an excise tax under an alias.”⁵⁸

CREA established procedural mechanisms empowered by the authority of the state through which commodity producers may decide whether “to levy a state assessment on themselves[.]”⁵⁹ In terms this Court cited in *Naifeh*, this checkoff assessment would be a “forced burden” among the “jurisdiction” of Oklahoma beef producers--who already must remit a dollar to the Oklahoma Beef Council for every head of cattle sold--and assessed at a flat-rate apportionment of \$1.00, to provide “public revenue” for “public expenses” ostensibly designed to benefit the entire community.⁶⁰ In practice, the checkoff “functions as a ‘payment exacted by the state . . . as a contribution toward the cost of maintaining governmental functions, where the special benefit deriv[ing] from th[e] performance [of the function] is merged in the general benefit[.]’”⁶¹

2. *CREA provides a method of levying taxes in the strict sense.*

The new state checkoff assessment proposed in the Referendum “levies a tax in the strict

⁵⁶ 2 O.S. § 5-63.3 (A)(1) (emphasis supplied).

⁵⁷ *Naifeh* at ¶43.

⁵⁸ *Id.*

⁵⁹ 2 O.S. § 5-63.4 (A).

⁶⁰ *Olustee Co-Op. Ass’n v. Okla. Wheat U.R. & M.D.C.*, 1964 OK 81, ¶8, 391 P.2d 216.

⁶¹ *Naifeh* at ¶45.

sense”⁶² because it is collected like a tax,⁶³ remitted like a tax,⁶⁴ and enforced with state power like a tax,⁶⁵ while no “direct nexus” exists between the checkoff assessment paid by the producer and any benefit conferred,⁶⁶ because the money is designed for use by the Beef Council to finance beef research and promotional programs,⁶⁷ or to employ personnel,⁶⁸ retain legal counsel,⁶⁹ or make “such reasonable expenditures of funds as are necessary to carry out [CREA]”--all descriptions of general government expenses.⁷⁰

What’s further, this tax is enforced under CREA by granting the Beef Council new powers to “investigate conditions that relate to the prompt remittance of the state assessment by any producer or processor.”⁷¹ In addition, CREA gives the Beef Council authority to “independently institute proceedings” to recover unremitted funds, or to seek “injunctive or other appropriate relief”⁷² in that regard. Not only, then, does CREA establish a method for levying taxes in a direct sense, but it grants the Beef Council, a not-for-profit domestic corporation,⁷³ expanded enforcement authority derived from state law.

Finally, in *Johanns v. Livestock Marketing Assoc.*,⁷⁴ the U.S. Supreme Court rejected a free speech challenge to the federal beef checkoff program on the grounds that

⁶² *Id.* at ¶43.

⁶³ Pet’r App. at Ex. P.

⁶⁴ 2 O.S. § 5-63.15

⁶⁵ *Id.*

⁶⁶ *Naifeh.* at ¶45.

⁶⁷ 2 O.S. § 5-63.4 (A)

⁶⁸ 2 O.S. § 5-63.12 (1).

⁶⁹ *Id.* at (2).

⁷⁰ *Id.* at (5).

⁷¹ 2 O.S. § 5-63.18.

⁷² *Id.*

⁷³ Pet’r App. at Ex. B.

⁷⁴ 544 U.S. 550 (2005) (included in Pet’r App. at Ex. AA).

the program was government speech. The Court noted that, “The message of the promotional campaigns is effectively controlled by the Federal Government”⁷⁵ because the legislative branch determined the purpose of the checkoff program and specified, “in general terms,” what the program could do, and what it could not do.⁷⁶

This is indistinguishable from CREA. CREA determined the purpose of the checkoff assessment: “to finance programs of research, disease and insect control, predator control, education or promotion designed to encourage the production, marketing and use of the commodity.”⁷⁷ CREA also determined, “in general terms,” what the Beef Council can do with these checkoff dollars,⁷⁸ and what it cannot do with these checkoff dollars.⁷⁹

Because CREA’s principal purpose was to raise revenue, and because it levies taxes in a strict sense, Article V, section 33 of the Oklahoma Constitution required it to originate in the House and receive three-fourths support in the House of Representatives. It failed to do that,⁸⁰ and the petitioners respectfully request that this Court enter a declaratory judgment holding CREA unconstitutional, and issue a writ of prohibition to the Respondent Reese preventing him from certifying the results of the Referendum.

⁷⁵ *Id.* at 560-562.

⁷⁶ *Id.*

⁷⁷ 2 O.S. § 5-63.4 (A).

⁷⁸ E.g., “employ personnel” (2 O.S. § 5-63.12 (1)) or investigate non-payment (2 O.S. § 5-63.18).

⁷⁹ E.g., “to promote or oppose the election of any candidate for public office or to influence legislation.” 2 O.S. § 5-63.14 (C).

⁸⁰ Pet’r App. at Ex. C, p. 1/4.

Third Cause of Action
Declaratory Judgment Under Separation of Powers

PROPOSITION: The Referendum is unconstitutional because CREA is a violation of Oklahoma’s separation of powers doctrine.

The Oklahoma Constitution requires strict separation of powers between the three branches of government.⁸¹ In particular, the people’s legislative power is vested in the House and Senate,⁸² and delegations of any legislative authority to any executive agency must adhere to the provisions of the APA in order to preserve constitutional balance.⁸³ The APA’s restrictions on internal executive rulemaking, which were not followed in this Referendum process,⁸⁴ are substantive, and not merely procedural, as this Court has said—and one reason this is true is because of Oklahoma’s constitutional division of powers.⁸⁵ In particular, the requirements of the APA, including and especially the provision that administrative rules be provided to the political branches of government,⁸⁶ are an important check on the state’s unelected bureaucracies,⁸⁷ helping to preserve separation of powers in realtime, and helping to prevent sprawl in the administrative state.

What’s more, the power of the Oklahoma people to enact constitutional change through initiative-petition is a cornerstone of our state’s political heritage, and a critical

⁸¹ Okla. Const. art. IV, § 1.

⁸² Okla. Const. art. V, § 1.

⁸³ *Musgrove Mill, LLC v. Capitol-Medical Center Improvement & Zoning Comm.*, 2009 OK 19, ¶2, ¶10, 210 P.3d 835. *See also Democratic Party of Oklahoma v. Estep*, 1982 OK 106, 652 P.2d 271 (finding that a challenge to agency authority was not justiciable because the Legislature had not set clear enough standards to guide the agency).

⁸⁴ *See supra* pp. 1-4.

⁸⁵ *Musgrove Mill, LLC v. Capitol-Medical Center Improvement & Zoning Comm.*, ¶ 2.

⁸⁶ 75 O.S. § 250.2.

⁸⁷ 74 O.S. § 10.3 (providing statutory authority to the Governor to appoint the Secretary and Commissioner of Agriculture).

component of Oklahoma separation of powers.⁸⁸ Article V, Section 33--added to the constitution by a petition-initiative drive to pass “State Question 640” in the early 1990s--is an essential piece of the state’s organic laws,⁸⁹ and the Constitution makes it clear that the right of the Oklahoma people to exercise reserved sovereignty in direct democratic action is a precious feature of our republican form of government, and helps preserve our state’s strong separation of powers.⁹⁰

If we assume for the sake of argument that the Legislature can constitutionally delegate revenue-raising authority to an executive agency--and if we assume the agency can delegate it one step further, to a private nonprofit corporation,⁹¹ to run a private Referendum under the banner of state law⁹² (while also operating as the Yes campaign in this same Referendum)⁹³--and if we assume even further that this double-delegation of revenue-raising power can enact a new tax in order to fund the activities of yet another private nonprofit corporation:⁹⁴ even if we assume that all this can be constitutional, then the Legislature would still have to comply with State Question 640 in order to do it.⁹⁵ That means any bill to enact a scheme of delegated revenue-raising power, like this one, would have to originate in the House, and would have to receive three-fourths support in each chamber.⁹⁶ That simply did not happen here.⁹⁷

⁸⁸ Okla. Const. art. V, § 1.

⁸⁹ *See Naifeh.*

⁹⁰ *Id.*

⁹¹ *See Pet’r App. at Ex. T.*

⁹² *Pet’r App at Ex. F.*

⁹³ *Pet’r App. at Ex. E.*

⁹⁴ *See Pet’r App. at Ex. B.*

⁹⁵ Okla. Const. art. V, § 33.

⁹⁶ *Id.*

⁹⁷ *Pet’r App. at Ex. C.*

For these reasons--that CREA did not comply with State Question 640,⁹⁸ nor did ODAFF comply with the APA in implementing it⁹⁹--the petitioners respectfully request this Court enter a declaratory judgment finding that the Commodity Research Enhancement Act, as implemented by ODAFF and applied to this Referendum, is unconstitutional under Oklahoma's separation of powers doctrine, and the petitioners also respectfully request this Court issue a writ of prohibition to the Respondent Reese, ordering him not to certify the results of this unconstitutional Referendum.

PRAYER FOR RELIEF

WHEREFORE, on premises considered, and incorporating by reference the Application for Original Jurisdiction contemporaneously filed, the Petitioner respectfully requests that this Court enter declaratory judgments in one, some, or all of the causes of action asserted above and issue writs of prohibition to the Respondent Reese, in his official capacity as ODAFF Commissioner, prohibiting him from certifying the results of the Referendum.

Respectfully submitted,

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⁹⁸ See *supra* pp. 8-11 (Second Cause of Action).

⁹⁹ See *supra* pp. 1-7 (First Cause of Action).

Certificate of Service

This is to certify that on the 23rd day of October, 2017, or within a reasonable time thereafter, this document was served on the following necessary parties:

The Honorable Jim Reese
Oklahoma Department of Agriculture, Food and Forestry
2800 N. Lincoln Blvd.
Oklahoma City, OK 73105

Oklahoma Attorney General
attn.: Office of Solicitor General
313 NE 21st St.
Oklahoma City, OK 73105

Brian Ted Jones, OBA No. 22611

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

LINDA BEST, BRYAN BEST,)	
DENNIS SWEAT, and JOHN JOHNSON,)	
)	
PETITIONERS,)	
)	
v.)	Case No.
)	
THE HONORABLE JIM REESE,)	
in his official capacity as)	
Secretary and Commissioner)	
of Agriculture, and,)	
THE STATE OF OKLAHOMA, <i>ex rel,</i>)	
OKLAHOMA DEPT.)	
OF AGRICULTURE, FOOD,)	
AND FARMING,)	
)	
RESPONDENTS.)	

**PETITIONERS' APPLICATION FOR STAY with
BRIEF IN SUPPORT**

COMES NOW the Petitioners, through their attorney of record, Brian Ted Jones, to respectfully request that this Court stay the Respondent Reese from certifying the results of the 2017 beef checkoff Referendum, in the event this Court has not resolved Petitioners' challenge to the Referendum by the time the Respondent Reese receives the returns of the election from the Oklahoma Cattlemen's Association. In support, Petitioners assert:

BACKGROUND

Petitioners incorporate by reference their Application for Original Jurisdiction and Brief filed in the above-styled case.

STAY AND MOOTNESS

A stay will preserve the status quo and prevent the irreparable harm to the

Petitioners and the public that would result if the Referendum were to succeed and be certified.

In the event this Court resolves this dispute before the returns of the election are transmitted from the Oklahoma Cattlemen's Association to the Respondent Reese, the Petitioners will withdraw this Motion as moot.

In the event the Referendum fails before the Court resolves this dispute, the Petitioners will withdraw this Motion as moot.

ARGUMENT

Oklahoma Supreme Court Rule 1.15(c)(2) requires applicants for a stay to address their likelihood of success, the threat of irreparable harm without a stay, the potential harm to the opposing party, and any risk of harm to public interest.¹

Petitioners have a strong likelihood of success. The Referendum derives its authority from an internal agency implementation of a statute (prohibited by the Oklahoma Administrative Procedures Act). That statute was a revenue-raising statute that failed to pass with three-fourths of the vote in both houses of the Legislature. And it raises serious problems under the separation of powers doctrine.

If the results of the Referendum are not stayed, and if the Referendum succeeds, then the Petitioners will suffer irreparable harm: as of May 1, 2018, they will be required to pay a new, additional \$1.00-per-head checkoff "assessment" to the Oklahoma Beef Council, and will have to take on a new, continuing burden of record-keeping and refund-requesting to get their money back.

¹ Cf. *Okla. Ass'n of Broads., Inc. V. City of Norman*, 2016 OK 119, ¶17, n.45, 390 P.3d 689, 704 n.45 (Edmondson, J., concurring).

At the same time, the potential harm to the Respondents is non-existent. The Petitioners are not seeking to have the Referendum halted, nor are they seeking to have the counting of ballots or reporting of returns halted. If this stay is granted, nothing will happen to disrupt the Referendum, except the Respondent Reese will have to wait to certify the election results until after this Court has ruled on the case.

Finally, there is no risk of harm to the public if a stay is granted. The Referendum is scheduled for completion on November 1, 2017, and the Oklahoma Cattlemen's Association will then be required to count the returns and deliver the results to the Respondent Reese. Only at that point will a stay have any effect, and then only to prevent the Respondent Reese from certifying the results. The new assessment will not enter into effect until May of 2018, and does not require much in the way of implementation, because it simply uses the existing infrastructure for the federal checkoff program to collect the new state assessment. What's more, the public has a strong interest in a resolution to this dispute, because it involves the market for Oklahoma cattle, a market engaged in by a considerable portion of the Oklahoma people.

WHEREFORE, on premises considered, this Court should stay the Respondent Reese, in his capacity as Oklahoma Commissioner of Agriculture, from certifying the results of the 2017 Oklahoma beef checkoff referendum.

Respectfully submitted,

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OKLAHOMA DEPT.)	
OF AGRICULTURE, FOOD,)	
AND FARMING,)	
)	
RESPONDENTS.)	

PETITIONERS' MOTION FOR ORAL ARGUMENT

COMES NOW the Petitioners, through their attorney of record, Brian Ted Jones, to respectfully request under Oklahoma Supreme Court Rules 1.9 and 1.91(g) that this Court grant oral before the *en banc* Supreme Court on the Petitioners' Application to Assume Original Jurisdiction, their Brief, and the causes of action contained in each.

In support, Petitioners incorporate, by reference, their Brief and Application, and assert:

1. *This case raises questions of substantial public importance.* The Petitioners argue the 2017 Oklahoma beef checkoff referendum--where mail-in voting is already underway--is illegal. This referendum concerns a proposed \$1.00 tax on every head of cattle sold in Oklahoma, would apply to every cattle producer in the state, unless they take up the continuing burden of requesting a refund every month. Two of these causes of action challenge the constitutionality of the authorizing statute itself. This Court has often

granted oral argument in cases raising important questions of broad public concern, especially those involving the constitutionality of a statute or government action or public funding.¹ Those factors are all present here.

2. *The questions require full and swift consideration.* Given the importance of these questions, the fact that mail-in voting in the Referendum is currently underway, with final in-person voting scheduled for November 1, 2017, and implementation of the new checkoff assessment (if approved) scheduled for May 2018, Petitioners assert that oral argument before the full Court will assist in the full and complete presentation and consideration of the matter. Moreover, since original jurisdiction proceedings involve limited and expedited briefing, oral argument will provide the Court an opportunity to ask questions and gain a larger sense of the case.

WHEREFORE, on premises considered, the Petitioners move for oral argument before the full Supreme Court.

Respectfully submitted,

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¹ *Naifeh v. State ex rel. Oklahoma Tax Com'n*, 2017 OK 63, 400 P.3d 759 PR-116102 (oral argument granted to consider a challenge under Article V, Section 33 of the state Constitution to a proposed new cigarette tax), *In re Initiative Petition No. 403*, 2016 OK 1, 330 P.3d 1216, O-114425 (oral argument granted to consider constitutionality of the initiative-petition penny sales tax proposal), and *Holland v. Okla. Health Care Auth.*, 2010 OK 60, 240 P.3d 665, MA-108519.

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