No. 122,472

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BLACK EMERGENCY RESPONSE TEAM, *et al.*,

Plaintiffs,

v.

GENTNER DRUMMOND, in his official capacity as Oklahoma Attorney General, *et al.*,

Defendants.

STATE DEFENDANTS' BRIEF IN CHIEF

Submitted by:

Garry M. Gaskins, II, OBA No. 20212
Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Garry.Gaskins@oag.ok.gov

Zach West, OBA No. 30768
Director of Special Litigation
Will Flanagan, OBA No. 35110
Assistant Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Zach.West@oag.ok.gov
William.Flanagan@oag.ok.gov

COUNSEL FOR STATE DEFENDANTS

January 30, 2025

No. 122,472

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BLACK EMERGENCY RESPONSE TEAM, *et al.*,

Plaintiffs,

v.

GENTNER DRUMMOND, in his official capacity as Oklahoma Attorney General, *et al.*,

Defendants.

STATE DEFENDANTS' BRIEF IN CHIEF

Submitted by:

Garry M. Gaskins, II, OBA No. 20212
Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Garry.Gaskins@oag.ok.gov

Zach West, OBA No. 30768
Director of Special Litigation
Will Flanagan, OBA No. 35110
Assistant Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Zach.West@oag.ok.gov
William.Flanagan@oag.ok.gov

COUNSEL FOR STATE DEFENDANTS

January 30, 2025

INDEX

Cases

Statutes

Other Authorities

INTRODUCTION

By enacting House Bill 1775 ("the Act") in 2021, the Legislature sought: (1) to prohibit the teaching of certain racist and sexist concepts in K-12 education; and (2) to prohibit Oklahoma universities from requiring students to attend so-called sexual or racial "diversity" trainings and orientations. Thus, the Act consists of two parts: one which applies only to higher education institutions, and one which applies only to public K-12 schools throughout the State.

Several months after the Act took effect in 2021, Plaintiffs—a collection of various advocacy organizations and opponents of the law—filed the present lawsuit in federal district court making allegations exclusively based on the United States Constitution. In their effort to overturn this straightforward and commonsensical law, Plaintiffs have put forward a number of far-fetched and overbroad readings of the Act's provisions. Implausibly, they claim that a law expressly attacking racism and sexism in education somehow perpetuates those evils.

Almost three years after Plaintiffs sought a preliminary injunction, the district court declined to stop enforcement of the bulk of the law but nevertheless enjoined several specific provisions despite having allowed those provisions to be enforced since 2021. Expressing hesitancy to embrace the straightforward interpretations provided by the various Defendants, the court certified the enjoined provisions to this Court for a conclusive interpretation. For the following reasons, this Court should reject the Plaintiffs' overbroad and absurd interpretations of HB 1775. Per its plain text and context, HB 1775 is a permissible and comprehensible provision attempting to combat the ills of racism and sexism in Oklahoma education.

BACKGROUND

I. Troubling trends emerge in education.

By early 2021, the United States was awash with stories of schools forcing radical ideological doctrines promoting racism and sexism onto students. New York schoolchildren were

taught that "all white people" perpetuate systemic racism. Christopher F. Rufo, *Failure Factory*, CITY JOURNAL (Feb. 23, 2021).[1] A California elementary school forced third-grade students to "deconstruct" their own racial and sexual identities, and then write an essay describing the aspects of their identity that "hold power and privilege." Christopher F. Rufo, *Woke Elementary*, CITY JOURNAL (Jan. 13, 2021).[2] And so on. Such teachings were not limited strictly to schools, either. The renowned National Museum of African American History and Culture, for example, even went so far as describing "hard work" and "self-reliance" as an element of "white culture." Peggy McGlone, *African American Museum Site Removes 'Whiteness' Chart After Criticism from Trump Jr. and Conservative Media*, THE WASHINGTON POST (July 17, 2020).[3]

Closer to home, in 2020 the University of Oklahoma rolled out mandatory "diversity" training for all students, faculty, and staff. *OU Launches Mandatory Diversity Training for All Students, Faculty, and Staff*, THE UNIV. OF OKLA., (Aug. 27, 2020).[4] This mandatory training soon drew criticism because it prohibited participants from answering in specific ways when responding to hypothetical situations. Sabrina Conza, *Univ. of Okla. Diversity Training Requires Students, Faculty to Agree with University-Approved Viewpoints*, FIRE, (April 8, 2021).[5] For example, when presented with a hypothetical scenario where a colleague said he was "tired of all this transgender stuff[,]" a

---

[1] *Available at* https://www.city-journal.org/buffalo-public-schools-critical-race-theory-curriculum.

[2] *Available at* https: / /www.city-journal.org/ identity-politics-in-cupertino-california-elementary-school.

[3] *Available at* https://www.washingtonpost.com/entertainment/museums/african-american-museum-site-removes-whiteness-chart-after-criticism-from-trump-jr-and-conservative-media/2020/07/17/4ef6e6f2-c831-11ea-8ffe-372be8d82298_story.html.

[4] *Available at* https://www.ou.edu/web/news_events/articles/news_2020/ou-launches-mandatory-diversity-training-for-all-students-faculty-and-staff.

[5] *Available at* https://www.thefire.org/news/updated-university-oklahoma-diversity-training-requires-students-faculty-agree-university.

participant was blocked from moving on with the training after selecting the response "I agree. Political correctness can be so tiring." *Id.* It was only after selecting the approved response that a participant could finish the training. *Id.*

II. HB 1775 combats racism and sexism in Oklahoma's schools.

As a result, in 2021 the Legislature overwhelmingly passed HB 1775 ("the Act"). The Legislature took a narrowly tailored approach in constructing the Act by (1) specifying eight racist and sexist concepts that should not be taught to public schoolchildren, and (2) prohibiting diversity trainings at institutions of higher education only if they are mandatory.

Specifically, Subsection A states that higher education institutions in Oklahoma cannot require students

> to engage in any form of mandatory gender or sexual diversity training or counseling; provided, voluntary counseling shall not be prohibited. Any orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited.

Subsection B, in turn, states that public schools and their employees, including teachers, shall not "require or make part of a course the following concepts":

> a. one race or sex is inherently superior to another race or sex,
>
> b. an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously,
>
> c. an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex,
>
> d. members of one race or sex cannot and should not attempt to treat others without respect to race or sex,
>
> e. an individual's moral character is necessarily determined by his or her race or sex,
>
> f. an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex,
>
> g. any individual should feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex, or

h. meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.

70 O.S. § 24-157. Importantly, Subsection B adds a limiting construction: "The provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards." The Oklahoma Academic Standards outline in detail what each K-12 student needs to know, understand and be able to do at the end of each grade, or—in the case of high school—each course. These standards expressly include the teaching of many topics involving race, such as Jim Crow laws, the Ku Klux Klan, the internment of Americans with Japanese descent, as well as ongoing issues with race relations. *See* OKLA. ADMIN. CODE 210:15-3-110(a)(2)(C); *id.* at (e)(1)(C); *id.* at (i)(3). This provision of HB 1775 therefore ensures that teachers know that they may teach about race relations, historical atrocities, and other related issues. Teachers are only prohibited from endorsing or teaching as true the specific prohibited concepts.

Pursuant to the Act, the State Board of Education issued emergency rules on July 12, 2021. *See* OKLA. ADMIN. CODE 210:10-1-23. Among other things, these rules put in place a system and structure for filing complaints about potential violations of the law. The rules did not purport to expand the meaning or scope of any of the eight prohibited concepts. *Id.*

III. Plaintiffs belatedly sue, claiming HB 1775 violates the U.S. Constitution.

Three months *after* the law went into effect Plaintiffs[6] filed the underlying lawsuit here, in the federal Western District of Oklahoma. They brought four claims, alleging that the Act violated the U.S. Constitution as a facial matter. Specifically, they argued that the Act was unconstitutionally

[6] Specifically, Plaintiffs consist of the Black Emergency Response Team, the University of Oklahoma Chapter of the American Association of University Professors, the Oklahoma State Conference of the National Association for the Advancement of Colored People, the American Indian Movement Indian Territory, Precious Lloyd, as next friend of S.L., Anthony Crawford, and Regan Killacky.

vague under the Fourteenth Amendment, the Act infringed on students' right to information in violation of the First Amendment, the Act consisted of viewpoint discrimination in violation of the First Amendment, and that the Act was unconstitutionally infected with racial animus in violation of the Fourteenth Amendment. *See* Certification Or. at 5. Soon after, late in 2021, the Plaintiffs moved the district court for a preliminary injunction of the Act. Doc. 27. Eventually, all the numerous Defendants[7] moved to dismiss the case, as well. Two and a half years later, with the Act having been in effect the entire time, the federal district court finally ruled on the pending motions to dismiss and motion for preliminary injunction. *See* Docs. 172 & 173. The court upheld much of the Act and granted dismissal on several claims. It "preliminarily" enjoined other portions, however—again, after the Act had already been in effect, in full, for nearly three years.

With respect to Subsection A's higher education regulation, the court upheld the first sentence prohibiting universities from requiring students to participate "in any form of mandatory gender or sexual diversity training or counseling[,]" 70 O.S. § 24-157(A)(1). Doc. 173 at 10. The court enjoined the next sentence, however, which reads that "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited." *Id.* The court based its decision on the alleged ambiguity of the word "requirement." Doc. 173 at 11–13.

---

[7] Defendants in this case consist of Attorney General Gentner Drummond, Oklahoma Superintendent of Public Instruction Ryan Walters, each board member of the Oklahoma State Board of Education, the Governor Kevin Stitt, each member of the Oklahoma State Regents for Higher Education, each member of the Board of Regents of the University of Oklahoma, the Superintendent of Edmond Public Schools Angela Grunewald, and each member of the Board of Education of Edmond Public Schools. Every defendant is sued solely in his or her official capacity. In the course of litigation, State of Oklahoma Defendants have been referred to as "State Defendants," the Board of Regents of the University of Oklahoma have been referred to as "University Defendants," and the defendants from Edmond Public Schools have been referred to as "Edmond Defendants." This brief will use the same terminology.

The court adopted a similar line-by-line (and word-by-word) approach to Subsection B's regulation of K-12 instruction. Subsection (B)(1) provides that no public school personnel "shall require or make part of a course the following concepts." 70 O.S. § 24-157(B)(1). The district court determined that the definition of "make part of a course" was sufficiently clear, but enjoined the word "require" as being vague. Doc. 173 at 15–16. (Thus, overall, the Court held that various forms of the word "require" in Subsections A and B were vague.)

Finally, the district court upheld six of the eight prohibited concepts in their entirety. *Id.* at 16–24. On the other hand, the court enjoined two provisions—subsections (c) and (d)—for supposedly being vague. *Id.* at 18–21. To reiterate, those provisions simply prohibit instructors from teaching schoolchildren that "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex" and "members of one race or sex cannot and should not attempt to treat others without respect to race or sex." 70 O.S. § 24-157(B)(1)(c), (d). The court also enjoined the Board of Education's implementing rules to the extent that they are inconsistent with the court's order. Doc. 173 at 30.

For the enjoined portions of the Act, the court was hesitant to adopt the straightforward construction of the Act proffered by the various Defendants and certified the interpretation of those provisions to this Court. *See, e.g.*, Doc. 173 at 13. For the following reasons, this Court should adopt State Defendants' reasonable interpretations of HB 1775's plain text.

QUESTIONS AND RESPONSES

I. Does 70 O.S. § 24-157(A)(1) of the Oklahoma Statutes violate article XIII, section 8 of the Oklahoma Constitution? In other words, does the Oklahoma Legislature have the power to regulate the affairs of the University of Oklahoma, or other universities or colleges impacted by the Act, to the extent done in section 24-157(A)(1)?

A. This Court lacks the authority to answer this question.

By statute, this Court "may answer a question of law certified to it by a court of the United

States" only when two conditions are met. 20 O.S. § 1602. First, this Court must confirm that "the answer may be determinative of an issue in pending litigation in the certifying court." *Id.* Second, there must not be a previously existing controlling decision. *Id.* Here, the first element is not met. There is no issue pending in the litigation that would be determined by this Court's answer to the first question certified. Thus, this Court should decline to provide an advisory opinion on this initial question about the respective authority of the Legislature versus the University of Oklahoma.

The question of whether 70 O.S. § 24-157 ("the Act") violates article XIII, section 8 of the Oklahoma Constitution is not in front of the certifying court. As described in the certification order, Plaintiffs have made four claims—two under the First Amendment and two under the Fourteenth Amendment. Certification Or. at 5 (citing Doc. 50 at ¶¶ 156–189). Each claim is federal in nature, and Plaintiffs have *not* alleged that the Act violates the State Constitution. Similarly, none of the Defendants has alleged or counter-claimed that the Act violates the State Constitution—nor have they asked the district court for any affirmative relief regarding the State Constitution.

To the extent that article XIII, section 8 of the Oklahoma Constitution was raised before the district court, it was raised by University Defendants to invoke the interpretative canon of constitutional avoidance, as an alternative argument. *See, e.g.*, Doc. 51. Plaintiffs, that is, argued that the phrase "[a]ny orientation or requirement that presents any form of race or sex stereotyping" is unconstitutionally vague; in response, University Defendants primarily argued that the structure of the Act makes it "obvious" that this phrase "applies to trainings and orientations, not to classroom study or academic research." *Id.* (quoting 70 O.S. § 24-157(A)(1)). As further support for their interpretation, University Defendants also argued that Section 24-157(A)(1) should be interpreted narrowly to avoid any constitutional conflict with article XIII, section 8 of the Oklahoma Constitution. *Id.* This Court—and others—have emphasized that it will construe statutes in a manner that is "consistent with the constitution." *Young v. Station 27, Inc.*, 2017 OK

68, ¶ 18, 404 P.3d 829, 838; *see also Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.").

The use of the constitutional avoidance canon is not a concession or argument that the statute is unconstitutional. Rather, it is the acknowledgment that if presented with two possible interpretations, one of which would raise serious constitutional questions, courts will adopt the interpretation that does not raise serious constitutional questions. The University Defendants emphasized in their reply in support of their motion to dismiss that they were not arguing that the Act was unconstitutional, but instead that the Act did not affect academic curriculum. Doc. 71 at 2 ("In their Motion to Dismiss, Defendants argued that HB 1775 *cannot be read* to restrict academic pursuits on campus because the legislature is without authority to regulate the education of the University's students." (emphasis added)). And the use of the constitutional avoidance canon does not require a court to conclusively hold that a particular interpretation would be unconstitutional. Rather, it is sufficient for the court to recognize that one possible interpretation "raises serious constitutional doubts." *Jennings*, 583 U.S. at 286. Thus, the certifying court has not been presented with a claim that the Act violates article XIII, section 8 of the Oklahoma Constitution, and that question should not be definitively answered.

To be sure, now that the question about the application of article XIII, section 8 to the Act has been certified to this Court, it is likely that Plaintiffs and the University Defendants will argue that the Act does violate this provision of the Oklahoma Constitution. But the arguments presented before this Court, after certification, cannot retroactively make the state constitutional

issue an issue that is before the certifying court as required by 20 O.S. § 1602.[8] As has been pointed out above, no party argued before the certifying court that the Act violates the Oklahoma Constitution. Instead, one party argued that a particular interpretation would cause the Act to conflict with the Oklahoma Constitution.

This question also asks about the Legislature's authority to regulate other universities or colleges impacted by the Act, in addition to the University of Oklahoma. This aspect of the question is even more improper for certification. Article XIII, section 8 of the Oklahoma Constitution is only relevant for the University of Oklahoma. The other university systems in the State are established by different constitutional and statutory provisions. As an example, the Board of Regents for Agricultural and Mechanical Schools and Colleges similarly exercises "supervision, management and control" over agricultural and mechanical schools in the state.[9] 70 O.S. § 3412; *see also* OKLA. CONST. art. VI, § 31(a). In addition, the Board of Regents of Oklahoma Colleges has authority to "make rules and regulations" governing the six different colleges in the State.[10] OKLA. CONST. art. XIII(B), § 2. The language of the provisions governing these various boards

---

[8] State Defendants did not object, as a general matter, to certification at the certifying court. But whether this Court is authorized to answer a certified question is jurisdictional, which cannot be waived. *See Ind. Nat'l Bank v. State Dep't of Human Serv.*, 1993 OK 101, ¶ 8 n.3, 857 P.2d 53, 59 n.3 ("subject matter jurisdiction cannot be waived by the parties, and it is proper to address even when it has not been raised in the trial court or preserved on appeal"). And regardless, the certifying court ordered the parties to submit proposed questions for certification on this issue, Doc. 172 at 22; Doc. 174 at 1, and State Defendants did not propose the question as currently framed, Doc. 183 at 3.

[9] The schools governed by the Board of Regents for Agricultural and Mechanical Schools and Colleges include Oklahoma State University, Connors State College, Langston University, Northeastern Oklahoma Agricultural and Mechanical College, and Panhandle State University. *See* 70 O.S. § 3412.

[10] The schools governed by the Board of Regents of Oklahoma Colleges are "the University of Central Oklahoma, East Central University, Northeastern State University, Northwestern Oklahoma State University, Southeastern Oklahoma State University, and Southwestern Oklahoma State University." 70 O.S. § 3510.

and colleges is different making it inappropriate for this Court to decide on the scope of their authority—especially when the other boards are not present in this lawsuit as plaintiffs or defendants.

For example, while discussing the University of Oklahoma, the Oklahoma Constitution states that "[t]he government of the University of Oklahoma shall be vested in a Board of Regents." OKLA CONST. art. XIII, § 8. However, for the Board of Regents for Agricultural and Mechanical Schools and Colleges, the Constitution merely provides for its creation. OKLA. CONST. art. VI, § 31(a) ("There is hereby created a Board of Regents for the Oklahoma Agricultural and Mechanical College and all Agricultural and Mechanical Schools and Colleges maintained in whole or in part by the State."). That Board is then delegated governing authority over specific colleges by statute. 70 O.S. § 3412. Thus, the various boards of higher education within Oklahoma are not identically situated. A decision based on the University of Oklahoma would not necessarily apply to Oklahoma State University. These differences only serve to underscore the inappropriateness of this certified question seeking a sweeping constitutional ruling on an issue not before the certifying federal court.

Again, as the question of the Act's compliance with the Oklahoma Constitution is not squarely before the certifying court, it would be improper for a court to decide that issue in this case. After all, "[i]t is a fundamental rule of judicial restraint . . . that [courts] will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Resrv. v. World Eng'g, P.C.*, 467 U.S. 138, 157 (1984). This Court has acknowledged the same. *In re Mayes-Rogers Counties Conservancy Dist. Formation*, 1963 OK 206, ¶ 5, 386 P.2d 150, 151 ("Courts will not assume to pass upon constitutional questions unless properly before them."). Not only is this particular question not before the certifying court, but it is also irrelevant to the claims that are presented to the court. Whether the Act theoretically violates the Oklahoma

Constitution does not affect the outcome of Plaintiffs' federal claims, which are based on accusations of vagueness, ambiguity, animus, and free speech concerns. Those claims must rise and fall on their own. As such, any determination from this Court about the Oklahoma Constitution would be a prohibited advisory opinion. *See Cattlemen's Steakhouse, Inc. v. Waldenville*, 2013 OK 95, ¶ 1 n.1, 318 P.3d 1105, 1107 n.1. ("This Court does not issue advisory opinions or answer hypothetical questions.").

To illustrate the advisory nature of the potential opinion, this Court would be deciding this constitutional question in the context of a certified question. Even if this Court were to answer that Section 24-157(A)(1) violates the Oklahoma Constitution, this Court would not issue any relief such as a declaratory judgment or injunction. *See Cont'l Res., Inc. v. Wolla Oilfield Servs., LLC*, 2022 OK 40, ¶ 12, 510 P.3d 175, 181 ("When answering certified questions this Court's examination is confined to resolving questions of law, not facts. Having answered these questions, it is for the certifying court to resolve any and all fact questions and to apply the law as provided herein."). After receiving this answer from the Oklahoma Supreme Court, it is unclear exactly how the certifying court will proceed with the exclusively federal claims, since there is no state law claim. Regardless, the certifying court may not issue a declaration or injunction holding that Subsection (A)(1) violates the Oklahoma Constitution. After all, it is axiomatic that "a court 'may not rewrite a petition to include claims that were never presented[,]'" and no party has asked the certifying court for a declaration that the Act violates the Oklahoma Constitution. *United States v. Guerrero*, 488 F.3d 1313, 1316 (10th Cir. 2007). At most, the certifying court could determine that Plaintiffs' claims regarding higher education fail on the grounds that the Oklahoma Supreme Court opined that applying the Act to the University of Oklahoma could not be done lawfully. This outcome would result in the dismissal of Plaintiffs' claims regarding higher education but would not trigger any sort of relief against the Act. Accordingly, this Court would have issued an opinion

on the constitutionality of an Act without imposing any sort of relief or restriction on a party—a quintessential advisory opinion. And this Court does not issue advisory opinions. *See Ball v. Wilshire Ins. Co.*, 2007 OK 80, ¶ 8, 184 P.3d 463, 466–67 (refusing to answer a certified question that would be advisory).

In addition to these jurisdictional reasons for declining to answer this question, this Court should also decline this question if it agrees with State Defendants and University Defendants on the interpretation of the word "requirement" in Subsection (A)(1). Both sets of defendants have argued that "requirement" only applies to mandatory non-course-related orientations and other similar requirements. The certifying court has already found that Plaintiffs "lacked standing to challenge the first sentence of section 24-157(A)(1)," Certification Or. at 6, on the grounds that Plaintiffs have no legally protected interest in whether university trainings are mandatory or voluntary. Doc. 172 at 12–13. Therefore, an interpretation that Subsection (A)(1) only applies to mandatory training would conclusively resolve Plaintiffs' higher education claims—vitiating any need to resolve any question about the Oklahoma Constitution. *See Bituminous Cas. Corp. v. Cowen Constr. Inc.*, 2002 OK 34, ¶ 2, 55 P.3d 1030, 1032 (declining to answer one of two questions certified where response to one question disposed of the case).

For these reasons, this Court should decline to answer this question.

B. Section 24-157(A)(1) is constitutional.

If this Court chooses to answer this question, it should hold that section 24-157(A)(1) complies with the Oklahoma Constitution. Questions Two and Three address the scope of this challenged provision. As demonstrated more fully below, and in line with the University Defendants' primary argument before the district court, this provision does not regulate classroom instruction or curriculum at all. On this particular point, State Defendants and University Defendants are in complete agreement. Instead, this provision only prohibits certain types of

mandatory training, counseling, orientation, or similar requirements for students enrolled in an institution of higher learning. Because this prohibition applies only to mandatory orientation activities or other similar requirements—and not classroom instruction—it does not conflict with the authority of the Board of Regents to govern the University of Oklahoma.

Article XIII, section 8 of the Oklahoma Constitution provides that "[t]he government of the University of Oklahoma shall be vested in a Board of Regents." OKLA. CONST. art. XIII, § 8. While this Court has ruled that this constitutional provision grants the OU Board of Regents a certain level of autonomy, this Court has not fully outlined the scope of that autonomy. The one case where this Court has interpreted Article XIII, Section 8 is *Board of Regents of University of Oklahoma v. Baker*, 1981 OK 160, 638 P.2d 464. There, the Oklahoma Legislature enacted a joint resolution which ordered all state agencies, which included OU's Board of Regents, to increase the salaries of all employees by a certain percentage. *Id.* at ¶ 1. The Board argued that this action was unconstitutional because it infringed on the "constitutional authority vested in the Board by" Article 13, Section 8. *Id.* at ¶ 2. This Court held "that Article XIII, [§] 8, of the Oklahoma Constitution establishes the Board of Regents of the University of Oklahoma as an independent body charged with the power to govern the University." *Id.* at ¶ 19. The Court emphasized that the University did not enjoy "complete immunity" (obviously) but that "[t]he determination of faculty salaries is clearly an integral part of the power to govern the University and a function essential in preserving the independence of the Board." *Id.* As the Court noted, legislative tinkering with the salaries of employees interfered with the Board's authority to make "judgments on individual needs and performance as well as institutional needs and resources." *Id.* ¶ 20.

While the *Baker* Court declined to draw a comprehensive line detailing when legislative regulation of the University would be permissible, it did provide some guidance. For example, laws that interfere with the "integral part of the power to govern the University" are

unconstitutional. *Id.* at ¶ 19. However, the Court indicated that laws of general applicability could be applied to the University as well as legislation regulating "matters of statewide concern not involving internal university affairs." *Id.* at ¶ 17. In a sense, the Court held that core governance activities, such as hiring and paying *employees*, was solely within the province of the OU Board of Regents. Non-core governance activities may therefore be regulated by the Legislature. Thus, the Legislature's decision to prohibit mandatory diversity training and certain forms of orientation activities for *students* is likely permissible under *Baker*. That is to say, nothing in *Baker* expressly indicates that the University's "core" "internal university affairs" extend to any and all *student* interactions. Here, HB 1775 does not regulate employment decisions, administration decisions, or the core academic mission of the University. Indeed, it does not even prohibit diversity training writ large. Instead, this provision of the Act merely ensures that incoming students are not *required* to attend a diversity training program that encourages race or sex stereotyping. Surely the Legislature is not prohibited from such a relatively minor regulation designed to protect student rights and freedoms. *Baker* should not be interpreted so broadly.

The implications of holding otherwise are potentially staggering. Under a broad reading of *Baker* here, OU would be a sovereign unto itself in terms of how the university as a whole treats incoming students, with little to offer in terms of checks or balances. The Legislature—and the people of the State—would be powerless to regulate the University in virtually any way. Under this reading, the University could require all first-year students to attend orientation sessions espousing any sort of prejudicial beliefs, racial or otherwise, and it could even require all incoming students to express agreement with those prejudices. For instance, if the University decided to teach all incoming students in an orientation that an emphasis on "objective, rational, linear

thinking" is a trait of "whiteness,"[11] the Legislature would be powerless to intervene, as would the People through a statutory initiative petition. This cannot be.

Ultimately, though, this Court should decline to answer this question in a case dealing solely with federal constitutional claims—but if it does, section 24-157(A)(1) complies with the Oklahoma Constitution.

II. As it relates to section 24-157(A)(1)'s prohibition of "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex," what is the meaning of the term "requirement?"

Again, this provision of the Act stemmed from a growing concern among legislators about mandatory "diversity" trainings that Oklahoma universities—as well as most other colleges nationwide—had instituted on their campuses. Prior to the Act's passage, a pro-free speech organization had reported the University of Oklahoma required all students and faculty to complete a "diversity training" program that required participants "to answer questions in a manner that *expresses agreement* with the university's viewpoints on thorny and difficult issues." Sabrina Conza, *Univ. of Okla. Diversity Training Requires Students, Faculty to Agree with University-Approved Viewpoints*, FIRE (April 8, 2021).[12] This issue was raised explicitly by the Act's author in debate surrounding the bill in the House of Representatives. Statement of Representative Kevin West, House First Regular Session. Day 50. Apr. 29, 2021, 10:13–10:15am (Apr. 29, 2021).[13] This provision of the statute was thereafter enacted with the goal of ensuring that Oklahoma college students were not forced to attend trainings, orientations, or programs that restricted their free

---

[11] This is not a farfetched example. *See In Smithsonian Race Guidelines, Rational Thinking and Hard Work are White Values*, NEWSWEEK (May 25, 2021), https://www.newsweek.com/smithsonian-race-guidelines-rational-thinking-hard-work-are-white-values-1518333.

[12] *Available at* https://www.thefire.org/news/updated-university-oklahoma-diversity-training-requires-students-faculty-agree-university.

[13] *Available at* https://former.okhouse.gov/video/Default.aspx.

speech rights or taught racist or sexist concepts as true.

In full, section 24-157(A)(1) provides that:

> No enrolled student of an institution of higher education within The Oklahoma State System of Higher Education shall be required to engage in any form of mandatory gender or sexual diversity training or counseling; provided, voluntary counseling shall not be prohibited. Any orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited.

Together, these two sentences serve as prohibitions on mandatory—not voluntary—training, counseling, orientation, or something similar for students enrolled in an institution of higher learning. The word "requirement" was included in the second sentence to ensure that a university could not skirt the prohibition by merely renaming a mandatory orientation activity as a first-year requirement. *See* Statement of Representative Kevin West, House First Regular Session. Day 50. Apr. 29, 2021, 11:32–34am (Apr. 29, 2021) (explaining that the key aspect of the higher education portion of the bill was the mandatory aspect of the trainings).[14] Contrary to Plaintiffs' allegations, the inclusion of the word "requirement" does not transform this provision targeting mandatory *orientation* activities into a sweeping regulation of curriculum and classwork at the University of Oklahoma. And even if that was an arguable interpretation, for reasons already mentioned above this Court should insist on a narrower approach that aligns with the State Attorney General's interpretation and avoids other constitutional debates.

Statutory interpretation begins with the text of the statute. *Medina v. State*, 1993 OK 121, ¶ 6, 871 P.2d 1379, 1382. The ultimate goal "is the determination of legislative intent" through the analysis of the text. *Chandler v. Valentine*, 2014 OK 61, ¶ 13, 330 P.3d 1209, 1213. While statutory interpretation must necessarily focus on the text, it "requires more than concentration upon isolated words." *Boys Markets, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 250 (1970). Instead,

---

[14] *Available at* https://former.okhouse.gov/video/Default.aspx.

"[w]ords and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context and they must harmonize with other sections of the act to determine the purpose and intent of the legislature. *State ex rel. Okla. State Dep't of Health v. Robertson*, 2006 OK 99, ¶ 7, 152 P.3d 875, 878 (quotations and citation omitted). Relevant textual context includes the title of an act. *Rodgers v. Higgins*, 1993 OK 45, ¶ 25, 871 P.2d 398, 411. Additionally, courts look to other provisions within "the relevant legislative scheme to ascertain and give effect to the legislative intent." *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656, 658. An analysis of the text of the Act, with a focus on the context of the Act as a whole, makes clear that section 24-157(A)(1) does not apply to classroom instruction or curriculum. Instead, it applies solely to mandatory non-course-related orientations and the like.

First, focus on the text of the provision alone. It contains two sentences. The first sentence prohibits "any form of mandatory gender or sexual diversity training or counseling" while allowing for voluntary counseling. 70 O.S. § 24-157(A)(1). There is no question that this sentence is directed at mandatory training done outside of the classroom. The next sentence—the one the district court took issue with—follows up on the first sentence's prohibition by stating that "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited." *Id.* This sentence uses "orientation" and "requirement" as a manner of making sure that there are not any loopholes left behind with the first sentence's use of the words "training" or "counseling." It also clarifies what the Legislature meant by "diversity training," and adds that mandatory training promoting racial stereotyping is also prohibited. The Legislature intended to prohibit mandatory trainings that "present[] any form of race or sex stereotyping or a bias on the basis of race or sex." *Id.* These two sentences work together to accomplish the same objective—prohibiting any mandatory diversity training session—not coursework or classroom teaching—that universities were imposing on their students. This is by

far the most natural reading of the provision, which makes no mention of a course, classroom, or curriculum.

The rest of the Act confirms the conclusion that "requirement" in this provision does not apply to classroom or curricular instruction—again, neither of which is mentioned in the provision. Section 24-157 consists of two different parts. The first part, subsection A, applies exclusively to higher education institutions and contains the prohibition on mandatory gender or sexual diversity training. The second part, subsection B, applies exclusively to K-12 schools and prohibits "teacher[s]," first and foremost, from teaching eight specific concepts as true in a "course." The Legislature, that is, knew perfectly well how to use classroom-based words (and concepts) like "teacher" and "course," *and it declined to use those terms in the higher education context. See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 186 (2020) (Courts "generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994)). This would be decisive here all by itself.

Nevertheless, this interpretation is also supported by the lengthy statutory title to the Act:

> An Act relating to education; prohibiting certain students within certain institutions from being required to engage in certain training or counseling; allowing for voluntary counseling; prohibiting orientation or requirement that presents any form of certain stereotyping or bias; directing promulgation of rules pursuant to certain act and subject to certain approval; prohibiting certain application; prohibiting employees of certain schools from requiring certain concepts to be part of a course; specifying concepts; directing promulgation of rules pursuant to certain act and subject to certain approval; providing for codification; providing an effective date; and declaring an emergency.

This description of the statute—provided by the Legislature—again illustrates that the Legislature viewed the statute as having two parts, one focused on "training," "counseling," and "orientation," and the other focused on "course[s]" and teaching. *See Fent v. Fallin*, 2014 OK 105, ¶ 8, 345 P.3d 1113, 1116 ("The title of an act is used to determine legislative intent.").

The manner in which the Legislature chose to regulate curriculum in subsection B further supports the interpretation that the Legislature was not regulating classroom instruction or course requirements in subsection A. When regulating K-12 classroom instruction, the Legislature identified eight specific concepts that are prohibited from being taught. The Legislature demonstrated that it regulates curriculum and instruction by banning specific concepts from being required by teachers. It did not take this approach in subsection B. Plaintiffs' interpretation of subsection A requires this Court to believe that the Legislature meticulously identified and described prohibited course concepts for K-12 education and then decided to add a much less detailed yet sweeping regulation of higher education classrooms by inserting "requirement" into a provision that is focused primarily on mandatory gender or sexual diversity training sessions. Such an interpretation is not plausible. Legislatures do not hide elephants in mouseholes. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 274 (2023). Put differently, had the Legislature intended to regulate university classrooms, why would it not have done so in the same manner—with the same eight prohibited concepts—as the K-12 classrooms?

Plaintiffs' interpretation is also implausible in light of the increased constitutional protections that university professors enjoy in comparison to K-12 teachers. According to the Tenth Circuit, university professors possess a unique First Amendment right to academic freedom. *See Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 913–15, 915 n.2 (10th Cir. 2000). And as discussed above, the Board of Regents for the University of Oklahoma possesses a certain level of autonomy to make the core governmental decisions for the University. K-12 teachers, on the other hand, do not possess a First Amendment right to determine their classroom curriculum. *See Ali v. Woodbridge Township Sch. Dist.*, 957 F.3d 174, 184 (3rd Cir. 2020) ("Teachers do not have a protected First Amendment right to decide the content of their lessons or how the material should be presented to their students."); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*,

624 F.3d 332, 340 (6th Cir. 2010) (A teacher "had no more free-speech right to dictate the school's curriculum than she had to obtain a platform—a teaching position—in the first instance for communicating her preferred list of books and teaching methods."). Accordingly, any regulation of the curriculum of universities must be done more carefully than that of K-12 instruction. Thus, it is highly improbable that the Legislature chose to proscribe eight specific concepts when regulating K-12 instruction and then chose to prohibit certain forms of university *teaching* purely through the simple sentence of "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited." 70 O.S. § 24-157. Even if the text of the statute were unclear or ambiguous—which, again, it is not—the canon of constitutional avoidance supports the interpretation that this provision does not affect university classroom content.

The *ejusdem generis* canon of construction lends additional support to the Defendants' interpretation. According to this interpretative principle, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). At its core, this principle limits the scope of more general terms that follow specific terms to matters that are similar to the specified terms. *United States v. Powell*, 423 U.S. 87, 91 (1975). Here, the relevant provision targets "diversity training[,]" "counseling," and "orientation" before mentioning "requirement." As those three terms are dealing with non-classroom content, "requirement" should also be interpreted as governing non-classroom content.

Finally, as a practical matter, it should be observed that until the district court's injunction the Act was enforceable for three years, and nothing resembling Plaintiffs' interpretation was ever applied by the University of Oklahoma. The regulations passed to enforce the Act did not allow

for this, and both the Attorney General and the University have been consistent in their insistence that the Act does not reach classrooms.

Therefore, this Court should hold that subsection A merely establishes prohibitions on the types of mandatory training, counseling, orientations, and similar requirements for students enrolled in an institution of higher learning. This Court should hold that the word "requirement" does *not* extend this prohibition into the classroom.

III. As it relates to section 24-157(A)(1)'s prohibition of "[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex," what does it mean to "present[]" race or sex stereotyping or a bias on the basis of race or sex?

Section 24-157(A) is focused exclusively on prohibiting certain training or orientation sessions focused on gender or sexual diversity training or racial bias. The first sentence of the provision prohibits "mandatory gender or sexual diversity training" but does not define diversity training. The second sentence expands the prohibition on mandatory out-of-class trainings by prohibiting "[a]ny orientation or requirement that *presents* any form of race or sex stereotyping or a bias on the basis of race or sex shall be prohibited." 70 O.S. § 24-157(A)(1) (emphasis added). This particular question centers on what "presents" means in the provision.

"Presents" is not ambiguous and it does not in any way expand the provision to cover classroom instruction. Of course, the word "present" has many different uses, from describing gifts, to referencing the immediate state of time, to being deployed to introduce VIPs. ("It is my honor to present the next Senator from Wisconsin …"). But here, given the context, it is patently obvious that "presents" is being used in essentially the same manner as it is in a court of law like this Court—to "present" an argument or a position that the "present[ing]" party desires to be accepted as true. *See, e.g.*, *Matter of Adoption of A.J.B.*, 2023 OK 122, ¶ 6, 540 P.3d 473, 476 ("Barbee's attorney did not *present* any additional evidence or a case in chief." (emphasis added)); *Oil Valley Petroleum, LLC v. Moore*, 2023 OK 90, ¶ 2 n.1, 536 P.3d 556, 559 n.1 ("The burden of

proof to *present* facts and argument for a cause of action seeking cancellation of an oil and gas lease rests upon the party seeking to cancel the lease." (emphasis added)); *White Star Petroleum, LLC v. MUFG Union Bank, N.A.*, 2020 OK 89, ¶ 13, 480 P.3d 887, 890 ("White Star *presents* a number of arguments based in the text of the statute and industry practice to support this interpretation." (emphasis added)); *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 OK 90, ¶ 38, 155 P.3d 16, 30 ("Plaintiff *presents* several arguments in supporting the district court's refusal to send this controversy to arbitration." (emphasis added)). No other reading makes sense. Thus, to answer the certified question, this Court should hold that what it means in this context to "present" "race or sex stereotyping or a bias on the basis of race or sex" is to give a presentation or argument in an orientation or training that promotes or endorses race or sex stereotyping or bias as something true, admirable, mandatory, required, or something that must or should be accepted by the listener as true.

The federal court's concern with "presents" in this provision was entirely based on its incorrect interpretation of the sentence as a whole. *See* Doc. 173 at 11–13. The district court indicated (wrongly) that it was reasonable for a university professor to believe that Subsection B applied to coursework and curriculum, such as an English or History class. *Id.* at 12. Based on this interpretation, which conflicts with the official interpretation of both the Attorney General and the University of Oklahoma, the court thought that that the use of the word "present" would potentially forbid a professor from ever introducing a class assignment that involves a *description* of racial bias. But, again, this provision does not govern classwork. It only applies to mandatory orientations or similar requirements. And given the context, it would not make sense for "presents" in this provision to mean something less than endorsement or promotion. That is to say, it would be irrational and contrary to the entire point of HB 1775 to say that a mandatory orientation or training could not discuss race or sex stereotyping at all, even if the discussion was to explain its

existence or condemn it. Thus, the district court's concern was misplaced.

IV. As it relates to title 70, section 24-157(B)(1) of the Oklahoma Statutes' directive that "[n]o teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts: ... ," what does it mean to "require" an identified "concept[]?"

Subsection B of the Act regulates K-12 instruction. It provides that "[n]o teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts." 70 O.S. § 24-157(B)(1). The Act then outlines each of the eight prohibited concepts. *Id.* The Act also contains a safe harbor provision that provides that the subsection "shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards." *Id.*

Much as happened with "presents" above, Plaintiffs have contended that the prohibition on "requir[ing] or mak[ing] part of a course the following concepts" is so broad that it prohibits teachers from even mentioning or discussing the concepts in order to repudiate them, or from teaching that people in the *past* believed the concepts. This interpretation is utterly implausible, and completely at odds with the obvious purposes of the Act to combat racism and sexism. With regards to the phrase "make part of a course[,]" the certifying court agreed with Defendants that this phrase prohibited "school personnel from directly endorsing, promoting, or inculcating any concept as a normative value." Doc. 173 at 15. However, the court was uncertain as to the meaning of the phrase that no school personnel shall require . . . the following concepts[,]" 70 O.S. § 24-157(B)(1). Doc. 173 at 15. But read in context with the rest of the statute, "require" clearly means to teach the subject matter in question *as true*. Thus, the statute prohibits school personnel from teaching the concepts as true or otherwise *endorsing* those concepts. It does not prohibit those same personnel from merely mentioning or refuting those concepts.

This interpretation is consistent with the ordinary meaning of the word "require." Merriam-Webster defines "require" as "to call for as *suitable* or *appropriate*" or alternatively "to

demand as *necessary* or *essential*: have a compelling need for." *Require*, MERRIAM-WEBSTER (emphases added).[15] Other definitions include "to impose need or occasion for; make necessary or indispensable." *Require*, DICTIONARY.COM.[16] Together with common sense, these definitions indicate that the Legislature sought to prohibit the teaching of these concepts as "suitable" or "appropriate" for schoolchildren—*i.e.*, as something "necessary or essential" for children to believe, rather than as something they should learn about in order to understand history or in order to reject them.

For example, teachers are prohibited from "requir[ing]" the concept that "one race or sex is inherently superior to another race or sex." 70 O.S. § 24-157(B)(1)(a). This means that a teacher cannot teach her students that white people are inherently smarter than black people, or vice versa. It does *not* mean that a teacher cannot explain to her students that people a century ago used to believe that white people are inherently smarter or more civilized than black people, or from explaining that such a belief was wrong. Similarly, a teacher may not "require" a child to learn that "an individual's moral character is necessarily determined by his or her race or sex." *Id.* § 24-157(B)(1)(e). But that teacher can obviously teach that there are countries and cultures in the past and present where such beliefs have been promulgated, so long as the teacher is not endorsing those countries and cultures as being the goal or ideal for students.

Plaintiffs' argument that "require" means that teachers are forbidden from mentioning the forbidden concepts, even to repudiate them, is meritless. While the definition of "require" alone demonstrates that the statute only prohibits endorsing the concepts, the rest of the statute requires this conclusion as well. Before listing the prohibited concepts, the Legislature chose to emphasize

---

[15] *Available at* https://www.merriam-webster.com/dictionary/require.

[16] *Available at* https://www.dictionary.com/browse/require.

that "[t]he provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards." *Id.* § 24-157(B). Those standards include the teaching of many topics involving race, such as the Civil War, Jim Crow laws, the Ku Klux Klan, the internment of Americans with Japanese descent, as well as "ongoing issues … [with] race relations." *See* OKLA. ADMIN. CODE 210:15-3-110(a)(2)(C); *id.* at (e)(1)(C); *id.* at (i)(3). A teacher could hardly teach about the Ku Klux Klan without discussing the racism rampant within the movement. Thus, a teacher *can* discuss the Ku Klux Klan's racism without running afoul of the prohibition on "requiring" the concept that "one race or sex is inherently superior to another race or sex." 70 O.S. § 24-157(B)(1)(a). This really is not difficult: A teacher may teach about racism in detail, but may not endorse the idea that one race is superior to others.

Again, common sense dictates this conclusion as well. The purpose of the statute is to prohibit certain sexist and racist concepts from being endorsed in Oklahoma schools—either in classrooms (K-12) or in mandatory orientations or trainings (higher ed). It would make little sense for the Legislature to ban the *repudiation* of the very same concepts that it chooses to ban from being taught to Oklahoma students. Any interpretation that would lead to such an understanding from the statute is clearly erroneous, untethered from the text, not remotely aligned with what the Legislature intended, and should not be entertained. Accordingly, this Court should interpret the term "require" in the Act as teaching the prohibited concepts as true.

V. As it relates to section 24-157(B)(1)(c), what does it mean to "make part of a course the ... concept[]: ... an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex?"

As briefed above, "require" and "make part of a course" mean to teach as true or otherwise affirmatively endorse the prohibited concept. This subsection, thus, prohibits teaching as true that "an individual should be discriminated against or receive adverse treatment solely or partly because of his race or sex." 70 O.S. § 24-157(B)(1)(c). This prohibition turns on what it means to "be

discriminated against" or "to receive adverse treatment." "Discriminate" means "to make a difference in treatment or favor on a basis other than individual merit." *Discriminate*, MERRIAM-WEBSTER.[17] Combined with the word "against," this means that a teacher cannot endorse the idea that an individual should be treated worse than other people on the basis of his or her race or sex. The phrase "to receive adverse treatment" possesses a similar meaning. "Treatment" is defined as "conduct or behavior towards another." *Treatment*, MERRIAM-WEBSTER.[18] "Adverse" means "acting against or in a contrary direction" or "opposed to one's interests." *Adverse*, MERRIAM-WEBSTER.[19] Taken together, to endorse the idea that an individual should "receive adverse treatment" on the basis of his or her sex means to teach as true that there are individuals that should have their interests harmed or be treated worse than others because of their race or sex.

In sum, Subsection (B)(1)(c) prohibits teaching that a person should be discriminated against due to his or her race or sex. That means an instructor cannot teach this as a fact or an opinion that should be adopted. After all, existing federal and state laws already prohibit discrimination on the basis of race and sex, and teaching these concepts as admirable or required in public schools would risk running afoul of these civil rights provisions. But that does not mean that teachers lack the ability to explain how the world works. For instance, an educator can lawfully teach statistics relating to wage differences for different races or sexes and also teach that many organizations have policies and procedures relating to proactively working to close any gaps. With regards to the debate over something like affirmative action, instructors could provide arguments both in favor and against such policies but may not present only the view that discrimination that

---

[17] *Available at* https://www.merriam-webster.com/dictionary/discriminate.

[18] *Available at* https://www.merriam-webster.com/dictionary/treatment.

[19] *Available at* https://www.merriam-webster.com/dictionary/adverse.

is inevitable under affirmative action policies is good or necessary.[20] Again, this provision only prohibits teaching that an individual *should* be discriminated against. It does not prohibit teaching that such discrimination occurs.

The certifying federal court expressed concern that this provision could be interpreted to forbid a teacher from teaching a class that only men should be subject to the military draft. As an initial matter, it is unclear why a Legislature would not be allowed to institute such a prohibition if it so desired. Regardless, even assuming that this draft example constitutes discrimination against men or women, this provision does not actually forbid instruction about the draft. After all, the Oklahoma Academic Standards call for students to analyze the draft. OKLA. ADMIN. CODE 210:15-3-110(c)(2)(C). Analyzing the draft likely involves discussing how the draft was conducted and the reasons why it was conducted in that manner. Nothing in the provision forbids a teacher from presenting a class with different viewpoints on the merits or demerits of only drafting men. All it would prohibit was instructing students that men should receive adverse treatment in relation to the draft. This proscription is consistent with the overarching theme of the Act which is to ensure that teachers allow for the free flow of ideas within the classroom and refrain from espousing one particular message on a controversial or sensitive issue.

VI. As it relates to section 24-157(B)(1)(d), what does it mean to "make part of a course the ... concept[]: ... members of one race or sex cannot and should not attempt to treat others without respect to race or sex?"

Subsection (B)(1)(d) prohibits instruction that people should not and cannot treat others without respect to race or sex. This prohibited concept is somewhat unique in comparison to the other provisions because it is focused primarily on teaching about how individuals should engage

---

[20] The Supreme Court recently held that such discrimination violated the Equal Protection Clause of the Constitution. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

with others in their daily life. This can be seen in how the prohibited concept begins with "members of one race or sex cannot and should not attempt . . . ." The word "treat" is defined as "to regard and deal with in a specified manner" or "to bear oneself toward." *Treat*, MERRIAM-WEBSTER[21] So put together, this provision simply means that instructors cannot teach students that racial "colorblindness"—or the attempt to treat others the same regardless of race or sex—is an unworthy or impossible goal. In other words, it prohibits instructors from teaching that students should not try to treat people of all races and sexes the same. It does not prohibit anything beyond that; for example, it does not prohibit teaching that minorities might face certain challenges in certain circumstances that others do not. Similarly, this provision does not prohibit teaching that sometimes differences in sex do matter. As an obvious example, teaching about biological differences between men and women would be permissible under this provision. To hold otherwise would be to place this statute in conflict with other Oklahoma and federal laws, not to harmonize them. *See* 70 O.S. § 1-125 (requiring public schools to maintain separate restrooms and changing areas for boys and girls); 70 O.S. § 27-106 (authorizing public schools to maintain separate sports teams for boys and girls); 20 U.S.C. § 1686 (authorizing separate living facilities, such as restrooms and lockers, for the different sexes). This Court has consistently held that "[i]f possible, statutes are to be construed so as to render them consistent with one another." *Sharp v. Tulsa Cnty, Election Bd.*, 1994 OK 104, ¶ 11, 890 P.2d 836, 840.

The certifying court appeared unsure about whether this provision would prohibit teachers from endorsing the idea "that separate sports divisions may be established for boys and girls." Doc. 173 at 20. Respectfully, this reflects a misunderstanding of the provision. It prohibits teaching, as a general matter, that people should not try to treat people the same regardless of race

---

[21] *Available at* https://www.merriam-webster.com/dictionary/treat.

or sex. Again, this provision is focused on how individual people treat other individuals. By its own terms, the provision discusses that "members of one race or sex" should not try to treat people the same regardless of race or sex. The provision does not prohibit the concept that society or government cannot ever take race or sex into account in certain times and instances. It is simply not talking about the government. For example, Subsection (B)(1)(c) prohibits a teacher from endorsing the view that an individual should be discriminated against by the government, as can be seen by the provision's emphasis on teaching that "an *individual* should be discriminated against." The provision does not specify who is discriminating. On the other hand, Subsection (B)(1)(d) is focused on regulating instruction on how private individuals should behave towards other individuals. It only prohibits instruction on how "members of one race or sex" treat other people: not government or society broadly. When the Legislature uses certain language in one part of the statute and different language in another, courts assume that different meaning was intended. *See Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 102 n.5 (2012). Thus, a teacher may endorse the idea of separate sports teams for boys and girls—again, an express requirement of Oklahoma and federal statutes—but that instructor may not teach boys that they should not or cannot attempt to treat other boys and girls as equals regardless of their sex.

This Court should therefore hold that this provision simply prohibits teaching students that racial colorblindness or the attempt to treat others without respect to race or sex is an impossible or unworthy goal.

CONCLUSION

The Act's provisions are not vague. Each provision of the statute contains a readily ascertainable meaning. This Court should ignore Plaintiffs' alleged confusion and give the statute the meaning made clear by its text and structure, a meaning that has been endorsed by the State Defendants for over three years now.

Respectfully Submitted,

GARRY M. GASKINS, II, OBA NO. 20212
Solicitor General
ZACH WEST, OBA NO. 30768
Director of Special Litigation
WILL FLANAGAN, OBA NO. 35110
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Garry.Gaskins@oag.ok.gov
Zach.West@oag.ok.gov
William.Flanagan@oag.ok.gov

Counsel for the State Defendants

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of January 2025, a true and correct copy of the foregoing STATE DEFENDANTS' BRIEF IN CHIEF was mailed, postage prepaid to the following:

Adam H. Hines
Oklahoma Bar Number: 35640
Megan Lambert
Oklahoma Bar Number: 33216
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OKLAHOMA
P.O. Box 13327
Oklahoma City, OK 73113

Emerson Sykes
Leah Watson
Sarah Hinger
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Maya Brodziak
Zakiya Lewis
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005

Douglas Koff
Julia Beskin
Sara Solfanelli
Kevin Scot Johns
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022

M. Daniel Weitman
Tina S. Ikpa
University of Oklahoma Office of Legal Counsel
660 Parrington Oval, Suite 213
Norman, OK 73109

GARRY M. GASKINS, II, OBA NO. 20212