

DEC 11 2009

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IN THE SUPREME COURT OF THE OSAGE NATION
PAWHUSKA, OKLAHOMA

In Re:)
)
PETITION OF JAMES R. GRAY,)
Principal Chief of the Osage Nation,)
Seeking Judicial Review of ONCA 08-07,)
Appellee,)

Case No.: SPC-08-01

v.)
)
ARCHIE L. MASON, Speaker of the)
Osage Nation Congress,)
Appellant,)

With Interested Parties Stated As:)

FAREN REVARD ANDERSON; JERRI)
JEAN BRANSTETTER; SHANNON)
EDWARDS; MARK FREEMAN;)
DEBRA LITTLETON; ARCHIE)
MASON; RAYMOND RED CORN;)
EDDY RED EAGLE, JR.; DOUG)
REVARD; ANTHONY SHACKELFORD;)
MARK SIMMS; and WILLIAM)
SUPERNAW, Members of the 1st Osage)
Nation Congress.)

**Osage Nation App. Proc. – Appeal by Permission; Judgment of the Osage Nation Trial
Court Reversed; Remanded**

O. Joseph Williams, Norman, Oklahoma, for the Appellee, Principal Chief James R. Gray
Loyed E. Gill III, Pawhuska, Oklahoma, for the Appellant, Speaker Archie Mason

OPINION

JUSTICE DRENT delivered the opinion of the Court, in which CHIEF JUSTICE LOHAH and JUSTICE
LOGAN join.

In the first case before the Supreme Court of the Osage Nation, Archie L. Mason,
Speaker of the Osage Nation Congress, appealed the Osage Nation Trial Court’s decision

declaring legislative act ONCA 08-07, the Independent Press Act of 2008, unconstitutional under Article IV, Section 3(A) of the Osage Nation Constitution. Notwithstanding the manner in which the Appellant filed his appeal of the trial court's decision, we granted the appeal for substantial compliance with the Osage Nation Appellate Procedures. We conclude that the Osage Nation Trial Court lacked jurisdiction over this matter because the Principal Chief failed to establish a case and controversy required by Article VIII, section 5 of the Osage Nation Constitution. We hold that the Principal Chief's duty to execute the law, by itself, does not constitute injury for purposes of establishing a case or controversy that would fall within the Osage Nation court's jurisdiction. Accordingly, we reverse the judgments of the Osage Nation Trial Court and remand this matter with instructions to dismiss the Principal Chief's petition for lack of jurisdiction.

I. Facts and Procedural History

On April 8, 2008, the Osage Nation Congress ("Congress") adopted ONCA 08-07, the Independent Press Act of 2008 ("Act"). The Act declared, among other things, the independence of the *Osage News* (a newspaper published by the Osage Nation ("Nation")), the establishment of an editorial board and its duties, and the qualifications and duties of an editor.

The Act created an editorial board responsible for establishing an enforcing a policy that would be "fair and responsible in the reporting of general news, current events and issues of Osage concern. . . ." ONCA 08-07 § 7(A). It also directed the editorial board to develop "consistent fair and reasonable policies on campaign advertising," and to publish those policies within a certain time period. The editorial board consists of three members, one of whom must be appointed by the Principal Chief, another by Congress and a third by the initial appointees. All appointees are subject to congressional confirmation. The editorial board is responsible for appointing an editor in accordance with the Act.

The Act was presented to the Principal Chief in accordance with the legislative process set forth in Article VI, section 12 of the Osage Nation Constitution ("Constitution"). The Principal Chief exercised his veto power, claiming the Act abridged the freedom of the press in violation of Article IV, section 3(A) of the Constitution by attempting regulate the structure and content of the *Osage News*. As further grounds for the veto, the Principal Chief stated the *Osage News* would be subject to legislative control through its appropriation power. Congress

subsequently overrode the Principal Chief's veto pursuant to Article VI, section 13 of the Constitution.

On July 14, 2008, the Principal Chief filed suit in the Osage Nation Trial Court, seeking declaratory relief by requesting the trial court to invalidate the Act in its entirety because of its constitutional deficiencies. The Principal Chief filed the matter as a petitioner in an *In Re* action, identifying the individual members of the Osage Nation Congress as "interested parties" instead of defendants or respondents.

Prior to the hearing set by the trial court, Archie Mason filed an *amicus curiae* brief in his capacity as the Speaker of the Osage Nation Congress. After the hearing, the trial court issued its order, finding the court had jurisdiction over the matter as the final authority on matters of constitutional interpretation, the requirement imposed on the Principal Chief to enforce the act constitutes injury in fact, and that the Act established a newspaper operated by an editorial board directed to develop policies and procedures regarding the newspaper's operation. The trial court determined that the Act violated Article IV, section 3(A) of the Constitution because it establishes an editorial board with a structure determined by the Act and is bound to report on matters that are "pre-determined and regulated by and through the Act." (*Order and Judgment*, September 11, 2008, p. 3.) The trial court further determined that no provision of the Act could be severed where the remaining provisions could stand alone, and declared the Act in its entirety unconstitutional, null, void and unenforceable.

Speaker Mason filed a preliminary *Notice of Appeal* within thirty (30) days of the trial court's Order. Following the trial court's order and the filing of the appeal, *amicus* party filed a *Post-Judgment Motion to Intervene* for the purposes of appeal, which was subsequently denied by the trial court as untimely filed. Within thirty (30) days of the trial court's decision on the motion, *amicus* filed an *Amended Petition in Error* to include the denial of the motion to intervene as grounds for appeal. We grant the appeal and now reverse.

II. Law Applicable to the Case

Both parties to this case attempted to interpret section 1 of the Civil Procedure Code, which states "the Court shall apply any laws of the United States that may be applicable" Chief Gray's counsel speculated during oral argument that the provision required compliance with procedural mandates. Speaker Mason's counsel argued the mandate required the

application of all United States law, including common law. We are not persuaded by either argument; Section 4 of the Civil Procedure Code designates what procedural rules apply in civil matters, and the interpretation proffered by Speaker Mason's counsel would have all statutes, regulations and case law of the United States apply, regardless of subject matter.

We appreciate Chief Gray's message to the Court with respect to determining matters within the Osage Nation's sovereign status. In the interests of creating a framework to guide future decisions of the Nation's courts, and until such time when the laws, rules, or regulations of the Osage Nation provide otherwise, we find that the language of section 1 of the Civil Procedure Code requires the Osage Nation courts to apply United States statutes that impose specific obligations upon the Nation with respect to its activities. Case law interpreting those statutes shall be non-binding, persuasive authority. We find this will give the courts the necessary latitude to interpret laws in a manner consistent with the sovereign status of the Osage Nation.

III. Standard of Review

We review *de novo* the trial court's findings on Speaker Mason's *Post-Judgment Motion to Intervene* with respect to intervention as of right. Permissive interventions are reviewed for abuse of discretion. Jurisdictional findings and questions regarding the constitutionality of a particular statute are questions of law. The Court finds it is appropriate, therefore, to review such questions *de novo*, with no presumption of accuracy or correctness afforded to the conclusions of the trial court.

IV. Post-Judgment Motion to Intervene

Although our decision ultimately turns on the content of Chief Gray's petition, we must first determine whether Speaker Mason's appeal is properly before this Court. We find it is. The original request for relief identified no adverse parties to Chief Gray's claim. Instead, the petition identified members of Congress as "interested parties." Speaker Mason filed briefs and participated in the hearing on Chief Gray's petition as amicus and sought a *Post-Judgment Motion to Intervene* seven (7) days after the trial court issued its order finding the Act unconstitutional. The trial court ultimately determined the motion was untimely filed. We reverse.

A. The Post Judgment Motion to Intervene Was Timely Filed

Although the Civil Procedure Code does not address post-judgment motions to intervene, and in the absence of applicable Federal Rules of Civil Procedure, the Court is persuaded by *United Airlines, Inc. v. McDonald*, in which the United States Supreme Court found a party had timely filed a post-judgment motion to intervene and satisfied the requirements for intervention under the Federal Rules of Civil Procedure. 432 U.S. 385, 395 (1977). In holding that its decision was consistent with other federal cases allowing post-judgment motions to intervene, the court stated “[i]nsofar as the motions to intervene in these cases were made within the applicable time for filing an appeal, they are consistent with our opinion and judgment. . . .”¹

Section 2 of the Appellate Rules requires appeals to be filed within “thirty (30) days from date of judgment.” Speaker Mason filed the motion within the thirty-day time period to appeal the trial court’s decision on the merits of Chief Gray’s petition. The Principal Chief not only consented to intervention, but also suffered no prejudice by Speaker Mason’s intervention. We, therefore, hold when a party participates in a matter as *amicus curiae*, files an uncontested post-judgment motion to intervene within the applicable time for filing an appeal, and the existing parties to the matter suffer no prejudice by the timing of the requesting party’s intervention, the motion is timely filed.

B. Motion to Intervene as of Right

Rule 24 of the Federal Rules of Civil Procedure governs the circumstances by which a party may intervene in an ongoing matter. Rule 24(a)(2) requires a court to grant a motion to intervene when the applicant “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” We find that Speaker Mason has satisfied the elements of this rule by identifying a protectable interest that would be impaired by the denial of intervention, and because there is no existing party to represent his interest.

¹ We depend on extra-jurisdictional rulings sparingly in an effort to consider the practical application of our decisions to the legal questions before us.

“An interest relating to the property or transaction” indicates that there is a significantly protectable interest. At minimum, “[t]he applicant must have an interest that could be adversely affected by the litigation. But practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention.” *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007). Speaker Mason must show that impairment of his legal interest is possible if intervention is denied.

In his capacity as a member of the Osage Nation Congress, Speaker Mason has an interest to defend the constitutionality of legislation that has been challenged. The interest is adversely affected by Chief Gray’s *In Re* petition, which, as a practical matter, precludes any party as a defendant or a respondent. Although the interest could be advocated as *amicus curiae*, the ability to appeal the trial court’s decision, and therefore protect the interest, is nonexistent without status as an intervenor. By denying intervention, Speaker Mason’s interest in the subject matter has been impaired.

The nature of Chief Gray’s petition further excluded the ability of a party to represent Speaker Mason’s interest, as no other party was named in the litigation to defend against Chief Gray’s allegations. Speaker Mason satisfied the final element of Rule 24(a).

We therefore hold a party satisfies the requirement for intervention as of right when he timely files a motion to intervene, asserts a protectable interest that will be adversely impacted by the litigation, and no other existing party adequately represents that interest. Speaker Mason has satisfied the requirement for intervention as of right.

V. Substantial Compliance with Civil Appellate Procedures

Appellant, Speaker Mason, filed a *Notice of Appeal* with the Osage Nation Trial Court pursuant to Section 5 of Osage Nation Rules for Civil Appeals (“Appellate Rules”). Appellee, Chief Gray, contended that this Court lacked jurisdiction over the appeal because the *Notice of Appeal* was not filed in compliance with the Appellate Rules. The Appellate Rules require appellants to file petitions in error in accordance with section 5. The petition places the parties on notice of the party’s intent to appeal the lower court’s decision. Section 5(d) of the Appellate Rules authorizes appeals to proceed despite defects in their filing provided they are within the prescribed time limit.

We are not so inclined to elevate form over substance to the detriment of an otherwise appropriate appeal. Speaker Mason filed a *Notice of Appeal* rather than a *Petition in Error* with the Court. The two forms, similar in format, serve the same purpose: to place the parties on notice that an appeal is pending. The defects contained within the *Notice of Appeal*, and later the *Amended Petition in Error*, were not so significant as to defeat or otherwise obstruct the purpose of the appeals process. In finding the appeal was timely filed, we hold that, with respect to the nominal errors in Speaker Mason's initial appeal to this Court, the appeal is properly before this Court.

Speaker Mason filed a *Notice of Appeal* on October 10, 2008, within thirty (30) days after the September 11, 2008 trial court judgment. The appeal was timely filed. Chief Gray's Counsel filed a *Notice of Appearance* and filed briefs in this matter. Chief Gray, the sole named party in this matter, was both aware and active throughout all phases of this appeal. We therefore find Speaker Mason substantially complied with section 5 of the Appellate Rules for purposes of establishing his appeal, and grant his appeal.

VI. Analysis

With the procedural issues addressed, we now turn to the jurisdictional question before the Court. Because we resolve this matter on a jurisdictional basis, we do not reach the merits of the Principal Chief's claim.

A. Osage Nation Courts Have Jurisdiction Over Cases and Controversies

The Court is called upon to settle the jurisdictional boundaries set forth in the Osage Nation Constitution. Under Article VIII, Section 1, the "judicial branch shall be responsible interpreting the laws of the Osage Nation" While we recognize the power of the courts to determine the constitutionality of laws adopted by the Nation, we must do so within the context of our own constitutional limitations. It is in the context of the sovereign status of the Osage Nation that we must examine the extent of those limitations. Though we are guided by the historical jurisprudence of the United States on these foundational concepts, we must establish our own framework of judicial principles that capture the values and uniqueness of the Osage Nation.

Our judicial power is limited to those matters set forth by the Constitution; unless a claim falls within those limitations, the courts are without power to act. We therefore rely on the language of the Constitution itself to inform our determination. Although Article VIII, section 1 of the Osage Constitution describes the court's responsibilities, it is section 5 that confers jurisdiction: "The Trial Court shall have original jurisdiction, not otherwise reserved to the Supreme Court, over all cases and controversies arising under the Constitution, laws, and customs and traditions of the Osage Nation."

Chief Gray draws a great deal of attention to a similar matter decided by the Chickasaw Tribal Court, *In Re James*, in which the Chickasaw Nation's court held an act of the Chickasaw Nation unconstitutional. 4 Okla. Trib. 488 (1986). The Chickasaw legislature overrode the Governor's veto of the act, which prompted the Governor's petition to the court.

Though procedurally similar to the case before the Court, *In Re James* can be distinguished because there is a distinct difference in the jurisdiction conferred by our respective constitutions. Article XIII, section 1 of the Chickasaw Constitution states, "The Judicial Department shall have jurisdiction to decide disputes under any provision of this Constitution or any legislation enacted by the Tribal Legislature" The Chickasaw court found that the language conferred jurisdiction upon the court to determine the validity of a law. *Id.* at 491 ("It is the duty of the Court to first determine if it has a jurisdiction to determine the question involved.").

As we previously stated, the key language that confers jurisdiction upon the Osage Nation trial court lies not in section 1 of Article VIII (which identifies the judiciary's responsibilities), but in section 5, which grants original jurisdiction to the trial court "over all cases and controversies."

The difference is critical; the Chickasaw Constitution confers jurisdiction to decide legislative disputes while the Osage Nation Constitution specifically confers jurisdiction over "cases and controversies." The legal basis for the Chickasaw court's jurisdiction diminishes the Chickasaw case's applicability here.

We have found nothing in the Constitution that grants jurisdiction to the trial court in the absence of a case or controversy. In the absence of any such language, we hold that all matters before the Osage Nation trial court must come within the provisions of Article VIII, section 5. A

party bringing a claim bears the burden of establishing the court's jurisdiction in accordance with Constitution. Failure to do so renders the court unable to adjudicate the matter.

By "case and controversy" we mean a claim brought before the court for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. There is little room for claims seeking advisory opinions, which we hold the courts are without jurisdiction to render in the absence of a case or controversy. Even in the context of declaratory judgments, *In Re* actions or so called "friendly suits", there must be competing interests at stake that fall within the "case and controversy" requirement.²

B. Standing Is Required to Establish a Case and Controversy

Our requirement to establish a case or controversy is satisfied where a plaintiff/petitioner has standing. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332 (2006). The question of standing is whether a plaintiff is entitled to have a court decide the merits of the dispute. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Plaintiffs that come before the Nation's courts must meet this threshold requirement prior to the adjudication of their claims.

We are advised by federal judicial precedent on this issue. To have Article VIII standing, a plaintiff must establish: (1) an injury to a legally protected interest; (2) causation that can be reliably traced to the challenged activity; and (3) redressability that goes beyond speculative relief. *See Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992) (identifying these elements as "irreducible constitutional minimum" requirements). We hold Article VIII, section 5 of the Constitution requires plaintiffs (or petitioners as the case may be) in civil matters to demonstrate standing prior to the court adjudicating their claim.

C. The Principal Chief Has Not Established Standing

Chief Gray filed his petition to challenge the constitutionality of the ONCA 08-07 due to provisions that attempted to "regulate the structure and content of the Osage News," and, thus, violated Article IV, section 3(A) of the Constitution. As part of his petition, Chief Gray claimed the Act placed him a position to violate his duty to uphold the Constitution by executing and enforcing a law that violates the Constitution. He further stated the risk of violating his oath

² This holding necessarily precludes the type of petition filed in this matter, as its form is not conducive to identifying competing interests and potentially adverse parties.

constituted injury for purposes of establishing standing, as did the risk that the Osage Nation Congress could control the *Osage News* through its appropriations power or some other means of indirect control.

Chief Gray's quandary is not lost on this Court. He is bound by oath to support the Constitution, but may, from time to time, be required to execute laws he may find inconsistent with it. Because it is the court's responsibility to determine the constitutionality of the Nation's laws, it is neither unexpected nor unreasonable to seek the court's assistance. At the same time, we are mindful of the judiciary's own constitutional obligations to hear only those matters properly before it. "We must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Bird*, 521 U.S. 811, 820 (1997). Instead, our duty is to examine whether Chief Gray met his burden of establishing that his claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable." *Id.* Identifying a judicially cognizable injury is essential to establishing standing to bring a claim before the Court.

Article VII, section 1 of the Constitution requires the Principal Chief to "dutifully support the Constitution and the laws of the Osage Nation and [to] see that the laws are faithfully executed, administered and enforced." The oath taken by Chief Gray relates to the official conduct of his office. The injury alleged by Chief Gray is essentially one that would force him to violate his oath by executing a law he believes is unconstitutional. Such an injury—to the extent one exists—is institutional in nature; if Chief Gray were to leave office today his successor would be required to assume Article VII responsibilities. The injury is not personal to Chief Gray.

The statutory responsibility to appoint an individual to an editorial board is also an institutional duty that does not impose on his oath to execute, administer or enforce a law. With respect to that responsibility, there is no particular injury Chief Gray can allege for purposes of standing. Nor is the injury alleged by Chief Gray concrete; that is, the injury is not that he cannot support the Constitution or that he cannot execute, administer or enforce the Nation's laws. Instead, he argues that by executing the law, he is violating the Constitution. Such an injury may be sustained if he had the power to determine whether a law was constitutional. We note, however, that nothing in Article VII of the Constitution authorizes the Executive branch to make determinations of the constitutionality of laws duly-adopted by the Osage Nation

Congress; that power belongs exclusively to the judiciary under Article VIII, and Article V, section 2 prohibits one branch from exercising "any power properly vested in either of the others except as expressly provided in the Osage Nation Constitution."

With respect to the risk that the Congress could control the newspaper through its appropriation powers or some other legislative retaliatory action, we find the assertion to be too speculative in nature to constitute injury for purposes of establishing standing. However realistic or fantastical the speculation may be, it is not concrete enough for the Court to find injury where none exists. In the future, should such an event occur, the newspaper may have the opportunity to seek recourse. Similarly, there could be available recourse to address constitutional defects in the Act should the newspaper's editorial board or staff find that it impairs or infringes on the newspaper's independence. We will not consider what matters may exist beyond this case.

To allow the type of injury alleged by Chief Gray to be judicially cognizable would be to authorize the Principal Chief, and conceivably any member of the Executive branch, to refuse to execute, administer or enforce a law because they believed the law was unconstitutional, without asserting more. It would open the doors to any member of the Executive to file a claim requesting an opinion on the constitutionality of any given law. Such a result is inconsistent with the requirements of Article VIII of the Constitution.

Based on the foregoing, we hold that the mere duty to execute, administer or enforce a law, without more, does not constitute injury for purposes of satisfying the standing requirement. Accordingly, Chief Gray has not established a judicially cognizable injury, which precludes standing in this matter. Because we find Chief Gray failed to satisfy the threshold requirements to file this claim, we find no case or controversy required by Article VIII of the Constitution existed, and the trial court was without jurisdiction to hear his petition.

The Court is cognizant of the impact of this decision on the relationship between the branches of government, and did not take this case or its implications lightly. Because this Court finds that Chief Gray failed to show he was injured by ONCA 08-07, the Court will not rule on whether the Act is constitutional. However, this Court does recognize that freedom of speech or the press is an inalienable right of the Osage people, not to be abridged or denied by any branch or department of the Osage Nation government or by any official of the government. This Court considers such rights to be necessary to maintain "a free, sovereign, and independent nation." Osage Nation Constitution, Art. IV, § 2. Those seeking to abridge or deny such freedoms with

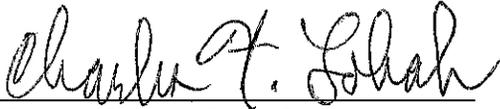
prior restraint will have a very high burden of proof to show that a less restrictive means is not possible.

The Osage Nation Trial Court's decisions are REVERSED, and this matter is remanded to the trial court with instructions to dismiss Chief Gray's petition for lack of jurisdiction.

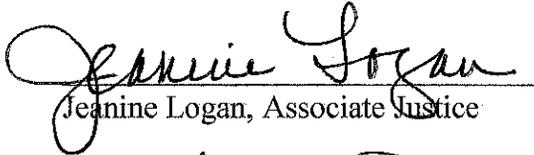
REVERSED AND REMANDED.

Issued this 11th day of December, 2009.

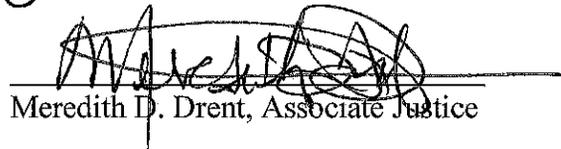
OSAGE NATION SUPREME COURT



Charles Lohah, Chief Justice



Jeanine Logan, Associate Justice



Meredith D. Drent, Associate Justice