

# Supreme Court of Louisiana

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NEWS RELEASE #039

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 2nd day of July, 2012, are as follows:

**BY GUIDRY, J.:**

2011-CA-2226

LOUISIANA FEDERATION OF TEACHERS, EAST BATON ROUGE FEDERATION OF TEACHERS, JEFFERSON FEDERATION OF TEACHERS VERNON L. BOLDEN, VENICE GUNNER-HOLIDAY, TERI ANN JOHNSON & RACHEL RASBERY v. STATE OF LOUISIANA & THE BOARD OF ELEMENTARY & SECONDARY EDUCATION (Parish of E. Baton Rouge)

The instant case presents no justiciable controversy currently amenable to resolution by this court. LFT has failed to demonstrate any real hardship requiring pre-enforcement review of the statute. It is not certain that a waiver will be requested or granted under the statute, and LFT will not be harmed by declining review of the statute at this point in time. Therefore, we reverse the decision of the trial court declaring La. Rev. Stat. 17:4041, et. seq. unconstitutional. REVERSED.

JOHNSON, J., dissents and assigns reasons.

07/02/12

**SUPREME COURT OF LOUISIANA**

**No. 2011-CA-2226**

**LOUISIANA FEDERATION OF TEACHERS,  
EAST BATON ROUGE FEDERATION OF TEACHERS,  
JEFFERSON FEDERATION OF TEACHERS  
VERNON L. BOLDEN, VENICE GUNNER-HOLIDAY,  
TERI ANN JOHNSON & RACHEL RASBERY**

**VERSUS**

**STATE OF LOUISIANA & THE BOARD OF  
ELEMENTARY & SECONDARY EDUCATION**

**ON APPEAL  
FROM THE NINETEENTH JUDICIAL DISTRICT COURT,  
FOR THE PARISH OF EAST BATON ROUGE  
HONORABLE R. MICHAEL CALDWELL, JUDGE**

**GUIDRY, Justice**

This case is before us on direct appeal from a judgment of the trial court declaring Act 749 of the 2010 Legislative Session unconstitutional.<sup>1</sup> Because we find the constitutional challenge is premature and presents no justiciable controversy, we reverse the ruling of the trial court.

**FACTS AND PROCEDURAL HISTORY**

During its 2010 Regular Session, the Louisiana Legislature enacted Act 749 (“the Act”), comprising La. Rev. Stat. 17:4041 through 17:4049, known as the “Red Tape Reduction and Local Empowerment Waiver Program.”<sup>2</sup> The Act

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<sup>1</sup> La. Const. art. V, § 5(D) provides, in pertinent part: a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional.

<sup>2</sup> Act 749 was originally enacted as La. Rev. Stat. 17:4031, *et seq.*, and was later redesignated as La. Rev. Stat. 17:4041, *et seq.*

authorizes the Board of Secondary and Elementary Education (“BESE”) to grant waivers exempting school districts and individual schools from complying with a number of statutes provided for in Title 17, the Education Code. Under the Act, a waiver cannot be presented to BESE “unless a majority of the classroom teachers employed in the school, voting by secret ballot, vote in favor of inclusion of such school in the waiver request.” La. Rev. Stat. 17:4043(A). At this point, no waiver has been granted under the Act, or even requested.

The Louisiana Federation of Teachers and others<sup>3</sup> (collectively “LFT”) filed a petition for declaratory judgment against the State of Louisiana (“State”) and BESE, seeking a judgment declaring Act 749 unconstitutional. In particular, LFT sought to enjoin defendants from applying and enforcing La. Rev. Stat. 17:4041(7), *et seq.*, which authorizes BESE to grant waivers as follows:

(7) “Waiver” means a waiver granted pursuant to and in accordance with this Chapter which exempts the recipient district from any provision of this Title or from any rule, regulation, or policy of the board that is applicable to public schools and to public school officers and employees....

LFT subsequently filed a motion for summary judgment asserting the Act was unconstitutional on numerous grounds.<sup>4</sup> The State and BESE opposed the motion, arguing the constitutional challenge was premature, LFT could not show

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The Petition for Declaratory Judgment was filed by Louisiana Federation of Teachers, East Baton Rouge Federation of Teachers, Jefferson Federation of Teachers, Vernon L. Bolden, Venice Gunner-Holiday, Teri Ann Johnson, and Rachel Rasbery.

LFT argued Act 749 was unconstitutional in the following respects:

- (1) It improperly delegates legislative authority to BESE in violation of La. Const. art. II, § 1 and § 2;
- (2) It is a prohibited local or special law in violation of La. Const. art. III, § 12; further, LFT complained the State enacted Act 749 without publication of a Notice of Intent as required under La. Const. art. III, § 13;
- (3) It violates constitutional requirements of due process and equal protection; and
- (4) It allows BESE to suspend a law in violation of La. Const. art. III, § 20.

the irreparable harm required to obtain injunctive relief, and Act 749 was not unconstitutional.

The trial court granted the motion for summary judgment in favor of LFT and declared Act 749 amounted to an unconstitutional delegation of authority. The trial court found Act 749 to be unconstitutional “to the extent that it delegated to BESE authority to grant waivers to governing authorities, as set forth in La. Rev. Stat. 17:4041 *et seq.*, exempting any recipient district from any provision of Title 17 of the Louisiana Revised Statutes of 1950 that is applicable to public school[s] and to public school officers and employees.”

The State and BESE directly appealed to this court pursuant to La. Const. Art. V, §5.

## **LAW AND DISCUSSION**

This matter arises out of a petition for declaratory judgment filed by LFT seeking to have Act 749 declared unconstitutional. La. Code Civ. Proc. art. 1872 designates who can bring a declaratory judgment action by providing that a “person...whose rights, status, or other legal relations are affected by statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status, or other legal relations thereunder.”

The State argues that LFT’s constitutional challenge is premature and presents no justiciable controversy. Pursuant to the subject statute, before a school district can apply for a waiver, the request must necessarily be approved by a majority of teachers, voting by secret ballot.<sup>5</sup> Even then, BESE would not be

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<sup>5</sup> La. Rev. Stat. 17:4043, “Requests for waivers,” provides in part:

A. A governing authority may request a waiver for any school, any combination of schools, or all schools under his district’s jurisdiction. However, *a governing*

*required* to issue a waiver, as the statute only provides that BESE “*may . . . issue a waiver.*” La. Rev. Stat. 17:4042.<sup>6</sup> (Emphasis added). At this point, no school district has applied to BESE for a waiver; thus, according to the State, LFT is essentially seeking an advisory opinion. Further, the State contends the constitutional question is hypothetical or abstract because it is based on a contingency (i.e., a request for a waiver), which may not arise.

The jurisprudence of this court is well settled that, courts will not render advisory opinions. *First Nat’l Bank of Picayune v. Pearl River Fabricators, Inc.*, 06-2195, p. 7 (La. 11/16/07), 971 So.2d 302, 307. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. *Prator v. Caddo Parish*, 04-794, p. 5 (La. 12/1/04), 888 So.2d 812, 815. For the reasons set

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*authority shall not request a waiver for any school unless a majority of the classroom teachers employed in the school, voting by secret ballot, vote in favor of inclusion of such school in the waiver request.* (Emphasis added).

B. A governing authority requesting a waiver shall submit to the board a written waiver request that does all of the following:

- (1) Identifies the specific laws, rules, regulations, and policies from which waiver is sought.
- (2) Identifies the school or schools that will be covered by the waiver.
- (3) Describes the policies and procedures that will be instituted as a substitute for the waived provisions.
- (4) Describes how the proposed waiver will accomplish all of the following:
  - (a) Increase the quality of instruction for students.
  - (b) Improve the academic achievement of students.
  - (c) Improve teaching effectiveness within schools.
- (5) Describes, for each school year, specific, measurable educational goals and the methods to be used annually to measure progress in meeting such goals.

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La. Rev. Stat. 17:4042, entitled “Authority of the board to grant waivers,” states:

Notwithstanding any provision of law to the contrary, *the board may*, upon receipt of a waiver application from a governing authority as set forth in this Chapter and with the goal of improving quality of instruction and student academic achievement, *issue a waiver to any district.* (Emphasis added).

forth below, we find that LFT's action seeking to have Act 749 declared unconstitutional because it delegates legislative authority to BESE presents no justiciable controversy.

This court has previously discussed "justiciable controversy" relative to declaratory judgment actions. In *Abbott v. Parker*, we explained:

A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

249 So.2d 908, 918 (La. 1971); *see also*, *Prator*, pp. 5-7, 888 So.2d at 815-817. A court must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise. *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 627 So.2d 158, 162 (La. 1993). Further, a case is not ripe for review unless it raises more than a generalized, speculative fear of unconstitutional action. *State v. Rochon*, p. 7, 11-0009 (La. 10/25/11), 75 So.3d 876, 882.

In addition to our jurisprudence, the United States Supreme Court has provided further guidance on the justiciability of an action and has held a court may review a statute prior to enforcement if: (1) the issues are fit for judicial decision; and (2) the parties will suffer hardship if the court withholds consideration. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In the case before us, no waivers have yet been sought, much less granted; thus, LFT cannot point to any particularized harm directly resulting from a waiver.

A “hardship” occurs where the law produces “adverse effects of a strictly legal kind.” *Nat’l Park Hospitality Ass’n*, 538 U.S. at 809. The Supreme Court has found a hardship exists where a law affects a party’s “primary conduct” and is “felt immediately by those subject to it in conducting their day-to-day affairs.” *Id.*; *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 58 (1993) (quoting *Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967)).

In the instant case, the subject statute does not create a hardship for LFT requiring pre-enforcement review. If a claim depends on “contingent future events that may not occur as anticipated, or indeed may not occur at all,” then it is not ripe for adjudication. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-581 (1985)). Currently, no waivers have been applied for or granted under the subject statute. Prior to submitting a waiver request, a majority of school teachers, voting by secret ballot, must approve the waiver. La. Rev. Stat. 17:4043. Thereafter, the statute allows, but does not mandate, BESE to grant the waiver. La. Rev. Stat. 17:4042. Thus, enforcement of the law is far from certain. *Cf. Texas*, 523 U.S. at 300-01 (question of whether appointing a magistrate to oversee school districts required preclearance under the Voting Rights Act was not ripe as no magistrate had been appointed and would only be appointed as a last resort).

LFT is not “required to engage in, or to refrain from, any conduct, unless and until” a group of teachers approves, by majority vote, a waiver request and BESE grants that request. *Id.* at 301. As such, the statute does not have an immediate impact on LFT members’ day-to-day conduct and “no irremediably adverse consequences [would flow] from requiring a later challenge” if and when a waiver is granted under the subject statute. *Reno*, 509 U.S. at 58. Accordingly, this

is not a case where LFT must face the immediate dilemma of complying with a law or risking penalties or where enforcement of the law is certain.<sup>7</sup>

Furthermore, this court's jurisprudence has recognized that, when asked to declare legislation unconstitutional, a court must examine whether the legislation is permissive or mandatory. *American Waste & Pollution Control Co.*, 627 So.2d at 162-163 (La. 1993), citing *Stoddard v. City of New Orleans*, 165 So.2d 9, 11 (La. 1964). Mandatory legislation requires a governmental agency to act while permissive legislation allows an agency to act. *See Id.* (providing an example of permissive zoning legislation).<sup>8</sup> This court has explained that, when legislation is permissive and a governmental agency has not implemented or threatened to implement the legislation, there is no justiciable controversy, and courts must refrain from deciding the constitutionality of the legislation. *See American Waste & Pollution Control Co.*, 627 So.2d at 163.

In the instant case, Act 749 is permissive because it allows, but does not require, BESE to issue waivers. La. Rev. Stat. 17:4042 states that BESE "may...issue a waiver." (Emphasis added). Similarly, nothing requires a governing authority to request a waiver. *See* La. Rev. Stat. 17:4043(A) ("A governing authority may request a waiver."). (Emphasis added). In addition, a governing authority cannot request a waiver "unless a majority of the classroom teachers employed in the school, voting by secret ballot, vote in favor of inclusion of such school in the waiver request." *Id.*

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*Reno*, 509 U.S. at 57; *see also*, *Abbott Labs*, 387 U.S. at 152-53 (plaintiff's action challenging a regulation that required manufacturers to change their labels and advertisements or face sanctions was ripe for review).

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*See Louisiana Associated General Contractors, Inc. v. State, Division of Admin., Office of State Purchasing*, 95-2105 (La. 3/8/96), 669 So.2d 1185, 1195 (for an example of mandatory legislation).



A permissive statute must be rendered operative or threatened to be rendered operative prior to being challenged. *American Waste & Pollution Control Co.*, 627 So.2d at 163. As explained above, Act 749 is a permissive statute. No school district has applied to BESE for a waiver under the Act and as a result, BESE has yet to implement a waiver under that Act. Therefore, it follows that LFT's lawsuit contesting the constitutionality of Act 749 is premature.

### **CONCLUSION**

The instant case presents no justiciable controversy currently amenable to resolution by this court. LFT has failed to demonstrate any real hardship requiring pre-enforcement review of the statute. It is not certain that a waiver will be requested or granted under the statute, and LFT will not be harmed by declining review of the statute at this point in time. Therefore, we reverse the decision of the trial court declaring La. Rev. Stat. 17:4041, *et. seq.* unconstitutional.

**REVERSED.**

07/02/12

**SUPREME COURT OF LOUISIANA**

**No. 2011-CA-2226**

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HONORABLE R. MICHAEL CALDWELL, JUDGE**

**JOHNSON, Justice, dissents and assigns reasons.**

I disagree with the majority's finding that the constitutional challenge is premature and presents no justiciable controversy. Therefore, I must respectfully dissent.

This Court has recognized that the issue of when a controversy is justiciable as opposed to an advisory opinion is a difficult one. *Prator v. Caddo Parish*, 04-0794 (La. 12/1/04), 888 So. 2d 812, 816; *Louisiana Independent Auto Dealers Assn. v. State*, 295 So. 2d 796, 798 (La. 1974). The nature of LFT's suit is one for declaratory judgment. In *Louisiana Independent Auto Dealers Assn.*, this Court looked to Professor Borchard's treatise on declaratory judgments for guidance in setting forth standards for determining when a controversy is "justiciable:"

It is sufficient if a dispute or controversy as to legal rights is shown, which, in the court's opinion, requires judicial determination - that is, in

which the court is convinced that by adjudication a useful purpose will be served. The requisites of justiciability must be present.

Not only must the plaintiff prove his tangible interest in obtaining a judgment, but the action must be adversary in character, that is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interests, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justiciable.

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Actions or opinions are denominated "advisory," when there is an insufficient interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations or where, by inadequacy of parties defendant, the judgment could not be sufficiently conclusive.

295 So. 2d at 798-99 (citing Borchard, *Declaratory Judgments* (2d Ed. 1941)). This Court has further recognized that "[t]he difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Prator*, 888 So. 2d at 816 (internal citations removed).

Based on my review of relevant jurisprudence, I find LFT's declaratory judgment action sufficiently meets the requirements of a "justiciable controversy." I recognize that no waivers have yet been granted by BESE, thus LFT cannot point to any particularized harm directly resulting from a waiver. However, in my view, the harm relevant to this Court's consideration is the unconstitutional delegation of legislative authority. It is the structure of the waiver system itself that is alleged to be unconstitutional. Here, there is an actual and substantial dispute over the constitutionality of the delegation of authority given to BESE by the Act. The alleged improper delegation of authority has already occurred in the drafting of the Act.

Because this is a facial challenge to the constitutionality of the text of the Act itself, I find it irrelevant that the Act has not yet been applied, or that LFT cannot point to a specific harm caused by the granting of a waiver. If the establishment of the waiver system (i.e the text of the Act itself) impermissibly delegates legislative authority to BESE, no further injury should be required for the Act to fail a facial challenge. There is no action BESE can take in implementing the Act that changes the issue of whether this delegation of authority, on its face, is unconstitutional. In my mind, the fact that no waiver has yet been granted does not deprive the dispute of sufficient immediacy and reality, so as to bar a declaratory judgment on the basis of lack of a justiciable controversy.

For this same reason, I do not agree that the necessity of a request for a waiver operates as a contingency which may not arise, thus making the issue hypothetical and premature. The constitutional attack is based on a formal defect in the Act. The alleged unconstitutionality is presented as a facial challenge to the text and structure of the Act itself. The Act as written either does, or does not, improperly delegate legislative authority to BESE. A waiver application, and subsequent application of the Act, should not be a prerequisite to determining whether the statute, on its face, is unconstitutional.

Declaratory judgments serve a useful purpose and provide the practical effect of terminating the controversy giving rise to the proceeding. The issue here concerns genuine rights between the State and LFT, and a declaratory judgment provides concrete relief by terminating the controversy if the Act is found unconstitutional. Moreover, the issue is purely legal, and its resolution is not dependent upon the presentation of involved factual evidence, or further development of the record. Thus, waiting until a waiver is granted would not advance this Court's ease and ability to

address the issue of improper delegation of legislative authority.

In sum, this Court was asked to declare whether the Act is unconstitutional on its face because the Act itself delegates legislative authority to BESE. The issue is not a dispute of a hypothetical or abstract nature. The controversy is definite and affects the legal relations of parties that have adverse legal interests. The controversy is real and substantial, and is distinguished from an opinion advising what the law would be upon a hypothetical set of facts. The issue is purely legal, and ripe for decision now. In my view, to require LFT to wait until the Act is applied before a facial challenge can be made based on the text of the Act itself defeats the purpose of declaratory judgments.

In reviewing the merits of the constitutional challenge, I would find Act 749 of 2010, comprising La. R.S. 17:4041 through 17:4049, to be unconstitutional on its face. I agree with the trial court's finding that Act 749 unconstitutionally delegates legislative authority to BESE.

The Louisiana Constitution divides the powers of government into three separate branches: legislative, executive and judicial. La. Const. art. II, § 1. Our constitution further provides that no branch may exercise power belonging to another. La. Const. art. II, § 2. The legislative power of the State rests exclusively in the Legislature. La. Const. art. III, § 1; La. Const. art. II, § 1; *State v. Alfonso*, 99-1546 (La. 11/23/99), 753 So. 2d 156, 160. Thus, it is axiomatic that the legislature is vested with the sole law-making power of the State. *See, e.g., State v. Dick*, 06-2223 (La. 1/26/07), 951 So.2d 124, 133.

Because of the constitutional separation of powers, delegation of legislative power is generally prohibited. *State v. Miller*, 03-0206 (La. 10/21/03), 857 So. 2d 423, 427. However, as an exception to this rule, this Court has recognized that the

legislative branch has the authority to delegate to administrative boards and agencies of the State the power to ascertain and determine the facts upon which the laws are to be applied and enforced. *See, City of Alexandria v. Alexandria Fire Fighters Ass'n*, 220 La. 754, 758, 57 So. 2d 673, 674 (La. 1952); *State v. Guidry*, 142 La. 422, 76 So. 843 (1917). This Court has noted that “delegation of certain administrative functions is necessary because of the vast amount of governmental functions that are vested in the legislative branch, which cannot possibly enact and re-enact detailed laws to cover every situation during rapidly changing times.” *State v. Alfonso*, 99-1546 (La. 11/23/99), 753 So. 2d 156, 160.

To determine whether a particular delegation of legislative authority is unconstitutional, this Court established the following rule in *Schwegmann Brothers Giant Super Markets v. McCrory, Commissioner of Agriculture*, 237 La. 768, 788, 112 So. 2d 606, 613 (1959):

So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature.

This rule requires courts to distinguish between “delegations of purely *legislative* authority, which necessarily violate the separation of powers, and delegations of *ministerial or administrative* authority, which do not.” *State v. All Pro Paint & Body Shop, Inc.*, 93-1316 (La. 7/5/94), 639 So. 2d 707, 711. Guided by these principles, this Court has developed a three-part test to ascertain whether a statute unconstitutionally delegates legislative authority. *Id.* at 712. A delegation of authority to an administrative agency is constitutionally valid if the statute: 1) contains a clear expression of legislative policy; 2) prescribes sufficient standards to guide the agency in the execution of that policy; and 3) is accompanied by adequate procedural

safeguards to protect against abuse of discretion by the agency. *Id.*; *State v. Barthelemy*, 545 So. 2d 531, 534 (La. 1989); *Adams v. State*, 458 So. 2d 1295, 1298 (La. 1984); *State v. Union Tank Car*, 439 So. 2d 377, 381 (La. 1983). This test serves two functions vital to preserving the separation of powers required by the Constitution:

First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

*All Pro Paint*, 639 So. 2d at 712. Moreover, this Court has explained the importance and necessity of each part of the test:

Application of the *Schwegmann* three-prong test ensures the elected members of the Louisiana Legislature retain all legislative power by insisting that they, not their delegates in the executive branch, make the difficult policy choices for which they are accountable to the public through the democratic process. Furthermore, by insisting that the enabling statute prescribe not only the legislative policy to be enforced by the agency but also sufficient standards to guide or “canalize” the agency’s execution of the legislative will, the test ensures the statute delegates only administrative or ministerial authority and guards against delegations of unbridled legislative discretion and the danger of “delegation running riot.” Additionally, because even delegations of administrative or ministerial authority require agencies to exercise some discretion in executing the legislative will, the requirement of adequate procedural safeguards ensures the agency exercises that discretion in accordance with the policy and standards prescribed in the enabling statute and consistent with democratic values served by public participation and judicial review.

*Id.* at 712-13.

Application of the three-prong test set forth in *Schwegmann* and *All Pro Paint* compels me to conclude that Act 749 fails to establish a constitutionally valid delegation of power to BESE. Examining the first prong of the test, I find Act 749 does contain a sufficient expression of legislative policy. La. R.S. 17:4042 states that BESE may grant a waiver application “with the goal of improving quality of

instruction and student academic achievement....”<sup>1</sup> The State and BESE assert that Act 749 provides flexibility and autonomy for purposes of achieving that stated goal. Further, they assert the Act gives BESE an opportunity to level the playing field between local school districts and charter schools, which enjoy greater autonomy than traditional public schools. This stated goal is further reflected in La. R.S. 17:4043, which provides that waiver applicants must describe how the proposed waiver will increase the quality of instruction for students, improve the academic achievement of students, and improve teaching effectiveness within schools. Thus, I find the Act sets forth a defined statement of legislative policy sufficient to satisfy the first prong of the test.

Although I find the Act meets the first prong of the test, it is clear the standards accompanying this declaration of legislative intent do not provide adequate guidelines for BESE in determining whether to grant a waiver, and thus the Act fails to satisfy the second prong of the test. This analysis is simplified because the Act contains ***absolutely no standards*** to guide BESE in carrying out the waiver process set forth by the legislature. While §4043 sets forth particular information that must be included by a school governing authority in its waiver application, there are no corresponding standards or criteria provided to guide BESE in applying, weighing, or processing this information as part of the waiver process.

In testing the constitutional sufficiency of the standards prescribed in the Act, regard must be given to the purpose and scope of the Act, the subject matters covered therein, the duties prescribed, and the broad or narrow powers granted. *All Pro Paint*, 639 So. 2d at 716. Here, the extent of the power granted to BESE is broad and great. The statute, as written, vests BESE with unbridled discretion to exempt a school

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<sup>1</sup> See also, Minutes, House Committee on Education, 2010 Reg. Sess., May 6, 2010, at 6.



district from almost any provision in the Education Code. Contrary to this Court's pronouncements in *Schwegmann*, the Act gives BESE power to exercise primary and independent discretion in granting or denying waivers. The legislature has essentially delegated to BESE the power to determine what law will apply in a particular school district, rather than delegating to BESE the power to determine whether a school district meets standards set by the legislature for the waiver. Because the legislature has failed to devise a scheme which provides intelligible standards sufficient to guide BESE in the waiver process, the Act runs afoul of the principles set forth in *Schwegmann* and *All Pro Paint*. When the delegated authority to an administrative agency is unfettered, its exercise becomes legislative in nature, and contravenes the constitutional mandate of separation of powers.

I also find Act 749 fails to meet the third prong of the test, which requires the delegation of authority be accompanied by adequate procedural safeguards to protect against abuse of discretion by BESE. As this Court recognized in *All Pro Paint*, delegations of power require agencies to exercise some discretion in executing the legislative will. 639 So. 2d at 713. Thus, requiring procedural safeguards ensures that the agency exercises that discretion in accordance with the policy and standards prescribed in the enabling statute. *Id.* The only provisions of the Act that can reasonably be construed as procedural safeguards are the requirement that BESE submit a yearly report to the Senate Committee on Education and the House Committee on Education, and the provision limiting waivers to a four-year period. La. R.S. 17:4046(B); La. R.S. 17:4045(A). The annual report would include a summary of waivers granted and BESE's statement as to whether such waivers increased the quality of instruction to students and improved the academic achievement of students. La. R.S. 17:4046(B). However, because there are no standards in the Act itself, it is

impossible for this report, submitted long after the waiver is granted, to ensure that BESE has exercised its discretion in accordance with standards set forth by the legislature. Nothing in the Act details standards as to whether a waiver should be granted initially. Thus, nothing in the Act safeguards against abuse by BESE in granting waivers. And, while waivers are only granted for a maximum four-year term, the Act also allows BESE to extend these waivers. La. R.S. 17:4045(C).

For these reasons, I would find the statutory provisions of Act 749 impermissibly delegate legislative authority to BESE, giving BESE unfettered discretion to determine which waivers to grant based solely on BESE's opinion, without any legislative guidance as to how that opinion is to be formed or what guidelines should be used in considering waiver applications. This conclusion reinforces the policies underlying *Schwegmann* and *All Pro Paint* by insisting that the legislature, not BESE, make the actual decision as to whether provisions of the Education Code should apply to all public schools. Moreover, such a holding would ensure that members of the legislature "retain all legislative power by insisting that they, not their delegates in the executive branch, make the difficult policy choices for which they are accountable to the public through the democratic process." *See, All Pro Paint*, 639 So. 2d at 712. I find the Act, as written, fails in these principles by creating a wholesale surrender of this legislative responsibility to BESE.

This Court has recognized that to successfully challenge a legislative act as unconstitutional on its face, the challenger must establish that no set of circumstances exists under which the Act would be valid. *State v. Powdrill*, 95-2307 (La. 11/25/96), 684 So. 2d 350, 357; see also, *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund*, 05-2548 (La. 10/1/07), 986 So. 2d 1, 19. Here, because I find the text and structure of the Act itself impermissibly delegates legislative

authority to BESE, I also find there are necessarily no circumstances under which application of the Act can operate constitutionally. Thus, I would find the Act unconstitutional on its face.