IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 12 OF OKLAHOMA COUNTY, COMMONLY KNOWN AS EDMOND PUBLIC SCHOOLS, PETITIONER VS. STATE OF OKLAHOMA, *ex. rel.* STATE BOARD OF EDUCATION, RYAN WALTERS, IN HIS CAPACITY AS PRESIDENT OF THE STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, AND STATE DEPARTMENT OF EDUCATION, RESPONDENTS.	CASE NO. #121987

BRIEF IN SUPPORT OF PETITIONER'S APPLICATION TO ASSUME ORIGINAL JURISDICTION & PETITION FOR WRIT OF PROHIBITION & DECLARATORY & INJUNCTIVE RELIEF

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Petitioner, Independent School District No. 12 of Oklahoma County ("District"), pursuant to Okla. S. Ct. R. 1.191, respectfully submits its Brief in Support of its Application to Assume Original Jurisdiction & Petition for Writ of Prohibition & Declaratory & Injunctive Relief, requests this Court assume original jurisdiction to issue declaratory and injunctive relief and/or a writ of prohibition barring the Respondents from taking any action based on the administrative rules referenced below and enter an Order: declaring that the Oklahoma State Board of Education's ("Board") and Oklahoma State Department of Education's ("SDE") rules at Oklahoma Administrative Code ("OAC") 210:35-3-121(b), 121-1, 126, and 128[1] violate Okla. Const. Art. IV, § 1, Art. V, § 1, and Art. XIII, § 5 and the Administrative Procedures Act ("APA"); and enjoining the Respondents from enforcing the rules or retaliating against District.

[1] Any reference to §§ 121, 126, and 128 or the "Rules" is intended to mean the regulations as amended by 40 OK REG 1990, OAR Docket #23-615, eff. Sept. 11, 2023.

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INTRODUCTION

This case is *not* about a public school district's desire to make pornography available to its students.[2] Neither is it about the wisdom of school library standards or forcing any student to read books their parents find objectionable.[3] Rather, this case is first about our Constitution's separation of powers and ensuring that a state board and agency only act within its lawful authority. It is also about the control the Oklahoma Legislature has given to local boards of education.

District finds itself in a Catch 22 where the Board adopted school library rules that the Attorney General advised would be unenforceable based on their cited legislative authority. The legislature disapproved the rules, but the Governor approved them by executive declaration. Acting on the rules, SDE has threatened District with Board action to lower District's accreditation if it does not remove two books from high school libraries. However, if District safeguards its accreditation by removing the books, it risks being sued for doing so based on invalid rules and express partisan preferences[4] in violation of District policy and students' First Amendment rights.[5] District asks this Court to enjoin the Board from taking any action regarding this matter at its February 22, 2024 meeting until the Court determines if the rules are lawful. To be clear, District does not ask the Court to act as a "Supreme Library Media Advisory Committee" to draw the line of acceptability for school library content. District only asks the Court to

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[2] Indeed, no such problem exists, as District has never included pornography in its libraries.

[3] Any citizen may request a review of a library book under current District Policy 3600F.

[4] Although District's Board of Education is non-partisan, at the March 23, 2023 State Board meeting, Superintendent Walters expressly cited a need to adopt the rules to counter Democrats, teacher unions, George Soros, the Biden Administration, and woke ideology. Video: Okla. Dep't of Ed., March 23rd State Bd. Mtg. at 1:23:00, https://youtu.be/nz3eJJ6HHik?t=5491 at 1:26:29.

[5] *See Black Emergency Response Team, et. al v. Gentner Drummond, et al.*, 5:21-cv-1022-G (W.D. Okla.), where District and its Board of Education are being sued for complying with statutes and SDE rules the plaintiffs claim are unconstitutional, citing, *e.g., Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (If a school board "ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

determine if the rules meet constitutional and statutory muster. Accordingly, any discussion of individual books below is provided only as factual and contextual background.

BACKGROUND

State agency rulemaking is governed by the Administrative Procedures Act ("APA") and, under the APA, an agency may only exercise powers "expressly given by statute" and cannot make "rules which extend their powers beyond those granted by [those] statutes." *Marley v. Cannon*, 1980 OK 147, ¶ 10, 618 P.2d 401, 405. Consequently, an agency cannot claim a power simply because the legislature has not expressly *denied* that power. *See Sch. Dist. No. 25 of Woods Cnty. v. Hodge*, 1947 OK 220, ¶ 27, 183 P.2d 575, 584. "To prevent the Legislature's role from being usurped, its ability to delegate rule-making authority is subject to the condition that **the [statute] 'must . . . set out definite standards for the exercise of . . . rule making power**.'" *Okla. State Med. Ass'n v. Corbett*, 2021 OK 30, ¶ 12, 489 P.3d 1005, 1011 ((quoting *Dem. Party of Okla. v. Estep*, 1982 OK 106, ¶ 16, 652 P.2d 271, 277) (emphasis added); *see also Ritter v. State*, 2022 OK 73, ¶ 20 ("[the statute] must both establish policy and provide definite standards for the delegated exercise of rulemaking power."). When an administrative rule is challenged, the burden is on the agency to show: (1) it had the authority to make the rule; *and* (2) that it has not exceeded that authority. § 306(C).

Attorney General opinions are not binding on this Court, but they are "binding upon the state official[s] affected by [them] and it is [their] duty to follow and not disregard those opinions" until "a court of competent jurisdiction relieves [them] of the burden of compliance." *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765.[6] In 2020, our Attorney General declared § 3-104 of TITLE 70 (SCHOOLS) of the OKLAHOMA STATUTES "generally outlines the 'powers and

[6] Superintendent Walters seemingly knows this as, at the March 23, 2023 State Board meeting, he said he intended to ask the Attorney General for an opinion interpreting a 2015 law restricting payroll deductions for union dues. Video, State Bd. Mtg. at 1:23:00.

duties' of the [State] Board [of Education,]" but does not expressly authorize any *particular* action. *See* 2020 OK AG 13, 2020 WL 7238260, at *4 (Dec. 3, 2020).

The Respondents were notified of the Attorney General's counsel by letter prior to the Board's March 23, 2023 regular meeting,[7] where State Superintendent and Board President Ryan Walters presented a slideshow intended to correct "the false narrative from the media and teachers union [that SDE is] burning *Huckleberry Finn* and *To Kill a Mockingbird*."[8] After Walters primed the Board with illustrations of sexual innuendo, SDE's general counsel advised the Board that the Attorney General's counsel was "meaningless" because (A) rules governing libraries are "squarely within" the Board's "irreducible constitutional authority over the supervision of instruction in public schools" under Okla. Const. Art. XIII, § 5, (B) this Court last year "held that those powers could not be freely reassigned," and (C) "constitutional agencies like the Board" are given "broader discretion to act" than agencies created by statute.[9] Finally, SDE's general counsel concluded, that (1) the Board is given broad discretion to "adopt policies and make rules," so long as it claims they are intended to ensure children "their opportunity to receive an excellent education," and (2) the legislature expressly delegated power to censor libraries because § 3-104.4(G) vaguely mentions media materials. *Id.* (citing § 3-104.3(A)(1)). The Board then voted to adopt OAC 210:35-3-121, 121.1, 126(b), and 128 ("the Rules"), relying on the general powers of § 3-104 as authority for each. *Id.*; *see also* 2023 OKLA. REG. TEXT 636062 (NS), 40 OKLA. REG. 1990.

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[7] *See* Nuria Martinez-Keel, *New Okla. rules on school library books, transgender students should be void, AG says*, THE OKLAHOMAN (April 4, 2023).

[8] Video, State Bd. Mtg. at 1:26:36.

[9] Video, State Bd. Mtg. at 1:33:41 (quoting § 3-104.3); *see also* Minutes, State Bd. of Educ. Mtg. (March 23, 2023), https://sde.ok.gov/sites/default/files/MAR.%2023%20Minutes_1.pdf ("[M]embers made aware of Attorney General (AG) staffer letter clarifying why rules should not be presented today, referencing Section 3-104 would be an unconstitutional technical point as meaningless[.]")

Less than two weeks later, Attorney General Gentner Drummond released an official opinion declaring "[a]ny rule promulgated relying only on the general 'powers and duties' within [70 O.S. § 3-104] is invalid and may not be enforced by [SDE] and [the Board]." 2023 OK AG 3, 2023 WL 2823594, at *5 (Apr. 4, 2023). Regardless, **Respondents submitted the Rules to the legislature, which disapproved them by joint resolution.**[10] The Governor, despite the disapproval and the Attorney General's opinion, approved the Rules by declaration on June 23. 40 OKLA. REG. 807 (July 17, 2023). They were published in THE OKLAHOMA REGISTER on September 1 and, per 75 O.S. § 304, became effective on September 10, 2023. *Id.* at 1990.

In a January 19, 2024 letter, SDE ordered District to remove two books—*The Kite Runner* by Khaled Hosseini and *The Glass Castle* by Jeannette Walls—from its high school libraries because SDE's Library Media Advisory Committee had adjudged them "pornographic" or "sexualized" under the Rules. *The Kite Runner* has won many awards,[11] was a World Book Day selection, and was praised at a White House dinner by Laura Bush.[12] According to SDE, however, the former school librarian and First Lady endorsed a book that "meets the criteria for pornography," "contains excessive sexual content," lacks "educational value," and "delivers secondhand trauma," all while arousing unusual sexual desire in the reader. The Committee claims there is similarly "no reason why any minor" should read *The Glass Castle*[13] because it is "sexualized," has "minimal, if

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[10] "All proposed permanent rules of Oklahoma state agencies filed on or before April 1, 2023, are hereby approved except for [SDE's rules]."; 40 OKLA. REG. 702, 1990; 2023 S.J.R. 22, § 1.

[11] *See, e.g.*, the ALA Notable Book and Alex Awards (special appeal to young adults, ages 12–18), Literature to Life Award, Best Book Award by EW, the Borders Original Voices Award, and Discover Great New Writers Award. https://khaledhosseini.com/book-facts/ (last accessed Feb. 7, 2024).

[12] Laura Bush, First Lady, Remarks at the Afghan Children's Initiative Benefit Dinner with Khaled Hosseini, https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060316-18.html (March 16, 2006) (last accessed Feb. 7, 2024).

[13] Also the winner of an award for literature for 12- to 18-year-olds. *See, e.g.*, the ALA Alex Award (special appeal to young adults, ages 12–18) and the ALA Award for Outstanding Books for the College Bound and Lifelong Learners (it was also nominated for a Lincoln Award). https://www.ala.org/awardsgrants/content/glass-castle-memoir-0 (last accessed Feb. 7, 2024).

any, educational value," "has no overriding merits," and also delivers "secondhand trauma to the reader." It is unclear if "secondhand trauma" contributed to the decision to ban the book from school libraries because neither the legislature nor SDE has included "secondhand trauma" in any statute or rule.

ARGUMENT & AUTHORITY

The Board claims a "duty and responsibility to protect minor students from accessing Pornographic materials and Sexualized content," citing Okla. Const. Art. XIII, § 5 and 70 O.S. § 3-104(A)(1), but the only authority the legislature has conferred on the Board is solely in relation to administering the School Code. OAC 210:35-3-121; *see also* § 104.3(A)(20). However, at its March 23, 2023 meeting, SDE's general counsel advised the Board it has statutory authority to adopt 210:35-3-121.1's proposed definition of pornography because it "was taken directly from" 21 O.S. § 1024.1's definition of *criminal* obscenity, implying that any rule incorporating the definition effectively has legislative pre-approval, no matter the agency or subject.[14] But, when the legislature intends for a definition in one title of the OKLAHOMA STATUTES to apply to another, it explicitly states so.[15] This makes sense as, for example, applying the definition of "competency examination" in 70 O.S. § 6-182(13) to the same term in criminal procedure statute 22 O.S. § 1175.3 would yield an absurd result. Further, the legislature explicitly specified that § 1024.1's definitions shall *only* apply to 21 O.S. §§ 1021–1024.4 and §§ 1040.8–1040.24—implicitly stating they shall not apply to any other statute. Yet, without legislative authority, the Board adopted § 1024.1's definition of *criminally* obscene materials into unrelated school regulations, defining "pornography" as:

[14] *See* Video, State Bd. Mtg at 1:35:55.

[15] *See, e.g.*, 70 O.S. §§ 11-202 ("child pornography or obscene materials, as defined in Section 1024.1 of Title 21"), 24-132 ("controlled dangerous substance, as defined in Section 2-101 of Title 63").

> (A) depictions or descriptions of sexual conduct which are patently offensive as found by the average person applying contemporary community standards, considering the youngest age of students with access to the material; (B) materials that, taken as a whole, **have as the *dominant* theme an appeal to prurient interest in sex** as found by the average person applying contemporary community standards, and (C) a reasonable person would find the material . . . taken as a whole, lacks serious . . . educational . . . value, considering the youngest age of students with access to the material.
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> OAC 210:35-3-121.1 (emphasis added).[16]

By declaring *The Kite Runner* "pornographic" under OAC 210:35:3-121.1, SDE represents that the sexual abuse suffered by its characters "aroused inordinate sexual desire" and lust in the reviewing members of the Library Media Advisory Committee.[17] The Board vaguely defined "Sexualized content" as "not strictly Pornographic but otherwise contain[ing] excessive sexual material in light of the educational value of the material and . . . the youngest age of students with access to said material." The term "excessive sexual material" is not defined. The Respondents enforce the Rules by lowering districts' accreditation to "Accredited with Warning" or "Accredited with Probation,"[18] a precursor to *withdrawing* accreditation. OAC 210:35-3-201(b); 70 O.S. § 3-104.3(C). When a district's accreditation is withdrawn, it is closed by the Board and its students are forced to attend neighboring districts. *See* § 7-101.1(A) (referencing §§ 3-104.4, 3-104.5, 7-201–203, and 7-206).

PROPOSITION I. THE RESPONDENTS' UNFETTERED EXERCISE OF LEGISLATIVE POWER IS UNLAWFUL UNDER THE OKLAHOMA CONSTITUTION.

The Oklahoma Constitution assigns to the legislature the authority to maintain public schools and the duty to make laws, while requiring that "the Legislative, Executive, and Judicial

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[16] Video, State Bd. Mtg. at 1:35:30

[17] *See Prurient*, BLACK'S LAW DICTIONARY, 8th Ed. (1999) ("Characterized by or arousing inordinate or unusual sexual desire"); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) ("'Prurient' is defined to mean 'that which incites lasciviousness or lust.'").

[18] Skipping over "Accredited with Deficiencies," the second-highest accreditation status.

departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others." Art. I, § 5; Art. IV, § 1; Art. V, § 1. According to SDE, the Board is a "constitutional agency" afforded broad discretion to "adopt policies and make rules," so long as they are intended to ensure children "their opportunity to receive an excellent education" under Art. XIII, § 5.[19] But that provision merely creates the Board, limiting its powers and duties to those "prescribed by law," *i.e.*, by the legislature. SDE nonetheless characterizes Art. XIII, § 5 and § 3-104(A)(1) as "broad sources of the Board's authority," and claims this Court in *State v. Ritter* held that broad authority cannot be "freely reassigned." But *Ritter* instead held that the powers of the *legislature* and *local* boards of education—not the *State* Board—cannot be freely delegated to the *executive* branch:

> The statutes go far beyond a delegation of rulemaking authority. . . . The Okla. Const. art 4, § 1 prohibits one branch of the government from exercising powers properly belonging to another branch. Local control of schools is usurped [when] statutes remove the school board's authority to act independently and exercise the authority granted to school boards and it grants that authority to the Governor[.]
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> *Ritter v. State*, 2022 OK 73, ¶¶ 21, 24, 520 P.3d 370, 381.

Further, the legislature's delegation of a *specific* authority to a state agency is prima facie evidence it has not delegated *general* authority, as that "would be unnecessary if the [agency] already had the broad authority" asserted. *Okla. State Med. Ass'n v. Corbett*, 2021 OK 30, ¶ 16, 489 P.3d 1005, 1011. Of over 100 statutes in Title 70 *expressly* delegating authority to the Board to adopt, implement, and enforce rules regarding public schools, none confers powers on the Board to adopt and enforce library censorship. *See, e.g.*, § 6-101.32 ("The [Board] shall promulgate rules necessary to implement the provisions of [the Teachers Due Process Act]."); *W. Heights Indep. Sch. Dist. No. I-41 of Okla. Cnty. v. Okla. State Dep't of Educ.*, 2022 OK 79, ¶ 35, 518 P.3d 531, 545.

[19] Video, State Bd. Mtg. at 1:35:10 (citing 70 O.S. § 3-104.3(A)(1)).

Tellingly, the only statutes addressing school library materials do not mention the Board; nor do they delegate enforcement power to the Board. *See* §§ 11-201, 11-202.

This Court should hold the Rules purporting to create censorship standards for public school libraries—and their associated penalties—contravene Okla. Const., Art. IV, § 1, Art. V, § 1, Art. XIII, §§ 1 and 5.

PROPOSITION II. THE RULES ARE INVALID UNDER THE APA BECAUSE THEY WERE DISAPPROVED BY THE LEGISLATURE.

Proposed agency rules are first submitted for approval to the governor and legislature, which prepares a joint resolution approving or disapproving proposed rules at the end of each session. 75 O.S. §§ 303.1, 308, 308.3. An agency rule may only be adopted in three ways: (1) it is approved by the legislature under § 308.3; (2) it is approved by joint resolution of the legislature under § 308(B); or (3) the legislature's disapproval is vetoed by the Governor, and the veto is not overridden. § 308(E)(1)–(3). None of these scenarios occurred here, as the legislature undoubtedly passed a joint resolution that disapproved the Rules, stating: "All proposed permanent rules of Oklahoma state agencies . . . are hereby approved except for . . . [OAC 210:35-3-121, 121.1, 126, and 128], submitted by [SDE]." 2023 S.J.R. 22 (emphasis added). Therefore, the Rules were not "finally adopted" under § 308(E)(1) or (2), and § 308(E)(3) is not applicable because the Governor did not veto the disapproval. In fact, despite the legislature's disapproval of the Rules and the Attorney General's April 2023 opinion, the Governor stated they were not "subject to" S.J.R. 22 because they "were neither approved nor disapproved":

> [E]ight rules submitted by [SDE] . . . were not subject (*i.e.*, were neither approved nor disapproved) to the joint resolution. **Pursuant to [75 O.S. § 308.3]**, rules . . . not subject to a joint resolution . . . may be declared approved . . . and finally adopted by the Governor[.]
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> 40 OKLA. REG. 812 (July 17, 2023) (emphasis added), referencing 2023 OKLA. REG. TEXT 646575 (NS), 2023 S.J.R. 22, § 1.

But the Governor's authority to approve the Rules would arise only if they were "**not subject** to a joint resolution passed by both houses of the Legislature," and the legislature passed a joint resolution disapproving the Rules. 75 O.S. § 308.3(C) (emphasis added). The Governor's declaration is therefore premised on two incorrect assumptions. First, the declaration assumes that, by the phrase "not subject to a joint resolution," the legislature meant "specifically mentioned, but not expressly approved nor expressly disapproved, in the joint resolution." Second, the declaration assumes that the Rules were not "disapproved" because, although the legislature explicitly declared that it did not approve the Rules, it did not use the magic word "disapprove." Presumably, the Governor arrived at this conclusion because S.J.R. 22, § 1 explicitly states it is not approving the Rules but does not name the Rules in § 2's list of "disapproved" rules. District has located no authority construing this to mean the Rules were "neither approved nor disapproved," and earlier versions of the APA contradict this interpretation.

When terms are not defined by statute, courts interpret them in their common, ordinary sense. *Murlin v. Pearman*, 2016 OK 47, ¶ 20, 371 P.3d 1094, 1098. "Subject to" is not defined in the APA, nor in BLACK'S LAW DICTIONARY, but MERRIAM-WEBSTER defines it as being "affected by or possibly affected by (something)."[20] It follows that, in common parlance, rules are "not subject to a joint resolution" when the resolution does not affect them, explicitly or implicitly. S.J.R. 22 undoubtedly "affected" the Rules by explicitly stating they were not approved, and, under *expressio unius est exclusio alterius*,[21] the exclusion of "approve" implies the *inclusion* of "disapprove."

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[20] *Subject to*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/subject%20to (last visited Feb. 15, 2024); *see also Subject to*, OXFORD AMERICAN DICTIONARY (2nd Pocket Ed. 2008) ("likely or having a tendency to be affected by something unpleasant or unwelcome").

[21] A "canon of construction holding that to express or include one thing implies the exclusion of the other, or vice versa." BLACK'S LAW DICTIONARY (8th Ed. 1999).

The legislative history of § 308.3 also supports this view. Before its 2021 amendments, § 308.3(D)(4) authorized the Governor to approve rules *only* when the legislature did not pass an omnibus joint resolution before the end of the legislative session. *See* 75 O.S. 2013 § 308.3(D)(4). The legislature then amended § 308.3 in 2021 to permit the Governor to approve rules when a joint resolution *is* passed but does not address (or "affect") proposed rules. § 308.3(C).

The Governor's June 23, 2023 declaration implies the legislature may only disapprove a rule by explicitly stating "[the rule submitted by SDE] is disapproved." The APA does not define the term, but "disapprove" is commonly defined as "to refuse approval" or to "refuse to sanction."[22] Surely, if the legislature intended "disapprove" to mean anything other than "not approve," it would have said so, and if it intended disapproval to be contingent on using the word "disapprove," it would have amended 75 O.S. § 2013 § 308.3(B) to reflect that intent. "The Legislature is never presumed to have done a vain and useless thing," and deleting required phrasing *entirely* from § 308.3 would be "vain and useless" if the legislature only intended to require *different* phrasing. *Bryant v. Comm'r of the Dep't of Pub. Safety*, 1996 OK 134, ¶ 11, 937 P.2d 496, 500.

If magic words *are* required, however, the legislature certainly used them when it disapproved the Rules. Until recently, the language used in S.J.R. 22 was the *required* language to disapprove agency rules, as § 308.3(B) mandated disapproval to be expressed in the following form: "*All proposed permanent rules of Oklahoma state agencies are hereby approved except for the following*[.]" That is the exact language used in S.J.R. 22. *See* 75 O.S. 2013 § 308.3(B). Without a statute explicitly stating so, no reasonable reader can claim the same language defining "legislative disapproval" in 2020 morphed into meaning "legislative abstention" in 2023. Also counseling against the

[22] *Disapprove*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/disapprove (last visited Feb. 15, 2024); *Disapprove*, BLACK'S LAW DICTIONARY (8th Ed. 1999).

Governor's interpretation is that the 2013 amendment of § 308(E) dispensed with a provision that gave the legislature 30 days to disapprove a rule or have it deemed automatically approved, subject only to Governor disapproval. 75 O.S. 2011 § 308(E).[23] Similarly, the 2021 amendments removed the Governor's authority to adopt a disapproved rule upon appeal by the proposing agency. *See* 75 O.S. 2013 § 308(D).[24] Together, these amendments evidence an intent to rein in rulemaking authority by discarding an administrative dead man's switch, jettisoning the mandate of technical language, and rejecting wholesale delegation of authority to the executive branch.

PROPOSITION III: THE RULES EXCEED THE SCOPE OF AUTHORITY DELEGATED BY 70 O.S. §§ 3-104, 3-104.3, AND 3-104.4 AND CONTRAVENE § 11-201.

After giving itself authority to decide what is "Pornographic material" and "Sexualized content," the Board assigned itself authority to adopt an enforcement and penalties provision at OAC 210:35-3-126(b). But the Board "may not enact a rule that directly contravenes a statute," and the Rules exceed any authority provided in 70 O.S. §§ 3-104, 3-104.3, and 3-104.4. *Jarboe Sales Co. v. Okla. Alcoholic Beverage Laws Enf't Comm'n*, 2003 OK CIV APP 23, ¶ 10, 65 P.3d 289, 292. Local boards of education are empowered to perform all school district functions, including operating libraries, and that "[l]ocal control of schools is usurped" when one branch of government exercises powers belonging to another. 70 O.S. § 5-117(7), (18), (21); *Ritter*, ¶ 24. Under the APA, the mere absence of a prohibition is not a carte blanche delegation of legislative power. *See In re Initiative Pet. No. 366*, 2002 OK 21, ¶ 18, 46 P.3d 123, 129 (proposed SDE rules unconstitutional when authority delegated by legislature did not include definite standards or principles). The Board, however, claims a broad general grant of authority under § 3-104(A)(1), which merely provides:

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[23] 2013 OKLA. SESS. LAW SERV. CH. 357 (H.B. 2055) (WEST).
[24] 2021 OKLA. SESS. LAW SERV. CH. 11 (S.B. 913) (WEST).

> A. The supervision of the public school system of Oklahoma shall be vested in the State Board of Education and, subject to limitations otherwise provided by law, the State Board of Education shall:
>
> 1. Adopt policies and make rules for the operation of the public school system of the state[.]

Even as the Attorney General has declared it does not delegate broad powers, SDE claims § 3-104(A)'s "subject to the limitations otherwise provided by law" grants broad general authority only revocable by specific legislation.[25] And, because "not one [public] commenter has found a statute that contravenes or limits §§ 3-104, 3-104.3, or 3-104.4," SDE contends "the Board can pass *any* accreditation rule" so long as it ensures children "the opportunity to receive an excellent education."[26] But, without express standards, that "leaves important determinations to the unrestricted and standardless discretion of bureaucrats." 2023 OK AG 3. Accordingly, this Court should reject SDE's interpretation of a broad general power delegated by § 3-104(A)(1) because, "[w]hen a statute is susceptible of more than one meaning, [this Court's] duty is to give it that one which makes it impervious to constitutional attack." *Earl v. Tulsa Cnty. Dist. Court*, 1979 OK 157, ¶ 8, 606 P.2d 545, 547–48. For example, in *Corbett* this Court rejected the argument that a similar general powers and duties statute adopted for the Oklahoma Health Care Authority delegated broad general authority to OHCA. *Corbett*, 2021 OK 30, ¶ 15 (analyzing 63 O.S. § 5006(A)).

Interpreting § 3-104 to impliedly incorporate powers to enforce any section of §§ 104.3 and 104.4 would likewise result in a general authorization for the Board to make *any* rule it claims is intended to ensure the opportunity for an excellent education, rendering "vain and useless" the legislature's over 100 express delegations of rulemaking authority to the Board. If § 3-104 truly delegated a general duty only constrained by proscriptive legislation, the legislature would not

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[25] *See* Video, State Bd. Mtg. at 1:34:30.
[26] *Id.* at 1:35:45 (emphasis added).

have, in the same statute, listed four specific areas in which the Board was granted authority to make and enforce rules. *See* § 3-104(A)(6), (7), (8), (21). Neither would SDE's January 19 letter have conceded it cannot order the books' removal from classroom curriculum if § 3-104 provided such broad authority. Conversely, if § 3-104 provided such broad authority, how did SDE determine it had the authority to remove "pornography" from libraries but not lesson plans?

The legislature tacitly affirmed § 3-104 did not grant the Board power to censor school libraries in 2022 when it passed its only statute governing school library books, 70 O.S. § 11-201. That statute, however, only requires that school library media "be reflective of the community standards for the population the library media center serves," *i.e.*, the population of the school district, which elects a board of education to represent it and enforce its standards. § 5-117. Thus, with § 11-201, the legislature set the standard library materials must meet (local community standards) *and* identified the entity tasked with enforcing the standard (local boards of education)—not the Board. *Id.* Although the Board seemingly interprets § 11-201 to permit removal of library books, it is clear that § 11-201 was never intended to apply retroactively to already-acquired books because "[s]tatutes are typically not given retroactive effect unless the Legislature has made its intent to do so clear. Any doubts must be resolved against a retroactive effect." *CNA Ins. Co. v. Ellis*, 2006 OK 81, ¶ 13, 148 P.3d 874, 877. The plain language reflects that § 11-201 applies to the acquisition of new materials and does not contemplate state-mandated removal of previously-acquired material.[27]

Thus, the Rules contravene § 11-201 in four ways: First, they make laws over a subject absent legislative authority. Second, they wrest authority over libraries from local boards of education. Third, they usurp the legislature by shoehorning Title 21's definition of *criminal*

[27] Longtime District Policy 3600F, however, does permit any parent to initiate such a request.

obscenity into *school* regulations, replacing "community standards" with a criminal standard judged by at least one non-Oklahoman who cannot speak to *any* Oklahoma community's standards.[28] Fourth, they transform a *prospective* statute regulating *future acquisition* of library books into one requiring the *removal* of previously-acquired books, opening District to a second lawsuit under *Pico* based on rules outside of District's control.

Even if the Board *was* empowered to make rules censoring libraries, however, it may not enforce them through accreditation. Section 3-104.3(B) is the only statute permitting the Board to alter accreditation status, and it limits that power to the enforcement of 12 statutes governing curriculum standards, salary schedules, courses, subject matter standards, and class size limitations.[29] Only one of those 12 statutes, 70 O.S. § 11-103.6, governs curriculum. The most-recent Supreme Court opinion interpreting § 3-104.4 involved a subsection *expressly* delegating a *particular* duty while § 3-104.4(G) does not address school library materials or authorize the Board to alter accreditation based on censorship of school libraries. *W. Heights*, 2022 OK 79, ¶ 76. Neither did the legislature amend § 3-104.3 or § 11-103.6 to authorize the Board to enforce § 11-201. Finally, despite SDE's argument that § 3-104.4(G) shows the legislature "explicitly contemplated that accreditation rules would address library and media programs,"[30] that subsection only vaguely references media materials and does not mention libraries or delegate enforcement.

CONCLUSION

The executive branch Respondents have shown that, without the prospect of impeachment or judicial intervention, they will disregard binding legal opinions of the state's chief legal officer and

[28] *See* Cheyenne Derksen and M. Scott Carter, *Libs of TikTok Creator Chaya Raichik appointed to Oklahoma's library review committee*, THE OKLAHOMAN (Jan. 23, 2024).

[29] 70 O.S. §§ 3-104.4, 11-103, 11-103.6, 18-113.1, 18-113.2, and 18-113.3.

[30] Video, State Bd. Mtg. at 1:35:15.

ignore legislative directives.[31] It is not mere conjecture that the Respondents will continue to adopt and enforce invalid rules so long as they claim the power to make *any* rule intended to provide what they claim to be an excellent education. Neither is it speculation that the Board was never intended to threaten accreditation while acting as the sole arbiter of local standards and librarian-in-chief for all schools because the legislature (A) did not authorize the Board to enforce library standards at 70 O.S. § 11-201; (B) disapproved the Rules censoring libraries; and (C) has introduced 2024 legislation stripping accreditation powers from the Board entirely.[32] But that mere possibility of relief is not an adequate remedy at law and, until and unless that legislation is passed, the Respondents' penalties and potential third-party lawsuits represent a Sword of Damocles above District's head.

District seeks immediate temporary injunctive relief to prevent the Respondents from proceeding against them until this matter is fully heard, a writ of prohibition prohibiting Respondents from ruling on District's purported noncompliance on February 22, 2024, enforcing the Rules against any public school district, and adopting rules relying on 70 O.S. § 3-104 as sole authority. District seeks a declaratory judgment under 75 O.S. § 306(D) determining the Rules violate our Constitution, exceed the Respondents' scope of authority, and contravene 21 O.S. § 1024.1 and 70 O.S. §§ 3-104, 3-104.3, 3-104.4, 11-103, 11-103.6, and 11-201. District finally respectfully requests permanent injunctions under 12 O.S. §§ 1381, *et seq.* prohibiting the Respondents from enforcing the Rules or retaliating against District by any means.

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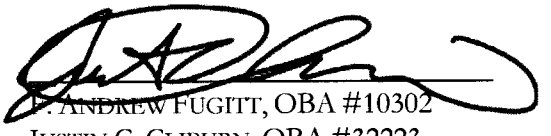
[31] *See, e.g.*, Beth Wallis, *Lawmakers subpoena State Sup. Ryan Walters after repeated information requests ignored*, PUBLIC RADIO TULSA (Dec. 22. 2023); M. Scott Carter & Murray Evans, *Subpoena is just the latest in tensions between Ryan Walters, Okla. lawmakers*, THE OKLAHOMAN (Dec. 21, 2023); Max Bryan, *State rep. calls for impeachment of superintendent*, PUBLIC RADIO TULSA (Aug. 25, 2023).

[32] *See* HB 3942, 2024 OKLA. SESS. LAWS. 2nd Sess. 161 (WEST), http://www.oklegislature.gov/Billinfo.aspx?Bill=HB3942 (last visited Feb. 16, 2024).

Respectfully submitted,



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CERTIFICATE OF MAILING

Pursuant to Okla. S. Ct. R. 1.191, this is to certify that a Notice of Filing and true and correct copies of Petitioner's Application, Petition, and above Brief were mailed to the below individuals via:

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