



**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

INDEPENDENT SCHOOL DISTRICT NO. 12 OF )  
OKLAHOMA COUNTY, COMMONLY KNOWN AS )  
EDMOND PUBLIC SCHOOLS )

*Petitioner,*

v. )

STATE OF OKLAHOMA, EX REL. STATE BOARD )  
OF EDUCATION, RYAN WALTERS IN HIS )  
CAPACITY AS STATE SUPERINTENDENT OF )  
PUBLIC INSRUCTION AND PRESIDENT OF THE )  
STATE BOARD OF EDUCATION, AND STATE )  
DEPARTMENT OF EDUCATION, )

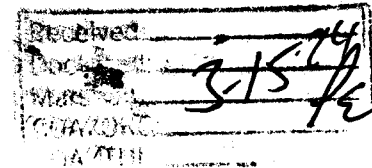
*Respondents.*

**FILED**  
SUPREME COURT  
STATE OF OKLAHOMA

MAR 15 2024

JOHN D. HADDEN  
CLERK

Case No. 121,987



---

**BRIEF OF *AMICUS CURIAE* OKLAHOMA STATE SCHOOL BOARDS  
ASSOCIATION IN SUPPORT OF PETITIONER**

---

Anthony T. Childers, OBA #30039  
Julie Miller, OBA #17716  
Kim Bishop, OBA #13928  
Oklahoma State School Boards Association  
2801 North Lincoln Boulevard  
Oklahoma City, OK 73105  
Telephone: (405) 528-3571  
Facsimile: (405) 609-3050  
TonyC@ossba.org  
JulieM@ossba.org  
KimB@ossba.org

**ATTORNEYS FOR OKLAHOMA STATE  
SCHOOL BOARDS ASSOCIATION**

March 15, 2024

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 12 OF )  
OKLAHOMA COUNTY, COMMONLY KNOWN AS )  
EDMOND PUBLIC SCHOOLS )

*Petitioner,* )

v. )

Case No. 121,987

STATE OF OKLAHOMA, EX REL. STATE BOARD )  
OF EDUCATION, RYAN WALTERS IN HIS )  
CAPACITY AS STATE SUPERINTENDENT OF )  
PUBLIC INSTRUCTION AND PRESIDENT OF THE )  
STATE BOARD OF EDUCATION, AND STATE )  
DEPARTMENT OF EDUCATION, )

*Respondents.* )

---

**BRIEF OF *AMICUS CURIAE* OKLAHOMA STATE SCHOOL BOARDS  
ASSOCIATION IN SUPPORT OF PETITIONER**

---

Anthony T. Childers, OBA #30039  
Julie Miller, OBA #17716  
Kim Bishop, OBA #13928  
Oklahoma State School Boards Association  
2801 North Lincoln Boulevard  
Oklahoma City, OK 73105  
Telephone: (405) 528-3571  
Facsimile: (405) 609-3050  
TonyC@ossba.org  
JulieM@ossba.org  
KimB@ossba.org

March 15, 2024

**ATTORNEYS FOR OKLAHOMA STATE  
SCHOOL BOARDS ASSOCIATION**

INDEX

**BACKGROUND .....1**

**ARGUMENT.....3**

**I. The Respondents’ Reading of Okla. Stat. tit. 70, § 3-104 Results in an Impermissible Delegation of Legislative Authority.....3**

*Democratic Party of Okla. v. Estep*, 1982 OK 106, 652 P.2d 271 .....4

*In re Initiative Petition No. 366*, 2002 OK 21, 46 P.3d 123 .....3, 4

*Okla. Coalition for Reproductive Justice v. Cline*, 2016 OK 17, 368 P.3d 1278 ....4

*Ritter v. State*, 2022 OK 73, 520 P.3d 370.....3

*Tulsa Cnty. Deputy Sheriff’s FOP v. Bd of Cnty. Comm’rs*, 2000 OK 2, 995 P.2d 1124.....4

Okla. Stat. tit. 70, § 3-104.....3

Okla. Stat. tit. 70, § 11-201 .....6

2020 OK AG 13 .....4

2023 OK AG 3 .....5

**II. To the Extent that Okla. Stat. tit. 75, § 308.3(C) Delegates Rule Approval to the Governor Absent Legislative Sanctioning, it is an Unconstitutional Delegation of Legislative Authority. ....6**

*Ritter v. State*, 2022 OK 73, 520 P.3d 401.....7

*Treat v. Stitt*, 2020 OK 64, 473 P.3d 43.....7

Okla. Stat. tit. 75, § 250.2 .....7

Okla. Stat. tit. 75, § 308.3(C)..... 6-7

<b>III. Pursuant to the Oklahoma Administrative Procedures Act, the Legislature “Disapproved” the Library Media Rules Contained at OAC 210:35-3-121, 121.1, 126 and 128..</b>	<b>8</b>
Okla. Stat. tit. 75, §§ 250-327 .....	8
Okla. Stat. tit. 75, § 250.2 .....	8
Okla. Stat. tit. 75, § 308(B).....	8
<b>CONCLUSION .....</b>	<b>9</b>

This case is about the State Board of Education's persistent dependence on a general statute outlining its duties as authorization to make any rule it believes to be necessary or remotely related to public education. Such unbridled discretion is unconstitutional.

As *amicus curiae*, the Oklahoma State School Boards Association, a non-profit and non-partisan association committed to serving Oklahoma's Public Schools and Public School Boards, stresses that the Respondents' constant overstepping has eroded local control of those elected to oversee Oklahoma's public schools, and given the Respondents broad, undefined discretion to legislate as opposed to facilitate policy. Further still, should the rules be considered "Approved" simply by declaration of the Governor and without legislative oversight, such a scheme should be found as an unconstitutional encroachment of the Executive branch into the policy making authority of the legislature. To that extent, the promulgation and enforcement of Oklahoma Administrative Code ("OAC") 210:35-3-121, 121.1, 126, and 128 is contrary to law and resulted from an unconstitutional delegation of authority. The Petitioner's application for original jurisdiction and request for declaratory and injunctive relief should be granted.

### **BACKGROUND**

On March 23, 2023 the State Board of Education ("the Board") approved proposed new and amended permanent rules under OAC 210:35-3-121, 121.1, 126, and 128. These rules purported to make several changes to the public school accreditation standards. Particularly, the rules created a definition for "Pornographic" material, which relied upon a modified version of the *Miller* test, and a new definition for "Sexualized content" which prohibited "excessive sexual material in light of the educational value of the material . . . ." OAC 210:35-3-121.1. The new rules went on to provide that any school with materials

falling under these new definitions would be subject to accreditation penalties including downgrades in accreditation status. OAC 210:35-3-126. A school's accreditation status directly impacts the students, staff, and community of the local school, and can ultimately lead to the complete closure of a district. If accreditation is revoked, the school district would effectively cease to exist and the students attending that district would be transported to a different district to receive their education. In support of its authority to enact these rules, Respondents cited Okla. Stat. tit. 70, § 3-104(A)(1). See OAC 210:35-3-121(b); 2023 Okla. Reg. Text 636062 (NS), 40 Okla. Reg. 1990.

By statute, the legislature has outlined specific powers for the Board at Okla. Stat. tit. 70 § 3-104 and has granted specific authority for rulemaking throughout Title 70 on various subjects. Within the general framework of powers and duties listed in § 3-104, the Board is provided with the power to “[a]dopt policies and make rules for the operation of the public school system of the state . . . .” *Id.* at § 3-104(A)(1). It is upon this simple definition that the Board rests the entirety of its authority for the rules now in question.<sup>1</sup> Yet, the Board has consistently invoked this overarching provision to enact rules it deems beneficial for public education, and its authority appears unlimited. From the reporting of the use of pronouns to parents, to changes to the Lindsey Nicole Henry program, to changes in the Oklahoma English Learner Program, to parental rights, to driver's education, to teacher professional development and classifications, school bus driver qualifications, statewide testing: in each the Respondents have cited to § 3-104 for authority. In many, multiple statutes for authority

---

<sup>1</sup> The rule and notice published in the Oklahoma Register also reference Okla. Const. art. XIII, § 5, which simply states, “The supervision of instruction in the public schools shall be vested in a Board of Education, *whose powers and duties shall be prescribed by law.*” (Emphasis added).

were cited, but in the rules currently at issue, it was the sole source. See 2023 Okla. Reg. Text 636062 (NS), 40 Okla. Reg. 1990.

Though these other sets of rules are not specifically in question as part of this action, the repeated and misplaced reliance upon § 3-104 by the Respondents shows not only how broadly they read the statute to give extensive legislative authority, but such repeated use weighs in favor of this Court accepting jurisdiction.

### ARGUMENT

#### **I. The Respondents' Reading of Okla. Stat. tit. 70 § 3-104 Results in an Impermissible Delegation of Legislative Authority.**

The Board has persistently cited Okla. Stat. tit. 70, § 3-104 as some generalized, omnipotent rulemaking authority and used it as a basis to adopt rules spanning the gamut. Such an interpretation of the statute leads to an unprecedented, practically unlimited expansion of executive power. This unrestrained legislative authority, when wielded by an executive agency, is an unconstitutional delegation of legislative authority as prohibited by Articles IV and V of the Oklahoma Constitution. Likewise, allowing such a broad interpretation of the statute gives the agency an unfettered ability to create rather than to facilitate policy, and subjects locally elected school boards and school districts to the political whims of the Respondents.

Though the legislature may delegate limited legislative functions to state agencies, “[t]he non-delegation doctrine prevents the Legislature from abdicating its policy-making role by delegating its authority to an agency.” *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 17; 46 P.3d 123, 128. Rulemaking, when the procedures of the Administrative Procedures Act (“APA”) are appropriately followed, does not in-and-of-itself encroach upon the separation of the government branches. Instead, the issue arises when the legislature gives

such broad authority that it has effectively delegated its policy making authority to the executive branch. See *Ritter v. State*, 2022 OK 73, 520 P.3d 370.

The formulation of policy is a legislature's primary responsibility. When the legislature delegates legislative authority to the executive, it must "set out definite standards for the exercise of any agency's rulemaking power." *Democratic Party of Okla. v. Estep*, 1982 OK 106, ¶ 16, 652 P.2d 271, 277-278; see also, *Okla. Coalition for Reproductive Justice v. Cline*, 2016 OK 17, ¶ 15, 368 P.3d 1278, 1285; *Tulsa County Deputy Sheriff's Fraternal Order of Police v. Board of County Comm'rs*, 2000 OK 2, ¶ 9, 995 P.2d 1124, 1128. When a statute grants unrestricted authority to the Board, it violates articles IV and V of the Oklahoma Constitution, which delineate the separation of powers. *In re Initiative Petition No. 366*, 2002 OK at ¶¶ 17-18, 46 P.3d at 129. Rulemaking based upon some indefinite standard passes on the legislature's duty to other agencies "not answerable in the same degree to the people." *Estep*, 1982 OK at ¶ 16, 652 P.2d at 277, n. 25. As such, for any statute presuming to delegate legislative authority "objective guidelines or standards should appear expressly in the act." *Id.*

As applied to this statute, the Office of Attorney General, under different administrations, has issued two opinions finding that the Respondents' reliance on § 3-104 is illegal and would constitute an unlawful delegation to the executive branch. Initially, the Office of the Oklahoma Attorney General issued an opinion in 2020 stating that the Board's reliance on § 3-104 to modify the antidiscrimination provisions of the Lindsey Nicole Henry Scholarship Program was unlawful. 2020 OK AG 13. This position was reaffirmed in the context of the current dispute over the promulgation of the library media rules. On February 22, 2023, at the time the Board of Education was considering the rules, the Office of the



Attorney General advised Respondents that it lacked authority to promulgate rules under § 3-104. The Board of Education proceeded despite the Attorney General's advice. A final binding opinion<sup>2</sup> was released on April 4<sup>th</sup> finding, "any rulemaking promulgated solely pursuant to section 3-104 is invalid as it renders that section, as applied, an unconstitutional delegation to an executive branch agency." 2023 OK AG 3.

If the Board's assertion that § 3-104 delegates broad rulemaking authority to enact virtually any rule pertaining to education, including regulations on the selection of library books, is correct, then the statute would constitute an unconstitutional delegation of power. The statute repeatedly relied on provides no objective guidelines or standards. There is no facilitation of legislative policy, only a weaponization of the accreditation process on an issue not otherwise addressed in the statute cited for rulemaking authority. This is made evident by the wide range of topics covered by rules citing to § 3-104: English language programs, teacher qualifications, bus driver qualifications, and requirements of the Lindsey Nicole Henry Scholarship Program to name but a few. This expansive reading leaves the door open for the Board to create rules based on whatever narrative or policy they see fit. Their counsel even advised them as so, explaining that the Board possessed authority to pass any rule that ensured an "opportunity to receive an excellent education," a near limitless definition lacking any policy based standard from the legislature. If taken as a broad grant to pass rules or accreditation, § 3-104 would be an unconstitutional delegation of powers.

Fortunately, should the Court find that an impermissible delegation of authority exists in § 3-104, the legislative scheme for rulemaking still stands. Title 70 is littered with statutes which specifically instruct Respondents to create rules related to accreditation and a vast

---

<sup>2</sup> Though binding on the Board, Attorney General opinions serve only as persuasive authority. *See In Re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶15, 326 P.3d 496; *Austin, Nichols & Co. v.*

array of other topics. These statutes do not have the same concern over their constitutionality as they provide definite standards based on set legislative policy, instead of indefinite unbridled discretion. If Respondents must rely on § 3-104 as their only source of authority, it should be understood that the legislature has purposefully left them out of the rule making process. In fact, the legislature did pass legislation related to library materials, yet left Respondents out of the process. Okla. Stat. tit. 70, § 11-201. The Respondents then should not be left with the ability to read express authority for rulemaking into the statute.

As the Respondents' reliance on Okla. Stat. tit. 70 § 3-104 as a sole source of authority to rulemake results in an unlimited legislative power, their action on March 23, 2023 should be found to be unlawful. If the Court embraces the Board's claim that § 3-104 confers extensive rulemaking authority to establish nearly any regulation concerning education, it will significantly enhance executive agency power and indicate to agencies statewide that regulations, as long as they have some connection to the agency's domain, can be generated without restraint. Such an expansion would be unprecedented and invite further encroachment on the separation of powers, and the authority of the legislative branch.

**II. To the Extent that Okla. Stat. tit. 75, § 308.3(C) Delegates Rule Approval to the Governor Absent Legislative Sanctioning, it is an Unconstitutional Delegation of Legislative Authority.**

Okla. Stat. tit. 75, § 308.3(C) is an unconstitutional delegation of legislative authority to the Governor. An amendment to the APA in 2021, Okla. Stat. tit 75, § 308.3(C), gives the Governor authority to approve adopted agency rules when:

1. the rules are not "subject to" a joint resolution passed by both houses of the Legislature and signed by the Governor; or,

2. is found by the Governor to have a technical legal defect preventing approval of administrative rules intended to be approved by the Legislature.

Okla. Stat. tit. 75, § 308.3(C). Allowing the Executive branch to both create and finally approve its own rules delegates significant legislative power to the Executive branch, and results in an impermissible delegation of authority by the legislature. As discussed in proposition I, the authority to create law lies only with the legislative branch, and its ability to delegate rulemaking authority is limited. The Executive branch, on the other hand, is charged with the responsibility of implementing the policies of the legislature and has limited autonomous authority. *Treat v. Stitt*, 2020 OK 64, ¶¶ 4-5, 473 P.3d 43; *Ritter*, 2022 OK 73, 520 P.3d 401.

Approving or disapproving an agency rule is a legislative function and specifically reserved to the legislature. Okla. Stat. tit. 75, § 250.2. As stated in *Treat v. Stitt*, “The legislative branch sets the public policy of the State by enacting law not in conflict with the Constitution. Okla. Const. art. V, § 1.” 2020 OK at ¶ 4, 473 P.3d at 44. And though the Executive branch does play a role in signing or vetoing legislation through the Governor, its “primary role is in the faithful execution of the law.” *Treat*, 2020 OK at ¶ 4, 473 P.2d at 44. That foundational scheme is defeated when rules are not only created by the Executive branch but approved and made legislatively binding through the Governor through a simple declaration. Such a process lacks oversight or approval by the legislative branch and the accompanying democratic accountability to those elected to legislate.

It was recognized by the drafters of the Oklahoma Constitution that a clear separation of authority between the branches should exist, and they placed provisions to protect the people of the State of Oklahoma against excessive political and economic power. A

Governor's action to approve or disapprove and finally adopt certain rules by publishing a single declaration in "the Oklahoma Register" is an unconstitutional exercise of legislative power. Consequently, the rules contained at OAC 210:35-3-121, 121.1, 126 and 128 should be found invalid, and the language in subsection C of § 308.3 should be stricken to remove the constitutional infirmity.

**III. Pursuant to the Oklahoma Administrative Procedures Act, the Legislature "Disapproved" the Library Media Rules Contained at OAC 210:35-3-121, 121.1, 126 and 128.**

The Oklahoma legislature, through the APA, has provided for a process by which rulemaking must be accomplished. Okla. Stat. tit. 75, §§ 250-327. However, in establishing the APA the legislature reserved certain powers to itself by requiring that the legislature "approve or disapprove" any rule. Okla. Stat. tit. 75, §§ 250.2 and 308(B). Under both sections of the APA, the legislature can take one of two actions through adoption of a joint resolution:

1. To approve all or part of rules; or
2. To disapprove all or part of rules.

The APA does not give the legislature the option to specifically mention a rule in a joint resolution, yet to abstain from approving or disapproving an adopted rule. When the legislature adopted SJR 22, the joint resolution to which the rules in question were subject, they specifically addressed the rules but "excepted" them from approval. As the APA provides that rules can be "approved or disapproved," excepting rules from approval resulted in disapproval.

This action alone indicates disapproval; however, as pointed out by Petitioner, the language used to "except" the rules from approval is the same language long used by the

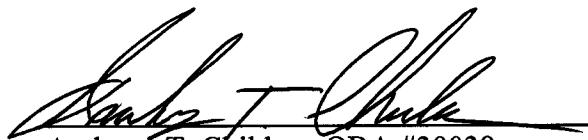
legislature to disapprove rules under a previous version of the APA. Though the APA admittedly was amended to no longer utilize a specific phrase for disapproval, the amendment did not change the meaning of the phrase itself. As with the decade worth of rules disapproved before the amendment, approval "except for the following:" maintains the same meaning regardless of its memorialization in statute. Not only is disapproval clear from their "exception" from approval, but considering that the Legislature had the option to approve or disapprove the rules, then used language which has long been considered a disapproval, the disapproval of the rules through SJR 22 is evident.

The Legislature had several courses of action available. It could have chosen not to adopt a joint resolution, omitted the library media rules from the resolution altogether, approved the rules via SJR 22, or disapproved the rules. The Legislature opted to exercise its rulemaking authority by disapproving the Rules, employing the same format and language it had used for disapproving numerous rules in the past.

### CONCLUSION

In the words of Thomas Jefferson, our system is one where "the legislative, executive and judiciary department should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."<sup>3</sup> The separation of powers with checks and balances is crucial to our system of government both nationally and here in the Great State of Oklahoma. The Respondents dependence on Okla. Stat. tit. 70, § 3-104 violates those principles. Moreover, the persistent executive overreach intrudes upon the province of local boards of education and appropriates the authority of locally elected officials. The Petitioner's application for original jurisdiction and request for declaratory and injunctive relief should be granted.

Respectfully Submitted,



Anthony T. Childers, OBA #30039

Julie Miller, OBA #17716

Kim Bishop, OBA #13928

Oklahoma State School Boards Association

2801 North Lincoln Boulevard

Oklahoma City, OK 73105

Telephone: (405) 528-3571

Facsimile: (405) 609-3050

[TonyC@ossba.org](mailto:TonyC@ossba.org)

[JulieM@ossba.org](mailto:JulieM@ossba.org)

[KimB@ossba.org](mailto:KimB@ossba.org)

**ATTORNEYS FOR OKLAHOMA STATE  
SCHOOL BOARDS ASSOCIATION**

---

<sup>3</sup> The Federalist No. 48, at 311 (Thomas Jefferson) (Clinton Rossiter ed., 1961)

**Certificate of Service**

This is to certify that on the 15<sup>TH</sup> day of March, 2024, a true and correct copy of the above and foregoing was mailed in United States mail with postage prepaid thereon to the following:

Honorable Ryan Walters,  
State Superintendent  
State Department of Education  
Oliver Hodge Building  
2500 N. Lincoln Blvd  
Oklahoma City, OK 73105  
Respondents

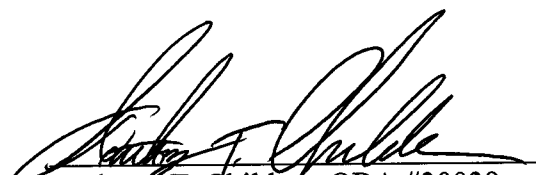
Honorable Gentner Drummond,  
Attorney General  
Office of the Oklahoma Attorney General  
313 NE 21<sup>st</sup> Street  
Oklahoma City, OK 73105  
Attorney General for the State of Oklahoma

Bryan Cleveland  
General Counsel  
State Department of Education  
Oliver Hodge Building  
2500 N. Lincoln Blvd.  
Oklahoma City, OK 73105  
Attorney for Respondents

State Board of Education  
Oliver Hodge Building  
2500 N. Lincoln Blvd.  
Oklahoma City, OK 73105  
Respondents

F. Andrew Fugitt  
Justin Cliburn  
The Center for Education Law, P.C  
900 N. Broadway Ave Suite 300  
Oklahoma City, OK 73102

Andrea R. Kunkel  
Cooperative Council of Oklahoma School  
Administration  
2901 North Lincoln Boulevard  
Oklahoma City, OK 73105

  
Anthony T. Childers, OBA #30039