

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

(1) J. KEVIN STITT, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF OKLAHOMA;
(2) BLAYNE ARTHUR, IN HER CAPACITY AS SECRETARY OF AGRICULTURE AND COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE, FOOD, AND FORESTRY;
(3) SHELLEY ZUMWALT, IN HER CAPACITY AS SECRETARY OF TOURISM, WILDLIFE AND HERITAGE AND AS EXECUTIVE DIRECTOR OF THE TOURISM AND RECREATION DEPARTMENT;
AND
(4) DR. DEBORAH SHROPSHIRE, M.D., IN HER CAPACITY AS SECRETARY OF HUMAN SERVICES AND AS DIRECTOR OF THE DEPARTMENT OF HUMAN SERVICES,

Petitioners,

v.

GENTNER DRUMMOND, IN HIS CAPACITY AS ATTORNEY GENERAL OF OKLAHOMA

Respondent.

**FILED IN DISTRICT COURT
OKLAHOMA COUNTY**

MAR - 7 2024

**RICK WARREN
COURT CLERK**

112

CV-2024 - 606

Case No.

PETITION FOR DECLARATORY JUDGMENT

Petitioners, J. Kevin Stitt, in his capacity as Governor of the State of Oklahoma, Blayne Arthur, in her capacity as Secretary of Agriculture and Commissioner of the Department of Agriculture, Food, and Forestry, Shelley Zumwalt, in her capacity as Secretary of Tourism, Wildlife and Heritage and as Executive Director of the Tourism and Recreation Department, and Dr. Deborah Shropshire, M.D., in her capacity as Secretary of Human Services and as Director of the Department of Human Services, seek judicial declarations that: (1) Contrary to an analysis in Oklahoma Attorney General Opinion 2024-5 (the "Opinion"),¹ the petitioner cabinet Secretaries who simultaneously serve as agency heads within their respective cabinet areas are not violating

¹ See, Attorney General Opinion 2024-5, attached hereto as Exhibit "1."

the State's dual officeholding prohibition; (2) The gubernatorial appointment and senate confirmation process may not be collaterally challenged by virtue of an OAG opinion; and (3) An action in the nature of *quo warranto* is the exclusive remedy to try the title to an office.

I.

BACKGROUND

A.

THE OPINION CONTAINS A FLAWED ANALYSIS REGARDING AGENCY HEADS' ABILITY TO SERVE AS CABINET SECRETARIES

On February 28, 2024, the OAG issued the Opinion. The Opinion was a response to a request submitted by State Senator Mary Boren (D-Norman) (the "Requestor"), who, along with an activist group known as Pike Off OTA, has been an outspoken critic of the Oklahoma Turnpike Authority's lawful efforts to expand the turnpike near Norman.² The Opinion was responsive to three questions, answers to the following two of which necessitated this action:

1. Under Oklahoma law, may the same individual serve simultaneously as the Secretary of Transportation, Executive Director of the Oklahoma Department of Transportation, and Executive Director of the Oklahoma Turnpike Authority?
2. What is the proper action if an officer of the state unlawfully holds more than one office?

The OAG answered the first question in the negative and concluded in response to the second that any earlier appointed position is vacated immediately upon acceptance of the latest appointment. Taken to its logical end, the Opinion's analysis stands for the proposition that no cabinet Secretary may simultaneously serve as an agency head, and to the extent it is occurring, as with the petitioner agency heads and cabinet Secretaries, one of the two posts has been vacated. Said another way,

² See, e.g., *Boren Supports Objections to OTA's Credit Application*, (April 29, 2022), <https://oksenate.gov/press-releases/boren-supports-objections-otas-credit-application> ("Boren has voiced her strong opposition in recent weeks to two proposed projects in her district.").

the OAG contends that all cabinet Secretary posts are offices and that the Governor cannot appoint a cabinet Secretary from among the agency heads within a cabinet area. In support of that end, the OAG, for unknown reasons, summarized an Attorney General Opinion issued in 2000 which concluded that the Secretary of Commerce is an office; highlighted a 2021 statutory amendment authorizing cabinet Secretaries to disapprove proposed administrative rules; referenced a 2019 Executive Order that hasn't been in effect since January 2023; and pointed to another Executive Order that is a near carbon copy of Executive Orders in existence since at least 2015.

Although the OAG cited 74 O.S. § 10.3—titled “Creation of Cabinet System – Cabinet Secretaries”—and 51 O.S. § 6—the law generally prohibiting dual officeholding—he glaringly made no meaningful mention of those statutes’ language most critical to an objective analysis of the issue at hand. The critical language is unambiguous black letter law that exempts from the dual officeholding prohibition any agency head who simultaneously sits as a cabinet Secretary.³ More on that follows some much-needed context.

B.

THE OPINION STEMS FROM A RELENTLESS, COORDINATED ATTACK ON THE OTA

Context surrounding the Opinion illuminates why impartiality may have been lacking. Decide for yourself: Since OTA announced plans to proceed with a turnpike extension in the Norman area, Pike Off OTA, the Requestor, and others have attempted to thwart turnpike extension plans; to disrupt OTA’s operations; and to jeopardize the livelihood and reputation of its leadership. A basic outline of this coordinated attack reads like this: three or more lawsuits have

³ To be clear, no additional legislative action is necessary to exempt from the dual office holding prohibition any cabinet Secretary who simultaneously serves as an agency head.

been filed to stymie progress and challenge OTA's credibility⁴; Pike Off OTA and the Requestor have publicly disparaged OTA and its legitimate efforts⁵; the OAG, premised largely on an overturned finding that the OTA violated the Open Meetings Act, called on the Oklahoma State Auditor to conduct an investigative audit of OTA⁶; an unconstitutional bill was passed to alter the makeup of the OTA commission⁷; and, to top it off, the referenced Opinion was issued, disrupting OTA's leadership and secretarial report. The OTA, left with no alternative, engaged the judicial system, where the Oklahoma Supreme Court has vindicated the OTA in three associated matters, thereby effectively green-lighting the lawful and prudent turnpike expansion and finding that the OTA did not violate the Open Meeting Act.

But the attack on OTA continues. The latest attack—the Opinion—suffers from a flawed analysis regarding cabinet Secretary posts held by agency heads—couplings state law could not more clearly permit. Left unresolved by this Court, the OAG's analysis and Opinion will operate to significantly alter the decades-long, lawful tradition of governors being able to appoint cabinet Secretaries from amongst agency heads with practical experience and necessary subject matter expertise. The consequences of the Opinion will be felt well beyond public servants like Tim Gatz and this Governor's administration.⁸ It must not be so.

⁴ *Pike Off OTA v. Oklahoma Tpk. Auth.*, 2023 OK 57, 531 P.3d 107; *Hirschfeld v. Oklahoma Tpk. Auth.*, 2023 OK 59, 541 P.3d 811; *Matter of Oklahoma Tpk. Auth.*, 2023 OK 84, 535 P.3d 1248.

⁵ See, *Supra* n. 2; Miranda Foster and David Chasanov, 'Intended to Mislead the Public': Oklahoma Judge Rules OTA Violated of Open Meeting Act, Fox 25 (December 2, 2022); Janelle Stecklein, *Capitol Calls for More Transparency, Accountability From OTA*, (March 27, 2023).

⁶ OAG Press Release, *Drummond Requests Investigative Audit of Oklahoma Turnpike Authority*, (March 15, 2023), <https://www.oag.ok.gov/articles/drummond-requests-investigative-audit-oklahoma-turnpike-authority>.

⁷ The constitutionality is being challenged in Oklahoma County District Court Case No. CV-2024-72. Although the Oklahoma Attorney General Office's historical policy is to not issue opinions on matters in litigation, the OAG issued an opinion affirming the legislative effort, the same day the Opinion was issued.

⁸ To be sure, examples of Governors having selected agency heads to simultaneously serve as cabinet Secretaries are innumerable, and application of the Opinion's flawed analysis on a go-forward basis would be a significant departure from law and precedent.

C.

AN OBJECTIVE ANALYSIS UNEQUIVOCALLY SUPPORTS AGENCY HEADS' ABILITY TO SIMULTANEOUSLY SERVE AS CABINET SECRETARIES

As mentioned, although the OAG cited relevant statutes, he looked past nearly all material language therein to arrive at an outcome unsupported by state law. The statute prohibiting dual officeholding explicitly exempts from its reach any office (or as here, purported office⁹) excepted elsewhere by law:

A. Except as may be otherwise provided, no person holding an office under the laws of the state and not deputy of any officer so holding any office shall, during the person's term of office, hold any other office or be the deputy of any officer holding any office, under the laws of the state. The provisions of this section shall not apply to:

...

51 O.S. § 6 (emphasis added). The Opinion left out the italicized language, although that very language points readers to germane provisions like that contained in 74 O.S. § 10.3.

The unambiguous language in Section 10.3—a specific and unambiguous statute addressing cabinet Secretaries and agency heads—explicitly allows agency heads to serve as cabinet Secretaries, regardless of whether a Secretary is an officer:

A cabinet Secretary may be . . . appointed as a cabinet Secretary from among the agency heads within the cabinet area.

74 O.S. § 10.3(B) (emphasis added); *see also Hall v. Globe Life & Acc. Ins. Co. of Okla.*, 1999 OK 89, ¶ 5, 998 P.2d 603 (“[A] specific statute, which clearly includes the matter in controversy and prescribes a different rule, governs over the general statute.”). As with the “Except as may otherwise be provided” language in 51 O.S. § 6, the quoted words from Section 10.3 were missing from the Opinion.

⁹ Whether any cabinet Secretary is an office is immaterial to the applicable analysis and therefore, will not be addressed herein.

The OAG seems to have the false impression that, unless an office is specifically exempted within 51 O.S. § 6, it is subject to the dual officeholding prohibition:

Oklahoma prohibits state officers and deputies from simultaneously holding another state office or serving as the deputy of any other state office. 51 O.S. 2021, 6. As of the time of this writing, the Legislature has enumerated thirty exceptions to this prohibition. However, none of these exceptions applies to the Secretary of Transportation, Executive Director of the Oklahoma Department of Transportation (“ODOT”), or Executive Director of the Oklahoma Turnpike Authority (“OTA”).

Section II of the Opinion.

Left standing, the Opinion would render vain the italicized language, above and below. And courts “will not assume that the Legislature has done a vain and useless act. Rather [they] must interpret legislation so as to give effect to every word and sentence.” *Hill v. Bd. of Educ.*, 1997 OK 111, ¶ 12, 944 P.2d 930 (citations omitted). The OAG may mistakenly believe the “[e]xcept as may be otherwise provided” language at the outset of 51 O.S. § 6 refers only to the offices specifically mentioned therein. But such a reading would impermissibly make the opening words of the very next sentence—“[t]he provisions of this section shall not apply to”—superfluous. *Id.* Such a reading also runs counter to prior Attorney General Opinions, which have rightly taken the opening words to refer to statutes other than Section 6. *E.g.*, 1981 OK AG 31. Simply put, the Legislature had in mind statutes like 74 O.S. § 10.3, not the thirty exemptions articulated in 51 § O.S. 6, when it said, “Except as may be otherwise provided[.]”

And the above quoted language in 74 O.S. § 10.3(B) can mean only one thing: A cabinet Secretary may simultaneously serve as the head of an agency falling within the Secretary’s cabinet area, even if the Secretary and agency head posts are both offices. That legal fact is further solidified later in Section 10.3, where the Legislature determined:

The cabinet Secretaries shall serve at the pleasure of the Governor, however, the appointment or removal of a cabinet Secretary who is also an agency head shall not otherwise affect the status of the other duties of the agency head.

74 O.S. § 10.3(C). That bears repeating. “[T]he appointment . . . of a cabinet Secretary who is also an agency head shall not otherwise affect the status of the other duties of the agency head.” *Id.* (emphasis added). Therefore, contrary to the OAG’s analysis and conclusion, appointment of a cabinet Secretary who is also an agency head (*e.g.*, Commissioner of the Department of Agriculture, Director of the Department of Human Services, and Executive Director of the Oklahoma Tourism and Recreation Department) does not—and legally cannot—result in an *ipso facto* vacation by the Secretary of the agency head post.

The black letter law—the most material portions of which are noticeably absent from the Opinion—is unambiguous: any cabinet Secretary may simultaneously serve as an agency head within the Secretary’s cabinet area. This Court should declare as much and prevent the flawed Opinion from being used as an improper tool for further disruption.

D.

AN ATTORNEY GENERAL OPINION CANNOT BE USED TO TRANSFORM THE APPOINTMENT AND REMOVAL PROCESSES FIXED IN LAW

Disruption to the cabinet structure not being enough, the Opinion purports to transform the process by which the petitioner cabinet Secretaries and agency heads are to be appointed and confirmed and end runs the exclusive method by which they may be removed. State law clearly articulates appointment and removal processes, and neither process contemplates involvement of an Attorney General Opinion.

“The Governor shall appoint, with the advice and consent of the Senate, a Secretary to head each cabinet area.” 74 O.S. § 10.3(B). Practically speaking, once the Governor appoints Secretaries, their appointment orders are submitted to the Senate for confirmation. Designated Senate committees then vote whether to send appointees to the floor for consideration by the full

Senate. Following favorable committee votes, the full Senate votes whether to confirm appointees. The lawful appointment process reaches its end after the Senate acts. *See* 74 O.S. § 10.3. In other words, there is no next step such as consideration and approval or disapproval by the OAG. The same appointment process applies to the petitioner agency heads. *See* 2 O.S. §§ 2-1, 2-3; 74 O.S. § 2206; and 56 O.S. § 162.

Once appointed, Secretaries serve at the pleasure of the Governor. 74 O.S. § 10.3(C). Only the Governor can remove a cabinet Secretary, save one legally available mechanism referenced in footnote 12 of the Opinion. The Supreme Court has been clear, “[A]n action in the nature of *quo warranto* will be deemed to constitute the exclusive remedy’ to try the title to an office.” *Spencer v. Wyrick*, 2017 OK 19, ¶ 2, 392 P.3d 290 (internal citations omitted). And only the Attorney General, the District Attorney, or a contestant for the office at issue have standing to bring such an action. *Id.* Oklahoma law does not allow for collateral attacks by others, state senators included. *See id.*

Dissatisfied with the Senate’s consistent, near-unanimous votes to confirm Gatz as cabinet Secretary and agency head since 2019 (in 2023, Senator Boren cast the lone “Nay”), Senator Boren set out to circumvent the statutory appointment process and end run a *quo warranto* action, the only legitimate mechanism for removal. For these reasons, this Court should further declare that a request for an official Attorney General Opinion and the resulting Opinion are not lawfully available means by which to challenge senate confirmation of a cabinet Secretary or agency head or to supplant or supplement an action in the nature of *quo warranto* as the exclusive remedy to try title to office.

E.

AN IMMEDIATE DECLARATION IS NECESSARY

The Opinion—which, as it stands, is in conflict with state law, to say nothing of the decades-long, lawful tradition of governors being able to appoint cabinet Secretaries from amongst agency heads—has left the Governor, the petitioner agency heads and Secretaries, and entire agencies in legal limbo. As of the date of this filing, the Governor’s appointments of Dr. Deborah Shropshire as Secretary of Human Services and Shelley Zumwalt as Secretary of Tourism, Wildlife and Heritage are pending before a senate susceptible to bias against the appointees on account of the Opinion’s flawed legal analysis. Lest there be any doubt, following issuance of the Opinion, Senator Kay Floyd (D-Oklahoma City) implicitly called into question the petitioner agency heads and Secretaries’ ability to simultaneously serve in both roles, saying, Gatz “wasn’t the only situation we have in the state.”¹⁰ Given that and other recent private and public statements, swift judicial action is necessary to rectify the erroneous Opinion. Short of judicial intervention, the cabinet structure will remain subject to disruption; agencies whose heads serve as Secretaries will operate with unnecessary uncertainty; and the professional status and livelihoods of the petitioner agency heads and Secretaries will be in the balance.

III.

PARTIES

1. The Honorable J. Kevin Stitt is the Governor of Oklahoma, and pursuant to his constitutional and statutory authority, he has the authority to appoint cabinet Secretaries and the petitioner agency heads.

¹⁰ Steve Lackmeyer and M. Scott Carter, *Lt. Gov Second to Resign from Cabinet Over AG Opinion; Stitt Warns of Shockwaves Through Government*, Oklahoman (March 1, 2024).

2. Blayne Arthur simultaneously serves as the appointed and Senate-confirmed Secretary of Agriculture and Commissioner of the Department of Agriculture, Food, and Forestry.
3. Shelley Zumwalt simultaneously serves as the appointed Secretary of Tourism, Wildlife and Heritage and the appointed and Senate-confirmed Executive Director of the Tourism and Recreation Department.
4. Dr. Deborah Shropshire, M.D. simultaneously serves as the appointed Secretary of Human Services and the appointed and Senate-confirmed Director of the Department of Human Services.
5. The Honorable Gentner Drummond serves as the Oklahoma Attorney General.

IV.

JURISDICTION AND VENUE

6. An actual controversy exists between Petitioners and the OAG as more fully set forth herein, and because of this controversy, a declaratory judgment is both necessary and proper in order to determine whether the Governor can lawfully appoint cabinet Secretaries from amongst the agency heads, who may then simultaneously serve in both roles, and whether an Attorney General Opinion is a legally available mechanism to supplant or supplement the senate confirmation process following the gubernatorial appointment of petitioner agency heads and cabinet Secretaries and to end run the *quo warranto* procedure as the exclusive method by which title to office may be tried.
7. The District Court for Oklahoma County, Oklahoma is a proper venue for this action because the cause, or some part thereof, occurred in Oklahoma County. Moreover, as the OAG is only being sued in his official capacity, the official residence of the OAG is in Oklahoma County, Oklahoma.

V.

FACTUAL ALLEGATIONS

8. Petitioners incorporate by reference each of the allegations in the preceding paragraphs as though fully set forth here.
9. The Governor has appointed the petitioner agency heads and cabinet Secretaries to simultaneously serve in both roles, and the petitioner agency heads and cabinet Secretaries are, in fact, simultaneously serving in both roles.
10. Petitioner Arthur has been appointed and senate confirmed to both roles at issue herein.
11. Petitioner Shropshire has been appointed and senate confirmed to serve as an agency head, and her appointment to serve as a cabinet Secretary is pending confirmation by the senate, during the ongoing legislative session.
12. Petitioner Zumwalt has been appointed and senate confirmed to serve as an agency head, and her appointment to serve as a cabinet Secretary is pending confirmation by the Senate, during the ongoing legislative session.
13. On February 28, 2024, the OAG issued the Opinion, which contains, in pertinent part, a finding, if only implicit, that it is a violation of the dual office holding prohibition contained in 51 O.S. § 6 to simultaneously serve as a cabinet Secretary and an agency head.
14. According to the Opinion, state law—namely, 74 O.S. § 10.3—does not allow for an agency head to simultaneously serve as a cabinet Secretary, regardless of whether the agency heads and cabinet Secretary posts at issue are both offices under a dual office holding analysis.

15. The Opinion contains a further finding that, acceptance of the more recent appointment—whether cabinet Secretary of agency head—results in the instantaneous vacation of the earlier accepted role.
16. The Opinion purports to have the effect of removing an agency head from office because, in part, such agency head later accepted an appointment as a cabinet Secretary.
17. Petitioners contend that state law explicitly permits any agency head to simultaneously serve as a cabinet Secretary, regardless of whether the agency head and cabinet Secretary posts are offices under a dual office holding analysis.

18. 51 O.S. § 6 provides, in relevant part:

Except as may be otherwise provided, no person holding an office under the laws of the state and no deputy of any officer so holding any office shall, during the person's term of office, hold any other office or be the deputy of any other officer holding any office, under the laws of the state.

19. 74 O.S. § 10.3 otherwise provides, in relevant part:

B. . . . A cabinet Secretary may be . . . appointed as a cabinet Secretary from among the agency heads within the cabinet area.

. . .

C. The cabinet Secretaries shall serve at the pleasure of the Governor, however, the appointment or removal of a cabinet Secretary who is also an agency head shall not otherwise affect the status of the other duties of the agency head.

20. Petitioners further contend that, once an agency head and/or cabinet Secretary has been confirmed by the Senate, an action in the nature of *quo warranto*, is the exclusive method by which title such offices may be tried.

VI.

CLAIMS FOR RELIEF

DECLARATION I

21. Petitioners incorporate by reference each of the allegations in the preceding paragraphs as though fully set forth here.
22. A controversy exists between the parties about whether cabinet Secretaries appointed pursuant to 74 O.S. § 10.3 may simultaneously serve as agency heads within their respective cabinet areas without violating the dual officeholding prohibitions in 51 O.S. § 6.
23. Accordingly, Petitioners request a determination and declaration that, as provided in 74 O.S. § 10.3 and 51 O.S. § 6, Oklahoma law allows the Governor to appoint cabinet Secretaries from among agency heads, who may then simultaneously serve as cabinet Secretaries and the heads of their respective agencies.

DECLARATION II

24. Petitioners incorporate by reference each of the allegations in the preceding paragraphs as though fully set forth here.
25. A controversy exists between the parties about whether an Attorney General Opinion is a legally available mechanism to supplant or supplement the senate confirmation process following the gubernatorial appointment of petitioner agency heads and cabinet Secretaries and to end run the *quo warranto* procedure as the exclusive method by which title to office may be tried.
26. Accordingly, Petitioners request a determination and declaration that:

- a. The gubernatorial appointment and senate confirmation process may not be collaterally challenged by virtue of an OAG opinion and
- b. An action in the nature of *quo warranto* is the exclusive remedy to try the title to an office.

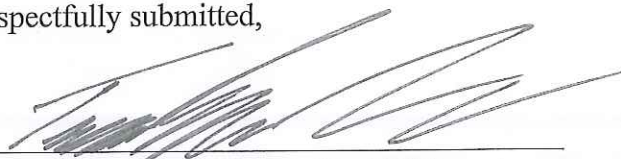
IV.

PRAYER FOR RELIEF

WHEREFORE, Petitioners, J. Kevin Stitt, in his capacity as Governor of the State of Oklahoma, Blayne Arthur, in her capacity as Secretary of Agriculture and Commissioner of the Department of Agriculture, Food, and Forestry, Shelley Zumwalt, in her capacity as Secretary of Tourism, Wildlife and Heritage and as Director of the of Tourism and Recreation Department, and Dr. Deborah Shropshire, M.D., in her capacity as Secretary of Human Services and as Director of the Department of Human Services, respectfully request that this Court declare:

- i. As provided in 74 O.S. § 10.3 and 51 O.S. § 6, Oklahoma law allows the Governor to appoint cabinet Secretaries from among agency heads, who may then simultaneously serve as cabinet Secretaries and the heads of their respective agencies;
- ii. The gubernatorial appointment and senate confirmation process may not be collaterally challenged by virtue of an OAG opinion; and
- iii. An action in the nature of *quo warranto* is the exclusive remedy to try the title to an office.

Respectfully submitted,



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GENTNER DRUMMOND
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION
2024-5

Senator Mary B. Boren
Oklahoma State Senate, District 16
2300 N. Lincoln Boulevard, Room 514.1
Oklahoma City, OK 73105

February 28, 2024

Dear Senator Boren,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Under Oklahoma law, may the same individual serve simultaneously as the Secretary of Transportation, Executive Director of the Oklahoma Department of Transportation, and Executive Director of the Oklahoma Turnpike Authority?**
- 2. What is the proper action if an officer of the state unlawfully holds more than one office?**
- 3. What are the legal ramifications of executive actions by an official who is unlawfully holding multiple offices?**

I.
SUMMARY

This office finds that under the current powers and duties of the Secretary of Transportation, the Executive Director of the Oklahoma Department of Transportation, and the Executive Director of the Oklahoma Turnpike Authority each constitute an "office" for purposes of the dual office holding prohibition in title 51, section 6 (2021). Further, it is a violation of the dual office holding prohibition for a single individual to serve simultaneously in any two or more of these roles.

If a state officer enters upon the duties of a second office in violation of the dual office holding prohibition, it operates as a vacation of the first office. The vacation of the first office is self-executing and notwithstanding the person's intention of continuing to hold the first office. However, the Oklahoma Supreme Court has on numerous occasions held the acts of a de facto officer are as binding as those of a de jure officer and that these acts were valid when the interest of the public and third persons were involved. Therefore, official actions involving the public interest and third persons, though made by officials who are not qualified to serve but act as de facto officers under color of title, are valid, binding, and enforceable.

II. BACKGROUND

Oklahoma prohibits state officers and deputies from simultaneously holding another state office or serving as the deputy of any other state office.¹ 51 O.S.2021, § 6. As of the time of writing, the Legislature has enumerated thirty exceptions to this prohibition. However, none of these exceptions applies to the Secretary of Transportation, Executive Director of the Oklahoma Department of Transportation (“ODOT”), or Executive Director of the Oklahoma Turnpike Authority (“OTA”).

Before statehood, the Oklahoma Supreme Court established that “a public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised for the benefit of the public.” *Guthrie Daily Leader v. Cameron*, 1895 OK 71, ¶ 8, 41 P. 635, 636 (quoting *MECHEM, PUBLIC OFFICERS* (1889)).

The Oklahoma Supreme Court distilled this declaration into three elements in *Oklahoma City v. Century Indemnity, Co.* Those elements are as follows:

1. the position was created or authorized by law;
2. the law imposes certain definite duties upon the position holder; and
3. the duties imposed involve “the exercise of some portion of *sovereign power*”

1936 OK 589, ¶ 21, 62 P.2d 94, 97 (emphasis added). “[A] position [having] these three elements is presumably an ‘office,’ while one [lacking] any of them is a mere ‘employment.’” *Id.* (quoting *Winsor v. Hunt*, 243 P. 407, 413 (Ariz. 1926)). In *Guthrie Daily Leader*, the Court explained the third element as follows:

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit.

Guthrie Daily Leader, 1895 OK 71, ¶ 10, 41 P. at 636 (quoting *MECHEM, PUBLIC OFFICERS* (1889)).

Thus, barring an exception, an individual violates title 51, section 6 by satisfying the elements established in *Century Indemnity* while holding two or more offices simultaneously.

¹ “[N]o person holding an office under the laws of the state and no deputy of any officer so holding any office shall, during the person's term of office, hold any other office or be the deputy of any officer holding any office, under the laws of the state.” 51 O.S.2021, § 6(A).

III. DISCUSSION

A. Simultaneously serving as the Secretary of Transportation, Executive Director of the ODOT, and Executive Director of the OTA violates the dual office holding prohibition in title 51, section 6 (2021).

Your question requires an examination of whether each position meets the elements of an “office” as provided by the Oklahoma Supreme Court in *Century Indemnity*. This office will address each position in turn.

1. Executive Director of the ODOT

The position of Executive Director of ODOT clearly meets each element of the foregoing *Century Indemnity* test. First, the position, is expressly established by ODOT’s enabling statutes. Second, the Executive Director has the “authority and duty to supervise, direct, account for, organize, plan, administer and execute the functions of the [ODOT]” 69 O.S.2021, § 4007(A). Finally, in carrying out the “transportation policies, plans and programs of [the] state,” the Director exercises sovereign power. 69 O.S.2021, § 4002. For instance, the Director has the power to “coordinate the development and operation of such transportation facilities in the state including, but not limited to, highways, public transportation, railroad, marine and waterways and aeronautics” and to “apply for, accept and receive and be the administrator for and in behalf of the state agencies, boards and commissions of all federal or other monies now or hereafter available for purposes of transportation” 69 O.S.2021, § 4002(2), (7). Accordingly, the Executive Director of ODOT is an office within *Century Indemnity*. And, without an exception in title 51, section 6, the Executive Director is subject to the dual office holding prohibition under Oklahoma law.

2. Secretary of Transportation

As detailed below, the Secretary of Transportation (the “Secretary”) is also an “office” under *Century Indemnity*. While specific Cabinet posts are not expressly created by law—excluding the Secretary of Veterans Affairs—the Governor’s statutory authority to create a cabinet system for Oklahoma’s executive branch authorizes the position of Secretary. 74 O.S.2021, § 10.3. Under the law, cabinet secretaries perform certain duties as follows:

The cabinet Secretaries shall:

1. Advise the Governor of any policy changes or problems within the area they represent;
2. Advise the entities represented of any policy changes or problems as directed by the Governor; and
3. Coordinate information gathering for the Legislature as requested.

Id. § 10.3(B).

Historically, most cabinet secretaries have served in merely an advisory capacity, which is not the exercise of sovereign power.² However, in 2000, this office concluded that the Secretary of Commerce exercises sovereign power by virtue of having a seat on a board or commission with authority to issue revenue bonds. 2000 OK AG 54, ¶ 14. Similarly, the Secretary is authorized to create the Advanced Mobility Program Advisory Council, which shall provide policy and regulatory recommendations to the Secretary on issues relating to advanced mobile technologies. 3 O.S.Supp.2023, § 374(A). And, subject to the availability of funds, the Advanced Program is authorized to annually award matching grants up to \$500,000 each. *Id.* § 374(E). Additionally, the Secretary is a member of the Land Mobile Radio Public Safety Interoperability Cooperative, which is established for the purpose of “unifying, stabilizing and enhancing” the public radio safety system communications in Oklahoma. 62 O.S.2021, § 35.6.2(A). Further, the Secretary is authorized to approve areas to be designated as “urban areas” for purposes of permitting outdoor advertising signs in Oklahoma. 69 O.S.2021, § 1273.

Moreover, cabinet secretaries have recently been provided with additional oversight responsibilities and authority to control agency operations, including rulemaking and expenditures. Under the Governor’s most recent executive order establishing cabinet posts, the Secretary is responsible for thirteen executive branch agencies.³ When Senate Bill 913 was passed in 2021, it vested all cabinet secretaries with the ability to unilaterally veto the rulemaking efforts of their respective reporting agencies—a substantial degree of executive authority that is tantamount to outright rulemaking power. 75 O.S.2021, § 303(A)(6).

Furthermore, agencies must obtain their Secretary’s approval to hire a lobbyist and/or apply for any grant exceeding \$50,000, and not granted by the federal government.⁴ *See* Exec. Order No. 2019-29, OAC 1:2019-29 (July 5, 2019) and Am. Exec. Order No. 2019-40, OAC 1:2019-40A (March 23, 2021). Notably, a current Executive Order also empowers the Secretary to approve or deny the following for each of its reporting agencies: (1) membership(s) in any private or public organization if the costs of the membership(s) collectively exceed \$500, (2) non-essential out-of-state travel for any agency employee that is wholly paid for by an entity other than the State, and (3) any non-emergency purchase that exceeds \$25,000. *See* Exec. Order No. 2023-4, OAC 1:2023-4 (Feb. 28, 2023).

With the elevated duties now delegated to all cabinet secretaries, the Secretary’s duties have grown beyond an advisory role to include exercising sovereign power. In light of the foregoing, this office

²*See* 2000 OK AG 54 (states that Cabinet Secretaries functions consist of “giving opinions and performing clerical work” based on the authorizing statute title 74, section 10.3(1991)); 2005 OK AG 28 (finding that the Secretary of Finance and Revenue had no specific statutory duties and therefore did not exercise sovereign power).

³The Secretary is responsible for the following executive entities or their successors: ODOT, OTA, OTA Board, Transportation Commission, ODOT County Advisory Board, ODOT Tribal Advisory Board, Committee on the Pilot Shortage, Highway Construction Materials Technician Certification Board, Interstate Midwest Reginal Passenger Rail Compact Commission, Oklahoma Aeronautics Commission, Oklahoma Tourism Signage Advisory Task Force, Tri-State Commission on the McClellan-Kerr Arkansas River Navigation System, and Waterways Advisory Board. Order No. 2023-8, OAC 1:2023-8 (Sept. 13, 2023).

⁴If an executive order has a specific statutory foundation, is designed to enforce the law and not accomplish a legislative result, it has the effect of a statute. 1996 OK AG 31; 1995 OK AG 36; *City of Albuquerque v. U.S. Dep’t of Interior*, 379 F.3d 901, 913 (10th Cir. 2004).

concludes that the Secretary is an officer of the State of Oklahoma and is therefore subject to the dual office holding prohibitions in title 51, section 6.

4. Executive Director of the OTA

While a more detailed analysis is required, the Executive Director of the OTA also holds an “office” under *Century Indemnity*. The purpose of the OTA is to construct, operate, and maintain turnpike projects. 69 O.S.2021, § 1701. The OTA is established pursuant to statute which provides:

There is hereby created a body *corporate and politic* to be known as the “Oklahoma Turnpike Authority. . . .” The Authority is hereby constituted an instrumentality of the state, and the exercise by the Authority of the powers conferred by this act in the construction, operation, and maintenance of turnpike projects shall be deemed and held to be *an essential governmental function* of the state with all the attributes thereof.

69 O.S.Supp.2023, § 1703(A) (emphasis added).

The Oklahoma Supreme Court has held that the OTA is a “governmental agency” acting in a “governmental capacity.”⁵ *Henry v. Okla. Tpk. Auth.*, 1970 OK 232, ¶ 22, 478 P.2d 898, 902. The property managed by the OTA is property of the State of Oklahoma. See *Application of the Okla. Tpk. Auth.*, 1950 OK 208, ¶ 19, 221 P.2d 795, 803; 69 O.S.2021, § 1717.

The position of Executive Director is statutorily authorized under title 69, section 1705. 69 O.S.2021, § 1705(k). The Oklahoma Supreme Court has held that an “office or position which is created . . . pursuant to power conferred by the Legislature upon [a] governing body is just as much created by law as if the Legislature itself had acted” *Century Indemnity*, 1936 OK 589, ¶ 28, 62 P.2d at 98. Additionally, OTA’s administrative rules, which have the effect of law, authorize the Executive Director position.⁶ OAC 731:1-1-3(b).

The law also imposes certain definite duties upon the Executive Director. For instance, the OTA’s administrative rules allow the Executive Director to extend the term of a contractor’s prequalification to bid on authority projects. See OAC 731:10-1-2(n). Further, the Executive Director has the authority to lift or suspend a contractor’s debarment from bidding on OTA contracts. OAC 731:10-1-5(7).

⁵While not necessary to the analysis here, this office and the Oklahoma Supreme Court have also categorized the OTA in other ways. See 1977 OK AG 110 (the OTA is “not the ‘State’ nor one of the ‘departments thereof. . . .’”); *In re Appl. of the Okla. Capitol Improvement Auth.*, 2022 OK 31, ¶ 2 n.2, 507 P.3d 1256, 1257 n.2 (“The Oklahoma Capitol Improvement Authority is a quasi-governmental entity created by statute. Title 73 O.S.2021, ch. 6, § 152 defines the OCIA as a ‘body corporate and politic’ and an ‘instrumentality of the state.’”); *Hirschfeld v. Okla. Tpk. Auth.*, 2023 OK 59, ¶ 7, 541 P.3d 811, 817 (referencing the OTA as a public trust). And, after all, the OTA has recently declared itself to be an executive branch agency. See *Okla. Tpk. Auth. v. Treat (In re Constitutionality of HB 2263)*, No. CV-24-72, Dist. Ct. Okla. Cnty., Okla.); Petition, at 8, ¶ 17 (Jan. 9, 2024).

⁶75 O.S.2021, § 308.2(C) (“Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer.”).

The position of Executive Director of OTA is thus clearly established by law and provides definite duties. Therefore, the first two elements of the *Century Indemnity* test are met. For the reasons set forth below, the duties imposed also involve the exercise of some portion of the State's sovereign power.

Again, exercising sovereign power requires that some portion of the state's sovereignty—whether legislative, executive, or judicial—attaches for the time being, to be exercised for the public benefit. *Guthrie Daily Leader*, 1895 OK 71, ¶ 10, 41 P. at 636. In *Guthrie Daily Leader*, the Court went on to describe the exercise of sovereign power as follows:

The term "office" implies a delegation of some portion of the sovereign power to, and a possession of it by the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and, in its effects, will bind the rights of others, and be subject to revisions and corrections only according to the standing laws of the state.

Id., 1895 OK 71, ¶ 15, 41 P. at 636 (quoting [*Bunn*] v. *People ex rel. Laflin*, 45 Ill. 397, 409 (1867)).

This office concludes that the Executive Director exercises some portion of the sovereign power for six reasons. First, Oklahoma law expressly authorizes the Executive Director to serve as an administrative review officer on an appeal of a toll evasion violation. 47 O.S.Supp.2022, § 11-1401.2. The Executive Director's final decision binds the contestant, subject only to revision and correction of a district court having jurisdiction in the county where the contestant lives. *Id.* Second, as discussed above, the Executive Director can lift or suspend a contractor's debarment from bidding on OTA contracts, thereby binding the rights of others.⁷ OAC 731:10-1-5(7); *Ex parte Tindall*, 1924 OK 669, ¶ 24, 229 P. 125, 130 ("The police power is an attribute of sovereignty . . .").

Third, the Executive Director has the authority to negotiate and execute contracts. At the OTA's December 12, 2023, meeting, the Executive Director was authorized to negotiate and execute contracts on no fewer than ten agenda items, including statements of work in an amount not to exceed \$13,964,776.40 and separately, construction management contracts not to exceed \$14,000,000. *See* December 12, 2023, Meeting Agenda, OTA, Items 1138 and 1142. Fourth, Oklahoma law authorizes the OTA to authorize the Executive Director to approve change orders not exceeding \$250,000. 61 O.S.Supp.2022, § 121. Fifth, the OTA recently amended its bylaws to authorize the Executive Director to take the following action:

⁷*Ex parte Tindall*, 1924 OK 669, ¶ 25, 229 P. at 130 ("The term 'police power' comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal and protection of the public interests.").

1. call a special meeting of the Authority pursuant to the Oklahoma Open Meeting Act;
2. execute in the name of the Authority, checks, drafts and orders drawn on the commercial trust accounts or checking accounts of the Authority;
3. execute in the name of the Authority, drafts and orders drawn on the revolving fund account in any bank or trust company;
4. negotiate and execute the following contracts and expenditures without the Authority's approval:
 - a. contracts not exceeding the sum of \$750,000,
 - b. payroll, without limits, and
 - c. change orders and supplemental agreements on contracts when the amount does not exceed \$150,000.⁸

OTA Bylaws, attached to the January 9, 2024, OTA Board Meeting Agenda and on file with the author. Finally, the Executive Director is required to give a bond to the Authority before entering upon his duties, which is one characteristic of a public officer exercising the sovereign's power. 2018 OK AG 11; 1979 OK AG 41.

Three prior opinions of this office further support the conclusion that the Executive Director of the OTA is an "office" under *Century Indemnity*. First, in 1985, this office determined that a member of the OTA held an office for purposes of the dual office holding prohibition, in part, because of the sovereign functions of adopting rules and regulations and the ability to collect and pledge revenues. 1985 OK AG 58. Second, this office previously concluded that a position with duties of receiving, giving, and disbursing funds attributable to a governmental entity is an "office." 2018 OK AG 11. Finally, conducting and managing business affairs of a governmental body, making and executing contracts, purchasing necessary equipment, and appointing and employing such officers and employees has been determined to be the exercise of some portion of the sovereign power. 1983 OK AG 220.

The Executive Director clearly exercises some portion of the sovereign power. Accordingly, the Executive Director is an officer for purposes of the dual office holding prohibition in title 51, section 6.

In determining that all three positions are an "office," this office considers, in turn, if any exceptions to the dual office holding prohibition exist in law. The Legislature has provided thirty exceptions to the dual office holding prohibition, but none of those exceptions include the Executive Director of the OTA, ODOT, or Secretary. *See* 51 O.S.2021, § 6. Notably, state statutes allow ODOT to contract with the OTA for "[r]ecord keeping, reporting, administrative, planning, engineering, legal and clerical functions of the Authority not in conflict with provisions of existing trust agreements." 69 O.S.2021, § 4010. However, the statute contemplates such an agreement would include the "temporary transfer of personnel" not permanent sharing of the principal

⁸The OTA cited title 69, section 1705 as authority for the amendments. Section 1705(a) provides the Authority with the power to "adopt bylaws for the regulation of its affairs and conduct of its business." 69 O.S.2021, § 1705(a).

executive officer. *Id.* (emphasis added). This office does not construe such personnel-sharing arrangements to constitute an exception to the dual office holding prohibition.⁹

In light of the foregoing, this office finds that it is a violation of title 51, section 6 for a single individual to serve simultaneously in any two or more roles as the Secretary, Executive Director of ODOT, and Executive Director of OTA.

You further asked this office to opine on whether the OTA's 1989 Trust Agreement prohibits the Executive Director from serving in other roles as Secretary and the Executive Director of ODOT.¹⁰ Given the above analysis, finding violations of Oklahoma's dual office holding prohibitions, it is not necessary to reach this question regarding the 1989 Trust Agreement.

B. When an office holder accepts and enters upon the duties of a second office, acceptance of the second office operates to ipso facto vacate the first office.

The Oklahoma Supreme Court has long held that "entering upon the duties of a second office or acceptance of a prohibited office *ipso facto* operates as a vacation of the first office, notwithstanding the person's intention of continuing to hold the first office." *Nesbit v. Apple*, 1995 OK 20, ¶ 24, 891 P.2d 1235, 1243 (citing *Wimberly v. Deacon*, 1943 OK 432, 144 P.2d 447). Though the *Wimberly* case involved the dual office holding prohibition found in section 12, article II, of the Oklahoma Constitution, the Oklahoma Supreme Court has further determined that the self-executing nature of the dual office holding prohibition would apply under a similar statutory prohibition.¹¹ See *Gibson v. Crowder*, 1946 OK 22, ¶ 10, 165 P.2d 628, 629 ("The same rule would apply in considering similar statutory provisions.").

⁹*Rodgers v. Higgins*, 1993 OK 45, ¶ 18, 871 P.2d 398, 409 ("We should not read into the law that which is not there." (emphasis omitted)).

¹⁰On February 1, 1989, the OTA entered into a trust agreement with The Liberty National Bank and Trust Company of Oklahoma City (the "1989 Trust Agreement"). The 1989 Trust Agreement and its supplements essentially pledge the tolls or other revenues from turnpike projects for service of the bonds and provides for certain obligations to both parties. Section 706 of the 1989 Trust Agreement requires the OTA to employ a Chief Executive Officer who "shall devote his entire time to the performance of such duties." Trust Agreement between OTA and The Liberty National Bank and Trust Company of Oklahoma § 706 (Feb. 1, 1989) (emphasis added) (on file with author). There have been at least eighteen supplemental agreements to the 1989 Trust Agreement, which form a part thereof and ratify the original 1989 Trust Agreement. However, this office has not reviewed the supplemental agreements to determine if an amendment has been made to this "entire time" duty. Nonetheless, this office has previously addressed the meaning of the requirement to "devote his or her entire time to the duties" proscribed by a particular position. See 1987 OK AG 120 ¶ 12 (the operative language "mandates that the position . . . is a full-time position, and that the [individual] is prohibited from engaging in any other occupation or outside interests during regular business hours").

¹¹In support of this holding, the *Gibson* court reasoned that the court in *Wimberly* quoted with approval the statement of the rule in *Mecham, Public Officers*:

Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates ipso facto to absolutely vacate the first.

Should a conflict of interest arise on the part of the appointing authority or should the office holder attempt to maintain his vacated office(s) under color of title, relief may be obtained through civil action.¹²

C. Official actions involving the public interest and third persons, though made by officials who are not qualified to serve, but act as de facto officers under color of title, are valid, binding, and enforceable.

Your last question involves the enforceability or validity of official actions taken by an official who is not properly serving in office. The validity or enforceability of the official's prior official actions depends on whether the individual is a de facto officer.

An "officer de facto" is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the . . . functions of the office are exercised by one who was in the actual possession of it under color of title.

Hatfield v. Jimerson, 1961 OK 250, ¶ 9, 365 P.2d 980, 982 (quoting *State ex rel. Tayrien v. Doggett*, 1956 OK CR 45, ¶ 6, 296 P.2d 185, 186).

When determining whether a judge—who was not qualified to serve in the office—was a de facto judge, the Oklahoma Supreme Court stated:

While mere possession of the office is not sufficient to make the incumbent a de facto judge, possession plus color of title to the office, if the office actually exists, is considered sufficient. Clearly, in the instant case, the appointment was not void on its face, for it was signed by the Governor of the state, the appointee took the oath of office, filed the statement thereof with the proper official, and actively assumed the duties of the office. He thus performed the duties with a color of right, or color of title to the office.

No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant.

Gibson, 1946 OK 22, ¶ 10, 165 P.2d at 629–30 (quoting *Wimberly*, 1943 OK 432, ¶ 27, 144 P.2d at 453); see also *MECHEM, PUBLIC OFFICERS* (1889).

¹²Forcible removal may be effectuated by an action in the nature of *quo warranto*. 12 O.S.2021, §§ 1531–1538; see also *State ex rel. Stuart v. Rapp*, 1981 OK 87, 632 P.2d 388. Any person serving as a state official who does not meet the qualifications of office or is holding office in violation of the dual office holding prohibition is unlawfully holding or exercising public office. *Id.* An action in the nature of *quo warranto* may be filed by the Attorney General or a district attorney on behalf of the State or by a person claiming an interest in the office. 12 O.S.2021, § 1533; see also *Callendar v. Dist. Ct. for the Twentieth Jud. Dist.*, 1981 OK 16, ¶ 9, 625 P.2d 627, 630 (holding that the thirty-day limitation period for filing a *quo warranto* action in the statute did not apply to actions initiated by the district attorney or Attorney General). While the Attorney General or a district attorney may bring a *quo warranto* action, there is no explicit affirmative duty to do so.

Sheldon v. Green, 1938 OK 165, ¶ 8, 77 P.2d 114, 115. The Court further stated that “the acts of a de facto officer are as binding as those of a de jure officer. This principle is well recognized and applies as thoroughly to the office of judge as it does to other public offices.” *Id.*, 1938 OK 165, ¶ 8, 77 P.2d at 116 (emphasis added).

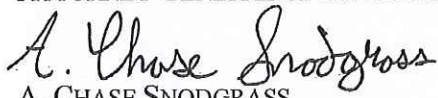
The Oklahoma Supreme Court has on numerous occasions held that public officials were de facto officers when lacking some qualification(s) to hold their office but that their acts were valid when the interest of the public and third persons is involved. *See, e.g., Ajax Contractors, Inc. v. H.L. Myatt*, 1967 OK 19, ¶ 17, 424 P.2d 30, 33–34. Therefore, official actions involving the public interest and third persons, though made by officials who are not qualified to serve but, without having prior notice otherwise, act as de facto officers under color of title, are valid, binding, and enforceable.¹³

It is, therefore, the official Opinion of the Attorney General that:

- 1. A single individual holding one or more offices simultaneously as the Secretary of Transportation, Executive Director of the Oklahoma Department of Transportation, and the Executive Director of the Oklahoma Turnpike Authority violates the dual office holding prohibition in title 51, section 6 (2021).**
- 2. When an office holder accepts and enters upon the duties of a second office, acceptance of the second office operates to ipso facto vacate the first office.**
- 3. Official actions involving the public interest and third persons, though made by officials who are not qualified to serve but act as de facto officers under color of title, are valid, binding, and enforceable.**



GENTNER DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA



A. CHASE SNODGRASS
DEPUTY ATTORNEY GENERAL



¹³This opinion does not address the validity of executive actions taken by a state officer after the officer has received notice, from proper authority, that they are purporting to exercise a second office in violation of title 51, section 6 (2021).