



1889

INSTITUTE

Expanding Opportunity  
Fighting Privilege



# A Principled Legislative Program For Oklahoma Legislators

*Fall 2020*

The 1889 Institute advances public policy ideas to promote the flourishing of all Oklahomans through limited and responsible government, robust civil society, and free enterprise.

## A LEGISLATOR'S HIGH DUTY

Individuals elected to office owe a high duty to the people they serve. Oklahoma Legislators swear an oath upon taking office to “support, obey, and defend” the constitutions of the nation and the state, to not take bribes, and to discharge their duties as best they can.

The Oklahoma Constitution, distilled to its fundamental essence, is intended to cause state government to serve the people. The preamble makes this clear: “Invoking the guidance of Almighty God, in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we, *the people* of the State of Oklahoma, do ordain and establish this Constitution.” (emphasis added)

Ultimately, every individual acting in an official governmental capacity in Oklahoma must act in the best interest of the people of the state as a whole, under the laws of the state. This high duty, executed as a public trust, is best characterized as a ***fiduciary duty*** wherein one puts the people's interest above one's own, preserving good faith and trust, with a duty to act in the people's best interest.

Fiduciaries have the power to act on behalf of someone else under an obligation to act in that person's best interest. Consequently, fiduciaries are held to strict standards of honesty, diligence, and responsibility. That means being conscientious, loyal, faithful, disinterested, and unbiased; free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud, and corruption.

When public officials act faithfully in a way that fulfills their fiduciary duty, it can be boring. Doing a really good job is rarely glamorous. It is focused, deliberative, purposeful work, and admittedly too often goes unrecognized. In a legislative capacity, it means taking the time to consider all sides, objectively determining to the best of one's ability what is best for all concerned, and exercising adequate oversight to be sure that laws are being faithfully executed by bureaucracy. Sometimes, this is mind-numbing, thankless work, poring over stale data, but it is what elected officials actually signed up to do.

## ABOUT 1889 INSTITUTE

The 1889 Institute analyzes and develops public policy for the state of Oklahoma based on principles of limited and responsible government, free enterprise, and a robust civil society. As an independent group of scholars dedicated to making Oklahoma the best it can be, we disseminate analyses and recommendations to policymakers and the general public. We are not affiliated with a political party, do not receive funding from any government entity, and do not engage in grassroots advocacy.

This booklet identifies specific problems Oklahoma faces and describes legislative solutions to those problems. Topics selected share several common features that warrant their inclusion. **First**, these are “root problems” that stand between the Oklahoma of today and a free, prosperous Oklahoma with a well-run, people-serving government. **Second**, each has concrete, attainable solutions with proposals in this booklet that acknowledge the necessary humility required for wise legislating. **Third**, undergirding each proposal in this booklet is a recognition that freedom advances human flourishing, and government’s job is to do only those things necessary to secure individual freedom and easy interchange. When individuals are free to pursue their own interests, the sum of their efforts creates a better society.

**Note:** *Listed publications are those of the 1889 Institute unless otherwise indicated.*

## CONTENTS

<b>Spur Innovation and Choice in Education</b>	<b>2</b>
Solution 1: Professional Teacher Charters	
Solution 2: Education Savings Accounts	
<b>End Hostage-Taking by Government Employee Unions</b>	<b>4</b>
Solution 1: Ban Collective Bargaining in Government	
Solution 2: Ban Strikes by Government Employees	
<b>Restore the Courts as Guardians of the Rule of Law</b>	<b>5</b>
Solution: Constitutional Amendment Fixing Judicial Selection	
<b>Remove Barriers to Honest Work through Private Certification</b>	<b>6</b>
Solution: Private Certification in Lieu of Licensing	
<b>Create Real Transparency in Government</b>	<b>7</b>
Solution: <i>A Vision for Transparency</i>	
<b>Pass/Join an Interstate Compact to End Corporate Welfare</b>	<b>8</b>
Solution: 1889/Mackinac and Mercatus Proposals	
<b>Require Proper Treatment of Health Savings Accounts</b>	<b>9</b>
Solution: Pass Requirements on Insurance Companies	
<b>Undo Medicaid Expansion</b>	<b>10</b>
Solution: Resubmit Medicaid Expansion to Voters	
<b>Measure Success &amp; Principles for Spending Taxpayer Dollars</b>	<b>11</b>
<b>Honorable Representative of the People: A Pledge</b>	<b>12</b>

# SPUR INNOVATION AND CHOICE IN EDUCATION

## The Problem:

The model for public education is one of top down, one-size-fits-all control, and is beset by bureaucracy. The state attempts to dictate details of what and how schools teach, and then a flawed testing regime is the only measure of success. The state often boosts funding, which mostly just enables the hiring of more support personnel and the occasional pay raise. Increased spending and a host of other ineffective measures have failed to bring real improvement.

Despite an ever-present hue and cry about public education, teachers feel unsupported and unable to effectively do their jobs. Administrative bloat, mind-numbing and irrelevant professional development training, curious state and federal mandates, unhappy parents, excessive paperwork, and nitpicking tasks undermine enterprising teachers in public schools. Too often, teachers are saddled with irrelevancies beyond just teaching students and holding them accountable for their learning.

Oklahoma's teachers and students deserve better than the educational system they have inherited. They do not need the current system just made bigger with more funding; they need truly innovative change.

## Solutions:

### 1. *Professional Teacher Charters*

A group of teachers should be allowed to independently establish a charter school without recourse to a "charter authorizer" (under current law, the local school district or a state university, who are often disposed *against* the creation of new charter schools). Under this proposal, teachers could open a school simply by demonstrating they have the financial ability to open and run the school. Other than checking the teachers' credentials, the only criterion for integrating such a school into Oklahoma's charter system would be to have the teachers post a bond to indemnify the state against expenses to remediate students should the school fail.

By instituting a path whereby experienced teachers, who are certified by the state to be well-qualified, can take control of their own destiny and practice the art of teaching as true educational practitioners, the Legislature can put real teachers in the educational driver's seat. These entrepreneurial education practitioners, like doctors and attorneys, would select their own administrators to facilitate the practice of educating rather than suffering constant interference by politics, educational fads, and pedantic bureaucratic demands.

## Resources:

- *Professional Teacher Charter Schools: Proposal with Model Legislation*
- *Education Reforms to Make a Difference*
- *America's War for Effective Education Reform*
- *Blueprint for Education Reform: Educational Choice and Empowered Public Schools*

## **2. Education Savings Accounts (ESAs)**

ESAs are state-funded and administered accounts to fund educational services for school-age children under the direction of the child's parents. The funds can be used for a variety of educational purposes such as tuition, tutoring, books, and online materials. Students can participate only if they contractually agree not to attend a traditional public school (i.e., participants cannot double-dip on taxpayers' funds). An incentive to economize is provided by allowing funds remaining in an ESA account upon graduation to be used for post-secondary (college and career) education.

Universal ESAs would introduce market forces into the sclerotic public education system. Parents and students could "vote with their feet," causing competition to take hold. Competition improves quality and lowers costs over time. An ESA funding level of \$4,500 to \$5,000 per student per year would cover all or nearly all of a student's education expenses *and* would save taxpayers money, as it is less than the approximately \$10,000 per pupil spent in the public schools.

### **Resources:**

- *Straight Talk on Public Education*
- *A Universal Education Savings Account Proposal: Fiscal Implications and Model Legislation*
- *Education Savings Accounts and Improving Oklahoma Student Achievement*

\*Model legislation available at [1889institute.org/model-bills/](http://1889institute.org/model-bills/)

# END HOSTAGE-TAKING BY GOVERNMENT EMPLOYEE UNIONS

## The Problem:

Although Oklahoma is a “Right to Work” state, it is beset by public sector unions—unions made up of government workers. Just a few years ago the state was hamstrung by a teacher strike, which saw schools close as teachers walked off the job. Government employee strikes undermine the sovereignty of the government, and by extension, the People. Unions increase the cost of government and decrease the quality of services by making it difficult to promote high-achieving employees and get rid of low performers. Government employee unions were long considered illegitimate in the American system, and have done little but frustrate efficient state government, including in Oklahoma, since they began organizing in the 1960s.

## Solutions:

### 1. ***End collective bargaining for government employment***

Other states have successfully ended public sector collective bargaining and strikes. The evidence shows these policies are better for the government *and* that employees actually receive a better deal in the process. Texas does not permit school districts to enter into collective bargaining agreements with teachers’ unions, and yet Texas teachers earn more than Oklahoma teachers and report greater job satisfaction. Indeed, the perennial threat from Oklahoma teachers’ unions is that their members will relocate to Texas for better employment opportunities.

“Right to Work” laws that enable employees to opt-out of union membership do not address the root issue—collective bargaining, itself. The state should prohibit any public official, state or local, from binding the government (and taxpayers, who have no direct role in bargaining) to a collective bargaining agreement.

### 2. ***Punish striking government employees severely enough to deter strong-arm tactics***

The remedy for government employee strikes is straightforward. The state should simply punish striking sufficiently to deter the conduct. Striking employees should automatically lose their jobs and pension benefits. If striking equates to holding the government hostage—it does—then the punishment ought to be commensurate with the crime.

## Resources:

- *Walking Out on School Kids: How Oklahoma Law Enabled the 2018 Teacher Strike, and How to Prevent the Next One*
- *Liberate Oklahoma from Union Tyranny* (forthcoming November 2020)

\*Model legislation available at [1889institute.org/model-bills/](http://1889institute.org/model-bills/)

# RESTORE THE COURTS AS GUARDIANS OF THE RULE OF LAW

## The Problem:

Appellate judges in Oklahoma routinely legislate from the bench rather than interpreting and applying the law as written. This judicial activism undermines the elected Legislature, degrades the Rule of Law, and limits individual liberty. The selection process for the judiciary has been captured by a financially conflicted interest group, the bar association. The result is courts ideologically to the left of the public that routinely rule in ways favorable to lawyers, as a class, and that frustrate the policy choices made by the Legislature.

The best efforts of legislators are for naught if the courts operate as policymakers instead of jurists. Signature legislative achievements have been eliminated by the Oklahoma Supreme Court, often years after the legislators who championed such reforms have retired from public service. Worse, the Court's inconsistent application of constitutional rules indicates that the most important factor determining whether a law will be upheld is whether it meets the personal policy preferences of the Justices, not whether it is permitted or disallowed by the Constitution. In sum, Supreme Court Justices view themselves as engaged in *legislating*, not judging, and will continue to behave in this manner until institutional incentives are corrected.

## Solution:

### ***A constitutional amendment fixing judicial selection***

The judicial nominating commission gives the bar a veto over who gets on the bench, and has been documented to result in judges taking the bench who are more ideologically left-leaning than the public.

Oklahoma should adopt the same system for selecting appellate judges as the American Founders laid out in the Constitution. The Governor should appoint judges, subject to confirmation by the Senate. This involvement by the elected branches would ensure that the unelected branch—the judiciary—bears at least some resemblance to the worldview of the people of the state. More importantly, it gives citizens recourse when the courts behave badly. The federal system also better preserves judicial independence, insulating questions of fundamental rights from popularity contest votes.

## Resources:

- *Legislators in Black Robes: Unelected Lawmaking by the Oklahoma Supreme Court*
- *Taming Judicial Overreach: 12 Actions the Legislature Can Take Immediately*
- *The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation*

\*Model constitutional amendment and legislation available at [1889institute.org/model-bills/](http://1889institute.org/model-bills/)

# REMOVE BARRIERS TO HONEST WORK THROUGH PRIVATE CERTIFICATION

## The Problem:

Occupational licensing is the most onerous form of government regulation of an occupation short of banning the activity outright. Requiring free individuals to get a permission slip from the government before they are legally permitted to pursue their trade is heavy handed, limits opportunity, and unjustly protects the powerful from competition. It is often sold as a way to safeguard consumers or to protect public safety, but it does neither well. Many on the Left and Right correctly criticize occupational licensing, but true reform is rarely achieved.

## Solution:

### ***Private certification in lieu of licensing***

Rather than attempting to knock down one unjust license at a time, the Legislature should create a default standard that occupations are not licensed unless an exceedingly persuasive justification is shown.

In place of onerous government licensing schemes, private certification should be allowed to flourish. This can be achieved through model legislation developed by the 1889 Institute with assistance from top lawyers at the Goldwater Institute. This model private certification law is a “win-win” for consumers and professionals alike. It provides the public with the information needed to evaluate practitioners and avoid harm, creates opportunity for workers, and opens up currently monopolized industries to competition, which lowers prices and improves quality. It also addresses a common concern about private certification—that uncertified fraudsters will abuse the “brand” of well-regarded certifying organizations—by allowing use of criminal fraud laws to prevent this practice.

This proposal separates itself from previous failed or weak-kneed efforts at reforming onerous occupational licensing schemes by inverting the entire construct of when a license is required for honest work. Doing so would usher in the best environment for worker freedom of any state in the country.

## Resources:

- *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing*, 1889 Institute and Goldwater Institute
- *Policy Maker’s Guide to Evaluating Proposed and Existing Occupational Licensing Laws*
- 1889 Institute’s Occupational Licensing Directory – See the link: [1889institute.org/issues/#search-issues+issues:oklahoma-licensing-directory+p:5](https://1889institute.org/issues/#search-issues+issues:oklahoma-licensing-directory+p:5)

\*Model legislation available at [1889institute.org/model-bills/](https://1889institute.org/model-bills/)



# CREATE REAL TRANSPARENCY IN GOVERNMENT

## The Problem:

Despite several decades of policy reforms aimed at increasing government transparency, the public is still largely in the dark about important aspects of government operation. Transparency advocates inside and outside of government, in all fifty states, have expended great effort, but often on the wrong things. The result is a haystack of government data that is largely unusable—and unused—by the citizenry. What is needed is easy public access to the important needles, not more piles of hay.

## Solution:

### ***True transparency over items that matter to citizens***

1889 Institute's publication, *A Vision for Transparency*, outlines a system that gives a streamlined window into the aspects of state government that matter, without regard to the “whiz-bang” aesthetics of many transparency websites. Citizens should, for example, be able to plug their address into a webpage that instantly tells them every level of government they are subject to. If the Institute's proposal were implemented, Oklahoma would, overnight, lead the nation in state government transparency. There would not be a close second.

An additional note warrants mention in any discussion about transparency. The Oklahoma Legislature's committee process leaves much to be desired. Testimony is rarely taken at all, and never opened to public participation. The process resembles an assembly line where the primary concern is with how many “finished” products (enacted bills) can be churned through the system (whether they are truly ready for prime time or not). Admittedly, today's legislators inherited this custom from previous legislatures, but they are not required to keep it. Rules changes are entirely in the hands of current legislators. Moreover, nothing stops individual committee chairmen from conducting their committee's business properly. They could start today.

## Resource:

- *A Vision for Transparency*

\*Model legislation available at [1889institute.org/model-bills/](http://1889institute.org/model-bills/)

# PASS/JOIN AN INTERSTATE COMPACT TO END CORPORATE WELFARE

## The Problem:

State policies that advance “economic development,” broadly defined, boil down to government support for businesses through subsidies. These usually take the form of preferential tax treatment, such as select tax credits, or direct grants of taxpayer money to specific firms or industries. There is broad consensus among economists that these programs are wasteful at best and actively damaging to a state’s economy at worst. In addition, they encourage cronyism and corruption by creating high stakes for the winners and losers of such policies.

Corporate welfare persists because states are locked in something akin to an arms race, competing with one another over who can give away more taxpayer money to favored businesses. The argument is that a state standing on principle will suffer if it unilaterally disengages from the arms race, as companies will locate in states that provide corporate welfare. Oklahoma is actively engaged in this arms race despite the reality that it cannot afford to outbid even its southern neighbor, which has vastly more resources, along with a coastline.

## Solution:

### ***An interstate compact to end corporate welfare***

The solution is a cease-fire in the corporate welfare arms race. An interstate compact between states that encourages good forms of tax competition and prevents subsidy-heavy corporate welfare would enable states to walk away simultaneously, mitigating the fear that they will be left behind. Such a compact would not become operative until enough states sign on that their representatives constitute a three-fifths majority of the United States Congress. Accordingly, Oklahoma can lead nationally on this issue by becoming the first compact state without the risk of unilaterally disarming.

## Resources:

- *Multilateral Disarmament: A State Compact to End Corporate Welfare*, 1889 Institute and Mackinac Center
- *An Interstate Compact to End the Economic Development Subsidy Arms Race*, Mercatus Center (cites 1889’s paper)

\*Model compact available at [1889institute.org/model-bills/](http://1889institute.org/model-bills/)

## REQUIRE PROPER TREATMENT OF HEALTH SAVINGS ACCOUNTS BY INSURANCE COMPANIES

### The Problem:

Health Savings Accounts (HSAs) were enacted in federal law in 2003 as a way to inject more market-like incentives into the health care system. There has long been a recognition that health care prices have risen excessively, and often make little rational sense, because third parties (government and insurance companies) pay the bills. Health care providers have little incentive to compete on price and consumers have little incentive to price shop. Unsurprisingly, providers have raised prices with impunity while insurers just raise their rates, also with relative impunity since insurance rates are mostly paid by employers and not by consumers.

HSAs allow individuals with high-deductible insurance plans to save, tax-free, and use those savings for health care expenses without paying taxes on the withdrawals. The intention was to make consumers more price sensitive and to make providers respond to that price sensitivity.

Insurance companies have discovered that they can undermine HSAs by forcing consumers to stay in-network and not allowing insured self-payers (those making purchases of health services without using their insurance card) to count such purchases toward the deductible. Most insurance companies will not accept a receipt from an insured consumer and count the purchase toward the deductible. This harms consumers, who can often obtain a lower cash price for services than the contract price their insurance company has negotiated.

### Solution:

***Require insurance companies to count any self-pay claim for a covered service toward a consumer's deductible, whether the service is in-network or not and whether the insurance card has been presented or not***

Such a law should allow insurance companies to count their average cost for a given procedure toward the deductible if it is lower than the price actually paid. But, they should also count their average cost for a given procedure toward the deductible if it is higher than the price actually paid. Also, insurance companies should be required to make their average costs for procedures transparent to consumers, not just the employers who pay premiums. It is, after all, ultimately the workers who are paying for health insurance since it is part of their compensation.

# UNDO MEDICAID EXPANSION

## The Problem:

Medicaid is a failed program. Not only does it consume an ever-increasing share of every state's budget, but the health outcomes of those on Medicaid are documented to be worse than those who have no health insurance at all. Perhaps no program better illustrates the failure of big, intrusive government, and yet, monied interests in Oklahoma pushed until they finally managed to drag the Obamacare Medicaid expansion across the finish line, but only barely.

In an extraordinarily low-turnout election, during a pandemic, with massive absentee balloting skewing heavily in favor of passage, State Question 802 was placed in the Oklahoma Constitution. It passed by fewer than 7,000 votes out of nearly 675,000 cast. Most of the absentee ballots were cast early, before a public education campaign occurred in the final week of the election. On election day, the "No's" decisively carried the day, indicating that at least some portion of the "Yes" vote would have changed course had they waited to cast their vote until election day. All these circumstances together indicate exceptionally soft public support. It is unlikely Medicaid expansion would receive an electoral mandate in an election conducted under normal circumstances.

## Solution:

***Re-submit Medicaid expansion to a vote of the people***, this time under more normal electoral conditions and with the benefit of a full public debate. If a constitutional amendment can be enacted with a razor-thin majority and without buy-in from the elected Legislature, then it is legitimate for the same amendment to be repealed before it takes effect, this time with the Legislature's opinion on the matter clearly expressed. Especially after the revenue hit the state will experience because of COVID-19, a down oil and gas industry, and legal uncertainties from the McGirt decision, expanding Medicaid is foolish policy. We need a re-do.

## Resources:

- *Medicaid Expansion in Colorado: An Exercise in Futility*
- *Obamacare Medicaid Expansion: Still a Bad Idea*
- *Think Carefully before Voting on SQ 802* (1889institute.org/blog/)
- *Undo 802* (1889institute.org/blog/)

## MEASURE SUCCESS & PRINCIPLES FOR SPENDING TAXPAYER DOLLARS

Every Legislator's principal duty is to make decisions about the expenditure of hard-earned taxpayer dollars. Legislators should ask these five basic questions when evaluating government programs and spending decisions:

1. Is a program or agency consistent with the mission of Oklahoma's state government?
2. Are the benefits from a program or agency unambiguous and universal?
3. Do the benefits of a program or agency indisputably outweigh the costs?
4. Is the program or agency fulfilling a need only government can effectively fill?
5. Does the existing program or agency show evidence of past success?

Unless the answer to each is "yes," the program should be excluded from the budget.

Far too often, public policy is judged by the amount of money spent or by the volume of new laws enacted related to the problem, without regard to whether the policy accomplishes anything positive. Legislators' well-intended desire to "do something" about a pressing issue, and intellectual laziness by journalists who find it easier to use superficial, often agenda-driven state rankings as substitutes for clear-eyed analysis, fuels this inclination. But it routinely leads to faulty conclusions about how effective programs and policies are. In fact, exorbitant spending often signals policy *failure*, not success. Programs that are inefficient are counterproductive from the taxpayer's standpoint, even if they achieve their stated ends. Few government programs can meet even this low standard, instead constituting expensive ventures that do not even reach their stated goals. Evaluating government policy, then, should include some measure of efficiency.

*Properly measuring policy success as a Legislator requires a humble view of what government is capable of in the first place.* With a realistic (i.e., modest) understanding of the role of government, the question for Legislators shifts from "Is this a problem the world should care about?" to "Is this a problem *government* can and should do anything about?" Only with this shift in mindset can Legislators truly live up to their oaths.

### Resources:

- *Rising Above Mere Politics: General Principles for Spending Taxpayers' Money*
- *Ten Top Tens: State Rankings Worth Pursuing*

# HONORABLE REPRESENTATIVE OF THE PEOPLE

## ***A Pledge***

Whereas, every individual I represent is equal before the law, a human being of inherent value, and worthy of equal representation regardless of personal characteristics, social or economic status, political affiliation, or connection to me personally, and

Whereas, all government officials owe a fiduciary duty to the citizens they serve, and

Whereas, the Rule of Law involves holding all, including the government and its officials and agents, as well as individuals and private entities, equally accountable under the law, and

Whereas, the Rule of Law requires that *all* laws are clear, publicized, stable, and just, are applied evenly to all parties who are similarly situated, and protect fundamental individual rights, and

Whereas, all individuals possess a fundamental right to liberty, physical security from external harm, and to own private property and keep the fruits of their own labor, and

Whereas, the Rule of Law requires that the process by which laws are enacted, administered, and enforced be accessible, transparent, and subject to good order, and

Whereas, a true public servant, while often receiving the esteem of the public, seeks it only insofar as he/she adheres to principle and refuses the temptations of directly creating or aiding in the creation of special favors or status for particular individuals, communities, classes, or businesses,

I, \_\_\_\_\_, do solemnly swear and affirm that, as an *Honorable Elected Official* in the office of \_\_\_\_\_, I will:

- Refuse any kind of gift or favor, regardless of monetary value, that might cause me to stray from truly representing the principles on which I was elected and the people who I represent,
- Hold myself and those appointed and employed within the government entity to which I have been elected strictly accountable to our mutual, undivided, and strict fiduciary duty to citizens,
- Vote in favor of laws that promote the Rule of Law, resist proposed laws that undermine it, and work to repeal existing laws inconsistent with the Rule of Law,
- Vote against laws that provide subsidies or tax benefits, regulations, programs, and measures that particularly favor certain individuals, businesses, industries, or the geographic region I represent if they undermine the Rule of Law, especially equality before the law,
- Conduct the public's business in public and in good order, making every effort to allow all voices to be heard within reasonable time constraints, and make sure the arms of government I am charged with overseeing does the same, and
- Adhere to these principles and stances even at the risk of losing the office to which I have been elected.

# 1889 INSTITUTE STAFF



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## WHY ARE WE NAMED THE 1889 INSTITUTE?

The 1889 Institute is named for Oklahoma's first land run, where pioneers gathered at a starting line and raced to claim unassigned tracts of land from the U.S. government. The land run typifies the American ideal of opportunity—readily available to anyone with the personal initiative to take it, but without expecting equal results. Regardless of one's station in life, no participant in a land run had an official advantage.

The land run illustrates 1889 Institute's commitment to fighting privilege granted by government and expanding opportunity where government has intruded excessively.



**1889institute.org**

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Nothing written here is to be construed as an attempt to aid or hinder the passage of any bill before the Oklahoma Legislature.