ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) MARC McCORMICK, AND (2) SCOTT JOHNSON, PROTESTANTS/PETITIONERS, v. (1) JANET ANN LARGENT, (2) ANDREW MOORE, AND (3) LYNDA JOHNSON, PROPONENTS/RESPONDENTS.	Case No. #119030

BRIEF IN SUPPORT OF APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE GIST OF INITIATIVE PETITION NO. 430

ROBERT G. MCCAMPBELL, OBA NO. 10390
GABLEGOTWALS
ONE LEADERSHIP SQUARE, 15TH FLOOR
211 NORTH ROBINSON AVENUE
OKLAHOMA CITY, OK 73102
TELEPHONE: (405) 235-5500

ATTORNEY FOR PROTESTANTS/PETITIONERS

SEPTEMBER 1, 2020

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I. INTRODUCTION

This action is filed by Marc McCormick and Scott Johnson (collectively "Protestants") because the gist of Initiative Petition 430 ("IP 430") is legally insufficient.

1. The proponents made two important changes to the language from their previous petitions, IP 420 and IP 426, in describing how the redistricting commission ("Commission") will draw new lines for legislative districts. It is now explicit that the Commission will use voting data from the previous ten years to determine whether a political party will have a "disproportionate advantage." This is a proportional representation scheme in which the Commission would draw districts so that each political party would get representation which is not "disproportionate." It is a political gerrymander. However, the gist reflects, as it did under IP 420 and IP 426 which used different language, that the purpose is to prevent political gerrymandering.

2. The gist fails to alert the reader that mid-decade redistricting will cause significant expense, disruption and confusion. While the gist does not need to reflect policy arguments, a voter deserves to know more than just there is "a process for the creation and approval of new redistricting plans within one year after approval of this Article."

3. The gist fails to disclose that when there are more than 48 senators in 2025 and 2026, the "extra" senators will be disproportionately in Oklahoma and Tulsa counties.

4. The gist fails to disclose that boundary lines for cities and counties would be deemphasized in drawing legislative districts.

5. The gist inaccurately reflects that the Panel selecting the Commissioner will select "~ 20" names in each of the three groups (members of the state's largest party, second largest party, and those unaffiliated with either party).

II. SUMMARY OF THE RECORD

The gist submitted by the proponents, Appx. at Tab A, (emphasis added) is as follows:

> This measure adds a new Article to the Oklahoma Constitution, **intended primarily to prevent political gerrymandering**. The Article creates a Citizens' Independent Redistricting Commission and vests the power to redistrict the state's House, Senatorial, and federal Congressional districts in the Commission (rather than the Legislature). The 9-member Commission will consist of 3 members from each of 3 groups, determined by voter registration: those affiliated with the state's largest political party; those affiliated with its second-largest party; and those unaffiliated with either. Commissioners are not elected by voters but selected according to a detailed process set forth by the Article: in brief, a panel of retired judges and justices designated by the Chief Justice of the Oklahoma Supreme Court will choose pools of **~20** applicants from each group, then randomly select 3 Commissioners from each pool. The Article sets forth various qualifications for Commissioners, Administrator, and Secretary, intended to avoid conflicts of interest (for example, they cannot have changed party affiliation within a set period, and neither they nor their immediate family may have held or been nominated for partisan elective office or served as paid staff for a political party or as a registered lobbyist in the last five years). It also **sets forth a process for the creation and approval of new redistricting plans within one year after approval of this Article**, and then again after each federal Decennial Census. This process includes, among other things, a method for counting incarcerated persons, public notice, and open meeting requirements. In creating the plans, the Commission must comply with federal law, population equality, and contiguity requirements, and must seek to maximize racial and ethnic fairness, respect for communities of interest, **respect for political subdivision boundaries**, and compactness (in order of priority). A plan shall not disproportionately advantage a political party when considered on a statewide basis, or consider the residence of any legislator or candidate except as necessary for the above criteria and requirements. The Article creates a fallback mechanism by which the state Supreme Court, using a report from the Administrator, will select a plan if the Commission cannot reach the required level of consensus within a set timeframe. It also sets forth procedures for funding and judicial review, repeals existing constitutional provisions involving legislative districts, codifies the number of state House and Senatorial districts, and reserves powers to the Commission rather than the Legislature. See attached Petition for further details.

III. ARGUMENT AND AUTHORITY

A. The Analysis of a Gist

1. Protection of Voters Asked to Sign

The right of initiative petition "is not absolute." There are constitutional and statutory, limits on the process. *In re Initiative Petition No. 420*, 2020 OK 10, ¶ 3. Because the ballot title is no longer circulated with the petitions, the gist "'is the only shorthand explanation of the proposal's effect.'" *Oklahoma's Children v. Coburn*, 2018 OK 55, ¶ 14, 421 P.3d 867, quoting *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 3, 376 P.3d 250. The gist now has an "enhanced significance." *Id.* at ¶ 14. As explained in *Oklahoma's Children, Inc. v. Coburn*, 2018 OK 55, ¶ 24:

- Potential signatories must be given "enough information to make an informed decision."
- "Fundamentally, the need for voters to be given enough information to make an informed decision is why this Court has historically taken a dim view of excluding important changes made to the law from the gist of a petition."

The protestants ask this Court to continue in its role of protecting voters who are asked to sign a petition.

2. Reallocation of Political Power

This Court has repeatedly recognized that giving notice of reallocation of political power is important in a gist. In *In re Initiative Petition 344*, 1990 OK 75, 797 P.2d 326, 330, this Court struck a gist which failed to disclose that the petition's effect would be to "increase the power of the newly elected Governor . . . ." Also, *In re Initiative Petition 384*, 2007 OK 48, ¶ 11, the Court explained, "The Protestants contend that these omissions mean that the gist failed to alert potential signatories to the effect the proposed statue would have on the balance of power between local school boards and the state. We agree."

When considering the first redistricting petition from these proponents, IP 420, the concurring opinion of Justice Winchester, joined by Vice Chief Justice Darby and Justice Kauger, also discussed the need of the gist to explain reallocation of power. "IP 420 shifts power in the redistricting process from the Legislature to the Oklahoma Supreme Court, something the gist ignores." *In re Initiative Petition 420*, 2020 OK 10, ¶ 1, (Winchester concurring). "The gist as written does not mention the Court, and from the gist alone, a potential signatory will not know that the Court will significantly be involved in redistricting." *Id.* at ¶ 2.

B. Insufficiencies In This Gist

1. IP 430 Would Require Proportional Representation

a. New Language in IP 430

IP 430 provides for a system of proportional representation in which the Commission would review a proposed map and data from previous elections and determine if the plan is proportionate for each party. IP 430 contains two critical changes from the proponents' previous petitions which make explicit that it would impose a proportional scheme. First, IP 420 and IP 426 both provided at § 4(D)(2)(b) that a redistricting plan shall not take into account the "voting history of the population of a district." That language has been deleted in IP 430. Instead, IP 430, § 4(D)(2)(a) now requires that the Commission "shall" use "data from the last ten years of statewide elections" in making its determination.

The second noteworthy change in IP 430 in this regard concerns the substantive criteria to be applied by the Commission. The proponents' first two petitions, IP 420 and 426 at § 4(D)(1)(c)(iii), provided, "No plan should, when considered on a statewide basis, unduly favor or disfavor a political party." However, the current petition states:

IP 430 at §4(D)(2)(a) (emphasis added)
A Plan shall not, when considered on a statewide basis, provide a **disproportionate advantage to any political party**. Disproportionate advantage to a political party shall be determined using the proposed map, data from the last ten years of statewide elections, and the best available, widely accepted statistical methods on identifying bias or inequality of opportunity to elect.

By requiring the Commission to determine what would be "disproportionate advantage to any political party" on a "statewide basis", IP 430 is explicit that it would institute a proportional representation system.

Also, add the two changes together: The Commission (a) "shall" use "data from the last ten years of statewide elections," (b) to "determine" (c) if "the proposed map" (d) will "provide a disproportionate advantage to any political party," (e) on a "statewide basis." It is a textbook proportional representation system in which the Commission's task would be to draw a map designated to give each party gets the number of legislative seats it deserves as determined by the Commission.

b. Proportional Representation

In considering the gist of proponents' second petition, IP 426, this Court provided a good description of proportional representation in *In re Initiative Petition 426*, 2020 OK 44, ¶ 17, *quoting Rucho v. Common Cause*, 139 S.Ct. 2484, 2499 (2019):

> The Court determined that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation" i.e., reapportioning district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.

That is what § 4(D)(2)(a) does. The U.S. Supreme Court also provided a good description of proportional representation in *Gaffney v. Cummings,* 412 U.S. 735, 752 (1973). There the Court considered a plan from Connecticut in which "virtually every Senate and House district line was

drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strength of the Democratic and Republican Parties . . . ."

A proportional representation plan is a political gerrymander; it is simply a bipartisan gerrymander. For example, in *Davis v. Bandemer*, 478 U.S. 109, 155 (1986)(O'Connor, J. concurring) it was explained that *Gaffney* represented a "bipartisan gerrymander". Indeed in *Gaffney,* one of the complaints about the plan was that it a "gigantic political gerrymander." 412 U.S. at 752. Similarly, in *Rucho v. Common Cause*, 139 S.Ct. at 2499, the Court described how a plan would accomplish "proportionality" by "engaging in cracking and packing, to ensure each party its 'appropriate' share of 'safe' seats." 139 S.Ct. at 2499, citing *Davis v. Bandemer,* 478 U.S. at 130-131.

The substantive criteria to be applied to drawing district lines makes a significant difference. As the Court in *Rucho v. Common Cause* noted, one conception could mean "a greater number of competitive districts." 139 S. Ct. 2484, 2500 (2019) (emphasis added). "But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party." *Id.* As the *Rucho* Court noted, a plan for an increase in competitive districts and a plan for proportional representation in the legislature are inconsistent goals. Proportional fairness "comes at the expense of competitive districts . . . ." *Id.* at 2499 (emphasis added). *Rucho* also noted that a plan for as keeping communities of interest or political subdivisions together will be inconsistent with an anti-gerrymandering goal in some instances. *Id.* at p. 2499. This is so because "the 'natural political geography' of a state—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts." *Id.* at p. 2499. The differing conceptions show how important it

is that the gist of IP 430 accurately describe the substantive criteria IP 430 would implement for drawing district lines.

c. Comparison to Gist in IP 420

In considering the gist of IP 420, *In re Initiative Petition 420,* 2020 OK 10, this Court found the gist to be insufficient. In particular, the Court ruled that it was particularly important that the gist mention that the Commission could not consider "the political party affiliation or voting history of the population of a district." The Court noted that language was "especially representative of the underlying purpose" of the petition. Here is what the Court explained:

> Section 4(D)(2)(b) of IP 420 removes from consideration "[t]he political party affiliation or voting history of the population of a district." Petitioners contend this provision is noticeably absent from the gist and its inclusion is necessary to reveal the purpose of the petition. We agree. Because this criterion is especially representative of the underlying purpose of the petition it should be, albeit briefly, mentioned.

In re Initiative Petition 420, 2020 OK 10, ¶ 8. Following the Court's opinion, the proponents filed IP 426 in which the gist was redrafted to (a) include language that the Commission could not consider party affiliation or voting history and (b) include that the petition's purpose is "to prevent political gerrymandering."

Now, IP 430 is the reverse. Instead of being prohibited from considering a district's voting history, the Commission is now required to consider the voting history. IP 430, section 4(D)(2)(a) provides that "disproportionate advantage" "**shall** be determined using the proposed map, [and] data from the last ten years of statewide elections . . . ." That issue—whether the Commission can consider voting history in a district—is still incredibly important, and the Court should use that same logic now that the language has been reversed:

- Just as it was important that IP 420 prohibited the Commission from considering a district's voting history, it is important that IP 430 requires the Commission to consider a district's voting history.
- Just as the prohibiting consideration of voting history in IP 420 was "especially representative" of the underlying purpose of IP 420 to prohibit gerrymandering, requiring consideration of the voting history of a district to determine disproportionate advantage is "especially representative" of the underlying purpose of IP 430 to allow gerrymandering (in the form of proportional representation).

With respect to the proponents' gist in IP 420, the Court noted that the gist "should inform 'a signer of what the measure is generally intended to do'" 2020 OK 10, ¶ 4, quoting *In re Initiative Petition 363*, 1996 OK 122, ¶ 20. The Court further noted that "the gist should be descriptive of the proposal's effect and sufficiently informative to reveal its design and purpose." *Id.* at ¶ 11 citing *In re Initiative Petition 384*, 2007 OK 48, ¶ 7. The Court should apply the same analysis here. To assert in the first line that IP 430 is "intended primarily to prevent political gerrymandering" is not "what the measure is generally intended to do" and does not "reveal its design and purpose."

Although the gist discloses that a plan "shall not disproportionately advantage a political party," that is insufficient. The gist leads with the statement that IP 430 is "intended primarily to prevent political gerrymandering," which is markedly misleading given the packing and cracking that will be necessary to achieve proportionality. Also, the phrase "disproportionate advantage" is insufficient for voters not involved in politics. The reader deserves to know that the Commission will look at prior voting data to predict how a proposed

map will affect the various parties. As noted in *In re Initiative Petition 420*, 2020 OK 10, ¶ 8, the issue of whether the Commission will consider voting history of a district is "necessary to reveal the purpose of the petition." Yet, it is not included in this gist. A neutral description could be drafted using the language in IP 430. Something like: "The Commission shall use data from the last ten years of statewide elections to determine if the proposed map will provide a disproportionate advantage to any political party."

This Court has repeatedly affirmed that a gist is "'not required to contain every regulatory detail so long as its outline is not incorrect.'" *In re Initiative Petition 420*, 2020 OK 10, at ¶ 4, *quoting In re Initiative Petition 409*, 2016 OK 51, ¶ 3. Here, the outline is incorrect. The statement that IP 430 is intended "primarily" "to prevent political gerrymandering" is inaccurate. Its purpose is to create proportional representation for the parties.

The cases discussed above concerning the need for a gist to disclose a reallocation of political power are pertinent as well. The proportional system proposed in IP 430 would deemphasize the importance of which candidates voters would support in the next election and enhance the importance of which parties voters supported in previous elections. It would also shift political power away from Libertarians and Independents, who can affect the outcome in competitive races, and toward the two largest parties. Just as the gist in IP 420 needed to disclose the enhanced role of the Supreme Court in redistricting, the gist in IP 430 needs to disclose the enhanced role of political parties.

In addressing the first petition by these proponents, this Court also noted that the gist must disclose the material changes to be made. "A potential signatory must be 'at least put on notice of the changes being made.'" *In re Initiative Petition No. 420*, 2020 OK 10, ¶ 4, *quoting In re Initiative Petition 409*, 2016 OK 51, ¶ 3. This principle too requires that this gist be

stricken. District lines drawn to achieve proportionality would be a huge change to our conception of democracy. "The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties." *Rucho,* 139 S.Ct. at 2502, n.1. A voter deserves at least notice of the massive change to the conception of democracy.

2. Insufficient Description of Mid-decade Redistricting.

The gist's only mention of mid-decade redistricting is that the petition "sets forth a process for the creation and approval of new redistricting plans within one year after approval of this article." That one clause is completely inadequate to apprise a voter of the issues that will arise with mid-decade redistricting. As shown in the brief challenging the constitutionality of IP 430, which is filed at the same time as this brief, mid-decade redistricting will cause a number of issues including (1) we will have more than 48 senators for two years, (2) precinct lines may not be done on time for the presidential primary in March 2024, (3) there will need to be a Special Session of the Legislature but there is no provision for how, or when, or by whom the Session would be called, (4) there may be no residency requirements in the 2024 elections. Although the gist does not need to include all of the details, a voter asked to sign the petition deserves some notice beyond "sets forth a process for creation and approval of new redistricting plans within one year after approval of this article."

A similar issue was fought with respect to IP 420. This Court held that merely telling voters that there is a "process for the selection of Commissioners" was insufficient and that voters deserved to know that the Commission would always contain three members of the largest party, three from the second largest party, and three unaffiliated. "Although the selection process need not be detailed, a simple statement concerning the selection and composition of the Commission is critical here to inform a potential signatory of the true nature

of the petition." *Id. at* ¶ 7. The same principle applies here. Merely saying "there is a process" for districting in the year following approval is insufficient.

The gist should include some neutral language disclosing that mid-decade redistricting will involve some dislocation and uncertainties.

3. Urban v. Rural

The gist is also insufficient in failing to provide any notice that when there are extra senators in 2025 and 2026, the benefit will occur primarily in urban areas. As explained in detail in the Application and Petition challenging the constitutionality of IP 430 and in the Brief is Support of that Application, IP 430 would result in Oklahoma having more than 48 senators during the years 2025 and 2026. The districts having extra senators will have an advantage. Those districts will be disproportionately be in Oklahoma and Tulsa counties because they are the most densely populated and the senators live closer to each other. When the Commission draws district lines without considering where the incumbents live, it is inevitable that incumbents will be drawn into the same district, and this will disproportionately occur in Oklahoma and Tulsa counties.

The gist should make some basic disclosure in this regard. In *Fletchall v. Rosenblum*, 442 P.2d 193 (Ore. 2019), a ballot noted that the "Commission over-represents rural areas." The court found that was not enough and ordered that a more robust description would be required. *Id.* at 200-201. In this case, the protestants would be satisfied with the non robust version. Simple notice that it is the districts in urban counties which would most likely get the benefit of having more than one senator would be sufficient.

Just as the gist in IP 344 needed to reflect that it would increase the power of the Governor and IP 384 needed to reflect the shift in the balance of power between school boards and the state, the gist for IP 420 should reflect the shift toward urban counties. If a gist is to

disclose the changes made by the petition, and a potential signatory allowed to make an informed decision, the gist should contain some notice that Oklahoma and Tulsa counties will be advantaged in 2025 and 2026. Something like: "Senators in excess of 48 will more likely be allocated in urban areas."

4. Cities and Counties Deemphasized

The gist fails to disclose that respecting boundaries of cities and counties will be deemphasized as compared to current law. IP 430 restricts the discretion permitted to account for political subdivision boundaries in redistricting. Courts have allowed a material amount of flexibility from strict population equality in drawing state legislative districts, and one of the reasons for allowing such flexibility is to allow for districts to be drawn with respect to city and county boundaries. *Wilson v. Fallin*, 2011 OK 76, *citing Reynolds v. Sims*, 377 U.S. 533, 579 (1964); *Mahan v. Howell*, 410 U.S. 315 (1973). A state legislative district is presumed to comport with Equal Protection if the difference between the largest and smallest district by population is no more than 10%. *Voinovich v. Quilter,* 507 U.S. 161-162 (1993). That is just a presumption. In *Mahan v. Howell*, for example, a redistricting plan was approved even though the difference between the largest district and the smallest district was 16%, and the Court specifically cited the desirability of accommodating political subdivision boundaries in allowing the plan. 410 U.S. at 321.

IP 430 would change that. Under IP 430, one of the criteria is: "No state legislative district's total population shall exceed that of any other district by more than 5%." § 4(D)(1)(b). Because flexibility in drawing state legislative districts will be materially reduced, there will be a diminished ability to respect political subdivision boundaries. The new 5% rule is "an important change to the law" and should not be "excluded" from the gist. *See Oklahoma's Children,* 2018 OK 55, ¶ 24.

Further, the gist is materially misleading because it reflect that one of the criteria in drawing district lines will be "respect for political subdivision boundaries." In fact, IP 430 will reduce respect for subdivision boundaries by cutting in half the flexibility allowed to accommodate those boundaries. This misleading description is exacerbated by the fact that the gist makes no mention of the new 5% rule that would be required in Oklahoma.

In *Oklahoma's Children, supra,* 2018 OK 55, ¶ 23, this Court struck a gist as inaccurate, because it discussed some of the taxes to be repealed, but omitted mention of the little cigar tax. Here the gist is similarly misleading because it mentions "respect for political subdivisions" but fails to mention the 5% restriction.

5. Confusion and Inaccuracy in Selection Process

Under IP 430, the "Panel" of retired judges and justices will select 20 finalists to be on the Commission from each of the three "Groups" (members of the state's largest party, the second largest party, and those unaffiliated with either). § 4(B)(4)(e). However, the gist says the Panel will choose "~20" applicants. The use of a tilde (~) in the gist, instead of language, creates confusion and does not provide sufficient information to allow a voter to make an informed decision. A tilde can mean several different things:

- A tilde can mean "the difference between." *Webster's Unabridged Dictionary,* Supplemental, p.129. Appx. at Tab K.
- It can be a diacritical mark used in Spanish. *Webster's Unabridged Dictionary*, p.1909; Appx. at Tab K.
- A tilde can mean "varies with" or "similar to". *Web Design Group*, p.4; Appx. at Tab K.
- A tilde can mean "approximately." *Bymath.com*, p.1; Appx. at Tab K.
- "Approximately" can also be symbolized by a double tilde. *Bymath.com*, p.1; Appx. at Tab K.

It is assumed here that ~ is intended to mean "approximately," but that should not be left to chance, depending on who is reading the gist. In order to allow a voter to make an informed decision, the gist should employ unambiguous words instead of symbols with multiple meanings. Further if the ~ is intended to mean "approximately," that opens another question of how close to 20 a number needs to be. Is 19 approximately 20? What about 22? Or 17? Again, a gist should inform a voter, and unambiguous language should be used.

Also, if ~ means "approximately," the gist is inaccurate. IP 430, at § 4(B)(4)(e) says the Panel will select 20—no more, no less. This is a material issue because of the way IP 430 is constructed. The three Commissioners from each Group will be selected randomly from among the finalists selected by the Panel. The members of the Panel then, are the only people able to exercise any discretion about who will be on the Commission. The discretion given to the members of the Panel is very broad, as they can eliminate applicants based on their assessments of a candidate's "ability to be impartial," and "ability to promote consensus." § 4(B)(4)(e). Because members of the Commission will be selected at random, the ability to eliminate a name or leave a name on the list is the most important decision point in the process. To include a 21st applicant on the list or to exclude an applicant so the list has 19 instead of 20, is a material issue. Also, if the tilde means "approximately" that creates confusion as to the Panel's role. Are Panel members supposed to be neutral or are they supposed to advocate to keep their favorite or, more importantly, eliminate a less favorite candidate?

This Court has repeatedly said that the gist should "mirror" the petition. *E.g. McDonald v. Thompson,* 2018 OK 25, ¶ 9. That is particularly important with respect to the exercise of discretion allowed for the members of the Panel. The gist here does not mirror the petition.

IV. CONCLUSION

The protestants here do not ask the Court to accept their policy arguments. They ask only for a gist which provides notice and allows voters to make an informed decision.

The Court should not entertain an argument that the gist is unimportant. "[T]he Legislature has deemed the gist a necessary part of the pamphlet, and we are not at liberty to ignore that requirement . . . ." *In re Initiative Petition 384, supra,* 2007 OK 48, at ¶ 13.

A properly drafted gist is "indispensable and noncompliance is fatal." *In re Initiative Petition No. 342*, 1990 OK 76, ¶ 11, 797 P.2d 331. "The gist is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition from the ballot." *In re Initiative Petition No. 409*, ¶ 7.

The gist of IP 430 is legally insufficient and should be stricken.

Respectfully submitted,

Robert G. McCampbell, OBA No. 10390
GABLEGOTWALS
One Leadership Square, 15th Floor
211 North Robinson Avenue
Oklahoma City, OK 73102
Telephone: (405) 235-5500
RMcCampbell@Gablelaw.com

Attorney for Protestants/Petitioners
Marc McCormick and Scott Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2020, a true and correct copy of the above and forgoing was served by email and hand delivery as follows:

D. Kent Meyers
Roger A. Stong
Melanie Wilson Rughani
CROWE & DUNLEVY, P.C.
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102

Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105-4897

Secretary of State's Office
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 101
Oklahoma City, OK 73105-4897

Robert G. McCampbell

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