

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) LAURA NEWBERRY, AND

(2) ELDON MERKLIN,

PROTESTANTS/PETITIONERS,

v.

(1) ANDREW MOORE,

(2) JANET ANN LARGENT, AND

(3) LYNDA JOHNSON,

RESPONDENTS/PROONENTS.

Case No. _____

**BRIEF IN SUPPORT OF APPLICATION AND PETITION TO
ASSUME ORIGINAL JURISDICTION AND REVIEW THE
GIST OF INITIATIVE PETITION NO. 420**

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I. INTRODUCTION

This action is filed by Laura Newberry and Eldon Merklin (collectively “Protestants”) because the gist of Initiative Petition 420 (“IP 420”) is legally flawed. As the Protestants’ Application sets out, IP 420 asks state voters to approve a plan to repeal the current constitutional legislative directive (that elected legislators reapportion districts for federal and state electoral districts) and replace it with a system that places that power within a Commission (made up of citizens who would be unelected, unaccountable to citizen oversight and selected at random by a group of retired judges). This is in an effort to eliminate the voters’ ability to influence the redistricting process by voting for their political party of choice. Yet, as the Court will see, none of these main considerations are explained or revealed within the gist of IP 420. The gist is misleading, inaccurate and not impartial; IP 420 should fail as a matter of law.

First, the gist fails to mention who will hold the power to select the Commissioners. *Second*, the gist fails to notify potential signatories that the Commissioners will not be selected by voters or accountable to voters. *Third*, the gist fails to mention that the process will severely restrict Commission membership based on prior political participation. *Fourth*, the gist fails to clearly state it will repeal portions of the Oklahoma Constitution. *Fifth*, the gist fails to notify potential signatories of IP 420’s purpose to repeal voters’ partisan preferences in redistricting. *Sixth*, the gist fails because it fails to set out that the Commission will under-represent Republicans and over represent those not affiliated with the two largest parties. Proponents’ failure to include a proper gist is fatal, and IP 420 should be found insufficient.

II. SUMMARY OF THE RECORD

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

This measure adds a new Article V-A to the Oklahoma Constitution. This new Article creates the Citizens' Independent Redistricting Commission and vests the power to redistrict the State's House of Representative and Senatorial districts, as well as its Federal Congressional Districts, in the Commission (rather than the Legislature). The Article sets forth qualifications and a process for the selection of Commissioners, a Special Master and a Secretary. It also sets forth a process for the creation and approval of redistricting plans after each Federal Decennial Census. In creating the redistricting plans, the Commission must comply with certain criteria, including federal law, population equality, and contiguity, and must seek to maximize compliance with other criteria, including respect for communities of interest, racial and ethnic fairness, respect for political subdivision boundaries, political fairness, and compactness. The Article creates a fallback mechanism in the event that the Commission cannot reach consensus on a plan 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 of Representative and Senatorial districts, and reserves powers to the Commission rather than the Legislature.

III. ARGUMENT AND AUTHORITY

PROPOSITION I: THE GIST OF THE PETITION IS LEGALLY DEFICIENT AND IP 420 SHOULD BE STRICKEN FROM THE BALLOT.

A. The Test

“The right of initiative petition is not absolute. There are limits, both constitutional and statutory, on the process.” *In re Initiative Petition No. 344*, 1990 OK 75, ¶ 14, 797 P.2d 326, 330. The pamphlet circulated for signatures must include a “gist” describing the effect of the Petition for those considering whether to sign. 34 O.S. § 3. Because the ballot title is no longer circulated with the petitions, the gist is “the only shorthand explanation of the proposal’s effect.” *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 3, 376 P.3d 250. It alone must “work to prevent fraud, corruption and deceit in the initiative process.” *Id.* ¶ 4. “[T]he gist must explain the proposal’s effect” and “should be sufficient that the signatories are at least put on notice of the changes being made . . .” *Id.* ¶ 3. Potential signatories, after reading

the gist, should be able to cast an informed vote. *In re Initiative Petition 384*, 2007 OK 48, ¶ 7, 164 P.3d 125.

B. The Gist of IP 420 is Legally Insufficient.

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. Because IP 420 attempts to combine multiple subjects, the gist is “diluted” and “misleading” resulting in it being deficient. *In re Initiative Petition No. 344*, 1990 OK 75, ¶ 13. IP 420’s gist is legally deficient, and IP 420 must be stricken.

1. The gist fails to specify who will select the Commissioners.

IP 420 would remove redistricting power from elected officials and place it with citizens. *See* Appl. at ¶¶ 19-20. Yet, the Petition is silent as to who will be responsible for selecting the Commissioners. The only reference in the gist states that “[t]he Article sets forth qualifications and a process for the selection of Commissioners” Without mentioning who will be selecting the Commissioners, the gist omits extremely material information related to the selection process.

In the *Voters First* case, an Ohio court struck down a ballot title which failed to provide information to voters about who selected the members of the redistricting committee. The court found that who appointed the committee was a “key element[] of the proposed constitutional amendment.” *State ex rel. Voters First v. Ohio Ballot Bd.*, 2012-Ohio-4149, ¶ 37, 133 Ohio St. 3d 257, 266, 978 N.E.2d 119, 127. The “who” is crucial to a voter’s determination because there is a vast difference between “conferring the authority to select Commission members on one elected official and authorizing a bipartisan panel of individuals to perform the selection.” *Id.* ¶ 34.

In assessing the advisability of IP 420, it will be of paramount importance to the potential signatories *who* will select the independent Commission. *Id.* ¶ 34 (“**It is axiomatic that ‘[w]ho does the appointing is just as important as who is appointed.’**” *Id.*). Leaving this crucial provision out of the gist does not provide a potential signatory with “sufficient information to make an informed decision about the true nature of the proposed constitutional amendment[,]” as required by law. *See In re Initiative Petition No. 409*, ¶ 3.

In accordance with the reasoning of *Voters First*, the failure to describe who is given power to execute the selection process within the gist is fatal and IP 420 should be stricken.

2. The gist fails to notify potential signatories that the Commissioners are not selected by citizens or accountable to citizens.

The gist is misleading in stating that it creates a “Citizens’ Independent Restricting Commission” without also mentioning that the Commission would not be selected by citizens or accountable to citizens. *Appl.* at ¶¶ 19-20. Instead, the Commission would be unelected, unaccountable to citizen oversight, and partially selected at random. The gist is silent as to these elements.

This Court has repeatedly rejected gists that misrepresent or omit relevant changes proposed by an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51, 376 P.3d 250 (gist did not give notice of limits on grocery stores’ ability to get wine licenses); *In re Initiative Petition No. 384*, 2007 OK 48, 164 P.3d 125 (gist failed to mention the change in authority of school superintendents); *In re Initiative Petition No. 344*, 1990 OK 75, 797 P.2d 326 (the gist listed only some of the changes being made to the operation of the Executive Branch). Merely setting out that the IP 420 “sets forth . . . a process for the selection of Commissioners” is insufficient to place potential signatories on notice of this substantial change.

A similar proposition in Michigan specifically informed potentially signatories of the political composition of the proposed committee, who was tasked with selecting the committee, and that the selection of Commissioners would be “randomly selected from a pool” after sorting into each political party delineated. Appx. at Tab G. The gist for IP 420 fails to provide the same information to potential signatories in Oklahoma in the gist of IP 420.

The gist is legally deficient as it fails to provide notice to potential signatories of the true effect of the legislation—placing redistricting power with an unelected Commission, selected through a process which is completely insulated from voter accountability. The gist should provide some sort of notice of this change.

3. The gist fails to disclose the limitations placed on those attempting to serve on the Commission.

IP 420 substantially limits citizens’ ability to serve as Commissioners in violation of the First Amendment. *See* Brief in *Gaddis et. al. v. Moore et. al.* also addressing IP 420. IP 420 would disqualify *any* individual if they or their family members exercised their constitutional right to (1) hold a partisan office, (2) run for office, (3) switch political parties, (4) serve as a lobbyist, (5) work for a political party or (6) work for the Legislature. These limitations are not even referenced within the gist, much less accurately explained.

“[D]istricting has. . . substantial political consequences.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (*quoting Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). The exclusion of tens of thousands of individuals covered by the excluded categories, severely burdens their First Amendment rights. Appx. at Tab D. Even if the Court does not find IP 420’s restraint on speech to be unconstitutional, potential signatories should at least receive notice of the burdens on their constitutional rights.

If the *sine qua non* of respondents' interest is the exclusion of partisanship and instead the selection of an independent Commission, then it should be clearly expressed in the gist of the petition. Based on this deficiency potential signatories cannot make an informed decision and the gist is insufficient.

4. The gist fails to clearly state it will repeal portions of the Oklahoma Constitution.

The gist fails to accurately notify potential signatories that IP 420 will amend significant and non-obvious portions of the Oklahoma Constitution. Appl. at ¶ 22. In considering a constitutional amendment reallocating the reapportionment power, an Oregon court expressly found that downplaying a constitutional repeal was fatal to a ballot title. "Simply stating that the new Commission "replaces" redistricting by the legislature does not convey that [the amendment] would repeal the present constitutional directive assigning reapportionment to the legislature." *Fletchall v. Rosenblum*, 365 Or. 527, 529, 448 P.3d 634, 635 (2019). The same is true here.

First, the current provisions for setting forth the criteria for redistricting, Art. V, § 9A and 10A, Okla. Const., would be repealed and replaced with *different* criteria. Second, the current Bipartisan Commission on Legislative Apportionment, Art. V5, § 11A-11E, would be repealed and replaced. This extinguishment of power should be properly established as a repeal of the prior system.

The gist of IP 420 should provide notice that a vote for this measure would repeal the present constitutional directive on redistricting as well as amend significant portions of seemingly unrelated articles. Instead it only mentions that IP 420 "adds a new Article V-A to the Oklahoma Constitution." The only mention of "repeal" within the gist references that IP 420 would "repeal[] existing constitutional provisions involving legislative districts." As in

Fletchall, this falls short of notifying potential signatories of the true effect of the petition and is legally inadequate.

5. The gist fails to notify potential signatories of IP 420's purpose to repeal partisan influence in redistricting.

The intended purpose of the proposed amendment (removing the influence of political parties in redistricting) is not referenced in the gist. *See Appl.* at ¶ 23. The gist sets out the criteria which the Commission either “must” follow or should “maximize compliance with,” but is silent as to items the Commission “shall not take into consideration.” These items go to the heart of the purpose behind the proposed article. IP 420 requires that the redistricting plan “shall not” consider “the political party affiliations or voting history of the population of a district.” § 4(D)(2). Indeed, this criterion is central to IP 420's purpose, but the gist provides no notice of it.

In *Oklahoma's Children, Our Future, Inc. v. Coburn*, this Court recognized that omitting relevant portions of the Petition within the gist, should be grounds for invalidating the gist as incomplete. 2018 OK 55, ¶¶ 18-23, 421 P.3d 867, 872-74; *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 6, 376 P.3d 250, 253. The gist here directly fails to set out the “purpose of the petition.” *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, 797 P.2d 326, 330.

The elimination of partisanship appears to be the primary intent of IP 420, but it is nowhere mentioned in the gist. The purpose of IP 420 must be included in the gist under this Court's precedent in *In re Initiative Petition No. 344* and *Oklahoma's Children, Our Future, Inc.* Because the gist fails to include these restrictions, it is legally inadequate.

6. The gist fails because it fails to set out that the Commission will under-represent Republicans and over represent those unaffiliated with the two largest parties.

The gist is deficient in failing to disclose that the Commission will necessarily over represent some groups and under-represent other groups. *See* Appl. at ¶ 24; *see also* Appx. at Tab C. As mentioned above, a reference that the IP 420 “sets forth qualifications” is insufficient to place the potential signatories on notice of the composition of the Commission. The makeup of the proposed Commission will include nine members composed of three “Groups”: (a) three Commissioners will be Republicans, (b) three Commissioners will be Democrats and (c) three Commissioners will be Unaffiliated (i.e. Libertarian or Independent). Each category will have 33⅓% of the Commissioners. § 4(B)(4)(g) and (i). As of January 15, 2019, voter registration in Oklahoma was (a) Republican 1,008,775 (47.4%), (b) Democrat 777,770 (36.6%), and (c) 340,352 (16.0%) Unaffiliated (Libertarian plus Independent). Appx. at Tab C.

Therefore, the “effect” will be that Republicans will be under-represented by 14%, Democrats will be under-represented by 3%, and the Unaffiliated category will be over-represented by 17%. The gist is deficient as it does not disclose that the Commission will not reflect voter preferences as to party affiliation, but instead be constructed such that the two largest political parties will be under-represented while the smallest party and independents will be over-represented.

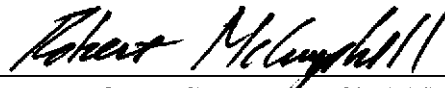
IV. CONCLUSION

This Court has regularly protected the process by ensuring a gist provides notice of the changes being made and explains the proposal’s effect. *E.g., In re Initiative Petition 409, supra; In re Initiative Petition 384, supra.* Protestants here do not ask that advocacy language

be included, but only that some neutral language providing notice of the significant changes should be included.

The deficiencies in the gist described above are egregious and go to the heart of the process, purpose and effect of IP 420. Potential signatories are entitled to some notice of what IP 420 would do so they can make an informed decision. The Court should hold that the gist is legally flawed and declare Initiative Petition 420 to be insufficient as a matter of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2019, a true and correct copy of the above and forgoing was served by hand delivery as follows:

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