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LAURA NEWBERRY and ELDON MERKLIN, Protestants/Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents/Proponents.	)	Sup. Ct. Case No. 118,406

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RESPONDENTS/PROPONENTS ANDREW MOORE, JANET ANN LARGENT AND LYNDA JOHNSON'S BRIEF IN RESPONSE TO APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE GIST OF INITIATIVE PETITION NO. 420

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December 5, 2019

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INTRODUCTION

In addition to the separately filed constitutional challenge to Initiative Petition 420, Petitioners Laura Newberry and Eldon Merklin ("Opponents") have also filed a perfunctory challenge to the short and simple statement of the "gist" of the Petition, set forth in the top margin of its signature page. Opponents do not contend that the gist of the Petition is inaccurate or misleading; it is plainly not. Rather, they contend only that the gist is not, in their view, *sufficiently detailed*—or, more precisely, does not contain all the details about the Petition that Opponents would have preferred to have been included.

Yet Oklahoma law makes quite clear that every detail of a Petition need not be included in a gist, and affords substantial deference to the initiative's proponents in determining which such details to include. Thus, Opponents are forced to rely almost exclusively on cases from other states to support their contentions. But these cases from other jurisdictions do not even address the "gists" of the petitions at issue. Rather, they address their separate ***ballot titles***—a very different part of the initiative process, with a very different purpose, and governed by very different standards. This Court has repeatedly made clear that the standard for reviewing the gist—a simple, shorthand description of a measure—is far less exacting, and a gist "need not satisfy the more extensive requirements for ballot titles." *In re Init. Pet. No. 362*, 1995 OK 77, ¶ 10, 899 P.2d 1145. Opponents' proffered authorities, therefore, are entirely inapposite here.

At bottom, Opponents' objections boil down to ***policy arguments*** best suited for the public debate about the initiative—not for the few brief sentences at the top of the signature page. The "gist" of the Petition here is exactly what it should be: a short, "simple" statement of the gist of the proposal, designed to fit in the top margin of the signature page and thereby prevent fraud in the initiative process. Proponents respectfully request that the Court deny the

gist challenge and permit the signature-gathering process to begin, so the Petition may timely proceed to a vote of the People.

ARGUMENT AND AUTHORITIES

I. Standard of Review: The Statement of the Gist Must, and Need Only, Be Simple

"The first power reserved by the people is the initiative." Okla. Const. Art. 5, § 2. Time and time again, this Court has thus recognized that "[t]he right of initiative is precious to the people," and "one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *In re Init. Pet. No. 348*, 1991 OK 110, ¶5, 820 P.2d 772. "The people reserved to themselves the power to propose laws and amendments to the Constitution," and this reserved power "should not be crippled, avoided, or denied by technical construction by the courts." *Id.* ¶ 6 (citation omitted). Accordingly, "[a]ll doubt as to the construction of pertinent provisions is to be resolved in favor of the initiative." *Id.* ¶ 5.

Pursuant to Oklahoma statute, an initiative petition must contain a "simple statement of the gist of the proposition . . . on the top margin of each signature sheet." 34 O.S. § 3. The statute sets forth no substantive requirements for this "gist," other than that it be "simple." *Id.* This Court has noted that the gist "should be sufficient that the signatories are at least put on notice of the changes being made," and "must explain the proposal's effect." *McDonald v. Thompson*, 2018 OK 25, ¶ 6, 414 P.3d 367, 371 (internal quotation marks omitted). However, this Court has also made clear that "[t]he gist need not satisfy the more extensive requirements for ballot titles," *In re Init. Pet. No. 362*, 1995 OK 77, ¶ 10, and "[i]t is not necessary for each signatory to be fully aware of every detail of a petition." *In re Init. Pet. No. 347*, 1991 OK 55, ¶ 37, 813 P.2d 1019. "The gist need only convey the practical, not the theoretical, effect of the proposed legislation, and it is not required to contain every

regulatory detail so long as its outline is not incorrect." *In re Init. Pet. No. 409*, 2016 OK 51, ¶ 3, 376 P.3d 250 (internal quotation marks omitted).

The limited scrutiny this Court applies to the gist (as opposed to, e.g., the separate ballot title) must be considered against the backdrop of the required form of the petition. Each page containing the gist must be followed by "twenty numbered lines for signatures." 34 O.S. § 2. By necessity, then, "[t]he gist of a proposition must be short," and "can contain no more than a shorthand explanation of a proposition's terms." *Init. Pet. No. 362*, 1995 OK 77, ¶ 10; *see also Okla. Indep. Petroleum Ass'n v. Potts*, 2018 OK 24, ¶ 7, 414 P.3d 351 (Wyrick, J. concurring). Further, the gist appears on a signature sheet that is *attached to the Petition itself.* The summary in the top margin thus prevents "fraud" or "deceit" in the petition process by ensuring that a blank signature sheet is not circulated under the guise of an unrelated matter and then attached to the petition; however, its purpose is not to explain every aspect of the proposal. If signatories have questions concerning issues raised in the gist, they need only turn the page and review the complete text of the proposed law. *Thompson*, 2018 OK 25, ¶ 10; *see also Initiative Pet. No. 365*, 2000 OK 47, ¶7, 9 P.3d 78. Absent obvious misstatements, then, the risk of a signatory being "misled" by the gist is limited, and scrutiny of the gist therefore is as well. *Id.*

II. The Statement of the Gist Is Legally Sufficient

The statement of the gist of IP420 provides a "shorthand explanation" of the terms of the proposal that is properly descriptive of its effect: to place redistricting authority with the Commission, rather than the Legislature, and otherwise reform the redistricting process. Where, as here, the gist generally puts potential signatories on notice of the changes being made and is "free from the taint of misleading terms or deceitful language," it must be upheld. *Thompson,* 2018 OK 25, ¶ 8 (internal quote marks omitted).

A. The Gist Need Not Include Every Detail of the Process for Selecting Commissioners

In their first and second propositions, Opponents contend that the gist of IP420 is insufficient because it "is silent as to who will be responsible for selecting the Commissioners," Br. at 3, and it "fails to notify potential signatories that the Commissioners are not selected by citizens or accountable to citizens," Br. at 4. This is incorrect.

IP420 sets up a complex, lengthy process for selecting the nine Commissioners and three Alternates. *See* IP420, § 4(B)(4)(a)-(i). In brief, the Chief Justice of this Court first selects from its Administrative Office a Special Master to act as a disinterested party to develop an application form, advertise the positions, and oversee the application process. The Chief Justice then designates three retired judges or justices to serve as a Panel to review applications. In public meetings, the Panel sorts the applicants into three buckets, or Pools (those affiliated with the state's largest political party; those affiliated with its second largest political party; and those not affiliated with either of those parties), and, according to set criteria, selects up to 20 of the most qualified applicants from each, while attempting to ensure that the Pools reflect geographic balance and various other types of diversity. The Panel then chooses, by lot, two Commissioners (as well as an Alternate) from each of these three Pools. Then the initial six Commissioners, by two-thirds majority, choose one more Commissioner from each Pool, again giving due consideration to ensuring the diversity of the Commission. *Id.*

Opponents would have the gist explain this process in detail, as well as gratuitously state (incorrectly[1]) that the Commission "would not be selected by citizens or accountable to

[1] The Commissioners, of course, would *themselves* be citizens, selected according to a process created and approved by citizens, and whose work will be reviewed under criteria drafted by citizens.

citizens." Br. at 4. As the 12-line abbreviated description above itself illustrates, however, it would be effectively impossible to do so and still have room on the signature page for the required number of actual *signatures*.[2] Fortunately, such explanation and commentary are not required by Oklahoma law.

As this Court has repeatedly emphasized, "*[t]he measure's gist is not required to contain every regulatory detail so long as its outline is not incorrect.*" *In re Init. Pet. No. 363*, 1996 OK 122, ¶ 20, 927 P.2d 558 (emphasis in original); *see also, e.g., Init. Pet. 362*, 1995 OK 77, ¶ 10. Here, the gist makes clear that the measure would vest redistricting authority in a "Citizens' Independent Redistricting Commission (rather than the Legislature)," and it notifies potential signatories that the Petition "sets forth qualifications and a process for the selection of Commissioners." App. A at 12. If potential signatories would like to delve into the regulatory details of how the Commissioners are selected, they can simply turn the page and review the complete text of the proposed law. *See Init. Pet. No. 365*, 2000 OK 47, ¶7 (the requirement that all signature sheets be attached to the petition is to ensure voters are able to examine the exact text of the proposal).

In support of their contention, Opponents rely primarily on a case from Ohio, applying Ohio law—and Ohio law regarding the sufficiency of a ***ballot title***, at that. *See* Br. at 3-4 (citing *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St. 3d 257, 266, 978 N.E.2d 119 (2012)). In Oklahoma, however, the gist is not the ballot title. And this Court has made clear that the standard for reviewing a gist is far less exacting. *See In re Init. Pet. No. 362*, 1995 OK 77, ¶10; *In re Initiative Pet. No. 363*, 1996 OK 122, ¶¶18-20; *In re Init. Pet.*

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[2] Of course, the gist is so detailed already that it barely fits, as required, in the top margin of the signature page. Opponents decline to identify what items they would omit from the gist as currently constituted to make room for their preferred details.

No. 341, 1990 OK 53, ¶24, 796 P.2d 267; *see also In re Init. Pet. No. 384*, 2007 OK 48, ¶ 9, 164 P.3d 125 ("We have continued to distinguish the gist from the more-detailed title, describing it as a shorthand explanation of a proposition's terms."). Unlike the ballot title, which is the only information given to voters in the ballot box, the gist appears on a signature page that is attached to ***the Petition itself***, so the risk of confusion or deceit is limited. Further, the gist—which must fit in the top margin of each signature page—by necessity can contain no more than a "shorthand explanation of a proposition's terms." *Id.* (internal quote marks omitted). It is well established, therefore, that so long as it "informs a signer of what the measure is *generally* intended to do," *Init. Pet. No. 363*, 1996 OK 122, ¶¶18-20 (emphasis added), the gist is sufficient: it "need not satisfy the more extensive requirements for ballot titles." *In re Init. Pet. No. 362*, 1995 OK 77, ¶10.

The Ohio case relied upon by Opponents, moreover, was effectively in the opposite procedural posture as the case here. It was not an endeavor to keep a measure *off* the ballot: rather, it was an action brought by the *proponents* of an initiative, who felt that the condensed ballot title subsequently drafted by the state's ballot board did not adequately communicate to voters their chosen process for selecting Commissioners (along with other details they found important). Notably, in Ohio, the default rule is that the *entire text* of the initiative is printed on the ballot for voters to review; thus, if the ballot board chooses to approve "a condensed text" instead, Ohio law requires that "any omitted substance of the proposal must not be material." *Voters First*, 133 Ohio St. 3d at 265. This does not even resemble the law in Oklahoma for a ballot title—much less a gist.

Finally, Opponents point to the fact that proponents of a redistricting proposition in Michigan chose to explain the political composition of the proposed Commission, as well as

the fact that there would be random selection from pools of applicants. Br. at 5. But when the Michigan drafters chose to include these details, they did so at the expense of including any discussion of other parts of their proposal—for example, any explanation of the new criteria to be used in redistricting, as set forth at length in the initiative; as well as, e.g., any mention of funding; judicial review; notice and comment requirements; voting thresholds and rank-choice voting procedures; repeals of existing provisions; and a provision reserving powers to the Commission rather than the Legislature. *See, e.g.*, full text of Michigan Proposal 18-2, *available at* https://www.michigan.gov/documents/sos/Full_Text_-_VNP_635257_7.pdf. As then-Justice Wyrick recently explained, "[c]rafting a statement of the gist is ... an inherently subjective exercise, requiring judgment calls as to what stays and what gets cut in order to boil down a lengthy proposition ... into a simple statement of "the pith of the matter" capable of fitting in the 'top margin' of a signature page." *Potts*, 2018 OK 24, ¶ 7 (Wyrick, J. concurring). Opponents do not point to any case that would suggest the Michigan drafters' approach is preferable (or even acceptable)—much less *required.*

B. The Gist Need Not Describe in Detail the Qualifications for Commissioner

Opponents next urge that the gist of the Petition is insufficient because it does not describe, to the level of detail they would prefer, the requirements for service on the Commission. Br. at 5. Like the provisions establishing the selection process, however, the provisions setting forth qualifications for positions on the Commission are quite lengthy, and "*[t]he measure's gist is not required to contain every regulatory detail.*" *In re Initiative Pet. No. 363*, 1996 OK 122, ¶ 20 (emphasis in original); *see also* § II(A), *supra.*

It is not as if the qualifications to which Opponents object are hidden from potential signatories. To the contrary: the gist expressly states that the proposed amendment "sets forth

qualifications" for the Commissioners, putting potential signatories on notice of these restrictions. App. Tab A at 12. If potential signatories want to know more about the qualifications referenced in the gist, they need only turn the page, flip to the subsection entitled "Qualifications," and read the text of the Petition. App. Tab A at 2-3 (setting forth these qualifications at length). *See supra*.

Invoking their related *Gaddis v. Moore* First Amendment challenge (Br. at 5), Opponents obliquely suggest that these particular details of the Petition are somehow uniquely material, such that they must be set forth at length. They offer no authority for this assertion, however. As explained in Proponents' Response to Opponents' First Amendment challenge (*see* Resp., Sup. Ct. No. 118405), qualifications like these are quite common, and do not violate the First Amendment. The qualifications for service on the Commission do not prevent anyone from speaking or associating with whoever they please; they simply prevent certain individuals with clear conflicts of interest from serving as Commissioners. Proponents are not required to voice Opponents' (misguided) First Amendment concerns in the gist. *Cf., e.g.*, *Thompson*, 2018 OK 25, ¶ 14 (rejecting similar argument that the gist was inadequate because it failed to disclose that its provisions would "upset the balance of power and usurp a role traditionally held by the Legislature," noting that "Protestants' arguments in this instance are in reality little more than policy arguments against the proposal, and would be more appropriately made to the public").

Indeed, even if the gist had failed to mention the qualifications for Commissioners altogether, it would not necessarily be fatal: recently, in *McDonald v. Thompson*, 2018 OK 25, the Court made clear that the omission of "one substantive detail"—even a pretty major one, like the fact that an initiative to increase the gross production tax would have applied to

wells drilled as far back as three years earlier, and thus was arguably impermissibly retroactive—did not warrant striking the petition. As Justice Kauger noted in her concurring opinion, although "the gist fails to discuss retroactivity with specificity" and "could certainly be written more clearly," proponents are entitled to substantial deference when deciding what details should be included, and "any ambiguity can be clarified by the ballot title so that voters will have the opportunity to cast an informed vote." *Id.* at ¶ 1 (Kauger, J. concurring).

Similarly, in *Initiative Petition No. 363*, 1996 OK 122, ¶¶ 19-20, which upheld a petition that legalized casino gambling, the gist made no mention whatsoever of a number of substantive provisions—e.g., that the measure would impose a 5 year moratorium on most gaming, as well as make gambling debts subject to civil liability. The court found it nevertheless sufficient:

> The sole question presented for the court's determination is whether *the absence of a more detailed gist statement* about the phase-in aspects of the gaming facilities in the 73 counties, the distribution of casino tax revenues and the legalization of gaming-related civil liability, without more, perpetrates a fraud on the signatories. The "gist" at the top of the petition states:
>
> > The gist of the proposition is: This measure would authorize regulated casino gaming by adding a new article to the State Constitution; the casinos would pay a 10% gaming fee to the State, which, after funding the Gaming Commission, would go: 50% to public elementary and secondary schools statewide, 25% to local governments where the casinos are located, and 25% to correctional institutions.
>
> The flaw, if any there be, in the omission of the complained-of details is not critical to protecting the initiative process from fraud. *The measure's gist is not required to contain every regulatory detail so long as its outline is not incorrect.* The text of the gist prepared in this case-required by § 3 to be in simple language-informs a signer of what the measure is generally intended to do, i.e., "authorize regulated casino gaming by adding a new article to the State Constitution". We therefore approve the text of the challenged gist statement as free from the taint of misleading terms or deceitful language.

Id. (emphasis in original). Here, of course, the gist *does* mention the fact that there are qualifications for Commissioners; this is more than sufficient under Oklahoma law.

C. The Gist Makes Quite Clear that it Will Repeal Portions of the Oklahoma Constitution

Opponents next criticize the gist for failing to state "clearly" enough, in their view, that the measure would "repeal portions of the Oklahoma Constitution." Br. at 6. But the gist is quite clear. In addition to explaining, *inter alia*, that the measure would create the Citizens' Independent Redistricting Commission and vest the power to redistrict "in the Commission (rather than the Legislature)," the gist goes on to state expressly that the measure "repeals existing constitutional provisions involving legislative districts." App. Tab A at 12.

Opponents fault the gist for not describing in detail the existing law that would be repealed and replaced: specifically, the current criteria for state legislative redistricting, set forth in Art. V, § 9A, and the current (though never-before used) "fallback" mechanism, the Bipartisan Commission on Legislative Apportionment, set forth in Art. V, § 11A-11E.[3] *See* Br. at 6. Again, the gist is a simple statement that must fit in the top margin of the signature page. The gist here makes clear that it vests the power to redistrict in the newly created Commission rather than the Legislature and "repeals existing constitutional provisions involving legislative districts," and it describes in detail the new criteria that must be considered by the new Commission. There is no requirement that the gist *also* describe in detail the substance of the law that is being *replaced*.

In support of their position, Opponents again look to a case from another state interpreting a ballot title, not a "gist." Br. at 6 (citing *Fletchall v. Rosenblum*, 365 Or. 527, 529, 448 P.3d 634, 635 (2019)). Once again, however, the standard for evaluating ballot titles is quite different. As the only information available to voters at the ballot box, ballot titles are reviewed much more carefully by courts in order to ensure that all material information is

[3] Indeed, neither this backup mechanism nor the more partisan one that existed before it has ever been employed. The Oklahoman, "Our SQ choices," Oct. 17, 2010.

conveyed; furthermore, as ballot titles are drafted by the Attorney General or other state figure and can be easily amended without striking the petition itself, courts are much less hesitant to require revisions. *See supra* Section II(A); *see also, e.g., Fletchall*, 365 Or. at 528 (noting this was the *second* revision of the ballot title).[4] This is not the case with the gist. As explained above, so long as the gist is accurate and not misleading, proponents are entitled to substantial deference in determining which details should be included in the simple statement in the top margin of the signature page.

D. The Gist Properly Reveals the "Design and Purpose" of the Initiative

Next, Opponents declare that the "intended purpose of the proposed amendment" is to "remov[e] the influence of political parties in redistricting," and then submit that the Petition is deficient for failing to expressly identify this "purpose" in the gist. Br. at 7. This is incorrect, both as to the facts and the law.

Initially, as explained in Proponents' Response to Opponents' related constitutional challenge, the purpose of the initiative is not to "remove the influence of political parties" (indeed, seats on the Commission are specifically reserved for members of both of the two largest political parties in the state). Rather, the purpose of the initiative is to safeguard against and combat improper partisan gerrymandering. The initiative furthers this general purpose in several different ways: among other things, it vests the power to draw district lines in a balanced, independent Commission made up of citizens rather than the Legislature; it sets forth qualifications and a selection process for Commissioners designed to minimize

[4] Notably, though the initiative petition at issue, Oregon Initiative Petition 5 (2020), required county commissioners to appoint Commissioners and the Supreme Court to determine the appropriate districts in the event of a failure by the Commission, the Court was unconcerned about the fact that the ballot title omitted any reference to these provisions. *See id.*; http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20200005..LSCY YYREDISTRICT.

partisan influence and conflicts of interest; and it requires the Commission to follow a specified process and seek to maximize certain redistricting criteria including, *inter alia*, respect for communities of interest and political fairness.[5] Although the gist does not expressly identify a "purpose" of the initiative, it is not required to: its necessarily brief description of the Petition's effect is certainly "*revealing of* the design and purpose of the petition" (*Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶ 13, 421 P.3d 867, 871; *In re Initiative Petition No. 344*, 1990 OK 75, 797 P.2d 326, 330), which is all the cases cited by Opponents require. *Ibid.*; *see also, e.g., In re Initiative Pet. No. 363*, 1996 OK 122, ¶ 20; *In re Initiative Pet. No. 348, SQ No. 640*, 1991 OK 110, ¶ 23, 820 P.2d 772.

E. The Gist Is Not the Place to Discuss Opponents' Policy Arguments

Finally, pointing out that, while Republicans currently make up 47.4% of registered voters in Oklahoma, they would receive only 33.3% of the Commission seats; while Democrats currently make up 36.6% of registered voters, they would receive only 33.3% of the Commission seats; and while Libertarians and Independents make up 16% of registered voters, the "Unaffiliated" group would receive 33.3% of Commission seats,[6] Opponents assert that the gist is deficient because it does not "disclose that the Commission will necessarily over represent some groups and under-represent other groups." Br. at 8.

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[5] In furtherance of this purpose, the initiative also, e.g., prohibits the Commission from considering incumbents' residences and party affiliation or voting history of the population of a district, except when evaluating the requisite criteria (§ 4(D)(2)); mandates public hearings be held in each Congressional District to seek public input (§ 4(C)(2)); requires the Commission to publish data in digitally readable format on its website for public use and comment (§ 4(C)(3)); provides that incarcerated individuals should be counted in their home communities (§ 4(C)(3)(a)); and sets forth specific voting requirements (§ 4(E)). As explained above, however, these details need not all be described in the gist.

[6] Notably, Opponents' statistics do not consider the many unregistered voters who, by definition, are unaffiliated with any of these political parties.

This is nothing but a thinly veiled policy argument by Opponents against the Commission—and not a very good one, at that. Though Opponents feign neutral concern about the over- and under-representation of various groups, this over- and under-representation is *even more pronounced* with respect to the body *currently* in charge of redistricting. While Republicans make up 47.4% of registered voters, they hold **76.2%** (77 of 101) of the seats in the House of Representatives; Democrats, though making up 36.6% of registered voters, hold only 24.8% (24 of 101) of House seats, and Libertarians, Independents, and other unaffiliated individuals hold none. The Senate is even worse: while Republicans make up 47.4% of registered voters, they hold **81.3%** (39 of 48) of the Senate seats; Democrats, though making up 36.6% of registered voters, hold only 18.7% (9 of 48), and Libertarians, Independents, and other unaffiliated individuals hold none.[7] This dramatic over- and under-representation in the Legislature is at least in part ***the result of gerrymandered districts***—and would be ameliorated, not enhanced, by the Petition.

Opponents "would require too much of the gist of an initiative petition." *In re Initiative Petition No. 362*, 1995 OK 77, ¶ 10. For obvious reasons, they prefer that the Legislature retain control over redistricting. But the gist of the petition is no place for Opponents' policy arguments. "While the statement must put voters on notice of the changes being made," it need not make the Opponents' "arguments for them by delineating each policy argument for and against the proposed legislation." *In re Init. Pet. No. 384*, 2007 OK 48, ¶ 10 (internal quote marks omitted); *see also In re Init. Pet. No. 347*, 1991 OK 55, ¶ 23 (refusing to entertain objection on ground that gist did not inform voters of changes it would make to the state appropriation system). Such policy arguments are best made to the public,

[7] *See* www.okhouse.gov/Members/Default; www.oksenate.gov/Senators.

in the ordinary course of debating the merits of the initiative—not in the few sentences in the top margin of a signature page.

CONCLUSION

For every initiative petition, there are an infinite number of details and policy arguments that could be included, or not included, in the short summary statement of the "gist"—and thus an infinite number of challenges that could be raised, *seriatim*, thereto. Opponents' challenge here is little more than an effort to keep Initiative Petition 420 from reaching the voters—or at least run out the clock so the measure cannot be approved before the upcoming redistricting cycle, and the People must wait another decade for its provisions to take effect. The statement of the gist of Initiative Petition No. 420 is legally sufficient, and Proponents respectfully request that the Court reject Opponents' challenges and allow the initiative to proceed to the next stage of the initiative petition process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served by U.S. Mail, postage prepaid, this 5th day of December, 2019 to:

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