

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
FEB 28 2020

JOHN D. HADDEN  
CLERK

#118686

(1) ELDON MERKLIN, AND  
(2) CLAIRE ROBINSON DAVEY,  
  
PROTESTANTS/PETITIONERS,  
  
v.  
(1) JANET ANN LARGENT,  
(2) ANDREW MOORE, AND  
(3) LYNDA JOHNSON,  
  
RESPONDENTS/PROponents.

Case No. \_\_\_\_\_

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APPLICATION AND PETITION TO  
ASSUME ORIGINAL JURISDICTION AND REVIEW  
THE GIST OF INITIATIVE PETITION NO. 426

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FEBRUARY 28, 2020

## I. INTRODUCTION

Initiative Petition 426, State Question 810 (“IP 426”) should be stricken by this Court because the gist is insufficient as a matter of law. IP 426 asks state voters to approve a plan to repeal the current constitutional system in which elected legislators reapportion districts for federal and state electoral districts and replace it with a system in which an unelected Commission.

The gist has three fatal defects. *First*, the gist is affirmatively inaccurate. The *gist* says that the Panel of retired judges and justices will be “designated by the Chief Justice.” However, the *Petition* reveals that the Panel will actually be “selected by random drawing.” A comparison of the gist with the Petition reveals the conflict.

### GIST

**[A] panel** of retired judges and justices **designated by the Chief Justice** of the Oklahoma Supreme Court will choose pools of approximately 20 applicants from each group, then randomly select 3 Commissioners from each pool.

### IP 426 § 4(B)(4)(b)

The Panel shall consist of three Judges or Justices who have retired from the Oklahoma Supreme Court or the Oklahoma Court of Criminal Appeals or the Oklahoma Court of Civil Appeals, and who are able and willing to serve on **the Panel, selected by random drawing.**

In the previous petition filed by these proponents (No. 420), this Court found that saying the Panel will be “designated by the Chief Justice” and saying the Panel will be “selected by random drawing” are “inconsistent.” *In re Initiative Petition 420*, 2020 OK 10, ¶ 7. This Court should not retreat from that finding.

*Second*, the gist fails to mention that instead of operating by majority vote, the Commission is subject to two super majority requirements. The Commission can approve a plan only if (a) six of the nine Commissioners approves and (b) only if at least one commissioner from each group (largest party, second largest party, and those unaffiliated with

either of those parties) approves. IP 426, § 4(E)(1). These two super majority requirements not only impact the operation of the Commission, but significantly increase the likelihood that the Commission will not be able to enact a plan and that the redistricting plan will actually be enacted by the Supreme Court as provided in the "fallback mechanism." IP 426, § 4(F). Nevertheless, the gist provides no information of any type regarding the super majority requirements. A voter asked the sign the petition deserves some notice of the super majority requirements in order to be able to make an informed decision.

*Third*, the gist recites a list criteria which will be considered in redistricting. IP 426, § 4(D). While many of them are self explanatory, such as "minimize the division of communities of interest," IP 426, § 4(D)(C), one is particularly opaque. The gist says at § 4(D)(1)(C)(iii) the Commission shall seek to maximize "political fairness," but provides no information to the voter about what "political fairness" might mean or how that is to be assessed. There is more than one understanding of fairness with respect to redistricting. See *Rucho v. Common Cause*, \_\_\_ U.S. \_\_\_, 139 S.Ct. 2484, 2499 (2019) ("[I]t is not even clear what fairness looks like in this context."). Indeed, as explained by the *Rucho* court, some of the most discussed versions of "fairness" are contradictory to each other. A voter asked to sign the petition deserves some disclosure of what "political fairness" means in IP 426.

## II. THE PARTIES

1. Protestant/Petitioner Eldon Merklin is a citizen of Oklahoma. He has been a resident of Woodward County for over twenty years and registered to vote for over twenty years.

2. Protestant/Petitioner Claire Robinson Davey is a citizen of Oklahoma. She has been a resident of Oklahoma County and registered to vote in Oklahoma County for over nine years.

3. Respondent/Proponent Andrew Moore is one of the proponents to IP 426.

4. Respondent/Proponent Janet Ann Largent is one of the proponents to IP 426.
5. Respondent/Proponent Lynda Johnson is one of the proponents to IP 426.

### III. JURISDICTION

6. IP 426 was filed with the Oklahoma Secretary of State on February 6, 2020. Appx. at Tab A.

7. Pursuant to 34 O.S. § 8, the Secretary of State published notice of IP 426 on February 13, 2020. Appx. at Tab B.

8. A protest is due 10 business days after notice is published. 34 O.S. § 8(B). Saturdays, Sundays, and legal holidays are excluded. *In re Initiative Petition 397*, 2014 OK 23, ¶ 19, 326 P.3d 496. February 17 is President's Day, a legal holiday. 25 O.S. § 82.1. The tenth business day after the notice was published is Friday, February 28, 2020.

9. The Protestants/Petitioners are citizens of Oklahoma and this Court has jurisdiction to hear this protest. 34 O.S. § 8. "Any citizen can protest the sufficiency and legality of an initiative petition." *In re Initiative Petition 409*, 2016 OK 51, ¶ 2, 376 P.3d 250 (quoting *In re Initiative Petition 384*, 2007 OK 48, ¶ 2, 164 P.3d 125).

10. "When a protest is filed in this Court, we are 'vested with original jurisdiction to evaluate and determine the sufficiency of the proposed initiative petition pursuant to 34 O.S. Supp. 2015 § 8.'" *In re Initiative Petition 409, supra*, 2016 OK 51 at ¶ 2 (quoting *In re Initiative Petition 403*, 2016 OK 1, ¶ 3, 367 P.3d 472). Pursuant to Rule 1.194 of this Court, a challenge to an initiative petition shall be treated as an original action in this Court.

### IV. INITIATIVE PETITION 426

11. IP 426 would enact a constitutional amendment to change the procedure for drawing legislative districts for U.S. House of Representatives, Oklahoma House of Representatives and Oklahoma Senate and the substantive criteria to be considered in redistricting.

12. IP 426 would create a new Commission to control redistricting. First, a “Panel” of three retired Justices or Judges of the Court of Criminal Appeals or Court of Civil Appeals and would be selected either by the Chief Justice (according to the gist) or by random selection (according to the Petition). The Panel members are the only people who can exercise any discretion over who is selected to serve as a Redistricting Commissioner. IP 426, § 4(B)(4)(f). The Panel members would oversee the creation of The Commission.

13. The Commission would be made up of three “Groups”: (a) the largest political party, (b) the second largest party, and (c) those unaffiliated with either of the two largest parties. IP 426, § 4(B)(1). From those who apply to be a Commissioner, the Panel can exercise virtually unfettered discretion in deciding who to eliminate to get to 20 finalists in each Group. IP 426, § 4(B)(4)(e) and (f). The Commissioners are randomly selected from the 20 finalists in each Group that were not eliminated by the Panel. IP 426, § 4(B)(4)(g).

## V. SUBSTANTIVE ISSUES

14. There are three fatal deficiencies in the gist.

15. *First*, the gist is factually inaccurate. The gist says the Panel is “designated by the Chief Justice,” but the petition itself shows that the Panel is “selected by random drawing.” This is a significant difference.

16. The proponents of this petition previously filed Initiative Petition 420 which was a very similar petition. This Court addressed the gist of IP 420 in *In re Initiative Petition 420*, 2020 OK 10. In that case, the issue of how the Panel would be selected was litigated, and this Court found there is an inconsistency between saying the Panel is designated by the Chief Justice and saying the Panel is selected randomly. *Id.* at ¶ 7. Consistent with that ruling, the Court should again rule that those terms are inconsistent.

17. The *second* fatal deficiency in the gist is that it fails to make any mention of the super majority requirements governing the Commission.

18. The Commission will not operate like an ordinary government body where the majority of votes controls. Instead the Commission is subject to two special requirements:

- The Commission can act only if six of the nine Commissioners vote in favor. IP 426, § 4(E)(1).
- The Commission can act only with the approval of at least one Commissioner from each of the three Groups IP 426, § 4(E)(1).

These two super majority requirements make it very difficult for the Commission to take action and materially increase the likelihood that the decision on the redistricting plan will end up with this Court, pursuant to the fallback mechanism pursuant to IP 426, § 4(F).

19. The *third* fatal deficiency in the gist is that it omits any explanation of what “political fairness” means even though the Commission is required to “maximize” it. IP 426, § 4(D)(1)(c).

20. IP 426 sets forth substantive standards to be used when the district lines are redrawn. Although many of these are criteria which are ordinarily applied, such as respecting political subdivision boundaries, the biggest substantive change to be made is that the Commission will draw lines to achieve "political fairness." Although this is the most important change to the substantive criteria, the gist provides no information at all about what "political fairness" might mean. It is a particularly noteworthy omission since "fairness" has different and inconsistent meanings in redistricting. As noted in *Rucho v. Common Cause*, *supra*, 139 S.Ct. at 2499, “fairness” defined as a greater number of competitive districts and “fairness” defined as electing a number of legislators which is proportional to a political party’s statewide support are inconsistent goals.

21. Most importantly, the proponents can select any version of “political fairness” they want. The protestants ask only that the gist include some sort of information of what “political fairness” means so a voter can make an informed decision whether to sign the petition.

## VI. CONCLUSION

A gist “should be sufficient that the signatories are at least put on notice of the changes being made . . . .” *In re Initiative Petition 409*, 2016 OK 51, ¶ 3. That is the request of Protestants here.

With respect to all of these issues, IP 426 would make historic, fundamental changes to our Constitution. On each of these issues, there will be a difference of opinion among Oklahoma voters. Protestants do not argue that language needs to be included advocating their position on the issues. Instead, the argument here is merely that a potential signatory is entitled to notice of the fundamental changes contained in the petition.

Because the gist is deficient, this Court must dismiss the Petition. “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 420*, 2020 OK 10, ¶ 11.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of February 2020, a true and correct copy of the above and forgoing was served by hand delivery as follows:

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