



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

NOV 15 2019

**JOHN D. HADDEN
CLERK**

(1) LAURA NEWBERRY, AND

(2) ELDON MERKLIN,

PROTESTANTS/PETITIONERS,

v.

(1) ANDREW MOORE,

(2) JANET ANN LARGENT, AND

(3) LYNDA JOHNSON,

RESPONDENTS/PROONENTS.

#118406

Case No. _____

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

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ATTORNEYS FOR PROTESTANTS/PETITIONERS

NOVEMBER 15, 2019

I. INTRODUCTION

Initiative Petition 420, State Question 804 (“IP 420”) should be stricken by this Court. 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. None of these main considerations are explained or revealed within the gist of IP 420.

As will be shown below and in the brief in support, the gist of IP 420 is inaccurate and misleading as it fails to disclose certain vitally important concepts to potential signatories: *First*, the gist fails to mention who will hold the power to select the commissioners who draw the redistricting lines. *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 upon the First Amendment political activity of a person, or a family member of the person. *Fourth*, the gist fails to clearly state it will repeal portions of the Oklahoma Constitution including the current Bipartisan Commission on Legislative Apportionment. *Fifth*, the gist fails to notify potential signatories of IP 420’s core purpose to eliminate 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 legally insufficient.

II. THE PARTIES

1. Protestant/Petitioner Laura Newberry is a citizen of Oklahoma. She has been a resident of Tulsa County for over twenty years and has been registered to vote for over twenty years. Ms. Newberry is married to Dan Newberry who was a state senator from 2008 to 2018. Under the terms of IP 420 § 4(B)(2)(b), Ms. Newberry would be ineligible to serve as a commissioner in the proposed new system solely because her spouse was elected to hold a public office.

2. 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.

3. Respondent/Proponent Andrew Moore is one of the signatories to IP 420.

4. Respondent/Proponent Janet Ann Largent is one of the signatories to IP 420.

5. Respondent/Proponent Lynda Johnson is one of the signatories to IP 420.

III. JURISDICTION

6. IP 420 was filed with the Oklahoma Secretary of State on October 28, 2019. Appx. at Tab A.

7. Pursuant to 34 O.S. § 8, the Secretary of State published notice of IP 420 on October 31, 2019. 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. November 11 is Veteran's day, a legal holiday. 25 O.S. § 82.1. The tenth business day after the notice was published is Friday, November 15, 2019.

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 420

11. IP 420 would enact a constitutional amendment to change who apportions legislative districts for U.S. House of Representatives, Oklahoma House of Representatives and Oklahoma Senate. § 3(A) – (B).

12. IP 420 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 would be chosen by the Chief Justice. § 4 (A)(7). The Panel then selects the names who will be eligible to serve on 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. § 4(A)(2). From those who apply to be a Commissioner, the Panel selects 20 names in each Group. § 4(B)(4)(f). Two names are selected by random drawing from the 20 names in each of the three Groups. § 4(B)(4)(g). Those six Commissioners then select three more Commissioners, one in each Group, from the list of 20 names selected by the Panel. § 4(B)(4)(i).

14. Under IP 420, as shown above, the Commission would not be selected by voters and would be politically unaccountable. §§ 4(A)(7), 4(B)(4)(f), 4(B)(4)(g) and 4(B)(4)(i).

15. Additionally, IP 420 would discriminate against Oklahomans if they or one of their family members had exercised their constitutional right to be active in our State's government. In particular, in setting forth the qualifications to be a Commissioner participating in redistricting, IP 420, § 4(B)(2) provides that an individual is absolutely disqualified if that individual or a family member has (a) held a partisan political office, (b) been a lobbyist, (c) been nominated for office by a political party, (d) held office in a political party, (e) been an employee of a political party, or (f) been an employee of the Legislature.

16. The Oklahoma Constitution currently provides for a Bipartisan Commission on Legislative Apportionment selected by the voters' elected representatives to accomplish apportionment in the event that the Legislature could not accomplish an apportionment plan. Art. V, § 11A-11E, Okla. Const. IP 420 would repeal the Bipartisan Commission and replace it with an undemocratic system in which apportionment is accomplished by unelected, unaccountable members chosen partially at random.

17. IP 420 would also change how legislative districts are apportioned and eliminates voters' ability to influence the process by supporting their favored political party. The Commission would provide for "political fairness" in the districts § 4(D)(1)(c)(iii). (These are material changes. The Oklahoma Constitution currently requires consideration of "political interests". Art. V, § 9A. The criteria for apportioning the House of Representatives, Art. V, § 10A, does not include any of the criteria set forth in § 4(D)(1)(c)(i)-(iii).) IP 420 further provides that a redistricting plan shall not take into consideration "the political party affiliation or voting history of the population of a district." § 4(D)(2)(b).

V. SUBSTANTIVE ISSUES

A. GIST

18. The Protestants challenge the “gist” set forth at the top of the Petition which allows a citizen to learn what the Petition is about in determining if he or she wants to sign it. In this case, the gist suffers from multiple fatal flaws.

19. The gist is inadequate in failing to disclose how the Commissioners will be selected. As discussed, the replacement of elected representatives with unelected, unaccountable, Commissioners selected partially at random is a significant change which should be disclosed in the gist.

20. The Commission would not be selected by citizens or accountable to citizens. Instead, the Commission would be an unelected, unaccountable body partially selected at random. A similar proposition in Michigan informs voters that the selection will be “random.” Appx. at Tab I.

21. The gist is further deficient in failing to disclose that Oklahomans would be excluded from serving as a Commissioner because they or a family member had exercised a First Amendment right to participate in political affairs. Replacing the Legislature with the Commission is perhaps the most important change, and the gist does not inform potential signatories of the effect of IP 420 if it does not disclose who would be eligible to serve. Here the gist discloses only that the proposition “sets forth qualifications,” which is insufficient to inform potential signatories.

22. The gist is further deficient in failing to disclose that meaningful portions of the Oklahoma Constitution would be repealed. The gist’s disclosure that IP 420 would “repeal[] existing constitutional provisions involving legislative districts” falls far short of adequately informing a potential signatory. First, the current provisions for setting forth the criteria for

redistricting, Art. V, § 9A and 10A, would be repealed and replaced with *different* criteria. Second, the current Bipartisan Commission on Legislative Apportionment, Art. V, § 11A-11E, would be repealed and replaced. These are significant changes which are central to the changes being sought. A potential signatory deserves some notice of the changes.

23. The gist is deficient in failing to describe that IP 420 seeks to eliminate the influence of political parties in redistricting. The elimination of partisanship appears to be the *primary* intent of IP 420, but it is nowhere mentioned in the gist. The gist's statement that "political fairness" will be one of the factors to be considered is insufficient. For decades in the United States "political fairness" has included that the majority party gets to control various functions of government. Indeed, many voters vote for just that outcome—to have their favored party get to exercise political power. The elimination of partisan power should not be hidden from potential signatories when it is the primary purpose of the initiative. The gist should disclose that its purpose is remove political parties from being able to influence the redistricting process.

24. The gist is also deficient in failing to disclose that the Commission will necessarily over represent some Groups and under-represent other Groups. The Commission will be 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 Group 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. With respect to membership on the Commission, Republicans will be under-represented by 14%, Democrats will be under-represented by 3%, and the

Unaffiliated will be over-represented by 17%. The gist should disclose that the Commission will be equally balanced such that the largest political parties will be under-represented while smaller parties and independents will be over-represented.

25. Because the gist is deficient, this Court must dismiss the Petition. This Court cannot step into the shoes of the Petitioners and redraft their gist for them. *In re IP 409*, 2016 OK 51, ¶ 7. The remedy is for the Petitioners, if they wish, to submit a new Petition which complies with the law and contains an accurate and sufficient gist.

VI. CONCLUSION

With respect to all of these issues, IP 420 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 that a potential signatory is entitled to some sort of notice of the fundamental changes being proposed.

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. IP 420 contains a fatally deficient gist and must be stricken from the ballot.

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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