



ORIGINAL

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. 118,406

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

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

ROBERT G. McCAMPBELL, OBA No. 10390
TRAVIS V. JETT, OBA No. 30601
GABLEGOTWALS
ONE LEADERSHIP SQUARE, 15TH FLOOR
211 NORTH ROBINSON AVENUE
OKLAHOMA CITY, OK 73102
TELEPHONE: (405) 235-5500

ATTORNEYS FOR PROTESTANTS/PETITIONERS

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Initiative Petition 420, State Question 8043

Initiative Petition 420 is self-contradictory on an integral matter and is incapable of having an accurate gist. Under IP 420, the Redistricting Commission would draw the lines on redistricting, and the Commissioners would be selected, in large part, by a “Panel” of three retired Justices or appellate Judges. IP 420, § 4(A)(7) says the Panel will be “chosen by the Chief Justice” However, IP 420, § 4(B)(4)(b) says the Panel shall be “selected by random drawing.” Proponents’ briefing is explicit that their position is in accordance with IP 420, § 4(A)(7)—that the Panel will be chosen by the Chief Justice. However, the gist does not address the question at all. A potential signatory has no way to know if the Panel will be chosen by the Chief Justice or selected at random. Both cannot be true. Potential signatories deserve to be able to know what will happen on this important issue.

I. DISCUSSION

IP 420 is self-contradictory. IP 420, § 4(A)(7) explains that “‘Panel’ shall refer to the group of retired Judges or Justices **chosen by the Chief Justice of the Oklahoma Supreme Court** to oversee the creation of the Commission.” However, IP 420, § 4(B)(4)(b) provides for a different way to select the Panel. “The Panel shall consist of three [retired] Judges or Justices . . . who are able and willing to serve on the Panel, **selected by random drawing.**” Proponents take a position consistent with IP 420, § 4(A)(7)—that the Chief Justice will select the Panel.

1. “The Chief Justice then designates three retired judges or justices to serve as a Panel to review applications.” *Newberry* Response Brief at 4.
2. “The Chief Justice would select a Panel of retired appellate judges to oversee the creation of the Commission” *Gaddis* Response Brief at 11.
3. “Nor is the Chief Justice’s role in selecting the Panel and Special Master that unusual. Under existing law, the Chief Justice appoints members of various other state agencies and commissions, presumably for much the same reason: to reduce partisanship in the selection process.” *Gaddis* Response Brief at 11-12.

However, IP 420, § 4(A)(7) and Proponents’ briefing cannot be harmonized with IP 420, § 4(B)(4)(b) which says the Panel will be “selected by random drawing.” Most important, the gist

at issue here makes no mention of the issue at all.

The method of selecting the Panel is critically important. The Legislature would no longer draw the redistricting lines and would be replaced by a redistricting Commission. The Legislature is selected by the voters, but how would the Commission be selected? As noted in *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 128 (Ohio 2012), who will appoint a redistricting commission is a “key element[]” of the proposal. “It is axiomatic that ‘[w]ho does the appointing is just as important as who is appointed.’” *Id.* at 127.

The Panel would play the most critically important role in selecting the Commissioners. The Commission will have nine Commissioners, three from each “Group” (Republicans, Democrats, and Unaffiliated). The Panel would evaluate the applicants for “experience,” “analytical skills,” “geographic balance,” and other factors. IP 420, § 4(B)(4)(f). The Panel gets to eliminate all but 20 applicants from each group. *Id.* The Panel must select applicants by unanimous vote, so selection of the Panel is very important. *Id.* § 4(B)(4)(e). The Panel has significant influence on the make-up of the Commission. Further, one member of the Panel would be able to disagree on the selections and throw the process into the “Fallback Mechanism” *Id.* § 4(B)(4)(f), and the Supreme Court would make the selections. *Id.* § 4(F).

Clarity on the Supreme Court’s role is also critical. As noted in Protestants’ brief in the companion case (No. 118,405), IP 420 would inject this Court into a central role in redistricting. This is a crucial change because this Court, particularly since Article VII-B, Okla. Const., was adopted in 1967, is structured to be apolitical. IP 420 would inject the Court into perhaps the most political of issues, redistricting. A potential signatory deserves clarity on the Court’s role.

Protestants’ Brief in Chief (p. 3-4) points out that the gist is deficient in failing to describe the process for the selection of the Commissioners. Proponents’ two arguments in

response are inadequate. First, the Proponents, at p. 5, point out that the gist states that the petition “sets forth qualifications and a process for the selection of Commissioners.” Merely stating that there is a process is insufficient to ““explain the proposal’s effect,”” *Oklahoma’s Children, Our Future v. Coburn*, 2018 OK 55, ¶13, 421 P.3d 867, quoting *In re Initiative Petition 409*, 2016 OK 51, ¶3, 376 P.3d 250, to provide the information so that ““the signatories are at least put on notice of the changes being made””, *id.*, or to allow signatories to “make an informed decision.” *Oklahoma’s Children*, at ¶24.

Second, Proponents’ brief argues, at p. 5, that “[i]f 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.” That cannot work in this case, however, because a potential signatory reviewing IP 420 itself still cannot know if the Panel is selected by the Chief Justice or at random. As noted in *Oklahoma’s Children* and *In re Initiative Petition 409*, *supra.*, the potential signatories deserve to know.

II. REMEDY

The remedy is straightforward and is simply resolved by Proponents: refile with a new gist. (They may choose to resolve the conflict between IP 420, § 4(A)(7) and IP 420, § 4(B)(4)(b) as well.) “The gist of referendum and initiative petitions is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition. Similarly, the Oklahoma Constitution and statutes provide no authority for this Court or Proponents to amend the petition itself.” *Oklahoma’s Children*, 2018 OK 55, ¶ 57 (citations omitted). Further, the result is not dispositive as to Proponents’ goal. “Nothing prevents Proponents from filing a new referendum petition, without the deficiencies identified today, and restarting the process of referendum.” *Id.* (citations omitted). This Court should strike the petition and allow Proponents to redraft as Proponents think best.

CERTIFICATE OF SERVICE

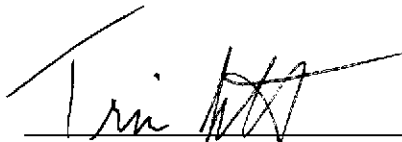
I hereby certify that on this 2nd day of January 2020, a true and correct copy of the above and forgoing was served by U.S. Mail, postage prepaid, and by electronic mail as follows:

D. Kent Meyers
Melanie Wilson Rughani
Alison M. Howard
CROWE & DUNLEVY, P.C.
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102
kent.meyers@crowedunlevy.com
melanie.rughani@crowedunlevy.com
alison.howard@crowedunlevy.com

I further certify that on this 2nd day of January 2020, a true and correct copy of the above and forgoing was served by U.S. Mail, postage prepaid, as follows:

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
Travis V. Jett