

MAY 29 2018

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OKLAHOMA’S CHILDREN, OUR FUTURE, INC.;)
THE OKLAHOMA EDUCATION ASSOCIATION;)
THE OKLAHOMA STATE SCHOOL BOARDS)
ASSOCIATION; THE COOPERATIVE COUNCIL)
FOR OKLAHOMA SCHOOL ADMINISTRATION;)
THE ORGANIZATION OF RURAL OKLAHOMA)
SCHOOLS; THE OKLAHOMA ASSOCIATION OF)
CAREER AND TECHNOLOGY EDUCATION; THE)
UNITED SUBURBAN SCHOOLS ASSOCIATION;)
OKLAHOMA PTA; THE TULSA CLASSROOM)
TEACHERS ASSOCIATION; DR. KEITH BALLARD;)
JOELY FLEGLER, AND TERANNE WILLIAMS,)

Sup. Ct. Case No. 117,020

Petitioners/Protestants,)

v.)

DR. TOM COBURN, BROOKE MCGOWAN and)
RHONDA VUILLEMONT-SMITH,)

Respondents/Proponents.)

**RESPONDENTS/PROponents’ RESPONSE IN OPPOSITION TO THE
APPLICATION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE
LEGAL SUFFICIENCY OF REFERENDUM PETITION 25**

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Dated this 29th day of May, 2018.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA’S CHILDREN, OUR FUTURE, INC.;)
THE OKLAHOMA EDUCATION ASSOCIATION;)
THE OKLAHOMA STATE SCHOOL BOARDS)
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INTRODUCTION

Article V, Section 1 of the Oklahoma Constitution reserves to the people of the State of Oklahoma the power to approve or reject at the polls any act of the Legislature. This power is a fundamental characteristic of the Oklahoma government, and the Oklahoma Supreme Court is duty-bound to preserve this sacred right. It applies to any type of enactment except those which contain an emergency clause. OKLA. CONST. art. V, § 2.

In 1992, the people of the State of Oklahoma amended Article V, Section 33 of the Oklahoma Constitution by approving State Question 640 (“SQ 640”). The “plain and popular meaning [of SQ 640] was expressed in the public theme and message of the proponents of this amendment: ‘No New Taxes Without A Vote Of The People.’” *Fent v. Fallin*, 2014 OK 105, ¶ 13, 345 P.3d 1113, 1117. SQ 640 was a “hugely significant change” that required all revenue bills to be approved by the people or a super-majority of the Legislature. *Oklahoma Auto. Dealers Ass'n v. State ex rel. Oklahoma Tax Comm'n*, 2017 OK 64, 401 P.3d 1152, 1160 fn 39; OKLA. CONST. art. V, § 33.

Even if a revenue bill is passed by a super-majority of the House of Representatives and the Senate, SQ 640 still empowers the people to approve or reject the measure at the polls through the referendum power. As the ballot title makes perfectly clear, SQ 640 “remov[ed] the authority of the legislature to prevent a referendum vote through enactment of an emergency clause.” *Fent* at ¶ 9, 345 P.3d at 1116 (quoting ballot title). This was the only loophole through which the Legislature could prevent a referendum petition per Article V, Sections 1-2. It is clear that the people of the State of Oklahoma meant it when they said No New Taxes Without A Vote Of The People.

In May 2018, Oklahoma Taxpayers Unite!, through Dr. Tom Coburn, Brooke McGowan, and Ronda Vuillemont-Smith (collectively, the “Proponents”) filed Referendum Petition 25 with the Oklahoma Secretary of State. (Pet. App. Tab 1). The purpose of RP 25 is to give the people of the State of Oklahoma the final opportunity to approve or reject House Bill 1010xx (“HB1010xx”), a revenue-raising bill that increases the tax burden on Oklahoma’s families and businesses.

The proposition set forth by RP 25 is clear: HB1010xx should be repealed. The Proponents have asked voters to approve their referendum petition, which will result in the repeal of HB1010xx. Pursuant to article V, Sections 1, 2, and 33, the Proponents have the constitutional right to refer this revenue bill to a vote of the people.

However, a number of educational entities and three citizens have filed a protest to RP 25, asserting that the gist is misleading and deceptive. They contend that the gist is missing substantive details and that it (along with the ballot title) is written “backwards,” so that a “Yes” vote means “No” and a “No” vote means “Yes.” They also contend that the Proponents failed to attach an “exact copy” of the measure to the petition itself, and that this failure dooms the referendum because strict compliance is required.

The Petitioners/Protestants’ arguments should all be rejected. The gist informs potential voters that, by signing the petition, they are in favor of repealing HB1010xx. The gist also includes the major substantive details of HB1010xx. Under this Court’s precedent, it is completely free from the taint of misleading terms or deceptive language.

Furthermore, the Oklahoma Legislature has mandated that substantial compliance with the statutory requirements set out in Title 34 is sufficient. *See* 34 O.S. § 24. Title 34 O.S. § 1 requires an “exact copy” of the measure at issue. The Proponents have substantially complied with this

requirement because the measure they attached is *substantively identical* to HB1010xx. (Pet. App. Tab 1). The only thing missing is the section numbers, which is a mere technical defect.

Proponents Dr. Tom Coburn, Brooke McGowan, and Ronda Vuillemont-Smith respectfully request that this Court assume original jurisdiction and hold that Referendum Petition 25 is legally sufficient to be circulated for signatures. They submit the following brief in support.

ARGUMENT AND AUTHORITIES

“Under section 1, article 5 of the Constitution, the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve the power at their own option to approve or reject at the polls any acts of the Legislature.” *In re Referendum Petition No. 1, Town of Haskell*, 1938 OK 131, 77 P.2d 1152, 1154. “The right to petition for a vote of the people by Initiative and Referendum provided by Art. 5, s 2, of the Constitution of Oklahoma is a sacred right to be carefully preserved.” *In re Referendum Petition No. 18, State Question No. 437*, 1966 OK 152, 417 P.2d 295, 297.

The rights of initiative and referendum are considered “a fundamental characteristic of Oklahoma government.” *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, 820 P.2d 772, 775. Accordingly, this Court has acknowledged that it has a “duty” to preserve the referendum power because “the initiative and referendum is the machinery whereby self-governing people may express their opinion in concrete form upon matters of public concern.” *Id.* at 775-776 (internal citation and quotation marks omitted). **“If the people are to be self-governed, it is essential that they shall have a right to vote upon questions of public interest and register the public will.”** *Id.* (internal citation and quotation marks omitted) (emphasis by the Court). The right

of referendum is a “fundamental and precious right” that must be “zealously protected.” *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 2, 376 P.3d 250, 252 (internal quotation omitted).

In order to prevent fraud, corruption, and deceit in the referendum process, the Oklahoma Legislature requires every referendum petition to contain “a simple statement of the gist of the proposition . . . on the top margin of each signature sheet” that is circulated to potential voters. 34 O.S. § 3; *see also McDonald v. Thompson*, 2018 OK 25, ¶ 6, 414 P.3d 367, 371 (internal quotation and citation omitted). The simple statement of the gist “should be sufficient that the signatories are at least put on notice of the changes being made” by the referendum. *Id.* (internal quotation and citation omitted).

When reviewing the gist, this Court is not tasked with deciding “the wisdom of the proposed [referendum petition] because that question will be answered by the voters at the polls.” *In re Initiative Petition No. 360, State Question No. 662*, 1994 OK 97, 879 P.2d 810, 812. Nor is this Court tasked with deciding whether “a more complete or more accurate gist may be crafted.” *OCPA Impact, Inc. v. Sheehan*, 2016 OK 84, ¶ 10, 377 P.3d 138, 148 (Edmondson, J., concurring in part and dissenting in part). Instead, this Court plays a gate-keeping role solely to ensure that the gist does not have inaccuracies that “amount to fraud or deceit.” *Id.* (Edmondson, J., concurring in part and dissenting in part); *see also McDonald* at ¶ 6, 414 P.3d at 371. If the gist is “free from the taint of misleading terms or deceitful language,” then it will be approved. *McDonald* at ¶ 6, 414 P.3d at 371 (internal quotation and citation omitted).

The gist at issue in this case does not have inaccuracies that amount to fraud or deceit. On the contrary, the gist accurately provides a shorthand description of the effect of RP 25: to repeal HB1010xx. Proponents respectfully request that the Court assume original jurisdiction and hold that the gist is legally sufficient for circulation for the reasons set out in full below.

PROPOSITION I

THE GIST SUFFICIENTLY INFORMS POTENTIAL VOTERS THAT THE PURPOSE OF REFERENDUM PETITION 25 IS TO REPEAL HB1010xx

The purpose of RP 25 is to repeal House Bill 1010xx, which increased the gasoline taxes, the diesel fuel tax, the cigarette tax, the little cigar tax, the hotel/motel tax, and the gross production tax. Oklahoma law required the Proponents to explain the “gist” of RP 25 on the top of every signature page that is circulated to potential voters, and the Proponents did exactly that. The gist provides that “The Proposition is to repeal House Bill 1010XX . . . This measure would restore those taxes to their original rates before House Bill 1010XX increased them when it was passed.” (Pet. App. Tab 1). The potential voters who sign the Petition will therefore know *exactly* what proposal they are putting on the ballot: the repeal of the tax increases set out in HB1010xx.

A. The omission of the little cigar tax and the hotel/motel tax was not misleading or deceptive.

Petitioners/Protestants’ first challenge is centered on the omission of the little cigar tax and the hotel/motel tax from the gist. They argue that the failure to reference “two of the five sources of revenue” included in HB1010xx renders the gist insufficient. (Pet. Brief at 7). However, this position is not supported by the Court’s case law. The Court has held that the gist is “not required to contain every regulatory detail so long as its outline is not incorrect.” *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 3, 376 P.3d 250. The Court has found that the statement of the gist will be sufficient so long as it informs potential voters of “all the major changes proposed” by the referendum. *McDonald v. Thompson*, 2018 OK 25, ¶ 9, 414 P.3d 367, 372. This is true even if the gist omits a “substantive detail.” *Id.* at ¶ 12, 414 P.3d at 373.

The gist of RP 25 satisfies the requirements identified by the Court. The little cigar tax is a minor part of the tax increase found in HB1010xx. The Oklahoma Tax Commission estimated

that the five tax increases in HB1010xx would result in an additional \$474,696,000 in state revenues for Fiscal Year 2019. (Pet. App. Tab 6). The little cigar tax makes up *less than \$1 million* of the increased revenue, or 0.2% of the total.¹ (Pet. App. Tab 6). The omission of this detail is not deceptive or misleading; the little cigar tax is a minor part of the increased taxes in HB1010xx.

Petitioners/Protestants make a number of policy arguments as to why a potential voter may *approve of a half a billion dollar tax increase just to increase the tax on little cigars*, but the Court has made it clear that the gist does not have to describe policy arguments for or against the proposal. *Id.* at ¶ 6, 414 P.3d at 371 (internal quotation omitted). A comparison of the gist in this case with the cases cited by the Petitioners/Protestants to support their argument is instructive. This comparison demonstrates that the circumstances where the Court has found a gist misleading and deceptive are very different from the circumstances present in this case.

To start with, every single case cited by the Petitioners/Protestants involves the challenge to an initiative petition, *not* a referendum. There are obvious and important differences between initiatives and referendums, with the most significant difference being that the purpose of a referendum is limited in scope to the approval or rejection of one piece of legislation. An initiative petition, on the other hand, often includes many changes to existing law, where there is a much greater potential to hide or obscure important details. *See, e.g., In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, 797 P.2d 326, 330 (“The danger of having more than one subject addressed in a Petition is that the ballot title cannot accurately reflect the contents of the Petition.”).

¹ Even when subtracting the hotel/motel tax revenue, the little cigar tax *still* only makes up 0.2% of the total estimated revenue from HB1010xx. (Pet. App. Tab 6).

Beyond this difference, the cases themselves are factually distinguishable. For example, in *In re Initiative Petition 409*, 2016 OK 51, 376 P.3d 250, the Court addressed an initiative petition that sought to repeal Article 28 of the Oklahoma Constitution and replace it with a new Article 28A. *Id.* at ¶ 1, 376 P.3d at 251. “In short, the proposed Article 28A would allow wine to be sold in grocery stores.” *Id.* Indeed, the gist informed potential voters that the new Article 28A “allows certain business entities, including grocery stores, to qualify for a license to sell wine for off-premises consumption.” *Id.* at ¶ 5, 376 P.3d at 253. However, the actual text of the measure placed serious limitations on the ability of a grocery store to obtain such a license, limitations that the Court stated would make “many grocery stores ineligible.” *Id.* at ¶ 6, 376 P.3d at 253. The gist was deceptive precisely because it implied to voters that *all grocery stores could obtain licenses*, when in reality there were serious limitations on this privilege. In the case at bar, the omission of the little cigar tax from the gist is not deceptive or misleading because the little cigar tax is not a significant, or major, part of the tax increase. A potential voter therefore has enough information to make an informed decision.

The same result is correct based on the omission of the hotel/motel tax. The Oklahoma Legislature *repealed the hotel/motel tax*, and it is no longer even a part of the tax raises in HB1010xx. (Pet. App. Tab 7). The omission of this tax from the gist and the ballot title is therefore not misleading, but accurate, because the hotel/motel tax will never take effect. It would be misleading to include the hotel/motel tax in the gist.

The Petitioners/Protestants make a number of theoretical arguments about what *might* happen to the hotel/motel tax if HB1010xx is approved by the voters at the polls. They even suggest that the approval of HB1010xx may resurrect the hotel/motel tax. (Pet. Brief at 11). These arguments are not an appropriate basis to challenge the gist. The gist does not have to convey “the

theoretical” impact of the referendum. *McDonald v. Thompson*, 2018 OK 25, ¶ 6, 414 P.3d 367, 372 (internal quotation omitted). It must only explain “the practical” impact of the proposal. *Id.* Here, the practical impact of the referendum is properly explained to potential voters: If they vote to approve RP 25, then the tax increases in HB1010xx will be repealed.

The gist of RP 25 is not misleading or deceptive because it omits a minor substantive detail, i.e. the little cigar tax. It is also not misleading or deceptive because it omits information about a tax *that has already been repealed and is therefore irrelevant*, i.e. the hotel/motel tax. The gist of RP 25 is appropriate and sufficiently explains the proposal to potential voters.

B. The gist is not written backwards and it informs signatories of the exact nature of the proposition

Despite the simplicity and clarity of the gist that the Proponents have prepared, the Petitioners/Protestants complain that it is fundamentally misleading and deceptive. They complain that the gist is written “backwards” and that it omits substantive details that may be important to particular industries or voters. They also worry about the theoretical impact RP 25 will have on HB1012xx, which repealed parts of HB1010xx. These complaints and worries should be rejected because they do not have any merit. The voters should be provided an opportunity to approve or reject HB1010xx at the polls.

Petitioners/Protestants argue that the gist of RP 25 is written “precisely backwards” and therefore it is fundamentally misleading. (Pet. Brief at 5 and 12). The argument’s premise is that a vote in favor of “the proposition” will actually be a vote against “the measure.” (Pet. Brief at 12-13). Simply put, they contend that voting “Yes” will actually mean “No,” while voting “No” will actually mean “Yes.”

The premise of this argument is flawed. Under 34 O.S. § 3, the proponents of a referendum petition are required to prepare “[a] simple statement of the gist of *the proposition*,” which must

be printed on the top margin of each signature sheet. 34 O.S. § 3 (emphasis added). Furthermore, the proponents must also prepare a suggested ballot title, which must “explain, in basic words . . . the effect of *the proposition*.” *Id.* § 9(B)(2) (emphasis added).

Petitioners/Protestants’ argument hinges on the belief that the “proposition” of every referendum is that *the bill should be approved*. This is the exact opposite of the proposition of every referendum. The proponents of a referendum are obviously opposed to the bill at issue.

Consistent with the purpose of a referendum, the proposition of RP 25 is that *HB1010xx should be repealed*. (Pet. App. Tab 1). Therefore, it is fully appropriate to phrase the gist and the ballot title in such a manner that a “Yes” vote is a vote in favor of the referendum to repeal, while a “No” vote is a vote against the referendum to repeal. The Proponents’ suggested ballot title makes this perfectly clear. (Pet. App. Tab 2). The voters will be answering the question *as phrased on the ballot title*, not on the referendum petition. *See McDonald* at ¶ 10, 414 P.3d at 372 (recognizing that “the ballot title is all a voter has access to within the voting booth”).

Ultimately, this is an argument that is simply academic, at least at the pre-circulation stage of the proceedings. *The people who sign the referendum petition are not voting*. They are signing to show that they are in favor of the proposition to repeal HB1010xx. It is therefore honest and accurate for the Proponents to explain, in the gist, that the proposition of RP 25 *is to repeal HB1010xx*. Any contrary explanation in the gist would, in fact, have the effect of misleading signatories, as they may believe that signing indicates their support for the bill at issue (*if* the gist were to ask, Should the bill be approved?).

Even if Petitioners/Protestants are correct that the question voters must answer is “Shall the bill be approved,” rather than “Shall the referendum to repeal be approved,” that issue can be addressed by re-writing the ballot title. *OCPA Impact, Inc. v. Sheehan*, 2016 OK 84, 377 P.3d 138.

It does not have any impact on the accuracy and correctness of the gist. The gist appropriately tells signatories that the purpose of RP 25 is to repeal HB1010xx. It is not deceitful or misleading to tell potential voters that the purpose of RP 25 is to repeal HB1010xx, even if the question must be stated differently on the ballot title, because that is exactly what RP 25 is intended to do.

Petitioners/Protestants also argue that the gist is “factually inaccurate” because the “Petition, if successful, would not . . . ‘repeal’ HB1010xx. Rather it would, either temporarily or permanently, *prevent HB1010xx from becoming law in the first place.*” (Pet. Brief at 13). They assert that, “by employing the word ‘repeal,’ the gist not only fails to disclose, but in fact affirmatively conceals, the potential effect of the Petition on the pay raise bills” passed in HB1023xx.

The gist of a referendum petition “need only convey the practical, and not the theoretical, effect of the proposal.” *See McDonald* at ¶ 15, 414 P.3d at 373. Proponents have presented another theoretical argument about the effect of RP 25, and once again, this type of argument is not a legitimate basis for a challenge to the gist.

Even considering this argument, it should be rejected. The word repeal means “to revoke or withdraw formally or officially”; “to revoke or annul (a law, tax, duty, etc.) by express legislative enactment; abrogation.”² The Oklahoma Legislature has commanded that the proponents of a referendum petition must use simple, basic words, which can be easily found in dictionaries of general usage. *See* 34 O.S. §§ 3 and 9. The practical effect of RP 25 is appropriately explained by the use of the word repeal based on its common meaning to revoke or withdraw. Furthermore, the gist of RP 25 is not required to provide theoretical information about what might happen to a separate bill (the teacher pay raise bill found in HB1023xx); it is not misleading to

² *See* <http://www.dictionary.com/browse/repeal?s=t> (last visited May 28, 2018).

omit information that this Court has held is not required to be included. *See McDonald* at ¶ 15, 414 P.3d at 373.

The final argument advanced by the Petitioners/Protestants in support of their position that the gist is misleading is as follows: The gist says “absolutely nothing about the numerous apportionment provisions contained in HB1010xx,” and it is therefore “incomplete, one-sided, and misleading.” (Pet. Brief at 14). The Court has held that the gist does not have to describe “policy arguments for or against the proposal.” *McDonald* at ¶ 6, 414 P.3d at 371. That is exactly what Petitioners/Protestants would have the Proponents do. This final, last ditch-effort should be rejected as well.

Referendum Petition 25 clearly and succinctly states the gist of its proposition. The Court is not tasked with deciding whether the gist could be written better or more accurately, but rather to determine whether it is tainted by misleading terms or deceitful language. The gist is free from this taint and it should be found legally sufficient by the Court.

PROPOSITION II

PROPONENTS HAVE SUBSTANTIALLY COMPLIED WITH THE STATUTORY REQUIREMENT TO ATTACH AN EXACT COPY OF THE MEASURE AT ISSUE

Proponents have substantially complied with the statutory requirements of Title 34. The only defect identified by the Petitioners/Protestants relates to the copy of the bill attached to the referendum petition. The copy of the bill attached by Proponents, as the Petitioners acknowledge, “does in fact contain each of [HB1010xx’s] substantive provisions.” (Pet. Brief at 15). However, the copy does not contain the section numbers. Petitioners/Protestants assert that *strict compliance* with 34 O.S. § 1 is required, and RP 25 is therefore legally insufficient.

Petitioners/Protestants cite in support the Oklahoma court of civil appeals case, *In re Referendum Petitions 0405-1, 0405-2, 0405-3 of City of Norman*, 2007 OK CIV APP 19, 155 P.3d

841. The case does hold that strict compliance with this particular statutory requirement is necessary. However, the case is not binding precedent, and the Court should reject it for the simple reason that substantial compliance is a statutory mandate. “The procedure herein prescribed is not mandatory, but if substantially followed will be sufficient. If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded.” 34 O.S. § 24. *In re Referendum Petitions 0405-1, 0405-2, 0405-3 of City of Norman* does not acknowledge § 24. Instead, the Court rejected the doctrine of substantial compliance based on policy grounds. The courts are not free to reject the statutory mandate of substantial compliance found in § 24.

In this case, Proponents have substantially complied with the requirement to attach an “exact copy” of the bill at issue. 34 O.S. § 1. The bill attached by the Proponents is substantively identical to HB1010xx, except for the section numbers. This is a clerical and mere technical error, not a substantive problem with the petition.

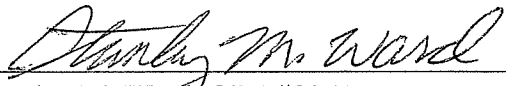
This challenge should be rejected.

CONCLUSION

Proponents respectfully request that the Court assume original jurisdiction and hold that Referendum Petition 25 is legally sufficient.

Dated this 29th day of May, 2018.

Respectfully submitted,


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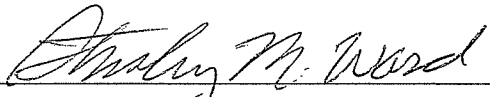
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This certifies that a copy of the above and foregoing was mailed on May 29, 2018, to the following:

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