

No. 121,777

DEC 14 2023

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOHN D. HADDEN
CLERK

STATE CHAMBER OF OKLAHOMA; OKLAHOMA FARM BUREAU LEGAL FOUNDATION; CHAD
WARMINGTON; and TOMMY SALISBURY,

Protestants/Petitioners,

v.

KELSEY COBBS and DUSTIN PHELAN,

Proponents/Respondents.

BRIEF OF THE ATTORNEY GENERAL

Respectfully submitted by:

GARRY M. GASKINS, II, OBA #20212
Solicitor General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405)521-3921
Garry.Gaskins@oag.ok.gov

AUDREY A. WEAVER, OBA #33258
Assistant Solicitor General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405)521-3921
Audrey.Weaver@oag.ok.gov

Counsel for the Attorney General

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INTRODUCTION

When an initiative petition manifests plain constitutional infirmities, allowing the petition to proceed to a state-wide election would disserve the proponents, protestants, and the people of Oklahoma. The State, as well as this Court, has an interest and responsibility in preventing costly and unnecessary elections. *See, e.g., In re Initiative Petition No. 349, State Question 642*, 1992 OK 122, ¶¶ 17–18, 838 P.2d 1, 8. The Attorney General’s interest here is unique because he “may under certain circumstances have the duty of defending the measure if it were adopted by a vote of the people and subsequently challenged” *Id.* at ¶ 17. Accordingly, pursuant to 74 O.S. § 18b(A)(1), the Attorney General respectfully submits this brief in support of Protestants/Petitioners. Because Initiative Petition No. 446 (State Question No. 832) exhibits clear constitutional and other infirmities, this Court should declare the same legally insufficient for submission to a vote of the people.

BACKGROUND

This citizens’ protest challenges the constitutionality of Initiative Petition No. 446 (State Question No. 832). Initiative Petition No. 446 proposes to amend the Oklahoma Minimum Wage Act (“OMWA”), 40 O.S. §§ 197.2, 197.4, 197.5. *See* App’x Tab 1. The initiative petition proposes to repeal Section 197.5, amend Section 197.2 to incrementally increase Oklahoma’s minimum wage, and amend the definitions of “employer” and “employee” as used in the OMWA. *See* App’x at 4–6. Among other specific changes, the petition proposes that each year beginning January 1, 2030, “the minimum wage . . . shall be increased by the increase in the cost of living, if any[.]” as “measured by the annual percentage increase . . . in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or its successor index, as published by the U.S. Department of Labor or its successor agency” *Id.* at 4–5.

On November 20, 2023, the Protestants/Petitioners timely filed their Application to

Assume Original Jurisdiction pursuant to 34 O.S. § 8, arguing Initiative Petition No. 446 is an unconstitutional delegation of legislative authority and contains a legally insufficient and misleading gist. *See generally* Br. in Support of App. to Assume Original Jurisdiction.

ARGUMENT AND AUTHORITIES

This Court has the authority and responsibility to determine the constitutional sufficiency of an initiative petition if “reaching the issue may prevent the holding of a costly and unnecessary election.” *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶ 18, 838 P.2d 1, 8; *see also* 34 O.S. § 8(B)–(D) (describing a citizen’s right to “file a protest as to the constitutionality of the petition” through the Oklahoma Supreme Court). When an initiative petition is fraught with legal infirmities, “[i]t would be a disservice to the citizens of Oklahoma to submit a petition which could not withstand a constitutional attack to a state-wide vote.” *In re Initiative Petition No. 366, State Question No. 689*, 2002 OK 21, ¶ 4, 46 P.3d 123, 125. And none doubt that “it is this Court’s responsibility to see the petitions for change . . . comply with the requirements set out in both the Constitution and the statutes.” *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, ¶ 16, 797 P.2d 326, 330. Thus, pre-election review is the appropriate vehicle to resolve this constitutional challenge to Initiative Petition No. 446 (State Question No. 832).

I. INITIATIVE PETITION NO. 446 IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The Oklahoma Constitution prohibits the delegation of legislative power. *City of Okla. City v. State ex rel. Okla. Dep’t of Labor*, 1995 OK 107, ¶ 11, 918 P.2d 26, 29, *as corrected* (Oct. 13, 1995). This prohibition is derived from article IV Section 1, which divides the powers of government into three separate departments exercising only the powers properly belonging to each, and article V Section 1, which vests the legislative authority of the State to the Senate and House of Representatives. *See id.*; OKLA. CONST. art. IV, § 1; OKLA. CONST. art. V, § 1. The non-delegation doctrine “rests on the premise that the legislature must not abdicate its responsibility to resolve

fundamental policy making by [1] delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy.” *City of Okla. City*, 1995 OK 107 at ¶ 12 (citation omitted). Importantly, “[t]he non-delegation doctrine applies to enactments by the people in the same manner it applies to enactments by the Legislature.” *In re Initiative Petition No. 366, State Question No. 689*, 2002 OK 21, ¶ 17, 46 P.3d 123, 129.

Although the non-delegation doctrine “has been somewhat relaxed in several jurisdictions, its force in this state remains undiminished.” *Democratic Party of Okla. v. Estep*, 1982 OK 106, ¶ 16, 652 P.2d 271, 277. To comport with the non-delegation doctrine, “the legislature must establish its policies and set out definite standards for the exercise of an agency’s rulemaking power.” *Id.*; see also *Okla. Coal. for Reprod. Just. v. Cline*, 2016 OK 17, ¶ 15, 368 P.3d 1278, 1286 (“When the Legislature allows an agency, or other entity, to make rules without sufficient legislative guidelines by setting binding policy on the agency, the Legislature has unconstitutionally delegated its authority to determine Oklahoma policy.”). This Court has emphasized that “[n]o matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines or standards should appear expressly in the Act.” *City of Okla. City*, 1995 OK 107 at ¶ 18 (quoting *Estep*, 1982 OK 106 at ¶ 16 n.25).

The abdication of legislative authority to a federal entity is especially disfavored in this Court’s precedent. This Court articulated the concern in *City of Oklahoma City v. State ex rel. Oklahoma Dep’t of Labor*, 1995 OK 107, 918 P.2d 26, *as corrected* (Oct. 13, 1995). In *City of Oklahoma City*, the Legislature passed a remarkably similar statute to the one at issue here, requiring the Oklahoma Labor Commissioner to adopt the “prevailing wage” as determined by the U.S. Department of Labor. *Id.* at ¶ 9. The act violated the non-delegation doctrine not only because it failed to provide definite standards or articulate adequate safeguards, but because “it delegate[d] to an administrative arm of the federal government.” *Id.* at ¶ 14. As this Court explained:

the federal agency which actually determines the prevailing wage is less answerable to the will of the people of Oklahoma than is the Labor Commissioner who holds elected office. It leaves public entities with no Oklahoma forum in which to challenge the accuracy of the United States Department of Labor's wage determinations.

Id.; *see also id.* at ¶ 9 (“No procedure was provided to protest or challenge a federal wage determination before Oklahoma’s Labor Commissioner or in Oklahoma courts.”). Other state courts have also accentuated concern over improper delegations to the federal government. *See, e.g., State v. Williams*, 583 P.2d 251, 255 (Ariz. 1978) (“Since the Legislature exercises absolutely no control over Congress or its agencies, the adoption as state law of those bodies’ prospective enactments is viewed as a complete abdication of legislative power.”).

And while “[n]othing in Oklahoma law prevents the Oklahoma Legislature from adopting as its own a set of particular standards **already in existence**[.]” *Hill v. American Medical Response*, 2018 OK 57, ¶ 34, 423 P.3d 1119, 1132, an “important distinction” exists when an enactment “delegate[s] legislative authority to another entity that might promulgate and change those standards on an ongoing basis.” *Id.* at ¶ 35; *cf. City of Okla. City*, 1995 OK 107 at ¶ 14 (“The current Act leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats.”); *In re Initiative Petition No. 366*, 2002 OK 21 at ¶ 18 (finding an initiative petition violated the non-delegation doctrine because its “omission of any principles leaves the fundamental policy-making function to the unbridled discretion” of State boards); *Cline*, 2016 OK 17 at ¶ 15 (“[T]he Legislature, or the voters acting as a legislature through the initiative process, delegates its authority when it enacts legislation giving an agency (particularly a federal agency that is not bound by Oklahoma's legislative policies) the power to alter Oklahoma law.”). Because enactments purporting to acquiesce to some future standard set by another entity make it impossible for the legislature (or the public) to know or evaluate subsequent changes, such enactments can be nothing but an unconstitutional abdication of legislative authority. Again, many

state courts have recognized the same. *See, e.g., Lee v. State*, 635 P.2d 1282, 1286 (Mont. 1981) (“[T]he cases which recognize the right of a legislature to adopt as a part of its enactments existing federal laws and regulations also except from that right any adoption of changes in the federal laws or regulations to occur in the future.”) (collecting cases).

Here, Initiative Petition No. 446 improperly delegates legislative authority to the U.S. Department of Labor by deferring future amendments to Oklahoma’s minimum wage after 2030 to the Department. *See* App’x at 4–5. Just as in *City of Oklahoma City*, Initiative Petition No. 446 provides no standards, rules, restrictions, or safeguards for the U.S. Department of Labor to follow in generating the Consumer Price Index for Urban Wage Earners and Clerical Workers (“CPI-W”), which determines the Oklahoma minimum wage. Just as in *City of Oklahoma City*, the unconstitutional delegation is directed to a federal entity—the U.S. Department of Labor. *Compare* 1995 OK 107 at ¶ 9 *with* App’x at 4–5. And just as in *City of Oklahoma City*, Initiative Petition No. 446 is a prospective enactment that purports to self-amend depending on some future federal standard not yet determined—a complete abdication of legislative function. *Compare City of Okla. City*, 1995 OK 107 at ¶ 14 *with* App’x at 4–5. Initiative Petition No. 446 leaves no discretion whatsoever to the state, its legislature, or its executive agencies, to determine the minimum wage after 2030. It leaves no Oklahoma forum or administrative procedure to challenge the accuracy of the U.S. Department of Labor’s determinations.

Instead, after 2030, Oklahoma’s minimum wage “shall be increased by the increase in the cost of living, if any[.]” which “shall be measured” by the annual increase in the CPI-W published by the U.S. Department of Labor. App’x at 4–5. The CPI-W is inherently colored by the subjective discretion of its publisher, the U.S. Department of Labor’s Bureau of Labor Statistics (“Bureau”). *See generally* U.S. BUREAU OF LAB. STATS., *Consumer Price Index: Design* (modified Sept. 6, 2023) [“CPI

Design”¹ (describing that “[t]he CPI sample-design process involves multiple stages[.]” each involving a myriad of decisions). The design and methodology of the CPI is subject to change,² and the CPI “has been comprehensively revised on several occasions to implement the following: updated samples and weights, expanded coverage, and enhanced methodologies.” U.S. BUREAU OF LAB. STATS., *Consumer Price Index: History* (modified Sept. 6, 2023).³ The Bureau candidly forecasts “the CPI will need revisions as long as there are significant changes in consumer buying habits” and that it “has the flexibility to monitor changing buying habits in a timely and cost-efficient manner.” U.S. BUREAU OF LAB. STATS., *Consumer Price Index Frequently Asked Questions* (modified Aug. 31, 2023) [“CPI FAQ”].⁴

Moreover, the CPI is designed to represent “urban households in core-based statistical areas (CBSAs) and in urban places of 10,000 inhabitants or more[.]” not “people living in rural nonmetropolitan areas” CPI Design *supra*. Although CPI data is available for different geographic regions, the CPI-W itself reflects a national average not necessarily representative of Oklahoma. *See* CPI FAQ *supra*. The CPI-W, a subset of the CPI, is perhaps even less representative of rural Oklahoma, designed to capture data on urban households that derive income primarily from clerical or wage occupations. *Id.*

Whatever the CPI-W dictates, no matter how drastically or arbitrarily that index may change by 2030 or thereafter, the Oklahoma minimum wage “shall be increased” accordingly. *See* App’x at 4–5. Remarkably, the CPI-W can cease to exist altogether, and whatever the unknown “successor index” dictates, the Oklahoma minimum wage “shall be increased” using this unknown

¹ Available at <https://www.bls.gov/opub/hom/cpi/design.htm>.

² Even the Handbook of Methods for the CPI reminds readers its methodology describes “the current” geographic sample, sample design, definitions, etc. *See* U.S. BUREAU OF LAB. STATS., *Consumer Price Index: Design* (modified Sept. 6, 2023), available at <https://www.bls.gov/opub/hom/cpi/design.htm>.

³ Available at <https://www.bls.gov/opub/hom/cpi/history.htm>.

⁴ Available at https://www.bls.gov/cpi/questions-and-answers.htm#Question_19.

“successor index.” *Id.* There is no escaping the mandatory nature of this provision, nor the virtually unfettered discretion it grants to the federal agency. Initiative Petition No. 446 “leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats.” *City of Okla. City*, 1995 OK 107 at ¶ 14. Thus, Initiative Petition No. 446 is an unconstitutional delegation of legislative power.

II. THE GIST OF INITIATIVE PETITION NO. 446 IS DECEPTIVE AND MISLEADING.

Oklahoma law requires initiative petitions include “[a] simple statement of the gist of the proposition[.]” which “shall be printed on the top margin of each signature sheet.” 34 O.S. § 3. The purpose of the gist “is to ‘prevent *fraud, deceit, or corruption* in the initiative process” by putting the signatories “on notice of the changes being made” *Oklahoma’s Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶ 13, 421 P.3d 867, 872 (quoting *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶ 3, 376 P.3d 250, 252). Thus, “to prevent deception in the initiative process[.]” the gist “must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition.” *Id.* (quoting *McDonald v. Thompson*, 2018 OK 25, ¶ 6, 414 P.3d 367, 370–71); *see also id.* at ¶ 24 (emphasizing “the need for voters to be given enough information to make an informed decision”). Because the printed initiative petition no longer includes the ballot title, the gist now takes on “enhanced significance” in preventing “fraud, corruption, and deceit in the initiative process.” *Id.* at ¶ 14 (quoting *In re Initiative Petition No. 409*, 2016 OK 51 at ¶ 4).

The gist need not “contain every regulatory detail[.]” nor include the “theoretical” effect of the proposed legislation. *Id.* at ¶ 13 (quoting *In re Initiative Petition No. 409*, 2016 OK 51 at ¶ 3). It must, however, correctly “convey the practical . . . effect of the proposed legislation[.]” refrain from “describing policy arguments for or against the proposal[.]” *id.* (citation omitted), and “apprise[] the voters of what the proposed measure is intended to do.” *In re Initiative Petition No.*

384, *State Question No. 731*, 2007 OK 48, ¶ 8, 164 P.3d 125, 129 (citation omitted).

On several occasions this Court has “declared the gist of a petition insufficient for failure to fully describe changes being made to the law . . .” *Coburn*, 2018 OK 55 at ¶¶ 24–25 (collecting cases); *see also TAY v. Green*, 2022 OK 37, ¶ 11, 508 P.3d 431, 436 (“We have declared a gist insufficient for excluding important changes to existing state law.”). Because a gist is not subject to amendment by the Court, “the only remedy” for an insufficient gist “is to strike the petition.” *Coburn*, 2018 OK 55 at ¶ 57.⁵

Here, the gist fails to provide signatories adequate notice of the changes proposed to the Oklahoma Minimum Wage Act and misleads signatories by artificially enlarging the purported effect of the proposed legislation on pre-existing law. First, the gist misleads signatories by claiming that “[u]nder this measure, federal . . . employees would not be covered under the OMWA.” App’x at 2. But the OMWA already exempts “[a]ny individual employed by the United States government . . .” *Compare* App’x at 5 *with* 40 O.S. § 197.4(e)(3). By suggesting federal employees “would not be covered under the OMWA” “[u]nder this measure,” the initiative petition gives the false impression that the OMWA does not currently exempt federal employees and that approval of the petition is needed to create this exemption. Thus, the gist materially misleads the public. As this Court admonished in *In re Initiative Petition No. 425, State Question No. 809*: “The gist must put signatories on notice of the changes being made and explain the proposal’s effect on existing law.” 2020 OK 58, ¶ 23, 470 P.3d 284, 290. Just like the initiative petition this Court declared invalid in *In re Initiative Petition No. 425*, Initiative Petition No. 446 fails to “accurately explain the proposal’s effect on existing law and is misleading.” *Id.*

Second, the gist’s ambiguous characterization that “[s]ome employers with ten or fewer

⁵ What’s more, “a pre-circulation challenge to the gist of the petition is appropriate as the gist remains a necessary part of the pamphlet circulated to potential signatories.” *In re Initiative Petition No. 409*, 2016 OK 51 at ¶ 4 n.10.

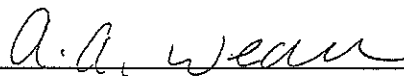
employees” and “certain other types of employees and volunteers” is likely to confuse and mislead signatories. App’x at 2. Describing the existing exemptions in the OMWA with such vague generalities in effect “requires potential signatories to know what the law was prior to” the proposal. *In re Initiative Petition No. 425*, 2020 OK 58 at ¶ 27. Yet, an average signatory reading the gist would not likely know that the exemption for “some employers with ten or fewer employees,” App’x at 2, only applies to those grossing less than \$100,000 annually. *See* 40 O.S. § 197.4(d). Nor would an average signatory know that the exemption for “certain other types of employees,” App’x at 2, includes employees working for carriers subject to the Interstate Commerce Act, bona fide executive, administrative, and professional employees, outside salesmen, and reserve force deputy sheriffs. *Compare* App’x at 6 *with* 40 O.S. § 197.4(e)(6), (8), (12). Without a more specific description of the exemptions being retained, the initiative petition forces average signatories to place undue reliance on the gist and make faulty assumptions about the current state of the OMWA. The intentional ambiguity of the gist prevents signatories from making an informed decision.

The flaws of the gist, on their own and taken together, “leave no doubt that signatories are not being put on notice of the changes being made.” *Coburn*, 2018 OK 55 at ¶ 56. Therefore, the only remedy is to strike the initiative petition.

CONCLUSION

“To hold an expensive and unnecessary election on a proposal which could not withstand a subsequent constitutional challenge would be to do a disservice to the proponent, the protestants, and the people of Oklahoma.” *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶ 17, 142 P.3d 400, 409. Because Initiative Petition No. 446 (State Question No. 832) cannot withstand constitutional scrutiny and contains a legally insufficient gist, this Court should declare the initiative petition legally insufficient for submission to a vote of the people.

Respectfully submitted,



GARRY M. GASKINS, II, OBA #20212

Solicitor General

AUDREY A. WEAVER, OBA #33258

Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL

STATE OF OKLAHOMA

313 N.E. 21st Street

Oklahoma City, OK 73105

Phone: (405) 521-3921

Garry.Gaskins@oag.ok.gov

Audrey.Weaver@oag.ok.gov

Counsel for the Attorney General

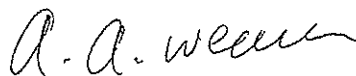
CERTIFICATE OF SERVICE

This certifies that on this 14th day of December 2023 a true and correct copy of the foregoing instrument was mailed via first class U.S. mail, postage prepaid to the following:

Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main Street
Oklahoma City, OK 73102
Counsel for Protestants/Petitioners

Melanie Wilson Rughani
Crowe & Dunlevy
Braniff Building
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102
Counsel for Proponents/ Respondents

Oklahoma Secretary of State's Office
Executive Legislative Division
2300 N. Lincoln Blvd., Room 122
Oklahoma City, OK 73105



Garry M. Gaskins, II / Audrey A. Weaver

