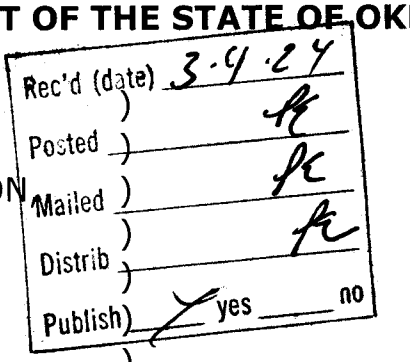
ORIGINAL

2024 OK 13

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA



FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR - 4 2024
JOHN D. HADDEN
CLERK

STATE CHAMBER OF OKLAHOMA, OKLAHOMA FARM BUREAU LEGAL FOUNDATION, CHAD WARMINGTON and TOMMY SALISBURY,	)	
Protestants/Petitioners,	)	
v.	)	No. 121,777
KELSEY COBBS and DUSTIN PHELAN,	)	For Official Publication
Proponents/Respondents.	)	

KUEHN, J. CONCURRING IN PART, DISSENTING IN PART:

¶1 I agree with the Majority that Initiative Petition 446 should go to a vote of the people. I disagree with its decision to determine whether the Petition itself violates the Oklahoma Constitution.

¶2 This challenge offers this Court the opportunity to review the extent of its jurisdiction under Title 34, which governs the initiative and referendum process. I take that opportunity in the context of the Oklahoma Constitution, a notoriously populist document, which states that "[a]ll political power is inherent in the people. . . [,]" who may alter or reform its government for the public good, in accordance with the United States Constitution. Okla. Const. art. 2, § 1. The ability to legislate by initiative petition is the first power reserved to the People in the Oklahoma Constitution. Okla. Const., art. 5, § 2. The People reserved power to themselves to propose laws, pass on

legislation, amend the Constitution, and vote on those proposals without legislative action. Okla. Const. art. 5, § 1. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382 State Question No. 729*, 2006 OK 45, ¶ 3, 142 P.3d 400, 403. "All doubt as to the construction of pertinent provisions is to be resolved in favor of the initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally." *In re Initiative Petition No. 348 State Question No. 640*, 1991 OK 110, ¶ 5, 820 P.2d 772, 775 (quoting *Oliver v. City of Tulsa*, 1982 OK 121, ¶ 31, 654 P.2d 607, 613).

¶3 We first considered initiative petitions in 1910 and concluded that the judiciary should not interfere with the initiative petition process by determining the constitutionality of the merits of a petition before it was put to a vote. *Threadgill v. Cross*, 1910 OK 165, ¶¶ 15-22, 109 P. 558, 561-62. This remained our position for decades. In 1975 our previous path of restraint ended. We decided that where an initiative petition violated the Oklahoma Constitution, and this Court's "determination could prevent a costly and unnecessary election," we may intervene in the initiative petition process before an election is held. *In re Supreme Court Adjudication of Initiative Petitions in Norman, Okla. Numbered 74-1 and 74-2*, 1975 OK 36, ¶ 19, 534 P.2d 3, 8. As late as 1992, however, this Court recognized a limitation to this authority. *In re Supreme Court Adjudication etc.* allowed review of

constitutional claims where the provisions were not severable from the remainder of the petition, but "[w]here the questioned provision is severable, and resolution of constitutional issues prior to the act becoming law would not prevent a costly and potentially unnecessary election. . . ," *Threadgill* would apply. *In re Initiative Petition No. 347, State Question No. 639*, 1991 OK 55, ¶ 25, 813 P.2d 1019, 1030-31; *see, e.g., In re Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶ 7 n. 15, 870 P.2d 782, 786 n.15; *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶ 15 n. 18, 838 P.2d 1, 7 n.18; *In re Initiative Petition No. 315, State Question No. 553*, 1982 OK 15, ¶ 5, 649 P.2d 545, 548. Under this interpretation, of course, *Threadgill* would apply here, since the provision at issue in Initiative Petition 446 is severable from the petition as a whole. However, we appear to have abandoned even this simple safeguard, and the exception has swallowed the rule.

¶4 In its current interpretation of the law, this Court may control whether an initiative petition goes to the people for a vote by considering and deciding its constitutional merits. However, *Supreme Court Adjudication of Initiative Petitions in Norman* did not articulate in a legal context how this exception to an inherent power reserved to Oklahoma citizens exists. We noted that Title 34, Section 8 placed with this Court administrative duties regarding the initiative petition procedure, and stated, "We believe this court is not limited solely to the duties of an administrative officer or act." *Supreme*

Court Adjudication of Initiative Petitions in Norman, 1975 OK 36, ¶ 19, 534 P.2d at 8. Belief is not a legal reason. It is a justification. The Court was justifying its desire to decide the constitutional issue. But our authority does not come from the beliefs of either individual Justices or the Court as a whole.

¶5 This Court's expansion of our pre-election review of initiative petitions exceeds our constitutional mandate. Our jurisdiction is limited to "all cases at law and in equity." Okla. Const. art. VII, § 4. We may decide what the law is, but we cannot "say what law shall or shall not be enacted." *Cress v. Estes*, 1914 OK 361, 142 P. 411, 412. The Legislature has provided for appeals to this Court from a protest to an initiative petition. 34 O.S. §§ 8, 10. Any citizen may protest the sufficiency or constitutionality of an initiative petition by filing written notice with its proponents and this Court. 34 O.S. § 8(B). However, the scope of our review is limited and does not include a determination of constitutionality pre-election. The Legislature merely authorizes the Court, upon review, to "decide whether such petition is in the form required by the statutes," and determine the "numerical sufficiency or insufficiency" of the signatures. 34 O.S. § 8(D), (H). Upon review of a ballot title this Court may correct or amend it, accept a proposed substitute, or draft a new title conforming to statutory provisions. 34 O.S. § 10(A). These statutory provisions empower this Court to ensure that the *form* of a proposed initiative petition is correct but say nothing about review of the *substance* of the petition.

¶6 Justice Rowe, in dissent, concludes that Section 8(B) implicitly authorizes us to review a constitutional challenge pre-election. But that is not what Section 8 says. We must read statutes as a whole, giving effect to each provision. *Oklahoma Dept. of Corrections v. Byrd*, 2023 OK 97, ¶ 27, __ P.3d __. The literal language of the statute (a) sets forth the types of challenges which may be made, and (b) sets forth the scope of this Court's review. The two are not contemporaneous. Of course, this Court has the authority to hear a constitutional challenge to any measure which is passed and enacted into law. But neither the Oklahoma Constitution nor the initiative petition statute compels this Court to address such a challenge before it is ripe – before there is any law to discuss. As Justice Wyrick said, "If our job is to 'say what the law is,' and in a constitutional challenge thus to say whether the Constitution prohibits another law from having an effect on these parties, then we cannot do that without first having a law." *Oklahoma Independent Petroleum Association v. Potts*, 2018 OK 24, ¶ 12, 414 P.3d 351, 365 (Wyrick, J., specially concurring). And I cannot agree to rely on case law precedent to weigh a pre-election constitutional challenge, as that precedent – justifying our inferred authority from Section 8(B) – rests on nothing more than this Court's "belief" that it has that authority.

¶7 Why, then, has the Court since 1975 insisted on its ability to review and decide these constitutional questions? After reviewing the case results I reluctantly conclude that over the last few decades this Court has been

motivated by a desire to ensure that certain measures are either on or off the ballot – to decide for itself what the People should or should not put to a vote.

¶8 This Court claims that it will step in only where a petition is clearly or manifestly unconstitutional. *See, e.g., In re Initiative Petition No. 362 State Question 669*, 1995 OK 77, ¶ 12, 899 P.2d 1145, 1151. First, neither art. 5 nor Title 34 says that the People may only introduce and pass laws which comport with current statutory or constitutional law. Citizens may use the initiative petition to articulate state policy, in order to prepare for potential changes in the law or influence subsequent case law or legislation. *Oklahoma Independent Petroleum Association*, 2018 OK 24, ¶¶ 15-18, 414 P.3d at 365-67 (Wyrick, J., specially concurring). "The People's ability to express their views through constitutional amendment thus *matters*, even when those views don't align with federal policies. The People are either sovereign or they are not." *Id.*, ¶ 19, 414 P.3d at 367. And if a manifestly unconstitutional petition becomes law, the law may be challenged and this Court has both the duty and the authority to correct the error.

¶9 Second, how does the Court measure manifestly and clearly? Some cases have involved a facially unconstitutional issue. In *Supreme Court Adjudication of Initiative Petitions in Norman*, the substance of the petition involved amending the Norman municipal charter to change the method of operation of a municipal utility. We concluded that the petition was facially constitutional and was thus sufficient. *Supreme Court Adjudication of Initiative*

Petitions in Norman, 1975 OK 36, ¶ 17, 534 P.2d at 8. Later, we decided cases where petitions proposed various restrictions on abortion which, at the time, facially violated the United States Constitution by contravening controlling United States Supreme Court case law. *See, e.g., In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶ 35, 838 P.2d at 12. In most cases, the Court must use similar statutes or case law in comparison to determine a provision's constitutional status. That is neither clear nor manifest.

¶10 Here is an example of this process taken to an extreme. This Court declared unconstitutional a proposed initiative petition requiring exclusive use of the English language within state government. *In re: Initiative Petition No. 366, State Question No. 689*, 2002 OK 21, 46 P.3d 123. There, the proponents of the petition unsuccessfully attempted to withdraw it after it was submitted to the Secretary of State and after protests were filed, but before this Court considered the challenges. *Id.*, 2002 OK 21, ¶ 2, 46 P.3d at 125. Thus, as Justice Opala noted in dissent, the Court insisted on reviewing a petition which had no advocate, and which nobody was pressing for submission to a vote. *Id.*, 2002 OK 21, ¶ 2, 46 P.3d at 131 (Opala, J, dissenting). I can only conclude that the majority in that case simply wanted to decide the constitutional issue.

¶11 The Court appears to have been swayed in *Supreme Court Adjudication of Initiative Petitions in Norman* and subsequent cases by the claim that an early decision on the constitutional merits will save the State,

and thus the People, time and money. We have gone so far as to state it is our duty to decide a constitutional issue to prevent a "useless" election. *In re Initiative Petition No. 349*, 1992 OK 122, ¶ 18, 838 P.2d at 8. No matter how noble the effort, that methodology misses the point of the right to initiative petition. Our Constitution provides twin paths to lawmaking: the Legislature and the People. In this context the voters are acting as the Legislature – they propose and vote on statutory or constitutional changes which, if passed, will become law. It is inappropriate for this Court to block that lawmaking path for cost considerations, just as it would be inappropriate for us to so treat Legislative proposals. And at this very early stage of the proceedings, there's no guarantee that this measure will ever require an election. The proponents of the initiative petition bear the initial financial burden to prepare the petition and collect signatures. Should they be successful, Title 34 not only contemplates but requires the petition be put to a vote of the people by election. That requirement, which facilitates the Constitutional right reserved to the people, shouldn't be overridden by this Court's speculative concern about election costs.

¶12 I do not break new ground in following *Threadgill*. Justice Opala objected strongly to the initial exception to *Threadgill* which the Court had created in *Supreme Court Adjudication of Initiative Petitions in Norman*. In numerous separate opinions he reiterated his conviction that this Court had no authority to decide constitutional issues pre-election. I agree with his

observation that "*Threadgill* should be kept in full force because it raises a necessary barrier of insulation between judicature and initiative lawmaking. The former is a function of judges, the latter of the people." *In re Initiative Petition No. 349*, 1992 OK 122, ¶ 5, 838 P.2d at 21 (Opala, J., dissenting) (emphasis omitted). Justice Wilson, dissenting in part in the same case, objected that the Court had interfered with the People acting as a legislative branch; if the petition had sufficient valid signatures, she said, the "only constitutional course" was to allow the people to vote. *Id.*, 1992 OK 122, ¶ 7, 838 P.2d at 18 (Wilson, J., dissenting in part). Justice Wyrick wrote at length discussing the history and doctrine underlying *Threadgill*'s refusal to pass on a constitutional issue pre-election, and some legal consequences of its abandonment. *Oklahoma Independent Petroleum Association v. Potts*, 2018 OK 24, ¶¶ 11-19, 414 P.3d at 364-67 (Wyrick, J., concurring specially).

¶13 Here, the Majority and the dissenters champion opposite dispositions but, from my point of view, get there the same way. The Majority finds without analysis or explanation that "Initiative Petition 446 does not clearly or manifestly violate either the Oklahoma or United States Constitution." That is, it wants to declare the petition constitutional. The dissenters want to declare it unconstitutional. Everyone wants this Court to decide the substantive merits of this petition before the voters even have a chance to see it.

¶14 Reading Title 34, Sections 8 and 10 along with the relevant Constitutional provisions and *Threadgill*, I conclude we have no business determining the merits of a substantive protest to a petition's contents before it is put to a vote of the people. Confining my review to those parameters, I would find Initiative Petition 446 is in the form required by the statutes and sufficient.[1] And I would overrule *Supreme Court Adjudication of Initiative Petitions in Norman* and subsequent cases insofar as they arrogate to this Court a power not granted to us by the Legislature or the Oklahoma Constitution. Of course, in many of those cases, the result would remain the same, since under my interpretation of the law the petitions would go to a vote of the people.

¶15 Not only is this challenge raised pre-election, but the proposed initiative petition has not yet been circulated for signature. In addition, it seeks to amend the Minimum Wage Act – a statute – which may always be changed by the Legislature. Under these circumstances I think it is wildly premature for this Court to intervene. The People should have the opportunity to vote on the measure if it reaches the ballot, the Legislature will have the opportunity to review it if it passes, and this Court should reserve its action for any challenges that may be raised post-election.

[1] I am not persuaded by Petitioners' argument that the gist is so misleading that it violates the statutory form.