

ORIGINAL

2024 OK 13



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Protestants/Petitioners,)

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FILED
SUPREME COURT
STATE OF OKLAHOMA

MAR 4 2024

JOHN D. HADDEN
CLERK

v.)

No. 121,777

KELSEY COBBS and DUSTIN)
PHELAN,)

FOR OFFICIAL PUBLICATION

Proponents/Respondents.)

KANE, C.J., dissenting:

¶1 Today, we ignore clear precedent specifying Constitutional and statutory infirmities in a proposed initiative petition without discussion. The People are entitled to Court decisions which comport with existing law or else give clear explanation when departure from extant law is necessary. In my view, the proposed initiative petition is a violation of the non-delegation doctrine, is not capable of correction by severance, and has a faulty gist.

¶2 The rights of initiative and referendum are vital to our democracy, but they are not absolute. These rights are subject to limitations established by the Constitution, legislative enactments, and this Court's jurisprudence. See *In re*

Initiative Petition No. 384, State Question No. 731, 2007 OK 48, ¶ 2, 164 P.3d 125, 127 (citing In re Initiative Petition No. 379, State Question No. 726, 2006 OK 89, ¶¶ 16-17, 155 P.3d 32, 39-40). Any citizen can protest the legal sufficiency of an initiative petition pursuant to 34 O.S.Supp.2015 § 8, and “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.*

I. DISCUSSION

A. The Petition is an Unconstitutional Delegation of Legislative Authority to Federal Officials

¶3 Initiative Petition 446 is facially an unconstitutional delegation of legislative authority to federal officials in direct contravention of this Court’s jurisprudence in *City of Oklahoma City v. State ex rel. Department of Labor*, 1995 OK 107, 918 P.2d 26. In *City of Oklahoma City*, the Legislature passed a 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.* ¶ 9, at 28. We held the Act [Prevailing Wage Act] violated the non-delegation doctrine because (1) it delegated to an administrative arm of the federal government; (2) it failed to establish definite standards or articulated safeguards; (3) it was less answerable to the will of the people of Oklahoma than the Labor Commissioner who holds elective office; and (4) it leaves public entities with no Oklahoma forum in which to challenge a wage determination. *Id.* ¶¶ 1, 9, 14, 18-19, 918 P.2d at 28-30.

¶4 Initiative Petition 446 contains the exact same constitutional infirmities found in *City of Oklahoma City*: it raises the minimum wage in 2030 and every year annually thereafter, to be increased based on “the Consumer Price Index . . . as published by the U.S. Department of Labor.” As Petitioners point out: (1) this leaves no standards for the U.S. Department of Labor to follow in calculating the CPI-W; (2) it leaves that important determination solely to the discretion of unelected bureaucrats who are arms of the federal government who are unaccountable to the Oklahoma Legislature or Oklahomans; and (3) Oklahomans and their state officials have little power to challenge the U.S. Department of Labor’s CPI determinations that will govern Oklahoma’s minimum wage.

¶5 The argument of Respondents that other Oklahoma legislation contains reference to the Consumer Price Index is specious. Many of the implementations referenced are distinguishable, and if Respondents cited statutes that are arguably violations of the non-delegation doctrine, those statutes are not properly before this Court in this case.

¶6 The proposed petition is a prospective enactment that purports to self-amend depending on some future federal standard not yet determined. After 2030, Oklahoma’s minimum wage is proposed to be increased by the cost of living, if any, measured by the annual increase in the CPI-W published by the U.S. Department of Labor. The Attorney General expressed concerns that: (1) the CPI-W “is inherently colored by the subjective discretion of its publisher” – the U.S. Department of Labor’s Bureau of Labor Statistics; (2) the CPI-W can cease to exist

altogether; and (3) the CPI-W itself actually represents a national average not necessarily representative of Oklahoma and perhaps even less representative of rural Oklahoma. While these arguments hinge more on policy than law, the Attorney General points to relevant factors underpinning the wisdom of the non-delegation doctrine.

¶7 Does the majority overrule *City of Oklahoma City v. State ex rel. Department of Labor* by implication, or factually distinguish said case? There is no way to tell. In my opinion, there is no way to summarily allow the Petition to proceed without either expressly contracting our teachings of the non-delegation doctrine in *City of Oklahoma City*, or else expressly overruling said precedent.

1. Severability Clause

¶8 Respondents argue that even if the reference to the CPI-W in Initiative Petition 446 had been found to violate the non-delegation doctrine, that by itself, does not invalidate the petition altogether because the petition contains a severability clause. The majority finds the proposed Petition wholly sufficient, rendering a severability analysis moot, but it is my opinion that the Petition is both deficient, and not susceptible to correction by severance. Initiative Petition 446 provides that if any part of the measure is held invalid, the remainder of the petition should still take effect. See *State Question 832* § 1(E).

¶9 Under Oklahoma law, we have the authority to sever unconstitutional or insufficient provisions of an initiative petition. See *In re Initiative Petition No. 347*,

State Question No. 639, 1991 OK 55, ¶ 24, 813 P.2d 1019, 1030.¹ In the case of *In re Initiative Petition No. 347*, *State Question No. 639*, the protestant argued the petition was constitutionally invalid on three separate grounds. *Id.* ¶ 24, at 1030. We held that protestant's allegations were not sufficient to defeat the submission of the initiative to the people of this state. *Id.* Specifically, we held that "[t]he alleged fact that a portion of an initiative petition would violate the constitution does not render the petition invalid where the proposed law contains a severability provision, and the questioned provisions could be eliminated without impairing the effect of the act." *Id.* ¶ 24, at 1030 (referencing *In re Initiative Petition No. 191*, 1949 OK 127, ¶¶ 12-13, 207 P.2d 266, 270). We assumed, without deciding the issue, that

¹ Statutes, as opposed to Initiative Petitions, have the following severability provision set forth in law:

In the construction of the statutes of this state, the following rules shall be observed:

1. For any act enacted on or after July 1, 1989, unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable, the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid, unless the court finds:

a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

the “these isolated infirmities would not invalidate the proposed statute in its entirety” and “should not be held to block the right of the people to pass legislation through the reserved power of the initiative.” *Id.* ¶ 24, at 1030.

¶10 In the case of *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma No. 74-1 & 74-2*, 1975 OK 36, 534 P.2d 3, this Court departed from our long-held teachings and considered the constitutionality of an initiative petition *before* it became law. There we said if questions of constitutionality are raised as to subject matter procedure and form, those queries *may* be addressed and determined if the Court determines that such a resolution could prevent an expensive and unnecessary election. *Id.* ¶ 19, at 8. This question is answered through an examination of the severability of the provisions in question. See *In re Initiative Petition No. 315, State Question No. 553*, 1982 OK 15, ¶ 5, 649 P.2d 545, 548. If the provisions are not severable the questions are determinable prior to passage of the act by approval of the voters. *Id.* The converse of this point is also true. Where 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, the questioned constitutionality is not ripe for determination since it presents nothing more than an abstract opinion on a hypothetical question.

¶11 The Alaska Supreme Court addressed this issue of severability in an initiative petition in *Mallot v. Stand for Salmon*, 431 P.3d 159 (Alaska 2018), wherein the Alaska Supreme Court held “that impermissible portions of an initiative can be excised, and the remainder invalidated, where each of the following factors

are met: (1) standing alone the remainder of the proposed bill can be given legal effect; (2) delegating the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.” *Id.* at 171-72.

¶12 In *Mallot*, the Alaska Supreme Court applied the above severability factors and found that severance was not required as to mitigation and habitat protection provisions to remedy the initiative; but severance was warranted as to the explicit restrictions to preserve the initiative. *Id.* at 177. As a result, severing the offending provisions was an appropriate remedy to save the initiative. “[B]y severing the offending provisions the constitutional problem can be remedied without substantially changing the spirit of the measure” and “the remainder of the initiative would not impermissibly infringe on the legislature’s authority over appropriations or that delegated to the ADFG [Alaska Department of Fish & Game] but would still establish a comprehensive regulatory framework for activities that potential harm anadromous fish habitat.” *Id.*

¶13 I believe that the Court in *Mallot* set forth a pragmatic and practical test to evaluate the severability of an Initiative Petition and would adopt the same test for this jurisdiction. Applying these factors to the case at bar, standing alone, the balance of the Initiative Petition could be given legal effect; and that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be

invalidated in its entirety (they have expressly so indicated). However, I find that the spirit of the proposed measure is to adopt a permanent indexing of the State minimum wage to a federal benchmark, with some specified benchmark wages set on the path towards an indexed wage. Once the indexed wage has been invalidated, the spirit of the measure has been breached. I would therefore find that the request for severability fails.

B. Sufficiency of the Gist

¶14 While the gist was not specifically mentioned in the majority Order, we must presume that it was not found deficient. The gist of an initiative petition is required by 34 O.S.2011 § 3, which provides, in pertinent part: “[a] simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet.”

This Court has explained:

[The] purpose of the gist, along with the ballot title, is to prevent *fraud, deceit, or corruption* in the initiative process. The gist should be sufficient that the signatories are at least put on notice of the changes being made, and the gist must explain the proposal’s effect. The explanation of the effect on existing law does not extend to describing policy arguments for or against the proposal. The gist need only convey the practical, not the theoretical, effect of the proposed legislation, and it is not required to contain every regulatory detail so long as its outline is not incorrect. We will approve the text of a challenged gist if it is free from the taint of misleading terms or deceitful language.

In re Initiative Petition No. 409, State Question No. 785, 2016 OK 51, ¶ 3, 376 P.3d 250 (footnotes and internal quotations omitted) (emphasis original). Each signature sheet is attached to a copy of the initiative petition. See 34 O.S. § 3. The

two form what is called the “pamphlet”² and is circulated to potential signatories. *Id.* The gist at the top of each signature sheet is a shorthand explanation of the proposal’s effect. See *Initiative Petition No. 409*, 2016 OK 51, ¶ 4.

¶15 We recently summarized how omissions of information from the gist should be evaluated in the case of *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶ 4, 458 P.3d 1080, 1084. “Because the purpose of the gist is to prevent fraud, deceit or corruption in the initiative process, any alleged flaw created by an omission of details in the gist must be reviewed to determine whether such omission is critical to protecting the initiative process.” *Id.* ¶ 4, at 10 (citing *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶¶ 18-20, 927 P.2d 558, 567). “The sole question . . . is whether the absence of a more detailed gist statement . . . without more, perpetuates a fraud on the signatories.” *Id.* ¶ 19, at 558.

¶16 I fully agree with the Petitioners’ proposition that Initiative Petition 446 is legally insufficient because it proposes to circulate to the voters a gist that misleads voters with respect to the Petition’s effect on existing law. The gist is misleading in two ways. First, the gist is misleading because it provides a list of exemptions from the Oklahoma Minimum Wage Act that the proposal would “eliminate,” and it provides a list of certain employees that “would remain exempt.” In regards to

² As of April 28, 2015, the more detailed ballot title is no longer part of the pamphlet circulated to potential signatories. See 34 O.S.Supp.2015 §§ 2, 8(A). As a result, [t]he gist alone must now work to prevent fraud, corruption, and deceit in the initiative process.” *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶ 4, 376 P.3d 250.

government workers, it provides, "Under this measure, federal and state employees would not be covered under the OMWA." This language is misleading because the Petition suggests that amending the law would exempt federal workers, when in fact, they are already exempt under the existing law. Similarly, the Attorney General in his Brief, points out that "the initiative petition gives the false impression that the OMWA does not currently exempt federal employees and that the approval of the petition is needed to create this exemption."

¶17 The gist is also misleading because it fails to inform voters that the exemption under the OMWA for "[s]ome employers with ten or fewer employees" only applies to businesses with less than ten employees at any one location that have an annual gross revenue of less than \$100,000. The gist fails to alert potential signatories about the true nature of the law by failing to include key limitations in the exemption – that the business have ten or less employees at any one location and that the business have an annual gross revenue of less than \$100,000, and therefore it should be invalidated.

¶18 The gist is ambiguous and confusing to voters in how it characterizes "[s]ome employers with ten or fewer employees" and "certain other types of employees and volunteers." Describing the current exemptions in the OMWA with such vagueness and generalities, improperly requires potential signatories to know what the law was prior to the proposal. Without requiring a more specific description of the exemptions being retained (for example, knowing that "some employers with ten or fewer employees" applies to those grossing less than \$100,000), the initiative

petition puts everyday signatories in the impossible and awkward position of making incorrect assumptions about the OMWA and the gist of the initiative petition in an attempt to make an informed decision.

¶19 The challenged provisions do not accurately explain the proposal's effect on existing law and are confusing and misleading. The gist does not put signatories on notice of the changes being proposed, and it suggests one change that already currently exists in the law. As a result, the gist is legally insufficient.

II. CONCLUSION

¶20 Based upon a neutral application of our Constitution, statutes, and existing precedent, this Court should grant the Petitioners' Application to Assume Original Jurisdiction and declare Initiative Petition 446 legally insufficient by opinion. I respectfully dissent to the Court's declination to do so.