CASE NO. O-117020

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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,

Petitioners,

v.

DR. TOM COBURN, BROOKE MCGOWAN AND RONDA VUILLEMONT-SMITH,

Respondents.

Brief of the State of Oklahoma

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May 29, 2018

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INTRODUCTION

In a dispute between citizens in cases such as this, the Office of the Attorney General is a neutral party. Nevertheless, the Attorney General submits this brief upon invitation of the Court to assist this Court in performing its role of declaring what the law is, and applying that law to the facts of this case. Protestants in this case are correct on some of the points of law argued in their brief. But their ultimate conclusion is incorrect: The petition and gist challenged in this case are not so legally deficient as to require an end to the referendum process. While the gist certainly could have been more precise, the referendum petition's technical deficiencies do not merit its invalidation. For these reasons, this Protest should be denied.

STANDARD OF REVIEW

Under Oklahoma law, "A ***simple*** statement of the gist of the proposition shall be printed on the top margin of each signature sheet."[1] "If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded."[2] The gist need only be "brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition."[3] It is "sufficient that the signatories are at least put on notice of the changes being made."[4] "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."[5] This Court will "approve the text of a challenged gist if it is free from the taint of misleading terms or deceitful language."[6]

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[1] 34 O.S.2011 § 3 (emphasis added).
[2] 34 O.S.2011 § 24.
[3] *In re Initiative Petition No. 384*, 2007 OK 48, ¶ 8, 164 P.3d 125, 129.
[4] *In re Initiative Petition No. 409*, 2016 OK 51, ¶ 3, 376 P.3d 250, 254.
[5] *Id.* (internal marks omitted).
[6] *Id.*

ARGUMENT

I. Omission of the taxes on little cigars from inclusion in the gist, which comprise less than 1% of the measure's effect on revenue, is not so material as to require invalidation of the referendum petition.

Protestants argue that the gist's failure to mention H.B. 1010xx's effect on taxation of little cigars renders the gist legally insufficient.[7] But those tax changes constitute less than 1% of the revenue effects of this revenue bill. Identifying more than 99% of the revenue effects at issue in a revenue bill is sufficient to notify potential signatories of the changes being made for purposes of the gist of a referendum.

The gist describes the cigarette tax, the gross production tax, and the motor fuels taxes. These taxes are predicted to generate more than $425 million in revenue.[8] The tax changes for little cigars is predicted to generate less than $1 million.[9] Protestants are simply wrong that two-tenths of a percent (0.2%) of the effects of a bill constitutes a "significant" or "major" part of the bill.[10] Explaining 99.8% of the revenue effects is sufficient to meet the standard of "a simple statement of the gist"[11] that is "brief," "descriptive of the effect," and "revealing of the design."[12] Although mention of the changes to little cigar taxation would have improved the gist, the gist is "not required to contain every regulatory detail"[13] and "nothing stops a potential signatory from looking up the text of [a petition] or asking to see it."[14]

Moreover, the gist notifies the reader that tobacco taxes are at issue by mentioning the increase in cigarette taxes. This is especially true because, as Protestants claim, little cigars are

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[7] Prot. Br. at 10.
[8] *See* Prot. App., Tab 6.
[9] *Id.*
[10] Prot. Br. 9-10.
[11] 34 O.S.2011 § 3.
[12] *In re Initiative Petition No. 384*, 2007 OK 48, ¶ 8, 164 P.3d 125, 129.
[13] *Id.* at ¶¶ 8-9, 164 P.3d at 129.
[14] *McDonald v. Thompson*, 2018 OK 25, ¶ 10, 414 P.3d 367, 372.

virtually indistinguishable from cigarettes.[15] Protestants speculate that this regulatory detail would be very significant to some citizens, like tobacco companies or public health advocates zealous about smoking cessation.[16] But those very same people are the ones most likely to be hyper-aware of H.B. 1010xx's full scope regardless of the gist, and nothing in the gist could make them more informed about the issue. It would be contrary to the protection of the referendum heretofore afforded if this Court invalidates a petition simply at the possibility—however slight—that someone might draw the line in their signing decision at the little cigar issue.

II. Lack of discussion of the hotel tax in the gist does not render it insufficient because approval of H.B. 1010xx at a referendum would not re-animate that repealed tax.

Protestants next argue that the gist is invalid because it fails to mention the "hotel/motel tax," which was included in H.B. 1010xx, but repealed before the referendum process commenced. Protestants argue that, if R.P. 25 is put to a vote and H.B. 1010xx is approved at referendum, the repealed hotel/motel tax would be revived or reanimated. We think that proposition is inconsistent with the effect and nature of a referendum petition.

The effect of a repeal of part of a referred measure prior to the filing of a referendum petition on the measure is a question of first impression for this Court and, as far as we can tell, for any court in the land. But we are not without guidance. This Court has held that once a measure has been properly referred to the people by the filing of a petition with sufficient signatures to place an enactment on the ballot, and before the vote on the measure, the legislative body "can neither amend nor repeal the [measure] during that time."[17] But the Court in those cases also emphasized that this limitation on the Legislature's power of repeal is only during a limited,

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[15] Prot. Br. at 8.
[16] Prot. Br. at 8-9.
[17] *In re Referendum Petition No. 1, Ordinance 6-B, City of Sand Springs*, 1950 OK 191, Syllabus 3, 220 P.2d 454, 455; *see also Okla. Tax Comm'n v. Smith*, 1980 OK 74, ¶¶ 25-26, 610 P.2d 794, 806.

discrete time window: "such period begins with the date of filing a valid petition for reference and ends with the date the referendum vote is had."[18] Outside of this window, the Constitution is clear that "the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law…."[19] Here, H.B. 1012xx repealed a portion of H.B. 1010xx well before the referendum process had been initiated (indeed, the official filing of signatures has not even occurred at the time of this filing). The Legislature was acting well-within its power to repeal, and Protestants are incorrect to suggest that the Legislature could not "preemptively 'repeal' provisions of a bill subject to referendum."[20]

There remains the question, however, of the effect of approval at referendum of an enactment that had partially been repealed prior to the filing of the referendum petition. Answering this question requires a correct understanding of the nature of the referendum power.

The referendum power is perhaps best conceptualized as an **optional veto power**. It is akin to a **veto** or "negative" power because, like the Gubernatorial veto, the referendum power has no ability to amend or initiate laws (unlike the initiative), but merely to approve or reject enactments as they emanate from the Legislature.[21] Thus, from the outset the Legislature,[22] this

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[18] *In re Referendum Petition No. 1*, 1950 OK 191, ¶ 31, 220 P.2d at 460; *see also Smith*, 1980 OK 74, ¶ 26, 610 P.2d at 806-07 (legislative amendment or repeal would only interfere with referendum right "[a]fter referendum proceedings began").

[19] OKLA. CONST. art. V, § 7; *see also Smith*, 1980 OK 74, ¶ 25, 610 P.2d at 806 ("[T]he Legislature may act in the face of the initiative and referendum or at any time in the manner it deems appropriate, without the possibility of a suspension of authority, but ever cognizant that it is answerable to the voters at regular intervals, the ballot again appearing to be the citizens' best assurance that government is responsive to the people.").

[20] Prot. Br. 11.

[21] The referendum, however, differs in that the people can exercise a line-item veto, *see* OKLA. CONST. art V, § 4, whereas the Governor cannot, *see* OKLA. CONST. art. VI, § 12 (permitting Governor to use line-item veto only when reviewing appropriation bills).

[22] R.L. 1910, § 3368 (original statute characterizing referendum as "veto").

Court,[23] and the public[24] have characterized the referendum as a veto power. This veto power is **optional** because it lies dormant, and the possibility of referendum has no effect on enactment, until the filing of a petition with the requisite number of valid signatures.[25]

A better understanding of the referendum power can be obtained by comparing it to the initiative power. The power of initiative is a legislative power that operates parallel to the power of the Legislature. In this dual-track system, both the people through initiative and the Legislature through enactments may operate concurrently, engaging in their respective processes simultaneously, and amending or repealing each other's acts more or less at will.[26] The referendum power, by contrast, is a single-track system. The Legislature, the Governor, and the People each have their separate, distinct roles, which may only operate at their designated times in the appropriate order, and one cannot interfere with the other while the other is acting at its rightful

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[23] *See, e.g.*, *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, ¶ 29, 820 P.2d 772, 780 (under the initiative and referendum powers, "the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the Legislature and the Governor") (quoting *Kadderly v. City of Portland*, 74 P. 710, 720 (Or. 1903)).

[24] *See, e.g.*, Samuel Hardiman, *'Not going to be enough for our circumstances': School finances have changed little despite walkout*, Tulsa World, (April 28, 2018), http://www.tulsaworld.com/news/education/not-going-to-be-enough-for-our-circumstances-school-finances/article_6acf92df-4102-5bfa-ac82-50aee7152dcf.html (quoting an Oklahoma State School Boards Association fact-sheet distributed to districts about "the veto (repeal) of HB 1010xx" through a referendum petition); Trevor Brown, *Ballot Questions Could Boost Teacher Pay or Put Raises at Risk*, Oklahoma Watch, (Apr. 13, 2018) http://oklahomawatch.org/2018/04/13/ballot-questions-could-boost-teacher-pay-or-put-raises-at-risk/ (calling it a "veto referendum"); David Blatt, *Will the teacher raise be delayed by a veto petition?*, Oklahoma Policy Institute (Apr. 12, 2018), https://okpolicy.org/will-the-teacher-raise-be-delayed-by-a-veto-petition/ (same).

[25] OKLA. CONST. art. V, § 1 (the people "reserve power ***at their own option*** to approve or reject at the polls any act of the Legislature") (emphasis added); *In re Initiative Petition No. 347*, 1991 OK 55, ¶ 6, 813 P.2d 1019, 1023 (citing *Wyatt v. Clark*, 1956 OK 210, ¶ 3, 299 P.2d 799) ("the people have reserved unto themselves the power to repeal a law ***only*** by complying with procedural requirements and invoking the power of referendum" or by the initiative (emphasis added)).

[26] *Smith*, 1980 OK 74, ¶ 26, 610 P.2d at 807 (the initiative system, apart from the referendum power, is one "whereby both the people and the Legislature may propose legislation independently, and neither can block the effort of the other during the process"); *Granger v. City of Tulsa*, 1935 OK 801, ¶ 15, 51 P.2d 567, 569 (law enacted by initiative "may be amended or repealed by the legislative body … at will").

stage of the process.[27] Moreover, because this process operates on a single track, the latter stages of the process can only act on what has resulted from the earlier stages.[28] For example, citizens cannot petition for referendum on a bill vetoed by the Governor. Were this not true, the latter stages of the process would be able to ***initiate*** lawmaking independently, which is the power of ***initiative***, not referendum.[29] Thus, aside from the ability to demand referendum against only part of an act, individual citizens seeking referendum must take legislative acts as they find them, and the other powers are free to amend or repeal up to the time the referendum process is activated. As a result, when the referendum power is activated, an enacted measure can only remain law if it has ultimately received the assent of all three powers (the Legislature, the Governor, and the People), absent explicit exemption (like the legislative veto override).[30] This triple-layered separation of legislative powers ensures that changes to the law are based on increased consensus, beyond bare majorities in a single body, adding an extra safeguard to liberty.[31]

With this understanding in mind, the question of the hotel/motel tax becomes more clear. The hotel/motel tax was validly repealed during the Legislature's rightful stage of the process, and well before any citizens exercised their option to activate the dormant referendum power. The law as it comes to the people seeking referendum is that the Legislature and Governor had already *disapproved* the hotel/motel tax. As several Justices of this Court once stated, "When voting on the

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[27] *In re Referendum Petition No. 1*, 1950 OK 191, ¶ 28, 220 P.2d at 460 (quoting *Drain v. Becker*, 240 S.W. 229 (Mo. 1922)) (endorsing notion that the Legislature cannot "interfere with legislative action by the people themselves or that the latter may interfere with like action by the [Legislature] until such action in each instance has been consummated").

[28] *Id.* (quoting *Drain*, *supra*, for idea that "[t]he people cannot refer a measure until it has been adopted by the General Assembly and signed by the Governor"); *see also* J. Michael Medina, *The Emergency Clause and the Referendum in Oklahoma*, 43 OKLA. L. REV. 401, 415 (1990).

[29] *Smith*, 1980 OK 74, ¶ 2, 610 P.2d at 798 (referendum is "distinct" from initiative because it "allow[s] the people to pass upon subject of legislation approved by the Legislature," which is "apart from the [initiative's] reservation of power to induce legislation").

[30] *See* OKLA. CONST. art. VI, § 11 (providing the Legislature's veto override power).

[31] *Cf. Clinton v. City of New York*, 524 U.S. 417, 450-53 (Kennedy, J., concurring).

question whether to exercise the *veto* power ... no repealed law can be re-activated."[32] The referendum power does not somehow change the enactment date or resurrect repealed laws, but only acts to "supersede" an enactment if such act is rejected at the polls.[33] As more fully explained below, the "enactment" of H.B. 1010xx has already occurred, and subsequent approval by the people at a referendum would not change that fact.[34]

While it is true that citizens could in theory call a referendum on a law creating the repeal, thereby properly rejecting the Legislature's act of repeal, such an action is not constitutionally permissible for H.B. 1012xx because it contains a properly-enacted emergency clause.[35] Permitting repeal of H.B. 1012xx through referendum on H.B. 1010xx would be impermissibly allowing the power to be used indirectly to accomplish that which the Constitution forbids from doing directly.[36] In this single-track system, such interference with another body's act in different stages of the process cannot be done outside of the permitted direct mechanisms explicitly authorized by the Constitution.[37] For these reasons, we think that approval of H.B. 1010xx at the polls through referendum would **not** undo the repeal accomplished by H.B. 1012xx and thereby re-animate or resurrect the hotel/motel tax.

Nevertheless, we recognize this is a question of first impression. If Protestants are correct that the effect of a vote on R.P. 25 would be to revive the hotel/motel tax, such an effect should have been included in the gist, and the gist would be legally insufficient without it. But if our view

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[32] *In re Referendum Petition No. 1*, 1950 OK 191, ¶ 3, 220 P.2d at 461 (Arnold, J., dissenting). Although this view was expressed in a dissent, the dissent correctly observed that nothing the majority in that case held was in contradiction to this point: "Could the voters re-enact this repealed ordinance by voting at this election not to repeal or to veto it? Surely the majority do not so hold. They have not said so." *Id.* at ¶ 9, 220 P.2d at 462.
[33] *Ex parte Wagner*, 1908 OK 77, ¶ 8, 95 P. 435, 437.
[34] *See infra* at 9-11.
[35] *See* H.B. 1012xx, Prot. App., Tab 7 at § 2; OKLA. CONST. art. V, § 2.
[36] *See Ry. Labor Execs.' Assoc. v. Gibbons*, 455 U.S. 457, 467-73 (1982).
[37] *See supra* at 6 n.27.

is correct that the hotel/motel tax will remain repealed even if H.B. 1010xx is approved at the polls, then R.P. 25 could have no potential ***effect*** on occupancy taxes, and the gist is not legally invalid for not explaining what the proposal would ***not*** do.

III. The gist's language that the petition is to "repeal" H.B. 1010xx sufficiently puts potential signatories on notice that the effect of signing the petition will be to place H.B. 1010xx on the referendum ballot.

Protestants argue that the gist is misleading because it styles the measure as a "repeal," when instead the petition would refer H.B. 1010xx to the people for approval or rejection.[38] Protestants are correct that, as a technical matter, a referendum on H.B. 1010xx is not to repeal the bill; rather, a referendum will refer H.B. 1010xx to voters for their approval or rejection.[39] Proponents correctly phrased it as such in their petition.[40] But regardless of how the gist is phrased, it puts signatories on notice that the effect of signing would be to put H.B. 1010xx and its taxes to a vote. This is sufficient for the gist of the proposition.

Protestants worry about "substantial confusion" that may result about the meaning of a "Yes" vote on the referendum and the meaning of a "No" vote. But any concern as to what a "Yes" or "No" vote means is the subject of the ballot title, which can be re-written by the Attorney General.[41] The gist need not inform voters about how the ballot will be grammatically structured in the voting booth months in advance, but only alert the voters about what is at issue: whether the higher taxes in H.B. 1010xx should be put to a popular vote. The language of "repeal" is sufficient for the lay voter to understand what is at stake. Even this Court has in the past characterized the referendum power as one of "repeal."[42] Other jurisdictions have similarly

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[38] Prot. Br. at 12-14.
[39] *See* OKLA. CONST. art. V, § 1 (referendum power is "to approve or reject at the polls any act of the Legislature").
[40] Prot. App., Tab 1 at 1.
[41] 34 O.S.2011 § 9(B)(5)-(6), (D).
[42] *See In re Initiative Petition No. 347*, 1991 OK 55, ¶ 6, 813 P.2d at 1023 (citing *Wyatt v. Clark*, 1956 OK 210, 299 P.2d 799) ("the people have reserved unto themselves the power to ***repeal*** a law

regarded the referendum as a "repeal" option.[43] And this Court several times rejected challenges based on a dispute as to whether the petition should phrase the question as "veto" rather than "approve" because, in either case, "[t]he voters could not be misled."[44]

In fact, Protestants' argument is particularly ironic because Protestants themselves in the first words of their brief say that the petition seeks to "reverse" H.B. 1010xx.[45] This is hardly different from the "repeal" language and demonstrates that such words sufficiently communicate in ordinary language to the layperson that signing the petition means that H.B. 1010xx will be put to a vote. This is further confirmed by the public discussion, even before the petition was filed, that characterized a potential referendum effort as one of "repeal."[46] And this notion is consistent with the longstanding common understanding and public discussion of the referendum power as one of "veto."[47] The idea of "repeal" is sufficient for the gist, even if the ultimate ballot title contains a more technically accurate description.

Protestants are also concerned that the language of repeal may affect the validity of H.B. 1023xx,[48] the teacher pay raise mandate, which is "contingent on the enactment of"

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only by complying with procedural requirements and invoking the power of referendum" or by the initiative (emphasis added)).

[43] *See, e.g.*, *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 191-92 (2003); *Telford v. Roberts*, No. 13-11670, 2013 WL 2285531, at *1 (E.D. Mich. May 23, 2013); *City of Houston v. Am. Traffic Sols., Inc.*, No. CIV.A. H-10-4545, 2011 WL 2462670, at *2 (S.D. Tex. June 17, 2011); *Hurst v. State Ballot Law Comm'n*, 696 N.E.2d 531, 532 (Mass. 1998); *Gibbons v. State Ballot Law Comm'n*, 439 N.E.2d 301, 303 (Mass. 1982); *Mello v. Woodhouse*, 872 P.2d 337, 341 (Nev. 1994).

[44] *In re Referendum Petition No. 130, State Question No. 395*, 1960 OK 185, ¶ 6, 354 P.2d 400, 403 (citing *In re Referendum Petition No. 73, State Question No. 236*, 1938 OK 457, ¶ 16, 82 P.2d 1017, 1023; *In re Referendum Petition No. 73, State Question No. 236*, 1938 OK 494, 83 P.2d 572; *In re Referendum Petition No. 71, State Question No. 216*, 1937 OK 309, 68 P.2d 424).

[45] Prot. Br. at 1.

[46] *See, e.g.*, Hardiman, *supra* at 5 n.24 (quoting an Oklahoma State School Boards Association fact-sheet distributed to districts about "the veto (repeal) of HB 1010xx" through a referendum petition); Brown, *supra* at 5 n.24 (providing quotations from both sides of the tax debate characterizing referendum as a "repeal").

[47] *See supra* at 4-5 nn.22-24.

[48] Prot. Br. 13-14

H.B. 1010xx.[49] But of course, if H.B. 1010xx is approved at the polls, what is law is what is in the bill, not the gist. In any event, Protestants are wrong about the nature of H.B. 1023xx's contingency on H.B. 1010xx. H.B. 1010xx was passed by both houses and signed by the Governor, and thus the people's representatives have engaged in the "enactment" of H.B. 1010xx within the meaning of H.B. 1023xx. Regardless of whatever happens with a future referendum on H.B. 1010xx, this would not affect the teacher pay raise provided by H.B. 1023xx.

This is true for several reasons. *First*, the Constitution gives the referendum power with respect to "any ***act*** of the Legislature,"[50] by which it must mean statutory enactments, and not such other acts as joint resolutions or bills vetoed by the Governor. Thus, this Court has recognized "the Legislature's power to ***enact*** legislation independent of the people without regard to the electorate's initiative and referendum powers," even if "the separate procedure of referendum [may] prohibit a legislatively-passed ***enactment*** from becoming law."[51] Accordingly, a referendum on H.B. 1010xx is not even possible unless "enactment" has already occurred. *Second*, when a referendum is filed, such filing does not retroactively alter the fact that the Legislature had already engaged in the "enactment" of H.B. 1010xx, but only suspends whether the enactment "shall take effect and be in force,"[52] and will "delay … such act from becoming operative."[53] The

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[49] H.B. 1023xx, Prot. App., Tab 3 at 9, § 3.
[50] OKLA. CONST. art. V, § 1.
[51] *Smith*, 1980 OK 74, ¶ 26, 610 P.2d at 807. Oregon law from around the time of Statehood is useful for understanding the referendum, because the initiative and referendum provisions of the Oklahoma Constitution "are taken substantially from the Constitution of Oregon." *Ex parte Wagner*, 1908 OK 77, ¶ 1, 95 P. 435, 435. That state's highest court said the referendum poses a "question of the approval or disapproval by the people of what the Legislature has already ***enacted*** as a law" and that the term "measure" in the Constitution "means an act as it comes from the hands of the Legislature" and "[i]t is the ***enactment*** with which we have to do." *Palmer v. Benson*, 91 P. 579, 580 (Or. 1907) (emphasis added).
[52] OKLA. CONST. art. V, § 3
[53] *Id.* at § 4.

distinction between enactment and effectiveness is well-known; the two are not the same.[54] *Third*, the Legislature's choice of the word "enactment" implies a single-instance occurrence, not the continued effect, validity, or operation of the measure.

Nevertheless, we recognize this is a difficult question. We respectfully urge this Court to provide a clear answer to whether referring H.B. 1010xx affects the continued validity of H.B 1023xx. This is important because, if H.B. 1010xx is properly put to a vote, the voters will benefit from this Court's authoritative guidance of the implications of their vote.

IV. The petition's omission of section numbers in the copy of the bill attached to the petition, which otherwise is a word-for-word reproduction of the enactment, does not render the petition invalid.

Protestants' final argument is that the referendum petition failed to include "an exact copy of the title and text of the measure" to be submitted to a vote of the People because the section numbers from the copy of H.B. 1010xx attached to the petition were missing.[55]

Although 34 O.S. § 1 states that proponents of a referendum should append "an exact copy of the text of the measure" to be referred, this instruction is part of a larger template form that is introduced with the directive: "The referendum petition shall be *substantially* as follows."[56] Moreover, elsewhere in the same statutory title the Legislature has explained that: "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."[57] We do not think that failure to include the section numbers of the bill referred

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[54] *See, e.g.*, *City of Coalgate v. Gentilini*, 1915 OK 742, ¶ 4, 152 P. 95, 95-96 (an enactment is not void "simply because it had not yet become operative" and such an act should not be "treated as not existing" merely because it had not yet become effective).

[55] Prot. Br. at 14. Protestants appear to quote an outdated version of Section 1 of Title 34, which since 2015 has not required an exact copy of the "title" of the referred measure, but rather just "an exact copy of the text of the measure." 34 O.S. Supp. 2015 § 1.

[56] 34 O.S. Supp. 2015 § 1 (emphasis added).

[57] 34 O.S.2011 § 24.

constitutes a substantial departure from the mandated procedure; instead, this appears to be a mere clerical error. The copy of H.B. 1010xx attached to the petition is accurate word-for-word in its substance, such that both the Secretary of State and potential signatories could not be under any misimpression about which bill is being referred. That is the purpose of such requirements,[58] and that purpose is fulfilled by this petition.[59]

Protestants believe these provisions allowing substantial compliance are somehow nullified by a case from the Court of Civil Appeals.[60] But this case is distinguishable on its facts and inconsistent with this Court's precedent. In *In re Referendum Petitions 0405-1*, the Court of Civil Appeals addressed a referendum petition that the proponents "concede[d] [] did not include the entire text of the ordinances" they sought to refer.[61] The court observed that the "exact copy" language was inserted into the statute in 1961, and inferred that it was meant to override any substantial compliance provisions that nevertheless remained in statute.[62] The Court invalidated

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[58] *In re Referendum Petition No. 1, City of Guymon*, 1946 OK 112, 167 P.2d 881, 882 ("[T]he reason for [the exact copy] requirement was to prevent any fraud or deception in ... referendum proceedings.").

[59] As noted above, Oregon law provides helpful guidance, *see supra* at 10 n.51, and early Oklahoma statutes giving effect to the initiative and referendum rights were adopted from that State, *Norris v. Cross*, 1909 OK 316, ¶ 29, 105 P. 1000, 1009. One such case noted that Oregon law required "a full and correct copy of the title and text of the measure," but that "[t]he purpose of the petition for referendum is to identify a particular enactment of the legislative assembly which the petitioners desire to have referred to the people—a question of identity, not of legislation. There is a distinction in that regard between the referendum and the initiative, in which latter legislation is initiated and the whole matter must be formulated just as it is to be submitted to the people, while in the referendum it is only a question of the approval or disapproval by the people of what the Legislature has already enacted as a law. ... And when we consider the purpose of the petition, namely, to bring to the attention of the Secretary of State a particular act for reference to the people, a petition that will identify such act and shall be sufficiently plain, that neither the signers of the petition nor the Secretary of State may be mistaken as to what is meant, will accomplish all that the Constitution contemplates, and the 'full text of the measure' fills this requirement." *Palmer v. Benson*, 91 P. 579, 580 (Or. 1907).

[60] Prot. Br. at 14-15 (citing *In re Referendum Petitions 0405-1, 0405-2, 0405-3 of City of Norman*, 2007 OK CIV APP 19, 155 P.3d 841).

[61] 2007 OK CIV APP 19, ¶ 12, 155 P.3d 841, 843.

[62] *Id.* at ¶¶ 13-16, 155 P.3d at 844.

the petition because the omitted provisions from the text of the ordinance were "substantive" and strict compliance will mean that there will be "nothing left to conjecture or speculation as to the content of the measure which is the subject of the petition."[63]

Here, by contrast, the omission of section numbers from the word-for-word copy of H.B. 1010xx does not leave out entire portions of the enactment, nor are the section numbers a "substantive" omission. No one need speculate about the content of the law being voted upon.

Moreover, this Court has consistently held that mere clerical or technical errors will not defeat a petition.[64] For example, in 1991, this Court faced a challenge to an initiative petition that sought to amend certain laws, and which contained an accurate word-for-word copy of the amendments proposed, but in various places did not have the typical markings associated with legislative amendments (such as underlining additions or ~~striking out~~ deletions).[65] Although protestants alleged potential deception thereby, the Court rejected that argument because the full text of the measure was included and "it is not clear that the people will be misled by submission of this petition to the voters."[66] Similarly, in 1970, this Court rejected a challenge to a petition on the grounds that a photocopy in 4-point font was not an "exact copy," even though the document was barely legible and the sizes of the margins were technically improper.[67] This Court explained:

> We are unable to agree with the appellants' contention that a writing which is tiresome to read is ipso facto fraudulent, corruptive or deceptive. ... The duty devolving upon the correlative legislative branch of government under Const. Art. 5 § 8 causes this court to feel reluctant to adjudicate invalidity of this referendum petition on technical grounds, as technical errors are to be disregarded if the intended purpose can be attained.[68]

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[63] *Id.* at ¶¶ 18-19, 155 P.3d at 844.
[64] *See, e.g., In re Initiative Petition No. 365 State Question No. 687*, 2000 OK 47, ¶ 14, 9 P.3d 78, 82; *In re Initiative Petition No. 1, City of Drumright*, 1956 OK 175, ¶ 13, 298 P.2d 409, 412; *Foster v. Young*, 1931 OK 220, ¶ 17, 299 P. 162, 167; *see also Stake v. City of Kingfisher*, 1985 OK CIV APP 31, ¶ 17, 707 P.2d 1220, 1223.
[65] *In re Initiative Petition No. 347*, 1991 OK 55, ¶¶ 26-27, 813 P.2d at 1031.
[66] *Id.*
[67] *In re Referendum Petition No. 1968-1 of City of Norman*, 1970 OK 143, 475 P.2d 381.
[68] *Id.* at ¶ 5, 610 P.2d at 383.

Thus, contrary to the Court of Civil Appeals, this Court has expressed no indication that the substantial compliance standard provided in statute has somehow been abrogated by the 1961 amendment.[69] Indeed, the earliest versions of the initiative and referendum statutes contained similar language requiring a "true and exact copy," but this Court nonetheless relied on the same substantial compliance provision that exists to this day and held that a "slight difference in the wording ... affects in no way the substance or form of the proposed measure," and that "if there was error, it was merely technical and must be disregarded."[70] Other jurisdictions have taken a similarly liberal approach to the exercise of the referendum right.[71] Such an approach is consistent with the larger purpose of the "exact copy" requirement, namely, preventing proponents from fraudulently obtaining signatures on one measure and then counting those signatures to support a referendum on a different measure.[72] No such instance of fraud is apparent here.

Here, there is no dispute that Proponents reproduced a true and exact copy of the substantive "text" of the provision. It is not even clear that section numbers (or, for example, the

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[69] *See also In re Referendum Petition No. 18, State Question No. 37*, 1966 OK 152, 417 P.2d 295 (Referendum "rights are not to be lightly brushed aside on mere technicalities. The law does not require a strict compliance with the provisions of our Constitution and statutes governing initiative and referendum procedures."); *Caruth v. State ex rel. Tobin*, 1923 OK 980, ¶ 13, 223 P. 186, 190 ("[T]he law should be liberally construed in favor of permitting the electors to voice their sentiments, and they should not be throttled with technicalities."); *In re Initiative Petition No. 23, State Question No. 38*, 1912 OK 611, ¶ 3, 127 P. 862, 866 ("If technical restrictive constructions are placed upon the laws governing the initiation and submission of these measures, the purpose and policy of the people in establishing the same will be entirely defeated, and instead of becoming an effective measure for relief from evils, under which they have heretofore suffered, there will be naught but an empty shell and a continuation of the conditions for which relief in this manner has been sought.").

[70] *Cress v. Estes*, 1914 OK 361, 142 P. 411, 412.

[71] *See, e.g., Assembly of State of Cal. v. Deukmejian*, 639 P.2d 939, 948 (Cal. 1982) (en banc) ("[T]he alleged errors in the text of the petitions concern only typographical errors in the listing of census tract numbers. The errors were so minor as to pose no danger of misleading the signers of the petitions. They, therefore, do not affect the validity of the petitions.").

[72] *In re Initiative Petition No. 2 of Cushing*, 1932 OK 124, ¶ 31, 10 P.2d 271, 279.

page numbers of the act) are part of the "text of the measure," as that term is used in 34 O.S. § 1. But even assuming *arguendo* that Proponents failed to strictly comply with this requirement of exact reproduction, such a clerical error is *de minimis* and would not affect the decision of signatories. Because every word is included, the public is put on exact notice about the measure at issue. The omission of section numbers is the paradigmatic example of a "clerical" or "technical error." And Protestants are simply incorrect as a legal matter in their assertion that the error will affect the law if H.B. 1010xx is approved at a referendum.[73] In that situation, it is the text that the Legislature enacted, not the copy of this text that Proponents were required to file with the Secretary of State, that is the law.

CONCLUSION

"If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded."[74] Although the petition and gist could have been better drafted, this Court should not allow citizens seeking to petition their government for redress through referendum to "be throttled with technicalities."[75] The Protest should be denied.

Respectfully submitted,

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[73] Prot. Br. 15.
[74] 34 O.S.2011 § 24.
[75] *Caruth*, 1923 OK 980, ¶ 13, 223 P. at 190.

CERTIFICATE OF MAILING

This is to certify that on this 29th day of May 2018, a true and correct copy of the foregoing instrument was mailed, postage prepaid to the following:

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