

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 29 2012

#110545
MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:)
)
INITIATIVE PETITION NO. 395) Case No. _____
)
STATE QUESTION NO. 761)

PROTEST TO THE INITIATIVE PETITION

FILED

To: THE SUPREME COURT OF OKLAHOMA

MAR 29 2012

-AND-

OKLAHOMA SECRETARY
OF STATE

Daniel P. Skerbitz
P.O. Box 35404
Tulsa, OK 74153

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Brittany Mays Barber, Larry Burns, D.O., Heather Hall, Eli Reshef, M.D., Martha Skeeters, Ph.D., and Dana Stone, M.D., all of whom are citizens of Oklahoma, protest the legal sufficiency of Initiative Petition No. 395, State Question No. 761 ("IP 395"), as follows:

Preliminary Statement

1. In 1992, this Court rejected an attempt to use the initiative process to ban abortion, holding that the initiative process could not be used to curtail rights secured to women by the

federal Constitution. *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1. In the twenty years since that decision, courts have repeatedly reaffirmed the federal Constitution's protections for a woman's right to decide whether to continue or interrupt a pregnancy.

2. The amendment to the Oklahoma Constitution proposed by IP 395 is intended to, and will, ban abortion in direct violation of both the federal Constitution and this Court's clear declaration that Oklahoma's initiative process may not be invoked for that purpose. Further, it would infringe on a woman's federal constitutional right to decide whether and when to conceive by banning most forms of contraception and effectively prohibiting medical interventions, like *in vitro* fertilization, that assist with conception. In addition, IP 395 violates Art. 24, § 1, of the Oklahoma Constitution because it addresses more than one subject. Finally, IP 395 contains a statement of the gist that is so misleading and inaccurate that it fails to satisfy the requirements of 34 Okla. Stat. § 3.

Background

3. On March 1, 2012, the proponents of IP 395 filed that petition with the Secretary of State. *See* Letter from Sec'y of State V. Glenn Coffee to Daniel P. Skerbitz (Mar. 1, 2012), *available at*: <https://www.sos.ok.gov/documents/questions/761.pdf>. In a press release issued in conjunction with the filing of IP 395, one of the proponents stated that the goal of filing IP 395 was "to stop abortion. As supreme law of the state, the Oklahoma Personhood Amendment, guaranteeing the right to life of all people, will, necessarily, have the greatest impact to that end." *See* Keith Ashley, *Pro-life Citizens Launch Initiative to Guarantee Personhood Rights in Oklahoma*, Personhood Oklahoma (March 2, 2012), <http://personhoodoklahoma.com/news/2012/03/pro-life-citizens-launch-initiative-to-guarantee-personhood-rights-in-oklahoma/>.

4. On March 8, 2012, the Attorney General certified that IP 395's ballot title "[did] not comply with applicable laws" because it failed to "adequately explain the effect" of the initiative and "reflects partiality in its composition." Letter from Att'y Gen. E. Scott Pruitt to Sec'y of State V. Glenn Coffee (Mar. 8, 2012), *available at*: <https://www.sos.ok.gov/documents/questions/761.pdf>. The Attorney General advised that he intended to rewrite the ballot title. *Id.*

5. The Attorney General identified two examples of the ballot title's failure to adequately explain the effect of the initiative: the ballot title "[did] not define the phrase 'the beginning of the biological development' nor explain how that phrase may apply to medical procedures and contraceptive measures"; and the ballot title "define[d] 'person' in a manner broader than the measure." *Id.*

6. The Attorney General explained that IP 395's ballot title reflected "partiality in its composition as it states that it 'reconcile[s] recent scientific developments with the definition of a human being for the purpose of equal protection under the law.'" *Id.*

7. On March 19, 2012, the Secretary of State received the ballot title prepared by the Attorney General. As rewritten by the Attorney General, the ballot title states:

This measure adds a new section of the Oklahoma Constitution.

The section defines a "person" for purposes of Article 2, Section 2 of the Oklahoma Constitution, which provides all persons with the inherent right to life, liberty, and the pursuit of happiness. The measure defines "person" as any human being from the beginning of biological development to natural death. Biological development of a human being begins at fertilization, which is the fusion of a female egg with a human male sperm to form a new cell.

The measure vests state constitutional inherent rights, including rights to equal protection regardless of age, place of residence or medical condition and due process rights to "persons" as defined by this measure. The measure thus generally prohibits abortion.

The measure does not prohibit contraceptive methods that prevent the creation of a “person” as defined by this measure. The measure would prohibit contraception methods that result in termination of a “person.”

The measure would also protect “persons” created in a laboratory, which would affect, but not prohibit, medical procedures such as in vitro fertilization. For example, “persons” created in a laboratory as part of the medical procedure could not be deliberately destroyed.

Letter from Att’y Gen. E. Scott Pruitt to Sec’y of State V. Glenn Coffee (Mar. 16, 2012), available at: <https://www.sos.ok.gov/documents/questions/761.pdf>.

8. The ballot title, as rewritten by the Attorney General, does not contain the statement that the initiative “reconcile[s] recent scientific developments with the definition of a human being for the purpose of equal protection under the law.” *Id.*

9. Dan Skerbitz, one of the proponents of IP 395, said publicly, “We are quite pleased with the AG rendering of the ballot title. We think it accurately reflects both the actual wording of the amendment and its effects.” Barbara Hoberock, *Attorney general revises ‘personhood’ petition wording*, Tulsa World, March 25, 2012. http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20120325_16_A26_OKLAHO116835.

10. On March 22, 2012, the Secretary of State published notice of the filing of IP 395 in newspapers of record in Oklahoma.

IP 395 Violates the Fourteenth Amendment to the U.S. Constitution.

11. The amendment to the Oklahoma Constitution proposed by IP 395 would confer rights on a fertilized egg that trump the rights of each woman to determine whether and when to conceive and whether to carry a pregnancy to term. Thus, the amendment would have far-reaching effects, including but not limited to (i) banning abortion without exception, and (ii) interfering with a woman’s exercise of her right to decide whether and when to conceive, including the use of contraception or medical interventions like *in vitro* fertilization.

12. By conferring constitutional rights on a fertilized egg, the amendment to the Oklahoma Constitution proposed by IP 395 would clearly ban abortion, as its proponents intend it to do.

13. In addition, conferring these rights on a fertilized egg would effectively prohibit contraceptives, like birth control pills and intrauterine devices, whose possible mechanisms of action include preventing a fertilized egg from implanting.

14. Further, IP 395 would effectively ban medical interventions like *in vitro* fertilization, which necessarily involves fertilizing eggs that are very often not successfully implanted.

15. Moreover, IP 395 would have potentially dire implications for a woman who needs medical treatment for ectopic pregnancy, a health-endangering and potentially life-endangering condition which occurs when a fertilized egg implants outside a woman's uterus, including by preventing her from receiving such treatment; for an incomplete miscarriage; or for particularly dangerous circumstances that can arise in the context of a high-risk pregnancy.

16. For the foregoing reasons, the amendment proposed by IP 395 violates the right to decide whether and when to "beget and bear a child," which is guaranteed to women by the Fourteenth Amendment of the U.S. Constitution. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849-51 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535 (1942). As this Court has explicitly held, an initiative whose enforcement would violate federal constitutional protections for reproductive liberty is invalid and cannot appear on the ballot. *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1. *See also* Art.1, §1, Okl.

Const. ("The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.")

IP 395 Violates the Single-Subject Rule.

17. The amendment proposed by IP 395 contains two unrelated subjects in violation of Art. 24, § 1, of the Oklahoma Constitution.

18. First, the amendment would redefine "person" for purposes of Art. II, § 2, of the Oklahoma Constitution to include a fertilized egg and confer due process and equal protection rights on each "person" as re-defined.

19. Second, the amendment would expand the bases for equal protection of the laws under Art. II, § 7, of the Oklahoma Constitution, by adding age, place of residence, and medical condition as protected classes.

20. Voters might support expanding the equal protection guarantee to include those three protected classes, but not redefining "person," or *vice versa*.

Statement of the Gist

21. The statement of the gist of the amendment proposed by IP 395 is identical to the ballot title that was originally submitted with IP 395, which the Attorney General deemed not to be in compliance with applicable laws.

22. The signature sheet for any petition to amend the Constitution must contain a "simple statement of the gist of the proposition." Okla. Stat. tit. 34, § 3. This Court has explained that a statement of the gist "should be sufficient that the signatories are at least put on notice of the changes being made." *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶¶ 7, 10, 164 P.3d 125, 129.

23. The statement of the gist of IP 395 fails to put voters on notice of the actual effect of IP 395 in at least the following ways:

- A. The statement of the gist includes the assertion, deemed to reflect “partiality” by the Attorney General, that the amendment proposed by IP 395 “reconcile[s] recent scientific developments with the definition of a human being for the purpose of equal protection under the law.” In addition to being inappropriately partial, this statement is misleading for at least two reasons. First, the use of that phrase suggests inappropriately and without evidence that the amendment is supported by scientific research. Second, the amendment is far broader than simply expanding the definition of human being for purposes of equal protection; rather, the amendment would redefine “person” as used in Art. II, § 2, (the inherent rights clause) of the Oklahoma Constitution, and secure due process and equal protection rights for every “person.”
- B. The statement of the gist misstates the amendment’s effect by claiming that the amendment “expands the legal definition of humanity or ‘personhood.’” The amendment redefines “person” as used in Art. II, § 2, of the Oklahoma Constitution and grants due process and equal protection rights to those persons, but it does not redefine “humanity” or “personhood.”
- C. The statement of the gist misstates the amendment’s alteration of the constitutional standards for equal protection of the law, by claiming that the amendment would prohibit discrimination on the following bases: “place of residence, race, gender, age, disability, health, level of function, condition of dependency, or method of reproduction.” The text of the proposed

amendment, however, prohibits discrimination based on a different and shorter list of criteria: “age, place of residence or medical condition.” Moreover, the statement of the gist misstates the effect of the proposed amendment by failing to explain the effect of adding the protected classes of age, place of residence or medical condition to the equal protection guarantee.

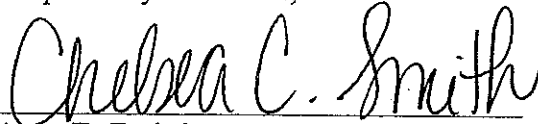
- D. The statement of the gist uses the vague and confusing phrases “beginning of biological development” – which the Attorney General found to be unclear in the proponents’ original ballot title – and “end of natural life.”
- E. The statement of the gist inaccurately claims that the amendment proposed by IP 395 would “prohibit[] the intentional killing of any such “person” without due process of law.” This statement implies that the amendment would affect only intentional killing, whereas the amendment contains no language that would limit its application to killing or to intentional acts.
- F. The statement of the gist misstates the effect of the amendment proposed by IP 395 because, among other things, it does not explain that the amendment would ban abortion and interfere with women’s right to decide whether and when to conceive by banning most forms of contraception and medical interventions, such as *in vitro* fertilization, that assist with conception.

24. Because of these inaccuracies and the multiple deceptive and misleading assertions in the statement of the gist, it could not possibly put a voter on notice of the effect of the amendment proposed by IP 395. Thus, a voter could not make an informed decision about whether to sign the petition.

WHEREFORE, the Protestants respectfully request that this Court declare IP 395 unconstitutional, insufficient as a matter of law and invalid for all purposes, for the reasons set forth above.

Dated: March 29, 2012

Respectfully submitted,



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ATTORNEYS FOR PROTESTANTS

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that on the 29th day of March 2012, a true and correct copy of the above PROTEST TO THE INITIATIVE PETITION was filed with the Supreme Court of Oklahoma, and with the Secretary of State and was personally served on the following person at the address indicated:

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In addition, a true and correct copy of the above PROTEST TO THE INITIATIVE PETITION was mailed, postage prepaid, via certified mail to the following persons at the addresses indicated:

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