



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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SUPREME COURT
STATE OF OKLAHOMA
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MAY - 7 2020

JOHN D. HADDEN
CLERK

THEODIS MANNING AND GENE RAINBOLT,)

Petitioners/Proponents,)

v.)

MICHAEL ROGERS, Oklahoma Secretary of)
State, in his official capacity,)

Respondent/Protestant.)

Sup. Ct. Case No. _____

#118774

BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND PETITION FOR EXTRAORDINARY RELIEF

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May 7, 2020

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PROPOSERS

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Because critical deadlines for the next general election ballot are rapidly approaching, and because of the need to respect the “importance of timeliness” in election-related issues,¹ Petitioners/Proponents of Initiative Petition 421, State Question 805, Theodis Manning and Gene Rainbolt, have made clear that they wish to forego the remainder of their signature-circulation period and submit their petitions to the Secretary—allowing signature-counting, and the remaining steps in the initiative process, to be completed timely. Citing a prior decision tolling the signature-circulation period, however, Respondent, Secretary of State Michael Rogers, has flatly refused to accept Proponents’ previously signed petitions for *filing*.

The Secretary’s refusal is contrary to both his duties under the governing statute, 34 O.S. § 8(G), and the People’s fundamental and “sacred” right of initiative. Proponents thus respectfully request that the Court assume original jurisdiction and issue a writ of mandamus or other appropriate extraordinary relief, directing the Secretary to accept Proponents’ initiative petition—signed by more than 260,000 Oklahomans—for filing and timely commence (and complete) the signature-counting process.

BACKGROUND

In early March of this year, the Proponents of SQ805 were on track to turn in a record number of signatures in favor of placing the criminal justice reform initiative on the November 2020 ballot. With more than 10% of their circulation period remaining, more than 260,000 Oklahomans had already signed the petition and exercised their “sacred” and “precious” right to “institute change through the initiative process.” *In re Initiative Petition No. 348*, 1991 OK 110, ¶ 5, 820 P.2d 772, 775.

¹ *Save the Ill. River, Inv. v. State ex rel Okla. State Election Bd.*, 2016 OK 86, ¶ 6, 378 P.3d 1220, 1224 (Combs, J. concurring).

As this Court is aware, however, the SARS-CoV-2 pandemic has upended the initiative process. On March 15, 2020, with 11 days remaining in the 90-day circulation period previously set by the Secretary, Oklahoma’s Governor declared a state of emergency. The next morning, Proponents—concerned about the health and safety of their signature collectors and of the public—temporarily halted all signature collection and filed an emergency motion in this Court, seeking to toll its circulation period. In response, on March 18, 2020, Secretary Rogers issued a general directive “toll[ing] the 90-day circulation period for initiative petitions.” App. Tab A.

At the time Proponents sought to toll their signature collection deadline, there was hope that the coronavirus outbreak in Oklahoma could be contained, and that the last 11 days of signature collection could be resumed in a timely manner. Now, however, it is clear this will not be the case. Although state agencies and some businesses are beginning to reopen, conditions will not soon allow for large-scale inter-personal circulation of petitions. And while the “90-day circulation period for initiative petitions” has been tolled, App. Tab A, the various other applicable statutory deadlines—including ballot printing deadlines—have not. Nor, of course, have the practicalities of making it through the remaining steps of Oklahoma’s complex initiative petition process before August 19, 2020—the deadline by which the Election Board says measures must be finalized for inclusion on the November general election ballot.²

Later in March, then, SQ805 campaign representatives contacted the Secretary of State’s office, noting that they may well wish to forego the remainder of their signature-collection period as provided in 34 O.S. § 8(G), and asking how they could turn in the

² See <https://www.ok.gov/elections/documents/2020%20Statutory%20Election%20Dates%20and%20Deadlines.pdf>.

signatures that had already been gathered so the counting process could begin. The Secretary's office responded that, "[d]ue to the state of emergency and the toll being placed on all active petitions on record with our office³, and also since our offices are closed to the public, we are unable to accept signature pamphlets for filing." App. Tab B.

Campaign representatives continued to follow up, requesting further details on when the office would reopen and how they could turn in signatures; the Secretary's office continued to demur. *See, e.g.*, App. Tab C. On April 22, 2020, however, the Governor announced his "Open Up and Recover Safely (OURS) Plan."⁴ Under that plan, the Governor declared that, beginning April 24, 2020, numerous organizations and businesses—including retail and even personal care businesses, such as hair and nail salons—could safely open on an appointments-only basis, so long as employees and customers follow certain social-distancing guidelines. *Id.*

Since that time, representatives of the SQ805 campaign have attempted to work collaboratively with the Secretary's office. They repeatedly requested information about how and when they could turn in previously obtained signatures so that signature counting, and the other remaining steps in the initiative petition process, could timely proceed. App. Tab B, C. They proposed a number of options to safely deliver sealed boxes of signed petitions without any personal contact.⁵ *Id.* And they patiently waited while, for weeks, the Secretary

³ Notably, the order issued by the Secretary of State "toll[ing] the 90-day circulation period for initiative petitions" addresses only *circulation*, and says nothing about filing already completed and signed petitions.

⁴ <https://www.okcommerce.gov/covid19/ours-plan/>.

⁵ Sealed boxes of signed initiative petitions have been sitting in a secure storage facility, untouched, for more than a month. Campaign representatives have offered to deliver these boxes, with no more than two individuals (wearing masks and gloves) to carry them, to any secure location the Secretary would like. No campaign representative would need to go within six feet of any state employee.

continued to promise that his office was “working on its reopening plan” and would have “more details” for Proponents “soon.” App. Tab C.

On Monday, May 4, the Capitol—where the Secretary’s executive/legislative office is located—officially reopened to the public by appointment.⁶ At 4 p.m. on May 5, 2020, however, the Secretary finally made official what Proponents were beginning to suspect: even though both the governing statute (34 O.S. § 8) and his tolling letter clearly contemplate early termination of the signature-collection period at Proponents’ election; and even though signature turn-in can be accomplished without any person-to-person contact or risk to staff; and even though the Governor had declared it safe to conduct public business, the Secretary nevertheless would **refuse** to accept the signed initiative petitions for filing so long as the emergency declaration is in place. App. Tab B.

Time is running short. Deadlines for the November general election ballot are rapidly approaching, and until the Secretary accepts the signed petitions, it will not be possible to count the signatures, determine numerical sufficiency, or commence any post-circulation legal process—all ministerial steps integral to the exercise of “[t]he first power reserved by the people.” *In re Initiative Petition 403, State Question No. 779*, 2016 OK 1, ¶ 3, 367 P.3d 472, 474. The Secretary is not entitled to simply refuse to accept an initiative petition. Proponents thus respectfully request that the Court issue a writ of mandamus compelling Secretary Rogers to accept and file their signed petitions, and timely commence (and complete) the signature-counting process.

⁶ https://www.normantranscript.com/news/oklahoma/state-capitol-to-reopen-topublic/article_8a33ad78-dbd1-5d8f-9e11-6160a9c91383.html.

ARGUMENT AND AUTHORITY

I. This Court Should Assume Original Jurisdiction

When the People of Oklahoma and the Oklahoma Legislature empowered this Court to assume original jurisdiction and compel performance of ministerial duty, they did so to safeguard against circumstances where, as here, a fundamental right is at risk; those persons tasked with carrying it out have not performed; and the remedy must come quickly. Okla. Const. Art. VII, § 4; 12 O.S. § 1451; *cf.* Okla. Const. Art. V, § 2 (“first power reserved by the people is the initiative”). Indeed, mandamus is an appropriate intervention where “there is: (1) a clear legal right vested in the petitioner; (2) a refusal to perform a plain legal duty which does not involve the exercise of discretion; and (3) [] inadequacy of other relief.” *Price v. Bd. of Cty. Comm’rs of Pawnee Cty.*, 2016 OK 16, ¶ 6, 371 P.3d 1089, 1091; *State ex rel. Dep’t of Transp. v. Post*, 2005 OK 69, ¶ 2 n.1, 125 P.3d 1183, 1185 n.1; *State ex rel. Indep. Sch. Dist. No. 1 v. Barnes*, 1988 OK 70, ¶ 18, 762 P.2d 921, 923.

Because the “people’s right to institute change through [] initiative [] is a fundamental characteristic of Oklahoma government,” *In re Initiative Petition No. 360*, 1994 OK 97, ¶ 9, 879 P.2d 810, 814, there is no question here of right. Mandamus has thus long been used to compel performance of ministerial duties associated with the initiative petition process. *See Norris v. Cross*, 1909 OK 316, 105 P. 1000, 1000 (“The duties of the Secretary of State to file referendum petitions when presented to him ... are purely ministerial; and, upon refusal to perform same, he may be compelled to do so by mandamus.”); *see also, e.g.*, App. Tab D (article about episode where Court ordered a different Secretary Rogers to open his office to accept the filing of a different petition); *Black v. Wood*, 1952 OK 276, ¶¶ 14-15, 249 P.2d 699, 701 (writ of mandamus appropriate to compel town clerk to publish notice of an initiative petition); *Threadgill v. Cross*, 1910 OK 165, 109 P. 558, 559–60, *overruled on*

other grounds by, *In re Initiative Petition No. 349*, 1992 OK 122, 838 P.2d 1 (writ of mandamus appropriate to compel Secretary of State to submit initiative petition to a vote of the People).

Original jurisdiction is further appropriate here because this matter inherently affects not only public right, but also public interest. See, e.g., *State ex rel. Nesbitt v. Ford*, 1967 OK 186, ¶ 9, 434 P.2d 934, 937 (“This court is authorized to and may take original jurisdiction and issue writs of mandamus . . . to executive officers commanding them to perform ministerial duties where the question raised is *publici juris*”). In less than three months, well over 250,000 Oklahomans signed petitions declaring their intent to place this important criminal justice reform measure on the ballot. The People have a substantial interest in ensuring that their will is able to be heard, and that their “sacred” right of initiative petition is not thwarted by the refusal of officials to perform their legal duties.

II. The Secretary Must Accept Submission of IP421

“A writ will issue when the action sought to be compelled is purely ministerial because the officer or board, when properly requested to do so, has a mandatory duty to act that stands imposed by law.” *Morton v. Adair Cty. Excise Bd.*, 1989 OK 174, ¶ 4, 780 P.2d 707, 709. Here, the Secretary’s duty to accept submission of signed initiative petitions is ministerial, and not only legally but also constitutionally mandatory. It is therefore subject to mandamus.

First, the Oklahoma Constitution unambiguously provides that “[p]etitions . . . for the initiative and for the referendum shall be filed with the Secretary of State.” Okla. Const. Art. V, § 3 (emphasis added). The relevant executing provision likewise provides that, “[w]hen the signed copies of a petition are timely filed, the Secretary of State shall file a copy of the proponent’s ballot title with the Attorney General, and after conducting a count of the filed,

signed petition, the Secretary of State shall certify” the number of signatures counted. 34 O.S. § 8(H) (emphasis added). The statute also makes clear that the proponents of a petition “may terminate the circulation period any time during the ninety-day circulation period by certifying to the Secretary of State” that they have ceased circulation and all petitions have been filed. 34 O.S. § 8(G). “If the Secretary of State receives such a certification from the proponents, the Secretary of State shall begin the counting process.” *Id.* (emphasis added).

The People and Legislature’s use of the word “shall” in regard to the Secretary’s duties indicates that he lacks discretion as to whether or not to accept and count signed petitions. *Cf., e.g., Velasco v. Ruiz*, 2019 OK 46, ¶ 9, 457 P.3d 1014, 1017–18; *Okla. Pub. Employees Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶¶ 13–14, n.18, 267 P.3d 838, 845; *N. Coltrane Cmty. Ass’n, Inc. v. Bd. of Cty. Comm’rs of Okla. City*, 2019 OK CIV APP 72, ¶¶ 31–33, 453 P.3d 913, 922. If the Secretary refuses to perform his “plain legal duty,” a writ of mandamus is both necessary and appropriate. *Ibid.*; *Price*, 2016 OK 16, at ¶ 6.

Second, the passive declaration that signed initiative petitions “shall be submitted” to the Secretary, Okla. Const. Art. V, § 3, reinforces that the duty to accept signed petitions is a ministerial act. *E.g., Russell v. Harrison*, 1912 OK 443, 124 P. 762, 763 (Secretary of State’s initiative petition duties are generally without discretion). Here again, the “ministerial ‘shall’ differs from the discretionary ‘may’ where the law describes the duty to be performed such that . . . no exercise of discretion necessary.” *N. Coltrane*, 2019 OK CIV APP 72, at ¶ 31. There are not varying degrees to which the Secretary can fulfill the duty at issue: he either accepts submission of signed petitions, or he does not. This binary execution of a mandatory duty is akin to issuance of a permit. Just as “[w]hen an applicant has complied with all []

provisions of the statute, issuance of [a] permit is a purely ministerial act,” *Bozarth, McCord & McCrary v. Okla. Dep’t of Transp.*, 1991 OK CIV APP 30, 812 P.2d 815, 816, so “when the signed copies” of a petition are ready, they may be “timely filed” with the Secretary of State who “shall” count them. 34 O.S. § 8 (H).

Third, a “writ of mandamus” is generally appropriate to compel the Secretary “to act upon [an] initiative petition and determine the sufficiency thereof.” *In re Initiative Petition No. 2 of Cushing*, 1932 OK 124, 10 P.2d 271, 274. Accepting signed petitions is not only integral to acting upon a petition, but also a clear statutory predicate for “conducting a count of the filed, signed petition” to determine sufficiency. 34 O.S. § 8(H). And, given that the Secretary has *both* a statutory and constitutional “fixed duty” to accept submission of signed petitions, it is particularly appropriate for this Court to take “action to require [him] to perform that duty.” *In re Initiative Petition No. 260, State Question No. 377*, 1956 OK 196, 298 P.2d 753, 756; *see also Black v. Wood*, 1952 OK 276, at ¶¶ 14-15.

Last, mandating acceptance of signed initiative petitions to preserve timely exercise of right accords not only with this Court’s role in requiring an official “to perform an official act,” *Price*, 2016 OK 16, at ¶ 6, but also this Court’s efforts to guard the People’s right to initiative. *E.g., Okla. Oil & Gas Ass’n v. Thompson*, 2018 OK 26, ¶ 4, 424 P.3d 345, 347. It is unclear when and if life will return to normal.⁷ It is likewise unclear just how long it will take to count signatures and process any subsequent protests. But the fact that more than 260,000 Oklahomans have already asked for a vote on SQ805—despite the shortened circulation period—shows that Proponents must be allowed to further the initiative process in

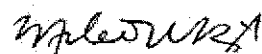
⁷ This is, of course, why Proponents now wish to have their signed petitions counted; even if the State partially reopens, there is no guarantee that circulators will be able to go door-to-door with any semblance of success. People are understandably scared of close person-to-person contact. *Cf. In re Initiative Petition No. 347*, 1991 OK 55, 813 P.2d 1019, 1034.

the only way that they can: by submitting their signed petitions for counting, as guaranteed by the Oklahoma Constitution.

On this note, a writ of mandamus requiring the Secretary to accept submission of Proponent's signed petitions does not conflict with either the Governor's declaration of emergency or this Court's own emergency orders. The latter are explicitly subject to constitutional limitations, and do not prevent early turn-in in any event. And the former in no way precludes the filing of petitions—and in any event has recently shifted substantially in conjunction with the "OURS" plan, which allowed, *inter alia*, restaurants, retail, and hair and nail salons to reopen. It logically follows that an eminently essential government service—one needed to discharge ministerial duty and protect the People's first right—should reopen on a limited basis as well.

Proponents are, of course, aware that they have previously urged caution when it comes to submission of signed petitions. They stand by the need for caution, and will ensure that submission involves proper use of personal protective equipment and is as "contactless" as possible. Nevertheless, Proponents have a right to file their petition, and exercise the "first power reserved by the people"—the "precious" right of initiative. Okla. Const. Art. V, § 2; *In re Init. Pet. No. 348*, 1991 OK 110, ¶5, 820 P.2d 772. The Secretary should not be permitted to "cripple" this fundamental right simply by refusing to unlock his doors. *Id.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served by U.S. Mail, postage prepaid, and e-mailed this 7th day of May, 2020, to:

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