

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In Re: Initiative Petition No. 397, )  
State Question 767, )  
TAKE SHELTER OKLAHOMA )  
AND KRISTI CONATZER, )  
Petitioners, )  
vs. )  
STATE OF OKLAHOMA, ex rel., )  
ATTORNEY GENERAL E. SCOTT )  
PRUITT, )  
Respondent. )

Case No. 112264

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

NOV 22 2013

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CLERK OF  
THE APPELLATE COURTS

ATTORNEY GENERAL PRUITT'S RESPONSE IN OPPOSITION TO  
PETITIONERS' REQUEST TO RECUSE ATTORNEY GENERAL

A Ballot Title Appeal Brought Per 34 O.S.2011, § 10

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## INTRODUCTION

As part of the *Supplemental Brief of Petitioner/Proponent* filed with this Court, under the heading “Recusal of Attorney General Scott Pruitt”, Petitioners ask this Court to “recus[e] and remove” the Attorney General from this case. *Supplemental Brief* at p. 3. Petitioners do so (1) based on false allegations supported by no evidence, and (2) with no legal basis on which they could have made such a claim in anything other than bad faith.

Indeed, in seeking what they term “recusal and removal” of the Attorney General, Petitioners point to no future action to be performed by the Attorney General in the review of the ballot title. General Pruitt has fulfilled the duty placed upon him by law to review the ballot title for legal correctness and has prepared a legally correct ballot title. Because it is impossible to “recuse” from a process that is already complete, Petitioners’ request is presumably one to have the Attorney General “recuse” from this appeal. If that is so, Petitioners ask this Court to do something that is legally impossible: “recuse” the Attorney General from a case in which he has not appeared as *counsel* and in which he has a statutory duty to appear as a *party*. And while the Attorney General’s *Assistants* appear herein to defend the ballot title in this appeal, Petitioners make no claim that the Assistant Attorneys General should be prohibited from defending the substitute ballot title in this appeal.

Petitioners’ request to “recuse” a party Respondent is thus frivolous on its face, and is patently an attempt to harass and create confusion. This shameless attempt to

grandstand and play to the media should be overruled because neither the law nor the alleged facts provide a basis for “recusal” from this case.

**STATEMENT OF FACTS**

1. Petitioner, Tax Shelter of Oklahoma, is represented in this matter by attorneys David R. Slane, Esq., OBA # 16156, and Richard Morissette, Esq., OBA # 11446.

2. On November 6, 2013, both attorneys signed and filed with this Honorable Court a legal brief entitled *Supplemental Brief of Petitioner/Proponent* (“Supplemental Brief,”) on behalf of their client, “Take Shelter Oklahoma,” a proponent of Initiative Petition No. 397.

3. Petitioners offer the following bald allegations and unsupported factual contentions in support of the motion to “recuse” (disqualify) the Attorney General from this matter:

In support, the Petitioners would allege that the Attorney General rewrote the Ballot Title in order to help defeat the measure at the election.

...

The State Chamber of Commerce has publically worked to eliminate the Corporate Franchised [sic] Tax (Exhibit 2)

The leaders of the State Chamber of Commerce and influential members of the State Chambers of Commerce have contributed thousands of campaign dollars to Scott Pruitt, the State Attorney General. (Exhibit 3 examples include public utilities, banks and telecommunications)

It is for this reason that the Attorney General did not make the changes to the title for “legal correctness” as required by 34 O.S. § 9 D.1

... These changes were made because the Attorney General Scott Pruitt is politically motivated to assist his political motivated (campaign contributing) friends at the State Chamber of Commerce. The Attorney General has rewritten the title to help achieve the goal of eliminating the Corporate Franchised [sic] Tax and defeating the Initiative Petition.

*Supplemental Brief*, at pp. 3-4 (Bracketed matter added, ellipses indicate deleted text).

4. Petitioners' above-quoted allegations impugn the good name of scores of Oklahoma citizens, unfairly suggesting they are somehow part of a political conspiracy simply because they made a contribution to the Attorney General's election campaign. Worse yet, Petitioners make this brazen allegation without offering a single piece of evidence that supports their claims.

5. Petitioners also did not bother to make inquiries about the Office of Attorney General ballot title review processes prior to making their unsubstantiated claims. Had they so inquired, Petitioners would have learned the following. The same ballot title review process used in the Attorney General's Office for over twenty (20) years—including for each and every of the numerous ballot titles reviewed by the current Attorney General—was followed in this case. Under that process, when a ballot title is received for review, it is assigned to an individual attorney, usually a Senior Assistant Attorney General, to review and prepare an initial draft letter for the Attorney General's consideration. The assigned attorney also prepares a draft proposed substitute ballot title, when necessary, for the General's review and consideration.

Here, the initial ballot title review and the redrafting of the ballot title was done by the same attorney who handles the vast majority of these reviews, Senior Assistant Attorney General Neal Leader, who has also aided five prior Attorneys General — all Democrats — in conducting such review and drafting.

Neither the Attorney General nor any member of his staff discussed either the proposed measure or its ballot title with the Governor or anyone on her staff or with the Chamber or anyone on its behalf. Politics — party politics or otherwise — was not involved in the consideration and drafting of the ballot title. Upon completion of the review of the proposed ballot title, the Senior Assistant Attorney General determined that the ballot title did not comply with 34 O.S.2011, § 9 as it did not explain the **effect** of the proposition. The Senior Assistant Attorney General prepared a draft letter to that effect and later, prepared a substitute ballot title. In accordance with the process, the draft ballot title was presented to the Attorney General for approval. As has been the case with previous Attorneys General, at this stage in the process, the Attorney General will sometimes make many changes in the proposed draft, while at other times he makes fewer changes.

In the case at hand, after the General studied and reviewed the draft, he approved it with one slight change. The Attorney General changed the phrase “the Legislature could — but is not required to — use General Revenue Fund monies to make the annual

bond payment,” to “the Legislature, at its discretion, could use General Revenue Fund monies to make the annual bond payment.”

6. Although the supposed “evidence” upon which Petitioners rely for the belated recusal request was then in existence,<sup>1</sup> at no time during the ballot title review process did Petitioners, nor anyone acting on their behalf, request that the Attorney General recuse from reviewing the proposed ballot title or preparing a substitute ballot title.

## ARGUMENT AND AUTHORITY

### PROPOSITION 1

**Petitioners’ Claim that Attorney General Pruitt Should Recuse or Be Removed is Frivolous as a Matter of Law, Has No Support in Law or Fact, and, if Considered, Should Be Denied.**

**A. Petitioners’ claim for recusal of the Attorney General is not supported by law.**

For almost a hundred years, this Court has rejected the notion that claims of political partisanship are a valid basis for seeking the Attorney General’s disqualification in the drafting of substitute ballot titles. *See Cress v. Estes*, 1914 OK 361, 142 P. 411. In *Cress*, the protestants in a ballot title appeal brought before this Court, among other claims, also sought to disqualify the Attorney General from preparing the ballot title because of his pending candidacy for re-election and his “championing” for the

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<sup>1</sup>Petitioner’s Exhibit 2, which speaks only to the State Chamber of Oklahoma’s position on the Oklahoma Franchise Tax, bears a date of January 2013.

proposition contained in the Initiative Petition. Noting that it was the statutory duty of the Attorney General to prepare a substitute ballot title if the one submitted with the Initiative Petition was found insufficient, this Court held:

The fact that the Attorney General is a candidate for office and the champion of the proposed amendments does not disqualify him to perform such duties nor in any manner affect the validity of such amendments.

*Cress v. Estes, supra*, 142 P. at 412. Apart from not citing any relevant legal authority for their claim, Petitioners have accordingly also failed to mention to this Court that their claim is obviously contrary to law that has been settled for nearly a century.

Petitioners argue General Pruitt should be “recused and removed” from this case. It is unclear what Petitioners mean by “this case” as Petitioner points to no future actions to be performed by the Attorney General in the ballot title review from which the Attorney General should be recused. Petitioners make no claim, nor could they find legal or factual support for such a claim, that General Pruitt’s Assistants defending the substitute ballot title should be recused, nor have Petitioners offered any law upon which a *necessary party* to a proceeding may be “recused.” Thus, the claim for recusal is exposed for what it is: a patently frivolous attempt to harass and create confusion.

The claim should also be denied because “recusal” would be contrary to clear statutory mandates. General Pruitt is the duly-elected and duly-qualified Attorney General of Oklahoma. Under the law it is the *mandatory legal duty* of the Attorney General to receive and review Initiative Petition ballot titles and to issue a substitute ballot title for

the proposition proposed in the Initiative Petition if the ballot title submitted by the proponents of the Initiative Petition is found not to comply with the legal criteria governing ballot titles. That is made clear by 34 O.S.2011, § 9(D) which provides:

D. The following procedure shall apply to ballot titles of referendums ordered by a petition of the people or any measure proposed by an initiative petition:

1. After the filing of the petition and prior to the gathering of signatures thereon, the Secretary of State shall submit the proposed ballot title to the Attorney General for review as to legal correctness. Within five (5) business days after the filing of the measure and ballot title, **the Attorney General shall, in writing, notify the Secretary of State whether or not the proposed ballot title complies with applicable laws. The Attorney General shall state with specificity any and all defects found and, if necessary, within ten (10) business days of determining that the proposed ballot title is defective, prepare and file a ballot title which complies with the law.**

*Id.* (emphasis added). See *Heirshberg v. Slater*, 1992 OK 84, ¶11, 833 P.2d 269, 275 (“The use of the word ‘shall’ by the Legislature is normally considered as a legislative mandate equivalent to the term ‘must,’ requiring interpretation as a command.”). The Attorney General is likewise under a mandatory legal duty to appear and defend all ballot titles when they are challenged in ballot title appeals filed in this Court:

Notice of the appeal provided for in the preceding section shall be served upon the Attorney General and upon the party who filed such ballot title, or on any of such parties, at least five (5) days before such appeal is heard by the court. **The Attorney General shall, and any citizen interested may, defend the ballot title from which the appeal is taken.** Other procedure upon such appeals shall be the same as is prescribed for appeals from petitions filed as set forth in Section 8 of this title.

34 O.S.2011, § 11 (emphasis added). It is clear as a matter of law that in reviewing the proposed ballot title, and by defending the substituted ballot title he approved in place of Petitioners' faulty proposed ballot title, the Attorney General is performing legal duties required of him as a public official by law. General Pruitt is thus a necessary party to this appeal.

Petitioners' sole asserted legal authority for the claim that General Pruitt should be removed from the case is an alleged violation of Rule 1.7, *Rules of Professional Conduct*, 5 O.S., Ch. 1, App. 3-A. *Supplemental Brief*, p. 3. Even then, Petitioners rely upon the *Comment* to the Rule rather than the terms of the Rule itself. Rule 1.7 by its terms prohibits representing multiple clients with conflicting interests. The pertinent part of the Rule provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyers' responsibilities to another client, a former client or a third person by a personal interest of the lawyer.

Rule 1.7(a), *Rules of Professional Conduct*. This rule plainly governs the conduct of attorneys toward their clients. Although the Attorney General routinely represents the State of Oklahoma as a client in other proceedings, the duties assigned by the Legislature to the Attorney General under the ballot title review procedures are not representational

but are duties imposed upon the Attorney General as a public official performing duties enjoined upon his office. Thus, Rule 1.7 does not govern the conduct in this case.

**B. Whether a Claim is Frivolous as a Matter of Law is not Necessarily Dependent Upon a Showing of Bad Faith and is Judged According to an Objective Test.**

A claim is frivolous as a matter of law when, “[t]he action or pleading was knowingly asserted in bad faith *or* without any rational argument based in law *or* facts to support the position of the litigant or to change existing law. 12 O.S.Supp. 2013, § 2011(E) (emphasis added). Although this Court could certainly find this unsubstantiated claim was made in bad faith, legal frivolousness of a claim is not dependent upon a showing of objective bad faith but also exists when a claim is without basis in law or fact. *Id.* See also *State ex rel. Tal v. Oklahoma City*, 2002 OK 97, ¶18, 61 P.3d 234, 244 (“[The] frivolity of a claim or defense does not depend on the attorney’s subjective good faith and having a pure heart, but having a pure heart, but empty head provides no defense” to frivolousness.).

Petitioners cite no legal authority for their request for “recusal” other than a reference to a *Comment* to a Rule of Professional Conduct which is inapplicable to the Attorney General’s legal duties with regard to ballot title reviews. They cite nothing requiring this Court to order recusal or removal. Therefore, the claim, as a matter of law, is actually unsupported by any legal authority and should be denied. See Okla.Sup.Ct.R. Rule 1.11(k) (arguments without supporting authority will not be considered).

The patently frivolous nature of this claim places counsels' conduct within the law authorizing the imposition of sanctions. *See* 12 O.S.Supp. 2013, § 2011(A) & (B) (requiring an attorney to certify, after a reasonable inquiry that claims are not presented “for any improper or frivolous purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”, that claims are warranted by existing law and are nonfrivolous, that the allegations have evidentiary support and that the denial of factual contentions are warranted on the evidence). *Compare* Okla.Sup.Ct.R Rule 1.190(j) (providing for the imposition of sanctions for filing frivolous original proceedings in this Court, including a proceeding “so obviously without any merit as to impute bad faith on the party bringing the action.”). The purpose of Section 2011(A) and (B) is “to discourage presenting pleadings, written motions, or other papers to a court that are legally and/or factually frivolous, or presented for an improper purpose, such as delay. The central goal of § 2011 is to deter baseless filings.” *Garnett v. Government Employees Ins. Co.*, 2008 OK 43, ¶15, 186 P.3d 935, 941-942 (footnotes omitted). An objective test is used to decide if a competent lawyer could make a reasonable argument supporting the legal theory advanced. *State ex rel. Tal v. Oklahoma City*, 2002 OK 97, ¶18, 61 P.3d 234, 244-245. *See also* 12 O.S.Supp. 2013, § 2011(C)(1)(b).

As noted above, the conduct of Petitioners' counsels has maliciously impugned the good names of innocent participants in the political process whose only offense against Petitioners is to have financially supported General Pruitt's candidacy. The

attorneys for Petitioners have also maliciously impugned the integrity of the Attorney General and his staff who routinely perform their statutory duties. No legal authority has been offered in support of the allegations raised in the claim for recusal and the claim should be denied.

**C. Petitioners' claim for recusal of the Attorney General is not supported by the facts.**

The "facts" relied upon by Petitioners are nothing but inferences built upon inferences, built on inferences and do not supply even circumstantial evidence to support Petitioners' claim. First, one must infer from the fact that the Chamber of Commerce's support for a Legislative repeal of the franchise tax, that the Chamber is opposed to any *use* of the proceeds of the franchise tax. Then one must infer that the Chamber opposes Petitioners' efforts because proceeds of the franchise tax would be dedicated to payment of the bonds sought to be authorized. Next we must infer from the scores of Oklahoma citizens who have contributed to the Attorney General's election campaign that they all support all of the Chamber's positions simply because they work for or operate businesses and that they all believe the Chamber is somehow opposed to the Initiative Petition though no public opposition to Petitioners' efforts by the Chamber has been shown. Thereafter, on and on, one must infer fact after fact to finally arrive at Petitioners' ultimate claim.

Petitioners' claim for recusal is wholly premised on the bald, unsupported allegation that political influences spawned by financial contributions to the Attorney

General's campaign for re-election, not the performance of legal duties pursuant to the law, caused the redrafting of the proposed ballot title. As shown above under the "Statement of Facts," no such alleged influences were involved in the actual preparation and submission of the substitute ballot title.

Petitioners do not assert that General Pruitt has in any way publically pronounced a view about the propositions they seek to promote. In fact, General Pruitt has not taken a public position either for or against the Initiative Petition. As noted above, if Petitioners had made even minimal inquires about the ballot title review procedure they would have learned that in truth and fact no private view of the Attorney General regarding the Initiative Petition was communicated to the Senior Assistant Attorney General who undertook the initial review of the Initiative Petition's proposed ballot title. Petitioners have made a scurrilous, factually unsupported allegation that, "[T]he Attorney General rewrote the Ballot Title in order to help defeat the measure at the election." *Supplemental Brief*, p. 3. As demonstrated by the facts set forth above in the "Statement of Facts", this allegation is factually false.

The facts brought forth by Petitioners simply do not support the request for recusal. The fact that the State Chamber of Commerce, many months before the Initiative Petition was filed, advocated in favor of the abolition of the State franchise tax serves as no proof that the State Chamber opposes the authorization by Oklahoma's voters of the placement of tornado shelters in every public school or this *Initiative Petition*. See

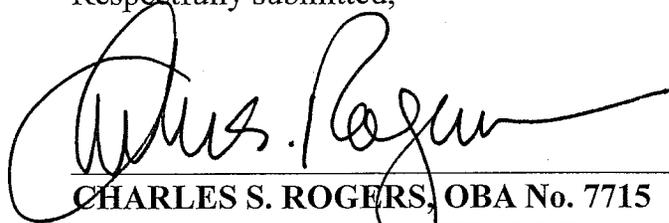
Plaintiff's Exhibit 1. Plaintiff's Exhibit 2 only presents the name, photograph, and professional occupation of the several, responsible civic leaders constituting the Executive Board of the State Chamber of Commerce and does not serve as proof of their personal views, either for or against the initiative petition. *Id.* Likewise, Plaintiff's Exhibit 3, while it may show favorable support of General Pruitt by numerous, responsible business leaders and political action committees, it does not serve as proof of these persons' personal views, either for or against, Petitioners' efforts. These exhibits certainly do not support Petitioners' allegations of the motivation for submitting a substitute ballot title, nor provide either direct proof or any reasonable inference upon which to support circumstantial evidence for the not so subtle, scurrilous innuendo that the contributions of these responsible business leaders caused the Attorney General to submit a substitute ballot title for improper reasons in conspiracy with members of the State Chamber of Commerce.

Petitioners' own exhibits do not support the claim of improper motive Petitioners are asserting. These factually unsupported allegations impugn the integrity of responsible business and civic leaders as well as the duly-elected Attorney General. The unsupported and frivolous claim for recusal should be denied. *See Okla.Sup.Ct.R. Rule 1.11(k)* (providing that argument without supporting authority will not be considered).

**CONCLUSION**

The claim for recusal of the Attorney General asserted by Petitioners in their Supplemental Brief is unsupported by the law and is without factual support. It is legally frivolous and should be disregarded by this Court in its decision on the pending appeal of the substituted ballot title prepared by the Attorney General. If considered, this Court should deny the claim as it is not supported by either law or fact.

Respectfully submitted,



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**CERTIFICATE OF MAILING TO PARTIES**

I hereby certify that a true and correct copy of this *Response to Motion for Recusal of Attorney General* was mailed this 22<sup>nd</sup> day of November, 2013, to:

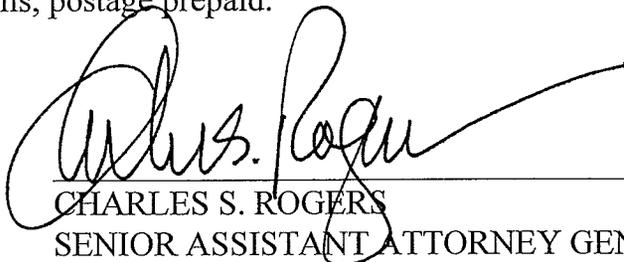
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