

SUBJECT INDEX

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I. INTRODUCTION

The sole issue presented in this case is whether a special election to replace the Honorable James M. Inhofe (“Senator Inhofe”) as a member of the United States Senate from Oklahoma may occur prior to Senator Inhofe actually vacating his office. The answer is undoubtedly that the Seventeenth Amendment of the United States Constitution and Oklahoma law preclude a special election to replace a member of the United States Senate prior to the Senator actually vacating their office.

On February 25, 2022, Senator Inhofe submitted a letter dated February 28, 2022 to the Oklahoma Secretary of State Brian Bingman that contained an irrevocable pledge to retire from the United States Senate effective January 3, 2023. On March 1, 2022, the Honorable J. Kevin Stitt, Governor of the State of Oklahoma, issued an Executive Department Executive Proclamation (the “Proclamation”) to the Oklahoma State Election Board and Secretaries of the County Election Boards ordering a Special Election be held to fill a vacancy in the office of United States Senator from Oklahoma, due to the retirement of Senator Inhofe. The Proclamation orders that the Filing Period for the Special Election to replace Senator Inhofe shall be held on April 13, 14, and 15, 2022; the Special Primary Election shall be held on Tuesday, June 28, 2022; if required, a Special Runoff Primary Election shall be held on Tuesday, August 23, 2022; and the Special General Election shall be held on Tuesday, November 8, 2022.

The Governor’s Proclamation violates the Seventeenth Amendment and Oklahoma law because the Governor does not have any authority to order a special election to replace a U.S. Senator until after there is a vacancy in the office. The vacancy in the office held by

Senator Inhofe is not scheduled to occur until January 3, 2023 at the earliest. Moreover, there is no legal impediment to Senator Inhofe withdrawing and/or revoking his letter of retirement and remaining in office through the end of his term in January 2027. Therefore, the Governor lacked authority to call a special election to occur in 2022 to replace a U.S. Senator that may or may not leave office until January 3, 2023 at the earliest.

The Respondent, as Secretary of the Oklahoma State Election Board, is charged with effectuating the Governor's unlawful Proclamation. 26 O.S. §§ 2-107, 5-102 and 6-103. Therefore, this Court should issue a writ of mandamus and writ of prohibition to Respondent to prevent the premature and unauthorized election order in the Proclamation.

II. JURISDICTIONAL BASIS

This Court has general superintending control over all Agencies, Commissions and Boards created by law and has original jurisdiction to issue writs of mandamus and writs of prohibition under Okla. Const., Art. 7, § 4. The Petitioner has no adequate remedy at law. With the candidate filing period for the special election to replace Senator Inhofe currently scheduled on April 13, 14 and 15, 2022, there is insufficient time for the filing of a district court case and an appeal, if necessary. Further, the election for the office of United States Senator from Oklahoma is of great local and national importance. Consequently, this Court will ultimately be asked to render a decision on the appropriate date for the election to replace Senator Inhofe. Therefore, a writ of mandamus and a writ of prohibition are the appropriate and necessary remedies to afford timely and complete relief to Petitioner.

III. ARGUMENT

A. THE SEVENTEENTH AMENDMENT DOES NOT PERMIT A SPECIAL ELECTION TO FILL SENATOR INHOFE'S SEAT UNTIL AFTER HE VACATES HIS SENATE SEAT, WHICH IS NOT EXPECTED TO OCCUR UNTIL JANUARY 3, 2023 AT THE EARLIEST.¹

The Seventeenth Amendment governs the filling of vacancies in the United States Senate. The critical phrases on this point are as follows:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. Const. amend. XVII.

In order for the Seventeenth Amendment to be activated, “a vacancy must ‘happen’ in ‘the representation of any State in the Senate.’” *Judge v. Quinn*, 612 F.3d 537, 547 (7th Cir. 2010), opinion amended on denial of reh'g, *Judge v. Quinn*, 387 Fed. Appx. 629 (7th Cir. 2010). After the vacancy, the executive authority of the State has an indispensable duty to issue writ of election to fill the vacancy. *Id.* Consequently, the Seventeenth Amendment “describes a chain of events: when a vacancy happens, the state executive issues a writ of election, which calls for an election in which the people will fill the vacancy.” *Id.* at 551. Therefore, to determine when the state executive (i.e., the Governor) has the power and

¹ As discussed below, there is nothing legally preventing Senator Inhofe from changing his mind and withdrawing and/or revoking his resignation prior to its effective date of January 3, 2023.

obligation to issue a writ of election to fill a Senate seat, it is critical to know when a vacancy occurs in the office of a member of the United States Senate.

As shown below, a vacancy in the office of a member of the United States Senate does not occur until the Senate seat is no longer occupied and the Senator has been officially removed. “The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention i[s] clear there is no room for construction and no excuse for interpolation or addition.” *United States v. Sprague*, 282 U.S. 716, 731, 51 S. Ct. 220, 222, 75 L. Ed. 640 (1931).

The term vacancy is ordinarily understood to mean an office, post or piece of property that is not occupied. Specifically, Black’s Law Dictionary defines vacancy as:

1. The quality, state, or condition of being unoccupied, esp. in reference to an office, post, or piece of property.
2. **The time during which an office, post, or piece of property is not occupied.**
3. An unoccupied office, post, or piece of property; an empty place. • Although the term sometimes refers to an office or post that is temporarily filled, the more usual reference is to an office or post that is unfilled even temporarily. An officer's misconduct does not create a vacancy even if a suspension occurs; **a vacancy, properly speaking, does not occur until the officer is officially removed.**
4. A job opening; a position that has not been filled.

VACANCY, Black's Law Dictionary (11th ed. 2019).

Further, the U.S. Supreme Court has indicated that a Senate office may only become vacant by the Senator’s “death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers.” *Burton v. United States*, 202 U.S. 344, 369, 26 S. Ct. 688, 694, 50 L. Ed. 1057 (1906). As such, a vacancy in a Senate

office does not occur until the office is no longer occupied and “properly speaking, does not occur until the officer is officially removed.”

Here, Senator Inhofe’s office will be occupied through at least January 2, 2023. He will not be removed from the office due to his retirement until January 3, 2023 at the earliest. Therefore, as a matter of law, there will not be a vacancy in Senator Inhofe’s office until January 3, 2023 at the earliest.

This same conclusion was reached in an analogous case from New Jersey, *Afran v. McGreevey*, 336 F. Supp. 2d 404 (D.N.J. 2004), *aff’d*, *Afran v. McGreevey*, 115 Fed. Appx. 539 (3d Cir. 2004). In *Afran*, the New Jersey Governor announced on August 12, 2004 his resignation from office effective November 15, 2004. *Id.* at 405. A group of New Jersey voters filed a class action lawsuit seeking a declaration that there was a vacancy in the Governor’s office as of August 12, 2004, the date the Governor announced his resignation. *Id.* If there were a vacancy in the office as of August 12, 2004, then a special election to replace the Governor was required in November 2004 under New Jersey law. *Id.* at 405–406. The New Jersey federal court rejected the voter’s request finding that the Governor’s office would not be “empty” or “unoccupied” until November 15, 2004, the date the resignation became effective. *Id.* at 409. Therefore, the New Jersey federal court concluded that there would not be a vacancy in the Governor’s office until November 15, 2004. *Id.* 409 – 410.

Similarly, here, Senator Inhofe’s office will not be empty or unoccupied until January 3, 2023 at the earliest. Therefore, the vacancy will not occur until January 3, 2023 at the earliest. Consequently, under the Seventeenth Amendment, the Governor’s power and duty to issue a writ of election to replace Senator Inhofe will not begin until January 3, 2023 at the

earliest. Accordingly, it was clearly improper for Governor Stitt to issue the Proclamation calling for a special election to replace Senator Inhofe in 2022 when there is no current vacancy in Senator Inhofe's office.²

B. THERE IS NO PRESENT LEGAL IMPEDIMENT TO SENATOR INHOFE WITHDRAWING OR REVOKING HIS IRREVOCABLE PLEDGE TO RETIRE PRIOR TO ITS EFFECTIVE DATE OF JANUARY 3, 2023 AND REMAINING IN OFFICE THROUGH THE EXPIRATION OF HIS TERM IN JANUARY 2027.

“[U]nder the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two thirds, may expel a Senator from that body.” *Burton*, 202 U.S. at 366. Again, a Senate office may only become vacant by the Senator's “death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers.” *Id.* at 369.

There is no known Senate rule or precedent that prohibits a Senator from withdrawing or revoking a letter of resignation/retirement (even one styled as irrevocable) prior to its effective date. Even if such a rule were established by the Senate, the Constitution would still require a concurrence of two-thirds of its members to expel the Senator from the Senate. U.S. Const. art. I, § 5. Consequently, there is no present legal impediment to Senator Inhofe

² Even if Senator Inhofe were to officially vacate his office as of the date of this filing (i.e., after March 1, 2022), the special election to replace him would not occur until the 2024 election cycle. 26 O.S. § 12-101(C)(2).

withdrawing or revoking his pledge to retire and remaining in office through the expiration of his term in January 2027.

It is anticipated that Respondent will allege that 26 O.S. § 12-119 of Oklahoma law (permitting an irrevocable resignation with a future effective date) makes Senator Inhofe's irrevocable pledge to retire effective on January 3, 2023 legally enforceable against Senator Inhofe. However, again, the Senate is the sole judge of a Senator's qualifications, and it is the only body with authority to expel a member. *Burton*, 202 U.S. at 369. Additionally, "the qualifications for Congress are fixed in the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 836, 115 S. Ct. 1842, 1871, 131 L. Ed. 2d 881 (1995). "A state-passed measure with the avowed purpose of imposing indirectly such an additional qualification violates the Constitution." *Id.*

Here, to the extent that 26 O.S. § 12-119 were directed to a member of the United States Senate, it infringes on the Senate's exclusive authority to judge a Senator's qualifications and expel a member. It also imposes an additional qualification on a Senator, i.e., that a Senator is ineligible to hold office after the effective date of an irrevocable letter of resignation. Therefore, 26 O.S. § 12-119 of Oklahoma law places no enforceable limit on Senator Inhofe remaining in office until January 3, 2023 at the earliest.

Accordingly, Senator Inhofe is still free to change his mind and remain in office through the date his term expires in January 2027. Thus, consistent with the Seventeenth Amendment, it is premature to have an election in 2022 to replace Senator Inhofe when Senator Inhofe still has the option to remain in office through the expiration of his term in January 2027.

C. CONSISTENT WITH THE SEVENTEENTH AMENDMENT, OKLAHOMA LAW DOES NOT PERMIT THE SPECIAL PRIMARY, RUNOFF PRIMARY AND GENERAL ELECTION TO REPLACE SENATOR INHOFE TO OCCUR PRIOR TO SENATOR INHOFE ACTUALLY VACATING HIS OFFICE.

“The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, and that intent is first sought in the language of a statute. Courts will give the words of a statute a plain and ordinary meaning, unless it is clear from the statute that a different meaning was intended by the Legislature.” *Fanning v. Brown*, 2004 OK 7, ¶ 10, 85 P.3d 841, 845–46 (internal citations omitted). “When the language of a statute is plain and unambiguous, no occasion exists for application of rules of construction, and the statute will be accorded meaning as expressed by the language employed.” *In re City of Durant*, 2002 OK 52, ¶ 13, 50 P.3d 218, 221

Consistent with the Seventeenth Amendment, the plain and unambiguous language found in 51 O.S. § 10(C) and 26 O.S. § 12-101(C) requires the Special Primary, Runoff Primary and General Election to replace Senator Inhofe to not take place until after Senator Inhofe officially leaves office. Specifically, “[w]hen a vacancy occurs in the office of a member of the United States Senate from Oklahoma, the Governor shall, **within thirty (30) days of occurrence of the vacancy**... [c]all a special election, if necessary, to fill such vacancy, as provided in Section 12-101 of Title 26 of the Oklahoma Statutes.” 51 O.S. § 10(C) (emphasis added). Section 12-101(C)(1) of Title 26 of the Oklahoma Statutes states: “A Special Primary, Runoff Primary and General Election shall be held concurrently with the next available regularly scheduled statewide Primary, Runoff Primary and General Election, and a special candidate filing period shall be on the same dates as the regular candidate filing

period for those elections.” Therefore, consistent with the Seventeenth Amendment, Oklahoma statutes do not permit the Governor to call a special election until there is the occurrence of the vacancy, and the special election shall occur in the next available regularly scheduled statewide Primary, Runoff Primary and General Election after the vacancy.

As previously discussed, a vacancy in Senator Inhofe’s office is not scheduled to occur until January 3, 2023 at the earliest. Accordingly, as a matter of law, the election to replace Senator Inhofe cannot take place until the next available regularly scheduled statewide Primary, Runoff Primary and General Election after January 3, 2023, which is not scheduled until 2024. See 26 O.S. §§ 1-101 – 1-103. Therefore, the Governor’s Proclamation calling for a Special Primary, Runoff Primary and General Election to replace Senator Inhofe in 2022 also violates Oklahoma law.

D. THE DATE SENATOR INHOFE SUBMITTED HIS IRREVOCABLE PLEDGE TO RETIRE ON JANUARY 3, 2023 HAS NO RELEVANCE TO DETERMINING THE DATE OF THE SPECIAL ELECTION.

It is anticipated that the Respondent will argue that the Legislature intended for the submission of an irrevocable resignation to be an operative date that triggers the calling of a special election to replace Senator Inhofe. Nevertheless, as previously discussed, such an intent would violate the Seventeenth Amendment.

Further, “when construing a statute, [the court] will presume that the Legislature did not intend an absurd or wholly unreasonable result.” *In re C.R.T.*, 2003 OK CIV APP 29, ¶ 35, 66 P.3d 1004, 1012. As shown above, there is nothing stopping Senator Inhofe from changing his mind and remaining in office through January 2027. As a result, it would be an absurd and wholly unreasonable result to permit a special election in 2022 to replace a

Senator who may not actually vacate his office prior to the expiration of his term. Even if Senator Inhofe were to honor his pledge, absurd and unreasonable results would occur if the date an irrevocable resignation were submitted determines the election date. For example, Senator James Lankford or his successor will begin a six-year Senate term on January 3, 2023. There is nothing stopping Senator Lankford or his successor from submitting an irrevocable resignation on January 3, 2023 with an effective date many years in the future, such as January 3, 2028. If the date of the irrevocable resignation triggers the special election, then the special election in this example would take place in 2024. However, the person elected in the 2024 special election would not assume the office for over three years. In the interim, there would be another general election in 2026. It would be absurd and unreasonable to elect a replacement Senator in 2024 who would not take the office until more than a year after a second intervening general election in 2026. As a result, such an interpretation must be avoided.

Additionally, any argument that the Legislature intended for the submission of an irrevocable resignation to be the operative date that triggers the calling of a special election is not supported by the plain and unambiguous text of the statutes. Consistent with the Seventeenth Amendment, 51 O.S. § 10(C) only identifies the “occurrence of the vacancy” as the triggering event to start the thirty-day clock for the Governor to appoint a successor and

call a special election with respect to a U.S. Senate office.³ There is no mention of “irrevocable resignation” anywhere in 51 O.S. § 10. Consequently, by the plain and unambiguous text of the statute, the Governor does not have the authority to call a special election until there is an actual vacancy.

Therefore, the date Senator Inhofe submitted his irrevocable pledge to retire has no relevance to determining the date of the special election. The special election to replace Senator Inhofe cannot be called until he actually vacates his office. Accordingly, the Governor lacked authority to issue his Proclamation requiring a special election to replace Senator Inhofe in the 2022 election cycle.

This Court should issue a writ of mandamus and writ of prohibition to Respondent to prevent this premature and unauthorized election in 2022.

IV. CONCLUSION

The Governor lacked authority to issue his Proclamation requiring a special election to replace Senator Inhofe prior to Senator Inhofe actually vacating his office. Therefore, this Court should assume original jurisdiction, and grant the petition for writ of mandamus and writ of prohibition.

³ It should be noted that the irrevocable letter of resignation statute, 26 O.S. § 12-119, does not give the Governor authority to “call” a special election. Further, any conflict between 51 O.S. § 10(C) and 26 O.S. § 12-119 is resolved in favor of 51 O.S. § 10(C) because it (a) is a specific statute governing members of the United States Senate; and (b) was adopted after 26 O.S. § 12-119. *See Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 13, 230 P.3d 853, 860, as revised (Feb. 4, 2010), as revised (Mar. 8, 2010) (stating that a specific statute governs over a general statute and “more recently-enacted legislation controls over earlier provisions”).

A writ of mandamus should issue directing the Respondent to not: (a) accept Declarations of Candidacy on April 13, 14, and 15, 2022 to fill a vacancy in the office of United States Senator from Oklahoma related to the retirement of the Senator Inhofe effective on January 3, 2023, and (b) print ballots to fill the vacancy of Senator Inhofe for the Special Primary Election on Tuesday, June 28, 2022, the Special Runoff Primary Election on Tuesday, August 23, 2022, and the Special General Election on Tuesday, November 8, 2022.

A writ of prohibition should further issue to prohibit the Respondent from (a) accepting Declarations of Candidacy on April 13, 14, and 15, 2022 to fill a vacancy in the office of United States Senator from Oklahoma related to the retirement of the Senator Inhofe effective on January 3, 2023, and (b) printing ballots to fill the vacancy of Senator Inhofe for the Special Primary Election on Tuesday, June 28, 2022, the Special Runoff Primary Election on Tuesday, August 23, 2022, and the Special General Election on Tuesday, November 8, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was hand delivered on this ____ of March, 2022 to:

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