

ORIGINAL



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

NOV 15 2019

JOHN D. HADDEN
CLERK

(1) ROGER GADDIS, AND

(2) ELDON MERKLIN,

PROTESTANTS/PETITIONERS,

v.

(1) ANDREW MOORE,

(2) JANET ANN LARGENT, AND

(3) LYNDA JOHNSON,

RESPONDENTS/PROONENTS.

#118405

Case No. _____

FILED	_____
RECEIVED	_____
NOV 15 2019	_____
Clerk of the Court	_____
John D. Hadden	_____

APPLICATION AND PETITION TO
ASSUME ORIGINAL JURISDICTION AND REVIEW THE
CONSTITUTIONALITY OF INITIATIVE PETITION NO. 420

ROBERT G. McCAMPBELL, OBA No. 10390
TRAVIS V. JETT, OBA No. 30601
GABLEGOTWALS
ONE LEADERSHIP SQUARE, 15TH FLOOR
211 NORTH ROBINSON AVENUE
OKLAHOMA CITY, OK 73102
TELEPHONE: (405) 235-5500

ATTORNEYS FOR PROTESTANTS/PETITIONERS

NOVEMBER 15, 2019

I. INTRODUCTION

Initiative Petition 420, State Question 804 (“IP 420”), should be stricken by this Court as unconstitutional.

IP 420 would make several significant changes in the procedure and substance of apportionment decisions for legislative districts for the Oklahoma House of Representatives, Oklahoma Senate, and U.S. House of Representatives. In particular, under IP 420, the apportionment decisions would not be made by the voters’ elected representatives in the Legislature, but would be made by a body of people who are not elected and would be selected through a process which would leave them unaccountable to the voters.

As will be shown below and in the brief in support, IP 420 suffers from two fatal constitutional defects.

1. IP 420 is unconstitutional under Art. XXIV, § 1, Okla. Const., because it contains more than one subject. For instance, the Supreme Court of Colorado ruled that a petition which would change redistricting for both state and federal offices violates the single subject rule. *In Matter of Ballot Title*, 2016 CO 55, ¶ 33, 374 P.3d 460, 468. Also, as held by the Supreme Court of Florida, a petition which would change both who does the redistricting and how redistricting is accomplished violates the single subject rule. *Advisory Opinion re Independent Commission*, 926 So.2d 1218, 1221 (Fla. 2006). IP 420 suffers from nearly identical defects as those in Colorado and Florida among others.

2. IP 420 is further unconstitutional under the First Amendment of the U.S. Constitution. Under IP 420, Oklahomans would be prohibited from serving on the redistricting Commission if they or a family member had exercised their constitutional right to (1) hold a partisan office, (2) run for office, (3) switch political parties, (4) serve as a lobbyist, (5) work for a political party or (6) work for the Legislature. Oklahomans would also be prohibited if

they had switched their party affiliation in the previous four years. The First Amendment protects the right to free speech and to political association. *Elrod v. Burns*, 427 U.S. 347, 357 (1976). The state cannot make participation in the IP 420 conditional based on a person's foregoing the right to free speech or political association. *Rutan v. Republican Party*, 497 U.S. 62, 86 (1990). In this case the infringement is particularly illogical because an Oklahoman would be prohibited from serving on the Commission even if, for example, that person's stepsister living in another state holds office in a different political party.

II. THE PARTIES

3. Protestant/Petitioner Roger Gaddis is a citizen of Oklahoma. He has been a resident of Pontotoc County for over twenty years and has been registered to vote for over twenty years.

4. Protestant/Petitioner Eldon Merklin is a citizen of Oklahoma. He has been a resident of Woodward County for over twenty years and registered to vote for over twenty years.

5. Respondent/Proponent Andrew Moore is one of the signatories to IP 420.

6. Respondent/Proponent Janet Ann Largent is one of the signatories to IP 420.

7. Respondent/Proponent Lynda Johnson is one of the signatories to IP 420.

III. JURISDICTION

8. IP 420 was filed with the Oklahoma Secretary of State on October 28, 2019. Appx. at Tab A.

9. Pursuant to 34 O.S. § 8, the Secretary of State published notice of IP 420 on October 31, 2019. Appx. at Tab B.

10. A protest is due 10 business days after notice is published. 34 O.S. § 8(B). Saturdays, Sundays, and legal holidays are excluded. *In re Initiative Petition 397*, 2014 OK

23, ¶ 19, 326 P.3d 496. Veterans' Day, November 11 is a legal holiday. 25 O.S. § 82.1. The tenth business day after the notice was published is Friday, November 15, 2019.

11. The Protestants/Petitioners are citizens of Oklahoma and this Court has jurisdiction to hear this protest. 34 O.S. § 8. “Any citizen can protest the sufficiency and legality of an initiative petition.” *In re Initiative Petition 409*, 2016 OK 51, ¶ 2, 376 P.3d 250, quoting *In re Initiative Petition 384*, 2007 OK 48, ¶ 2, 164 P.3d 125.

12. “When a protest is filed in this Court, we are ‘vested with original jurisdiction to evaluate and determine the sufficiency of the proposed initiative petition pursuant to 34 O.S. Supp. 2015 § 8.’” *In re Initiative Petition 409, supra*, 2016 OK 51 at ¶ 2, quoting *In re Initiative Petition 403*, 2016 OK 1, ¶ 3, 367 P.3d 472. Pursuant to Rule 1.194 of this Court, a challenge to an initiative petition shall be treated as an original action in this Court.

13. This protest attacks the constitutionality of IP 420. A protest is also being filed on behalf of Protestant Laura Newberry which attacks the “gist” submitted with IP 420.

IV. SUMMARY OF THE RECORD

14. IP 420 proposes a constitutional amendment to change who apportions legislative districts for U.S. House of Representatives, Oklahoma House of Representatives and Oklahoma Senate. §3(A) and (B). First, a “Panel” of three retired Justices or Judges of the Court of Criminal Appeals or Court of Civil Appeals would be chosen by the Chief Justice. § 4(A)(7). The Panel would select the names who will be eligible to serve on the Commission. The Commission is made up of three “Groups”: (a) the largest political party, (b) the second largest party, and (c) those unaffiliated with either of the two largest parties. § 4(A)(2). From a list of those who apply to be a Commissioner, the Panel selects 20 names in each Group. §4(B)(4)(f). Two names are selected by random drawing from the 20 names in each of the three Groups. § 4(B)(4)(g). Those six Commissioners then select three more Commissioners,

one in each Group, from the list of 20 names selected by the Panel. § 4(B)(4)(i). Additionally, the Chief Justice designates a Special Master (the director or an employee of the Administrative Office). § 4(4)(a). In the event the “Fallback Mechanism” is necessary, the Special Master creates a report to the Supreme Court and the Court would then determine the redistricting plan. § 4(F).

15. IP 420 would also change how legislative districts are apportioned. The Commission would minimize division of communities of interest including but not limited to “racial, ethnic, economic, social, cultural, geographic, tribal, linguistic, or historic identities.” § 4(D)(1)(c)(i). The Commission would protect “racial and ethnic fairness.” § 4(D)(1)(c)(ii). The Commission would provide for “political fairness” in the districts § 4(D)(1)(c)(iii). (These are material changes. The Oklahoma Constitution currently requires consideration of “political interests”. Art. V, § 9A. Also, the criteria for apportioning the House of Representatives, Art. V, § 10A, does not include any of the criteria set forth in § 4(D)(1)(c)(i)-(iii). Neither the Oklahoma Constitution nor the U.S. Constitution contain provisions on the criteria for drawing Congressional districts.)

16. IP 420 would also make changes which are not integrally related to who apportions the Legislature or how it gets apportioned. For example, (a) IP 420 would change the way incarcerated felons are counted. §4(C)(2)(e) and § 4(C)(3)(a). (b) IP 420 would eliminate the people’s right of initiative and referendum with respect to apportionment. § 3(A) and (B) and § 5. (c) IP 420 would cause the Supreme Court to be the driving force behind apportionment from selecting the Panel, § 4(A)(7), to having the power to disapprove an apportionment plan, § 4(G), to performing the legislative function of selecting the apportionment plan. §4(G)(3) and §4(F).

V. SUBSTANTIVE ISSUES

A. MULTIPLE SUBJECTS

17. IP 420 is unconstitutional pursuant to Article XXIV, § 1, Okla. Const., because it proposes multiple subjects in a single constitutional amendment. Among the different subjects are:

(a) **Federal and State Redistricting**. IP 420 proposes a Commission which would address both federal redistricting for Congress and state redistricting for the Oklahoma House of Representatives and the Oklahoma Senate. § 3(A) and (B). Federal redistricting and state redistricting have always been treated as separate topics under Oklahoma law. For example, the Oklahoma Constitution has provisions on redistricting for the Oklahoma House of Representatives, Art. V, § 10A, Okla. Const., and the Oklahoma Senate, Art. V, § 9A, Okla. Const. It has no provisions for redistricting for U.S. Congress. Those are governed by the U.S. Constitution Art. I, § 4, a different document. Federal and state redistricting are two subjects. *In re Matter of Ballot Title*, 2016 CO 55, § 33, 374 P.3d 460, 468.

(b) **Who controls redistricting and how it is accomplished**. IP 420 would create a new system for who makes redistricting decisions by substituting an unelected Commission in place of the Legislature for each of the three legislative entities. Further, IP 420 also changes the substantive criteria for determining how the new districts will be drawn. Who does the redistricting and how it is to be done are two different subjects. *Advisory Opinion re Independent Commission*, 926 So.2d 1218, 1221 (Fla. 2006).

(c) **Eliminating the people's right of initiative and referendum**. Since statehood, the people of Oklahoma have reserved to themselves the right to make law through the initiative and referendum process. Art. V, § 1, Okla. Const. However, IP 420 would eliminate the right of the people by vesting redistricting decisions with a Commission which

has “exclusive” authority, and which does not pass legislation which would be subject to referendum. IP 420 §§ 3(A), 3(B), and 5. See also Art. V, § 1 stating that the right of referendum applies to “acts of the Legislature.” The elimination of the people’s direct democracy rights with respect to redistricting is a separate and important subject.

(d) **Revising and Expanding Judicial Power.** The Supreme Court of Oklahoma would be given a role which is political, policy making, and legislative, § 4(F) and 4(G), and is therefore very different from how this Court has previously functioned. Further, the Court would play a central role in the redistricting process, literally from beginning to end. At the beginning of the process the Chief Justice will choose the three retired Justices or Judges who will serve on the Panel. § 4(A)(7). Also, the Chief Justice will appoint the Special Master, § 4(B)(4)(a), and the Special Master will nominate the Secretary of the Commission. § 4(C)(1)(a). At the end of the process, the Supreme Court has the power to invalidate a plan proposed by the Commission, § 4(G). Also, at the end of the process, if the Supreme Court invalidates a plan or if the Commission cannot approve a plan, the Supreme Court will perform the substantive policy and political role of choosing a redistricting plan. § 4(F). Placing the Court in these *multiple* roles which are significantly *different* from how this Court has functioned since statehood, is a separate subject. *See, In Matter of Ballot Title*, 2016 CO 55, ¶ 21.

(e) **Replacing the Current Commission.** The Oklahoma Constitution currently provides for a Bipartisan Commission on Legislative Apportionment selected by the voters’ elected representatives to accomplish apportionment in the event that the Legislature could not accomplish an apportionment plan. Art. V, § 11A-11E, Okla. Const. IP 420 would repeal the Bipartisan Commission and replace it with a different Commission which is selected

differently and would operate differently. The repeal and replacement of the Bipartisan Commission on Legislative Apportionment in Art. V, § 11A-11E is a separate subject.

(f) **New Criteria**. IP 420 also substantively changes the criteria to be used in redistricting. It not only changes the procedure with respect to who would make redistricting decisions, but also the substance governing what those decisions should be. For example, IP 420 would (1) add a requirement that incarcerated felons would be counted as though they were non-incarcerated/non-felons, (2) eliminate partisan considerations from redistricting, and (3) add a requirement that “divcrsity” be considered.

(g) **Replacing Elected Representatives**. Another subject is that IP 420 would replace the current system in which redistricting is accomplished by the voters’ elected representatives, Art. V, § 11A, Okla. Const., and instead move to an undemocratic system in which apportionment is accomplished by unelected, unaccountable members. Under IP 420, the Commission would be unaccountable. The three retired Justices/Judges would examine the list of applicants and select twenty names to serve on the Commission from each Group. § 4(B)(4)(f). From those names, six Commissioners would be selected by random drawing. § 4(B)(4)(g). Those randomly selected Commissioners would then select three more Commissioners. § 4(B)(4)(i). At no point in the selection process is any participant accountable to the voters of Oklahoma. This radical departure from a representative form of government responsive to the voters is a separate subject.

B. FIRST AMENDMENT

18. The First Amendment of the United States Constitution guarantees all citizens the right to participate in political parties, to participate in running for office and to petition the government for the redress of grievances.

19. Nevertheless, IP 420 would discriminate against certain Oklahomans if they, or one of their family members, had exercised their constitutional right to be active in the government of any state in the past five years.

20. In particular, in setting forth the qualifications to be a Commissioner participating in redistricting, IP 420, § 4(B)(2) provides that an individual is absolutely disqualified if that individual or a family member has (a) held a partisan political office, (b) been a lobbyist, (c) been nominated for office by a political party, (d) held office in a political party, (e) been an employee of a political party, or (f) been an employee of the Legislature.

21. Further, Oklahomans would be disqualified from serving as a Commissioner if they had exercised their right to change party affiliation during the previous four years. § 4(B)(2)(a).

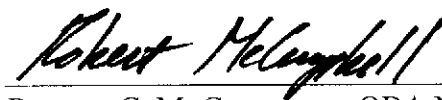
22. A state cannot discriminate against a person for exercising their First Amendment rights.

23. A state cannot discriminate against a person because the person is related to someone who exercised their First Amendment rights.

VI. CONCLUSION

IP 420 violates Article XXIV, § 1 of the Oklahoma Constitution and violates the First Amendment of the United States Constitution. For all of these reasons, IP 420 must be stricken from the ballot.

Respectfully submitted,



ROBERT G. MCCAMPBELL, OBA No. 10390
TRAVIS V. JETT, OBA No. 30601
GABLEGOTWALS
One Leadership Square, 15th Floor

211 North Robinson Avenue
Oklahoma City, OK 73102
Telephone: (405) 235-5500
RMcCampbell@Gablelaw.com
TJett@Gablelaw.com

*Attorneys for Protestants/Petitioners
Roger Gaddis and Eldon Merklin*

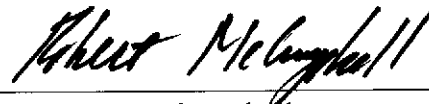
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2019, a true and correct copy of the above and forgoing was served by hand delivery as follows:

D. Kent Meyers
Roger A. Stong
Melanie Wilson Rughani
CROWE & DUNLEVY, P.C.
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102

Secretary of State's Office
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 101
Oklahoma City, OK 73105-4897

Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105-4897



Robert G. McCampbell
Travis V. Jett