



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA
FILED
SUPREME COURT
STATE OF OKLAHOMA

(1) ROGER GADDIS, AND
(2) ELDON MERKLIN,

PROTESTANTS/PETITIONERS,

NOV 15 2019

JOHN D. HADDEN
CLERK

v.

(1) ANDREW MOORE,
(2) JANET ANN LARGENT, AND
(3) LYNDA JOHNSON,

RESPONDENTS/PROponents.

Case No. **#118405**

**PETITIONERS' BRIEF IN SUPPORT OF APPLICATION AND PETITION
TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE
CONSTITUTIONALITY OF INITIATIVE PETITION NO. 420**

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NOVEMBER 15, 2019

Stamp with fields: Name, Mailing, Received, Cert mailed, Updated

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INDEX

I.	INTRODUCTION	1
	<i>Advisory Opinion re Indep. Comm'n,</i> 926 So. 2d 1218 (Fla. 2006).....	1
	<i>Elrod v. Burns,</i> 427 U.S. 347 (1976).....	1
	<i>In the Matter of the Title, Ballot Title, and Submission Clause,</i> 2016 CO 55, 374 P.3d 460 (Colo. 2016)	1
	<i>Rutan v. Repub. Party,</i> 497 U.S. 62 (1990).....	2
	U.S. Const. amend. I.....	1
	Okla. Const. art. XXIV, § 1.	1
	Initiative Petition 420, State Question 804	1
II.	SUMMARY OF THE RECORD.....	2
	Initiative Petition 420, State Question 804	2
III.	ANALYSIS.....	2
	A. IP 420 contains multiple subjects in violation of Okla. Const. art. XXIV, § 1	2
	<i>Advisory Opinion re Indep. Comm'n,</i> 926 So. 2d 1218 (Fla. 2006).....	2
	<i>In the Matter of the Title, Ballot Title, and Submission Clause,</i> 2016 CO 55, 374 P.3d 460 (Colo. 2016)	2
	<i>In re Initiative Petition No. 314,</i> 1980 OK 174, 625 P.2d 595.....	3
	<i>In re Initiative Petition No. 342,</i> 1990 OK 76, 797 P.2d 331.....	2, 3
	<i>In re Initiative Petition No. 344,</i> 1990 OK 75, 797 P.2d 326.....	3, 4
	<i>In re Initiative Petition No. 403,</i> 2016 OK 1, 367 P.3d 472.....	3
	<i>Okla. Oil & Gas Ass'n v. Thompson,</i> 2018 OK 26, 414 P.3d 345.....	2, 3, 4

U.S. Const. art. I, § 4.....	3
Okla. Const. art. IV.....	3
Okla. Const. art. V.....	3
Okla. Const. art. VI.....	3
Okla. Const. art. VII.....	3
Okla. Const. art. XXIV, § 1.....	2, 4
Initiative Petition 420, State Question 804.....	2, 3, 4
1. State redistricting and federal redistricting are separate subjects.....	4
<i>Alexander v. Taylor</i> , 2002 OK 59, 51 P.3d 1204.....	5, 6
<i>Brown v. State Election Bd.</i> , 1962 OK 36, 369 P.2d 140.....	5
<i>Davis v. McCarty</i> , 1964 OK 5, 388 P.2d 480.....	5
<i>In re Initiative Petition No. 271</i> , 1962 OK 178, 373 P.2d 1017.....	5
<i>In re Initiative Petition No. 317</i> , 1982 OK 78, 648 P.2d 1207.....	5
<i>In the Matter of the Title, Ballot Title, and Submission Clause</i> , 2016 CO 55, 374 P.3d 460 (Colo. 2016).....	5, 6
<i>In re Referendum Petition No. 18</i> , 1966 OK 152, 417 P.2d 295.....	5
<i>Jones v. Cordell</i> , 1946 OK 135, 168 P.2d 130.....	5
<i>Jones v. Freeman</i> , 1943 OK 322, 146 P.2d 564.....	5
<i>Jones v. Winters</i> , 369 P.2d 135 (Okla. 1961).....	5
<i>Jones v. Winters</i> , 1961 OK 224, 365 P.2d 357.....	5
<i>Reed v. State Election Bd.</i> , 1962 OK 37, 369 P.2d 156.....	5

<i>Romano v. Cordell</i> , 1952 OK 139, 243 P.2d 677.....	5
<i>State ex rel. Carrier v. State Election Bd. of Okla.</i> , 1957 OK 253, 318 P.2d 422.....	5
<i>Wilson v. State ex rel. State Election Bd.</i> , 2012 OK 2, 270 P.3d 155.....	5
<i>Wilson v. Fallin</i> , 2011 OK 76, 262 P.3d 741.....	5
U.S. Const. art. I, § 4.....	5
Okla. Const. art. V, § 57	5
1951 Okla. Sess. Laws. p.26 (H.B. 78).....	5
1965 Okla. Sess. Laws Ch. 511	5
1967 Okla. Sess. Laws Ch. 23	5
1972 Okla. Sess. Laws Ch. 210	5
1981 Okla. Sess. Laws Ch. 354	5
1991 Okla. Sess. Laws Ch. 260	5
2011 Okla. Sess. Laws Ch. 194	5
1913 Okla. Sess. Laws Ch. 241	5
Initiative Petition 420, State Question 804	4, 6
2. New criteria for drawing districts is a new subject.....	6
<i>Advisory Opinion re Indep. Comm'n</i> , 926 So. 2d 1218 (Fla. 2006).....	6, 8
<i>Alexander v. Taylor</i> , 2002 OK 59, 51 P.3d 1204.....	8
<i>Arizona State Legislature v. Arizona Indep. Redistricting Comm'n</i> , 135 S. Ct. 2652 (2015).....	7, 8
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986).....	8
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019).....	8
Okla. Const. art. V, § 9A	8

Initiative Petition 420, State Question 804	7, 8
3. Eliminating citizens access to the initiative and referendum process.....	9
<i>In re Initiative Petition No. 317,</i> 1982 OK 78, 648 P.2d 1207.....	9
<i>In re Initiative Petition No. 344,</i> 1990 OK 75, 797 P.2d 326.....	9, 10
<i>In re Referendum Petition No. 18,</i> 1966 OK 152, 417 P.2d 295.....	9, 10
<i>State ex rel. Carrier v. State Election Bd. of Okla.,</i> 1957 OK 253, 318 P.2d 422.....	9
Okla. Const. art. V, § 1	9
Okla. Const. art. V, § 2	9
Okla. Const. art. V, § 5	9
Okla. Const. art. XXIV, § 1.....	10
14 Okla. Stat. Ann. § 2 (West 2019).....	9
Initiative Petition 420, State Question 804	9, 10
4. Revising the judicial power with respect to redistricting is a separate subject.....	10
<i>Alexander v. Taylor,</i> 2002 OK 59, 51 P.3d 1204.....	10, 11
<i>In the Matter of the Title, Ballot Title, and Submission Clause,</i> 2016 CO 55, 374 P.3d 460 (Colo. 2016)	11
Okla. Const. art. V, § 11D	10, 11
Okla. Const. art. VII, § 3.....	10
Initiative Petition 420, State Question 804	10
B. State Question 804 violates the First Amendment.....	12
<i>In re Initiative Petition No. 349 State Question No. 642,</i> 1992 OK 122, 838 P.2d 1.....	12
<i>In re Initiative Petition No. 364,</i> 1996 OK 129, 930 P.2d 824.....	12, 15
<i>Buckley v. Valeo,</i> 424 U.S. 1 (1976).....	12

<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	13
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	12, 13, 14
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973).....	15
<i>Janus v. AFSCME, Council 31</i> , 138 S. Ct. 2448 (2018).....	13
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967).....	13
<i>Kusper v. Pontikes</i> , 414 U.S. 51, (1973).....	13
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019).....	14, 15
<i>Rutan v. Repub. Party</i> , 497 U.S. 62 (1990).....	13
<i>Umbehr v. McClure</i> , 44 F.3d 876 (10th Cir. 1995)	13
Initiative Petition 420, State Question 804	12, 13, 14, 15
III. CONCLUSION.....	15
Initiative Petition 420, State Question 804	15

I. INTRODUCTION

Initiative Petition 420, State Question 804 (“IP 420”), should be stricken by the Court as unconstitutional. IP 420 would significantly change who makes redistricting decisions for legislative districts for the Oklahoma House of Representatives, Oklahoma Senate, and U.S. House of Representatives and how they are made. 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 group of “Commissioners” who are not elected and not accountable to the voters.

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 Op. re Indep. Comm’n*, 926 So.2d 1218, 1221 (Fla. 2006).

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) serve as a lobbyist, (4) work for a political party or (5) work for the Legislature. Additionally, the thousands of Oklahomans who exercise their right to switch political parties in the four years preceding apportionment would be ineligible. The First Amendment protects the right 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 political association. *See 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. SUMMARY OF THE RECORD

The Summary of the Record including a description of what IP 420 does is set forth in § IV of the Application and Petition for this case.

III. ANALYSIS

A. IP 420 contains multiple subjects in violation of Okla. Const. art. XXIV, § 1.

IP 420 contains multiple subjects and violates Article XXIV, § 1. It is similar to initiative petitions seeking to implement independent redistricting Commissions that have been rejected by other state supreme courts on single subject analysis. *In Matter of Ballot Title*, 2016 CO 55, ¶ 33, 374 P.3d at 468; *Advisory Opinion re Indep. Comm'n*, 926 So. 2d at 1221 (Fla. 2006).

An amendment by article will be deemed a single proposal if it “embrace[s] one general subject.” Okla. Const. art. XXIV, § 1. The Court applies the germaneness test to determine whether a multiplicity of subjects exist. *Okla. Oil & Gas Ass'n v. Thompson*, 2018 OK 26, ¶ 8, 414 P.3d 345, 348. “The purpose of the one general subject criteria is to prevent deceit or the presentation of a misleading proposal and to prevent logrolling, the combining of unrelated proposals.” *In re Initiative Petition No. 342*, 1990 OK 76, ¶ 4, 797 P.2d 331, 332; *accord Thompson*, 2018 OK 26, ¶ 14, 414 P.3d at 349-50. “Voters should not have to adopt measures of which they really disapprove in order to embrace propositions that they favor.” *In re Initiative Petition No. 342*, 1990 OK 76, ¶ 10, 797 P.2d at 333.

This Court analyzes whether the “purposes behind the rule were offended by the particular proposals.” *In re Initiative Petition No. 314*, 1980 OK 174, ¶ 60, 625 P.2d 595, 603. *See Thompson*, 2018 OK 26, ¶ 14, 414 P.3d at 349-50. In recent years, this Court has held that petitions that seek to implement discrete plans for raising teacher pay and increasing education funding by instituting a new tax are a single subject. *In re Initiative Petition No. 403*, 2016 OK 1, ¶ 22, 367 P.3d 472, 480; *Thompson*, 2018 OK 26, ¶ 16, 414 P.3d at 350. However, this Court has rejected proposals that seek to amend the Oklahoma Constitution’s provisions governing the executive branch (Article VI), *In re Initiative Petition No. 344*, 1990 OK 75, 797 P.2d 326, and corporations (Article IX), *In re Initiative Petition No. 342*, 1990 OK 76, 797 P.2d 331.

Initiative Petition 420 does not target a discrete topic like teacher pay. It does not even attempt to repeal and replace a single article of the Oklahoma Constitution as was rejected in *In re Initiative Petition No. 344* and *In re Initiative Petition No. 342*. Instead, it seeks to combine in the same petition the subject of state apportionment, which is governed by Article V of the Oklahoma Constitution, with the subject of federal reapportionment, which emanates from Article I, § 4 of the U.S. Constitution. In doing so, it attempts to modify Articles IV, V, VI, and VII of the Oklahoma Constitution, all while curtailing rights found in Article II, §§ 3, 4, and 22. The Petition would also (1) codify a “political fairness” theory of redistricting in the Constitution with the imposition of new criteria; (2) eliminate Oklahoma voters’ power of initiative and referendum in redistricting, and (3) give the heretofore nonpolitical judicial branch an animating role in the political process of redistricting from beginning to end. These are distinct subjects and violate the purpose of the one general subject rule.

Additionally, IP 420 contains multiple additional changes which are neither necessary nor intertwined with the rest of IP 420, such as changing the way incarcerated felons are

counted and eliminating voters' power of initiative and referendum with respect to redistricting. In assessing single subject cases, this Court has found a violation where the sections "are not incidental or necessary to an overall design" and "are not so intertwined as to require that they be adopted at the same time in order to preserve the integrity of each section." *In re Initiative Petition 344*, 1990 OK 75, 797 P.2d at 329. In examining an amendment by article in *Thompson*, 2018 OK 26, ¶ 14, 414 P.3d at 349-50 (emphasis added), this Court explained, "A single-subject measure, within the meaning of Art. XXIV, § 1, Okla. Const., is one whose component ingredients, no matter how numerous, *are so interrelated as to all form parts of an integrated whole.*" Those principles require that IP 420 be rejected. Changing the process for redistricting can be accomplished without (a) eliminating the voters' rights to initiative and referendum, (b) changing the way incarcerated felons are counted, (c) giving the Supreme Court a highly political, legislative role, or (d) depriving Oklahomans of their constitutional rights to free speech and political association.¹ Similarly, changing who makes the decisions on redistricting can be accomplished without changing the substantive criteria for how the districts are drawn—each can and should rise or fall as a separate proposition.

1. State redistricting and federal redistricting are separate subjects.

Redistricting the Oklahoma House and Senate and redistricting the U.S. House of Representatives are two different subjects. The Colorado Supreme Court recently rejected a similar initiative petition on this basis. The Colorado petition (1) restructured the existing state

¹ The issue of how to count incarcerated felons was hotly debated at the Census Bureau in 2016 with over 77,000 comments submitted. U.S. Census, Final 2020 Census Residence Criteria and Residence Situations (2016). The Census Bureau elected to continue to count felons at their place of incarceration, but would allow a state to request information to reallocate prisoner counts. Oklahoma may or may not want to do so. However, that decision is not intertwined with or interrelated to IP 420's purpose to change the process for making redistricting decisions.

redistricting Commission and (2) delegated federal redistricting from the Legislature to an independent Commission in the same measure. The court rejected the initiative because it “creates a danger of log rolling because the Initiative may attract a ‘yes’ vote from voters who are unhappy with the current process for state legislative redistricting and would support restructuring the Reapportionment Commission but who might oppose removing the power to draw congressional districts from the General Assembly, or vice versa.” *In Matter of Ballot Title*, 2016 CO 55, ¶ 34, 374 P.3d at 468. “[S]tate legislative redistricting and congressional redistricting are distinct processes derived from distinct sources of constitutional authority and governed by different standards.” *Id.* ¶ 33, 374 P.3d at 468.

IP 420 suffers the same legal defect because state and federal redistricting are separate subjects in Oklahoma. First, state redistricting is governed in detail by the Oklahoma Constitution, but redistricting the U.S. House of Representatives is not even mentioned in the Oklahoma Constitution. Instead, it emanates from Article I, § 4 of the U.S. Constitution. The fact that state and federal redistricting “are addressed by separate constitutional schemes is meaningful and relevant to the single subject analysis.” *Id.*, 374 P.3d at 468.

Second, state and federal redistricting have been treated as different subjects throughout Oklahoma’s history. The Legislature has always passed separate legislation to reapportion Oklahoma’s congressional districts,² thus avoiding a single-subject challenge under Okla. Const. art. V, § 57. State Questions dealing with congressional redistricting,³ and state redistricting⁴ have been separate from each other. Finally, there are no reported cases in

² 2011 Okla. Sess. Laws Ch. 194; 1991 Okla. Sess. Laws Ch. 260; 1981 Okla. Sess. Laws Ch. 354; 1972 Okla. Sess. Laws Ch. 210; 1967 Okla. Sess. Laws Ch. 23; 1965 Okla. Sess. Laws Ch. 511; 1951 Okla. Sess. Laws, p. 26 (H.B. 78); 1913 Okla. Sess. Laws Ch. 241, p. 655.

³ *In re Initiative Petition No. 317*, 1982 OK 78, 648 P.2d 1207, 1213; *In re Referendum Petition No. 18*, 1966 OK 152, 417 P.2d 295, 296; *State ex rel. Carrier v. State Election Bd. of Okl.*, 1957 OK 253, 318 P.2d 422, 424.

⁴ *E.g. In re Initiative Petition No. 271*, 1962 OK 178, 373 P.2d 1017, 1018; State Question 416; State Question 423; State Question 748.

which litigants have attempted to challenge both state and federal redistricting in the same case.⁵

Third, different legal standards apply to state and federal redistricting. Compare Okla. Const. art. V, § 9(A), with *Alexander v. Taylor*, 2002 OK 59, ¶¶ 9, 23, 51 P.3d 1204, 1208, 1211. Just as in the Colorado case, state and federal redistricting in Oklahoma “are distinct processes . . . governed by different standards.” *In Matter of Ballot Title*, 374 P.3d at 468. The difference in applicable standards for redistricting demonstrate separate subjects.

As demonstrated by (a) *In Matter of Ballot Title*, (b) the text of Oklahoma’s Constitution, (c) historical practice in this state, and (d) the applicable legal standards, federal redistricting and state redistricting are separate and distinct subjects.

2. New criteria for drawing districts is a new subject.

Constitutionalizing new standards for how Senate, House, and Congressional districts are apportioned is a separate subject from the significant procedural changes IP 420 would make to who makes redistricting decisions. In *Advisory Opinion re Indep. Comm'n*, the Florida Supreme Court struck down an initiative petition on this same issue because it “encompassed two subjects.” *Advisory Opinion re Indep. Comm'n*, 926 So. 2d at 1225. “Not only would the proposed amendment create a new redistricting Commission, but it would also change the

⁵ *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, 270 P.3d 155 (State Senate redistricting); *Wilson v. Fallin*, 2011 OK 76, 262 P.3d 741 (same); *Alexander v. Taylor*, 2002 OK 59, ¶ 21, 51 P.3d 1204, 1210 (congressional redistricting); *In re Initiative Petition No. 317*, 1982 OK 78, 648 P.2d 1207, 1213 (congressional redistricting petition); *Davis v. McCarty*, 1964 OK 5, 388 P.2d 480, 481, *overruled by Alexander v. Taylor*, 2002 OK 59, 51 P.3d 1204 (state legislature redistricting); *Jones v. Winters*, 369 P.2d 135, 138 (Okla. 1961) (Oklahoma House); *Jones v. Winters*, 1961 OK 224, 365 P.2d 357, 365 (Oklahoma Senate); *Brown v. State Election Bd.*, 1962 OK 36, 369 P.2d 140, 152, *overruled by Alexander v. Taylor*, 2002 OK 59, 51 P.3d 1204 (Oklahoma House); *Reed v. State Election Bd.*, 1962 OK 37, 369 P.2d 156, 161 (Oklahoma Senate); *State ex rel. Carrier v. State Election Bd. of Okla.*, 1957 OK 253, 318 P.2d 422, 424 (congressional redistricting initiative petition); *Romano v. Cordell*, 1952 OK 139, 206 Okla. 369, 370, 243 P.2d 677, 679 (Oklahoma House); *Jones v. Cordell*, 1946 OK 135, 197 Okla. 61, 63, 168 P.2d 130, 132 (Oklahoma Senate); *Jones v. Freeman*, 1943 OK 322, 193 Okla. 554, 146 P.2d 564, 568, *overruled by Alexander v. Taylor*, 2002 OK 59, 51 P.3d 1204 (Oklahoma House and Senate).

standards applicable to the districts that are created by the Commission.” *Id.* The Florida court, *id.* at 1226, rejected this attempt at logrolling.

A voter who advocates apportionment by a redistricting Commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the “all or nothing” fashion that the single subject requirement safeguards against. Thus, we conclude that the proposed amendment does not comply with this constitutional requirement.

IP 420 presents the exact same problem.

Who: With respect to the procedural change, IP 420 would be the first initiative petition in Oklahoma proposing a redistricting Commission for federal reapportionment. This is also the first reapportionment cycle since the U.S. Supreme Court upheld the constitutionality of independent congressional redistricting Commissions. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671 (2015). Most importantly, whether to displace the elected members of the Legislature for an independent Commission is a subject of extensive debate.

How: The political theory for drawing districts incorporated into IP 420 is equally controversial. IP 420 would, for the first time in state history, prohibit those redistricting from considering “the political party affiliation or voting history of the population of a district” other than to assess “political fairness.” § 4(D)(1)-(2). “Political fairness” apparently means eliminating “inequality of opportunity to elect.” § 4(D)(1)(c)(iii). IP 420 also expressly precludes consideration of the residence of any member or candidate of the Oklahoma House of Representatives, Oklahoma Senate, or U.S. Congress.⁶ These are is different criteria than have

⁶ Under IP 420, any redistricting plan must comply with federal law and be contiguous. § 4(D)(1)(a)-(b). The Commissioners must also seek compliance with the following criteria in order of priority: community of interest, racial and ethnic fairness, political fairness, geographic integrity of political subdivisions, and

been employed in Oklahoma. For instance, Article V, § 9A requires that the Legislature consider “political interests.” Similarly, in selecting a congressional redistricting plan, this Court identified “avoiding contests between incumbents running for reelection” as a neutral criteria for selecting a plan. *Alexander*, 2002 OK 59, ¶ 23, 51 P.3d at 1211.

Should the substantive criteria for drawing districts change and, if so, what should the changes be? Reasonable minds can and will differ. As the U.S. Supreme Court in *Rucho v. Common Cause* noted, one conception of “[f]airness may mean a greater number of competitive districts.” 139 S. Ct. 2484, 2500 (2019). “But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party.” *Id.* “[I]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” *Id.* (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986)). This is an important subject to be debated and considered by our state.

It is quite likely that a voter could like the idea of an independent redistricting Commission but have serious reservations about making “political fairness” the touchstone for redistricting. On the other hand, a voter may recoil at the idea of eliminating the Legislature’s role in redistricting and giving extraordinary power to unelected citizens, yet like the idea of imposing what proponents would call “fair” standards for redistricting. This all or nothing choice demonstrates multiple subjects and is exactly what the one general subject rule is intended to prevent. Just as in *Advisory Opinion re Indep. Comm’n*, IP 420 should be stricken due to multiple subjects.

compactness. Most, important the Commissioner cannot take into consideration (1) the residence of any member of candidate of the Oklahoma House, Oklahoma Senate, or U.S. Congress or (2) the political party affiliation or voting history of the population of a district.

3. Eliminating citizens' access to the initiative and referendum process.

IP 420 would eliminate the voters' right to pass and disapprove redistricting legislation by initiative or referendum; that is a separate subject. Under current law, the voters of Oklahoma are entitled to invoke their powers of direct democracy with respect to redistricting. *In re Initiative Petition No. 317*, 1982 OK 78, 648 P.2d 1207, 1213; *see also In re Referendum Petition No. 18*, 1966 OK 152, 417 P.2d 295, 297; *State ex rel. Carrier v. State Election Bd. of Okl.*, 1957 OK 253, 318 P.2d 422, 424. In fact, the people have succeeded in disapproving congressional redistricting passed by the Legislature by using the referendum power. 14 Okla. Stat. Ann. § 2 (West 2019) (repealed), Historical and Statutory Notes; SQ No. 437; *see also In re Referendum Petition No. 18*, 1966 OK 152, 417 P.2d 295, 297.

IP 420 would eliminate the voters' opportunity to exercise the initiative and referendum with respect to redistricting. By taking redistricting from the Legislature and giving it to the unaccountable redistricting Commission, IP 420 voids the referendum power. The right of referendum applies only to "act[s] of the Legislature." Okla. Const. art. V, § 1. Also, the initiative power allows the people only to "propose laws . . . and to enact or reject the same at the polls." *Id.* So, the people would be shut out of the redistricting process. *Id.* IP 420 uses precise language to avoid the voters' initiative and referendum power. The Commission is given the "power to redistrict" the State Legislature and the U.S. House "[n]otwithstanding any other provisions of this Constitution." IP 420, § 3(A); also, *id.* § 3(B) (congressional redistricting). Vesting the power to redistrict in the Commission "notwithstanding any other provision of this Constitution" vitiates the people's power to propose initiatives recognized in Article V. Similarly, § 5 states that the Commission's powers are "exclusively reserved to the Commission." If the power to redistrict is "exclusively reserved to the Commission," it cannot

also be reserved by the people such that the initiative power can be employed. Section 5 shuts out both the Legislature and the People.

Elimination of direct democracy is more than an incidental change. **“The right to petition for a vote of the people by Initiative and Referendum provided by Art. V, § 2, of the Constitution of Oklahoma is a sacred right to be carefully preserved.”** *In re Referendum Petition No. 18*, 1966 OK 152, 417 P.2d 295, 297. Eliminating the people’s right, as recognized by this Court, to redistrict by initiative and referendum is unrelated and unnecessary to the goal of changing Oklahoma’s redistricting Commission and excluding the Legislature’s participation. This violates the purpose of the one general subject rule because the elimination of the people’s initiative and petition power is “not readily understandable.” *In re Initiative Petition No. 344*, 1990 OK 75, 797 P.2d 326, 329. Moreover, this is blatant logrolling. It defies logic. Someone who likes IP 420 because they are unhappy with how the Legislature is handling redistricting must also be willing to cede their right to initiate a future referendum in the event the Redistricting Commission promulgates an unacceptable apportionment plan. This logrolling violates Art. XXIV, § 1.

4. Revising the judicial power with respect to redistricting is a separate subject.

IP 420’s plan to run the inherently political process of redistricting through the judicial branch is a separate subject. Throughout this Court’s history, it has been steadfast in leaving politics to the other branches of government. Further, justices and judges are retained and elected in nonpartisan elections. Okla. Const. art. VII, § 3. The structure of the Oklahoma Constitution has been careful to protect the nonpartisan nature of the judicial branch. Under the current constitutional system for state redistricting, the Court’s role is to merely apply the law in the event a plan is challenged. *Id.* art. V, § 11D. If a plan is deficient, currently the Court

is to remand the matter to the existing Bipartisan Commission. *Id.* The judicial branch has no role in selecting plans or selecting Commissioners under the current constitutional system.

Under IP 420, the judicial branch would serve as the backbone for redistricting. The retired appellate justices who serve on the Panel to review potential Commissioner's qualifications would be "chosen by the Chief Justice . . ." § 4(A)(7). The Chief Justice would also appoint the Special Master to take the leading administrative role. § 4(B)(4)(a). This Court would determine the district lines if the Commission cannot create a redistricting plan or if the plan is invalidated by the Court. § 4(F) and 4(G)(3). This would be the first time in Oklahoma history, that the Constitution would enshrine a redistricting scheme that contemplated this Court drawing the lines.⁷

Giving the Court a political role in redistricting, in light of the Court's nonpartisan nature, is a separate and distinct subject. In *In Matter of Ballot Title* case, the Colorado Supreme Court found a similar scenario constituted a separate subject. In that case, the Supreme Court Nominating Commission was tasked with determining finalists to serve on the Commission. *Id.* ¶ 21, 374 P.3d at 466. The Court concluded that this was a deviation from the Nominating Commission's apolitical purpose and constituted a separate subject. *Id.* ¶ 25. Just as having the Colorado Supreme Court Nominating Commission in the selection process was a separate subject, having the Oklahoma Supreme Court involved in the selection process and the line drawing process is a separate subject.

A voter could well favor creating a new Commission, but disfavor placing the Court in an integral role in the procedure and decision making. These are two separate subjects.

⁷ Under the current Constitution, if the Court strikes down a plan, the issue is remanded to the Bipartisan Commission. Art. V, § 11D, Okla. Const. On one occasion, this Court was thrust into the role of selecting between congressional redistricting plan. *Alexander*, 2002 OK 59, 51 P.3d 1204. This was not a matter of constitutional design or the Court's choosing. *See id.* ¶ 9. Instead, it was a matter of necessity. *Id.* ¶ 16. Taking the responsibility to take action due to deadlock in the political branches is distinguishable from instilling a constitutional framework that codifies a plan-picking, legislative, role for the Court.

B. IP 420 violates the First Amendment.

The exclusion of certain categories of individuals from serving as a Commissioner⁸ solely because of their protected First Amendment activities—or their blood or marital status with someone exercising those rights—is an unconstitutional condition of employment. “[T]he most basic requirement of the Oklahoma Constitution is that the change in law petitioned for be compatible with the United States Constitution as construed by the United States Supreme Court.” *In re Initiative Petition No. 349 State Question No. 642*, 1992 OK 122, ¶ 28, 838 P.2d 1. Any proposed amendment to the Oklahoma Constitution “is invalid as a whole” if “it is beyond the reserved initiative power of the people” set forth in the Oklahoma Constitution. *In re Initiative Petition No. 364*, 1996 OK 129, ¶ 38, 930 P.2d 824. IP 420 is incompatible with the U.S. Constitution and established U.S. Supreme Court precedent and, therefore, must be stricken in its entirety.

If there is a North Star to the Supreme Court’s constitutional jurisprudence, it is that “[t]he First Amendment protects political association as well as political expression.” *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)). As such, “political belief and association constitute the core of those activities protected by the First Amendment.” *Elrod*, 427 U.S. at 356.

[T]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments. The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom. These protections reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, a principle itself reflective of the fundamental understanding that competition in ideas and governmental policies is at the core of our electoral process.

⁸ The same is applicable to the individual serving as Secretary, however, in the interest of brevity this brief will reference exclusively service as a Commissioner.

Elrod, 427 U.S. at 356-57 (internal citations and alterations omitted).⁹ Consequently, while “a person has no ‘right’ to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act.” *Rutan v. Repub. Party*, 497 U.S. 62, 86 (1990). Included among those are “the denial of public employment” *Elrod*, 427 U.S. at 356; *see also Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2470 (2018).

“The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” *Elrod*, 427 U.S. at 361 (internal alterations omitted) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967)). “Under [the Supreme Court’s] sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.” *Rutan*, 497 U.S. at 78. “The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.” *Elrod*, 427 U.S. at 362. Speech is most vital when it is on “matters of public concern” a term that includes “speech relating to any matter of *political*, social, or other concern to the community.” *Umbehr v. McClure*, 44 F.3d 876, 879 n.3 (10th Cir. 1995) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

IP 420 disqualifies *any* individual, or their “immediate family members”¹⁰, from service as a Commissioner, or Commission Secretary,¹¹ if they meet broadly defined criteria.

⁹ The right to change from one political party to another is including in the constitutional protections. *See Elrod, supra*; and *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

¹⁰ The term “immediate family member” is given excessive scope by the petition and includes the following list of consanguineous and non-consanguineous relationships: father, stepfather, mother, stepmother, son, stepson, daughter, stepdaughter, brother, stepbrother, sister, stepsister, husband, wife, father-in-law, and mother-in-law. *See* IP 420, § 4(A)(9).

¹¹ In addition to being burdened with the same disqualification provisions as Commissioners, the Secretary must also be approved by a majority vote of the Commissioners. IP 420, § 4(C)(1).

Any individual is excluded who, within the “five years immediately preceding the date of appointment”, engaged in the following:

- held partisan elective office;
- registered as a state or federal lobbyist;
- was nominated as a candidate for political office; or
- was employed by the state legislature.

IP 420, § 4(B)(2)(a)-(f). In addition to these requirements, also excluded are any individuals who have, *inter alia*, “changed their political affiliation in the four years immediately preceding the date of appointment to the Commission.” *Id.* Commissioners each receive remuneration equivalent to the per diem and mileage rate given members of the Oklahoma Legislature. IP 420, § 4(B)(7).¹² The special Master and the Secretary would be compensated positions as well. Each of the above categories subsumes within it all manner of speech considered at the “core of those activities protected by the First Amendment.” *See Elrod*, 427 U.S. at 356. As such, the burden falls upon the government, or in this case the proponent of the ballot initiative, to present a “vital” interest of “paramount” importance. *Id.* at 362.

People Not Politicians (“PNP”), the group advancing the ballot initiative, has advanced several purported interests, none of which are “vital” or “paramount.” For instance, PNP states their interest is “to draw boundaries for state legislative and congressional districts in a fair, open, and transparent manner”¹³ In essence, the only interest conveyed by People Not Politicians, is their view that the process of redistricting not be political. However, as has been repeatedly emphasized by the U.S. Supreme Court, “districting inevitably has and is intended to have substantial political consequences.” *Rucho v. Common Cause*, 139 S. Ct. at 2497, (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). The government cannot, therefore,

¹² The current *per diem* rate is \$156 dollars a day. *See National Council of State Legislatures*, Legislative Compensation, <http://www.ncsl.org/LinkClick.aspx?fileticket=tk1TESJZiUY%3D&tabid=33809&portalid=1>.

¹³ People Not Politicians, Learn More, <https://www.peoplenotpoliticians.org/learn-more>

have a “vital” interest in preventing that which the constitution specifically condones, namely, political decision making in redistricting.

Furthermore, it is not only the Constitution that condones partisanship in redistricting; IP 420 itself requires it. Six of the nine members of the Commission are required to have partisan affiliation as established by their registration for the same political party for the past four years. IP 420, § 4(A)(3), 4(B)(1). It is impossible to envision any interest, let alone a vital one, that requires exclusion based on the exercise of the fundamental right to political speech and activity while simultaneously requiring affiliation with political parties. There can be no vital interest in requiring some political activity but prohibiting other political activity.

Protestants have a First Amendment right to associate freely, participate in the political process, express their political views, and petition the government for redress, all without discrimination by the State based on the exercise of these foundational rights. The exclusion of Protestants, and any of the thousands of individuals covered by the excluded categories, severely burdens their First Amendment rights. A “fair, open, and transparent” process, while certainly laudable, cannot be used as a cudgel for punishing Protestants for their prior exercise of fundamental First Amendment rights. And the denial of Protestants’ rights certainly cannot be adequately linked to the achievement of PNP’s generalized interests in a way that justifies the burdens consequent therefrom. As such, the proposed initiative is in violation of the U.S. Constitution and must be stricken in its entirety. *See In re: Initiative Petition No. 364*, 1996 OK 129, ¶ 38.

IV. CONCLUSION

For these reasons, Petitioners respectfully request the Court find IP 420 to be unconstitutional and order that it be stricken.

Respectfully submitted,



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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:

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