IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROGER GADDIS and ELDON MERKLIN, Protestants/Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents/Proponents.	Sup. Ct. Case No. 118,405

RESPONDENTS/PROPONENTS ANDREW MOORE, JANET ANN LARGENT AND LYNDA JOHNSON'S BRIEF IN RESPONSE TO APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE CONSTITUTIONALITY OF INITIATIVE PETITION NO. 420

D. KENT MEYERS, OBA #6168
ALISON M. HOWARD, OBA #19835
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
alison.howard@crowedunlevy.com
melanie.rughani@crowedunlevy.com

December 5, 2019

ATTORNEYS FOR RESPONDENTS/PROPONENTS

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROGER GADDIS and ELDON MERKLIN, Protestants/Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents/Proponents.	)	Sup. Ct. Case No. 118,405

RESPONDENTS/PROPONENTS ANDREW MOORE, JANET ANN LARGENT AND LYNDA JOHNSON'S BRIEF IN RESPONSE TO APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE CONSTITUTIONALITY OF INITIATIVE PETITION NO. 420

D. KENT MEYERS, OBA #6168
ALISON M. HOWARD, OBA #19835
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
alison.howard@crowedunlevy.com
melanie.rughani@crowedunlevy.com

December 5, 2019

ATTORNEYS FOR RESPONDENTS/PROPONENTS

Page(s)

INDEX

INTRODUCTION

Every ten years, after the decennial census, states must redraw the district boundaries used to elect their state and federal representatives. This redistricting process, though at times arcane, is extraordinarily important. How districts are drawn can have an enormous impact on the results of subsequent elections: indeed, with today's powerful computers, elaborate voter databases and sophisticated analytical models, district maps can be "precisely engineered to assure [incumbent] control in all but the most extreme circumstances."[1]

In several states, like Arizona, Colorado, Missouri and Michigan, redistricting is handled by an independent commission tasked with drawing fair lines in an open and transparent process.[2] But in other states, like Oklahoma, the Legislature essentially has free reign to draw the lines as its members see fit. When legislators are in charge of constructing the districts in which they and their colleagues will run for office—particularly in a process that occurs behind closed doors, with little or no public input and few set criteria—lines can easily be manipulated to "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2658, 2676-77 (2015). In short: representatives can choose their own voters. This is called partisan gerrymandering, and it undermines the very notion of representative government. *Id.*

Respondents Andrew Moore, Janet Ann Largent, and Lynda Johnson ("Proponents"), believe Oklahoma voters should choose their representatives, not the other way around. In October 2019, therefore, they joined with a bipartisan group of citizens to propose State Question 804, Initiative Petition 420 ("IP420"). This proposal, which would ensure that

---

[1] "How Computers Turned Gerrymandering Into a Science," N.Y. Times (Oct. 6, 2017).

[2] *See, e.g., Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) (noting that "numerous other States are restricting partisan considerations in districting … by placing power to draw electoral districts in the hands of independent commissions").

future redistricting decisions are made by an independent, politically balanced Commission protected from the undue influence of partisan politics, aims to present a comprehensive solution to prevent partisan gerrymandering and improve Oklahoma's redistricting process.

Relying almost entirely on cases from other states applying different constitutional provisions, Petitioners Roger Gaddis and Eldon Merklin ("Opponents") have attempted to derail this initiative before it can even be presented to the voters by concocting challenges under the "one general subject" rule and the First Amendment. But IP420's provisions plainly embrace one general subject: redistricting. And Opponents have failed to identify any protected First Amendment right—much less shown "clearly and manifestly" that any infringement on that right is not justified by the state's interest in combatting gerrymandering. Thus, Opponents' brief is devoted in large part to arguing the policy merits of the initiative. Such a policy debate should certainly be had; however, its proper place is before the voters, not this Court. Opponents have not met their burden to show that the measure is "clearly and manifestly" unconstitutional. Proponents thus respectfully request that the Court deny the pre-election challenge and permit the commencement of the signature-gathering process, so the Petition may timely proceed to a vote of the People.

ARGUMENT AND AUTHORITIES

I. Standard of Review: At the Pre-Election Stage, an Initiative Petition May Not be Invalidated Absent a "Clear and Manifest" Showing of Unconstitutionality

"The power of the people 'to institute change through the initiative process is a fundamental characteristic of Oklahoma government'": indeed, it is "[t]he first power reserved by the people." *In re Init. Pet. 403*, 2016 OK 1, ¶ 3, 367 P.3d 472. As this Court has repeatedly emphasized, "[t]he right of the initiative is precious," and "one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *Okla. Oil &*

Gas Ass'n v. Thompson, 2018 OK 26, ¶ 4, 414 P.3d 345. "All doubt," therefore, "is to be resolved in favor of the initiative." *In re Init. Pet. 348*, 1991 OK 110, ¶ 5, 820 P.2d 772.

In deference to this precious right, moreover, this Court has "consistently confined [its] **pre-election** review of initiative petitions … to ***clear and manifest facial constitutional infirmities***." *In re Init. Pet. No. 358*, 1994 OK 27, ¶¶ 7, 12, 870 P.2d 782 (emphasis added); *see also In re Init. Pet. No. 365,* 2001 OK 98, ¶26, 55 P.3d 1048. Opponents thus bear a heavy burden: to warrant taking the issue away from the voters, they must show not just that the measure is unconstitutional, but that it is "***clearly and manifestly*** unconstitutional." *Thompson*, 2018 OK 26, ¶ 6 (emphasis added). They plainly cannot do so here.

II. Opponents Have Not Established a Violation—Much Less a "Clear and Manifest" Violation—of the "One General Subject" Rule

A. Amendments by Article are Subject to a Far More Lenient Test

Article 24, Section 1 of the Oklahoma Constitution, commonly known as the constitutional "single-subject rule," provides that "[n]o proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than **one general subject** ...; **provided, however**, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, **each proposed article shall be deemed a single proposal or proposition**." *Id.* (emphasis added).

In cases involving the separate single-subject rule applicable to acts of the legislature, Art. 5, § 57, this Court has applied a fairly strict version of the "germaneness" test for determining whether a proposal encompasses but "one subject." *See, e.g., Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, 302 P.3d 789. Proposed constitutional amendments, however, are subject to a lesser "one ***general*** subject" rule. Art. 24, § 1. And where, as here, the proposal is not only a constitutional amendment, but also an amendment "***by article***"—and

therefore ***by nature*** a more open and obvious change to the Constitution less likely to confuse or mislead voters—a ***much lesser standard of scrutiny*** applies. *In re Init. Pet. No. 319*, 1984 OK 23, ¶ 10, 682 P.2d 222. Although an amendment by article "is still required to relate to a single general subject," this Court has "indicate[d] clearly that the various changes need not meet" the more exacting forms of the germaneness test applicable to acts of the legislature or other forms of constitutional amendments. *Id.* ¶ 9. Rather, amendments by article need only satisfy the most "liberal" test articulated in *Rupe v. Shaw,* 1955 OK 223, ¶ 6, 286 P.2d 1094—a minimal standard discounted for other measures, but specifically approved in the "amendment by article" context. *Id.* ¶ 10.

Under this more liberal test, "provisions governing projects so related as to constitute a **single scheme** may be properly included within the same amendment." *Init. Pet. 403*, 2016 OK 1, ¶ 8 (quoting *Rupe*, 1955 OK 223, ¶ 6) (emphasis added). A proposal may contain incidental or supplemental measures, even if such measures could stand independently, if they are "necessary or convenient or tending to the accomplishment of one general design." *Id.* ¶ 10. So long as the provisions at issue are not "**essentially unrelated one to another,**" an amendment by article will satisfy the one-general-subject criterion. *Thompson*, 2018 OK 26, ¶ 8; *In re Initiative Pet. No. 363*, 1996 OK 122, ¶ 15, 927 P.2d 558.[3]

[3] The importance of this distinction is best illustrated by comparing two similar "liquor by the drink" petitions. IP314 proposed to change the state's alcoholic beverage laws through a number of constitutional amendments. *See In re Init. Pet. No. 314*, 1980 OK 174, 625 P.2d 595. Noting that three of the measure's provisions would each be independent, "important, substantial change[s] in our Constitution," and that they were not so "'interrelated and interdependent' that they form[ed] an 'interlocking package'" with a "common underlying purpose," the Court concluded that it constituted "logrolling," and thus violated the single-subject rule. *Id.* ¶¶ 75-76. But the Court went on to invite proponents to submit the proposal another way: "either" by "three separate" petitions, or as one proposal in the form of "***amendment by article***." *Id.* ¶ 81 (emphasis added).

As explained below, Proponents submit that this initiative—aimed at the one general subject of redistricting—satisfies even the more exacting germaneness test applied in other circumstances. Under the more liberal standard applicable here, however, there can be no question that the Petition encompasses one *general* subject.

B. The Petition Satisfies the One-General-Subject Rule

1. The redistricting of state legislative districts and the redistricting of federal Congressional districts both relate to redistricting

Opponents first submit that, because the Petition would apply its proposed redistricting process to both state legislative districts and federal Congressional districts, it addresses two separate subjects. But the Petition sets forth a singular process for redistricting in Oklahoma. No matter how many objects of that process there may be,[4] redistricting itself is one general subject. *Cf., e.g., In re Init. Pet.403*, 2016 OK 1, ¶ 18 (upholding petition that addressed early education, common education, and higher education); *Okla. Ass'n of*

The proponents took the Court at its word, and a few years later, offered a similar measure, but this time as an "amendment by article." *In re Init. Pet. No. 319,* 1984 OK 23, 682 P.2d 222. This dramatically altered the Court's analysis:

> *In Re Initiative Petition No. 314*, 625 P.2d 595 (Okl. 1981) recognized that our constitution may be amended by article under Article 24, Section 1, and that **such an amendment may cover changes which would violate the single subject rule if not proposed in that format**. Proponents have complied with that procedure. While the amendment is still required to relate to a single general subject, our previous ruling indicates clearly that the various changes need not meet the test which was applied in *Initiative Petition No. 314*, and which resulted in the invalidity of that proposal.

Id. ¶ 9 (emphasis added). Rather, the Court noted, "we can apply to this question no more restrictive test than the one approved in both *Rupe v. Shaw*, 286 P.2d 1094 (Okl. 1955), and in *In re Initiative Petition No. 271*, 373 P.2d 1017 (Okl. 1962)." *Id.*

[4] Opponents currently identify two different subjects, federal and state redistricting. Yet, if Proponents were to start over with separate initiatives, (redundantly) setting forth the (identical) process for federal redistricting, on the one hand, and state redistricting, on the other, Opponents would surely be back arguing that the *state* measure addresses two separate subjects: House and Senate redistricting. After all, as they point out, the two chambers are typically apportioned through separate Acts. *See* Br. at 5 n.2.

Optometric Physicians v. Raper, 2018 OK 13, ¶¶ 10-17, 412 P.3d 1160 (upholding petition addressing both optometrists and opticians); *In re Init. Pet. 360*, 1994 OK 97, ¶¶ 19-20, 879 P.2d 810 (upholding petition addressing term limits for both Senators and Representatives).

Opponents do not point to a single Oklahoma case in support of their contention that federal and state districts must be treated separately. Instead, they rely exclusively on a case from Colorado, *In the Matter of the Title*, 2016 CO 55, 374 P.3d 460. That case, however, involved both different facts and different governing law.

First, the rule applied by the Colorado court was quite different from the rule that governs here. Colorado's Article V, § 1 requires that "[n]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." This is almost exactly like the *stricter* of Oklahoma's two single-subject rules, Article 5, § 57 ("[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title"), which governs acts of the Legislature. As explained at length above, however, that standard simply does not apply here: Oklahoma applies a far less exacting standard to proposed constitutional amendments, and particularly amendments by article. If *Oklahoma* cases applying Article 5, § 57 do not apply, then surely *Colorado* cases applying that rule's equivalent are even more inapposite.

Second, Colorado's Constitution had long set forth quite different processes for federal and state redistricting: a Reapportionment Commission for state legislative districts, and the General Assembly for federal Congressional districts. Emphasizing this history of two "distinct processes," the Court held that state legislative and congressional redistricting were two separate subjects. *Id.* ¶ 33.[5] The Oklahoma Constitution, however, does not lay out

[5] Notably, though the Colorado court suggested that addressing state and federal redistricting in one initiative could constitute logrolling because voters might register distinct opinions

two separate and distinct processes (indeed, it does not even mention congressional districts). Instead, Oklahoma's state House, state Senate, and federal Congressional districts all get reapportioned through the same highly political and impenetrable process: the Oklahoma Legislature.[6] In similar circumstances, a Florida court (on whose opinion Opponents elsewhere rely) *rejected* the notion that joining state legislative and congressional redistricting in the same initiative violated the single-subject rule, even under a stricter standard. *Advisory Opinion*, 926 So.2d 1218, 1225-26, 1229 (Fla. 2006).

2. *Both the "who" and the "how" of redistricting relate to redistricting*

Opponents next urge that IP420 violates the single-subject rule because it "would change both who does the redistricting and how redistricting is accomplished." Again, however, the "who" and the "how" of redistricting relate to a single subject: *redistricting*. *Cf., e.g., In re Init. Pet. 319*, 1984 OK 23, 682 P.2d 222 (upholding initiative that set forth the "who" and "how" of alcohol regulation, by replacing the Alcoholic Beverage Control Board with the ABLE Commission, and also, e.g., authorizing sale of liquor by the drink, requiring sales to wholesale distributors on equal basis, and providing for taxes and other regulations); *In re Init. Pet. 363*, 1996 OK 122 (upholding initiative that set forth the "who" and "how" of casino gambling, creating a Gaming Commission to regulate and enforce related rules and

---

regarding state legislative and congressional redistricting reforms, Colorado voters ultimately approved the separate proposals by the *exact same margins* in 2018. *See, e.g.*, https://www.coloradoan.com/story/news/politics/elections/2018/11/06/colorado-election-results-amendments-y-and-z-pass-changing-redistricting-process/1894902002/.

[6] Opponents note that the Legislature has always passed separate legislation to reapportion Congressional districts, "thus avoiding a single-subject challenge under Okla. Const. art. V, § 57." Br. at 5. Assuming this was in fact the motivation for separate congressional acts (and for separate acts for state house and for state senate districts, *see, e.g.*, Laws 2011, SB821, c.289; HB2145, c.285), the Legislature was attempting to avoid a *stricter* single-subject requirement than the one applicable here. By contrast, prior constitutional initiative petitions have addressed state and federal redistricting together. *See* SQ760 (available at https://www.sos.ok.gov/gov/questions.aspx).

setting out various minimum requirements).

Here, too, Opponents are forced to look outside Oklahoma for any support for their contention. They point to an opinion by a Florida court, *Advisory Opinion*, 926 So.2d 1218 (Fla. 2006), which held an initiative that both created an independent commission and required it to draw single-member, contiguous districts violated that state's single-subject rule.[7] Once again, however, that case was applying a much stricter test. Article XI, § 3 of the Florida Constitution, which requires initiative petitions to "embrace but one subject," reads like Oklahoma's more exacting Article 5, § 57. Further, because the Florida initiative process "does not afford the same opportunity for public hearing and debate" as amendments proposed by the Legislature, Florida courts actually apply a *stricter* standard to initiative petitions, 926 So.2d at 1224—the *opposite* of Oklahoma's approach.[8]

IP420 plainly complies with Oklahoma's more liberal germaneness test, however. The "who" and the "how" of redistricting—including, *inter alia*, the data to be used, the process to be followed, and the criteria to be employed[9]—are the very details necessary to set forth a "single scheme to be presented to voters" to improve the redistricting process in

---

[7] Notably, the Florida initiative dealt not just with the *criteria* for drawing lines, but with the *type* of districts themselves: it would have changed Florida law, which allowed for multi-member districts, to permit single-member districts only—a major structural change. *Id.* at 1225-26. Other states, however, have upheld even broader initiatives against single-subject challenge. *See, e.g., Ritter v. Ashcroft*, 561 S.W.3d 74, 86 (Mo. Ct. App. 2018).

[8] *See, e.g., Rupe*, 1955 OK 223, ¶ 6 (noting "the distinction between ordinary legislation and proposed constitutional amendments, where there is a period of publicity in which those interested may acquaint themselves with the purpose thereof" as a reason a more lenient standard applies to constitutional initiatives).

[9] Opponents object to the Petition, e.g., specifying how prisoners should be counted for purposes of drawing districts, and prohibiting consideration of party affiliation or voting history except to assess political fairness. Certainly, these details—like many others—may be "controversial," Br. at 7-8; however, that does not make them any less germane to redistricting. *See, e.g.*, https://www.prisonersofthecensus.org/news/2009/09/25/okreport/ (explaining how counting prisoners where incarcerated contributes to gerrymandering); *cf., e.g., OIPA v. Potts*, 2018 OK 24, ¶¶ 20-22, 414 P.3d 351.

Oklahoma. *Init. Pet. 403*, 2016 OK 1, ¶ 12. As in *Initiative Petition 403*, "[e]ach section of the proposed amendment is reasonably interrelated and interdependent, forming an interlocking package deemed necessary by the initiatives' drafters" to combat partisan gerrymandering and improve the redistricting process, and "[t]he proposal stands or falls as a whole." *Id.* (internal quotation marks omitted).

Certainly, as Opponents note (at 8), "[r]easonable minds can and will differ" on some of the measure's provisions. "[I]f a voter agrees," for example, with the creation of an independent Commission "but does not agree" with the redistricting criteria, "then the voter must choose whether to approve the proposal based on such considerations." *Init. Pet. 403*, 2016 OK 1, ¶ 12. But this is not the test for determining multiplicity of subjects (if it was, any petition with more than one subsection could be struck down, effectively eviscerating the initiative power). To the contrary: this Court has repeatedly held that "**[s]uch choices are the consequence of the voting process rather than any constitutional defect in the proposal.**" *Id.*; *see also Potts*, 2018 OK 24, ¶¶ 20-22 (similar). Where, as here, the Petition's provisions are "germane to a singular common subject and purpose" and not "essentially unrelated one to another," it is enough to satisfy Article 24, § 1. *Id.*

3. The Petition does not eliminate the right of initiative or referenda with respect to redistricting (though if it did, it would relate to redistricting)

Opponents next submit that IP420 contains another, hidden, subject: "eliminat[ing] the right to pass and disapprove redistricting legislation by initiative or referendum." Br. at 9. But the Petition no more "voids the referendum power" by taking redistricting decisions out of the hands of the Legislature than does any other constitutional amendment—which, by definition, promulgates law not subject to either the Legislature or the various checks thereon

(e.g., bicameralism, veto, and referendum).[10] Nor does the measure "vitiate[] the people's power to propose initiatives": if the People want to change IP420's redistricting scheme (or simply propose new maps), they need only introduce another petition and amend it.[11] *Init. Pet. 348*, 1991 OK 10, ¶ 16, 820 P.2d 772 (rejecting an almost identical argument).

Even assuming, *arguendo*, IP420's exercise of direct democracy here did limit future exercises of direct democracy with respect to redistricting, this would not make it a separate "subject." Any such limitation would simply be a consequence of the new redistricting process, which puts redistricting decisions in the hands of the Commission rather than the Legislature. Opponents' arguments "are at their root policy arguments ... best made to Oklahoma voters." *Potts*, 2018 OK 24, ¶ 21. No matter how "novel" or "momentous," so long as the initiative's changes are "germane to a singular common subject and purpose" and not "essentially unrelated one to another," they satisfy the "one general subject" rule. *Id.*; *see also Init. Pet. 348*, 1991 OK 10, ¶ 12 ("While the amendment, if adopted, may indeed affect other articles of the constitution ... that is insufficient reason for this court today to deny the people of Oklahoma the right to vote on this Petition").

4. Establishing a limited role for the Court in the redistricting process relates to redistricting

Finally, Opponents submit that, because "[t]he judicial branch has no role in selecting plans or selecting Commissioners under the current constitutional system," the increased role

---

[10] Indeed, under current law, if the Legislature fails to adopt a plan within a certain timeframe, a backup Commission of three Democrats and three Republicans draws the lines, and they are not subject to veto or referendum.

[11] Opponents are incorrect that § 5 of IP420, entitled "Authority of the Legislature," would restrict the power of the *People* with respect to future redistricting initiatives. Section 5 makes clear that the Commission's powers are exclusively reserved to it and shall not be altered or abrogated by "the Legislature"; however, it says no such thing with respect to the "People," separately referenced in that same provision. Even if it did, however, all the People would have to do to change that is propose an amendment to § 5 in any subsequent petition.

of the judiciary in IP420's redistricting process constitutes an impermissible separate subject. They are incorrect, on both the facts and the law.

It is true that, to reduce partisan influence, IP420 contemplates a limited but specific role for the judiciary. The Chief Justice would select a Panel of retired appellate judges to oversee the creation of the Commission, as well as a Special Master to serve in an administrative role. And if the Commission is unable to reach consensus on a redistricting plan in a certain timeframe, then the Supreme Court serves as the "fallback mechanism"—once the Special Master creates a report advising the Court of available plans, the Court has 30 days to approve a plan that complies with the requisite criteria.

It is not true, however, that involving the Court in the redistricting process is particularly novel. To the contrary: particularly with respect to Congressional redistricting, the judiciary has long served as the unofficial "fallback mechanism" when the legislature fails to fulfill its duties. *See, e.g., Alexander v. Taylor*, 2002 OK 59, 51 P.3d 1204 (affirming trial court's selection of a redistricting plan from various proposals). In doing so, this Court has made clear that "reapportionment is **not a strictly legislative enterprise**," and "*both* state legislatures and state courts are appropriate 'agents of apportionment.'" *Id.* ¶¶ 11-17 (bold added).[12] The fact that this role would be made explicit in IP420, and the Court would have the benefit of a Special Master report in the event its involvement is required, does not dramatically change the nature of the Court's role in the redistricting process.

Nor is the Chief Justice's role in selecting the Panel and Special Master that unusual. Under existing law, the Chief Justice appoints members of various other state agencies and commissions, presumably for much the same reason: to reduce partisanship in the selection

[12] Indeed, in announcing the upcoming House redistricting effort, Speaker McCall noted his Redistricting Committee already plans to "enhance the process further by soliciting input from the Oklahoma Supreme Court." Speaker Charles McCall, Press Release, Sept. 4, 2019.

process. *See, e.g.*, Okla. Const. Art. 29, § 1 (Ethics Commission); Art. 6, § 10 (Pardon and Parole Board); 74 O.S. § 4103 (State Capitol Preservation Commission).

Even if IP420 did propose an enormous shift in the role of the judiciary, moreover, it would not constitute a separate *subject*. The shift from partisan politicians to nonpartisan officials is just one part of the "interlocking package deemed necessary by the initiatives' drafters" to combat partisan gerrymandering and improve the redistricting process. *Init. Pet. 403*, 2016 OK 1, ¶ 12. Indeed, this Court has recently rejected nearly identical arguments with respect to "expanding the reach" of executive agencies "into the legislative realm." *Thompson*, 2018 OK 26, ¶ 16; *see also Potts*, 2018 OK 24, ¶ 23 (similarly rejecting contention that granting Board of Equalization "novel" powers that "would negatively affect the balance of separation of powers" constituted a separate subject).[13]

III. Opponents Have Not Established a First Amendment Violation—Much Less a *Clear and Manifest* First Amendment Violation

A. The First Amendment Does Not Prohibit Restrictions on Speech and Association For Policymaking Officials—Particularly Where, As Here, Those Restrictions Are Limited, Viewpoint-Neutral, and in Service of Important State Interests

Opponents finally submit that IP420's various restrictions on those who may serve on the Commission—designed to prevent undue partisan influence and conflicts of interest—violate the First Amendment. But "not all limits on [otherwise protected] activities are unconstitutional." *In re Init. Pet. No. 341*, 1990 OK 53, ¶ 4, 796 P.2d 267. To establish a violation, Opponents must show—at this stage, "clearly and manifestly"—1) there is a protected *right* to serve on the Commission unqualified by the conditions at issue, and 2) the

[13] Indeed, even under a far stricter standard, the Florida court found that provisions of a redistricting petition requiring the Chief Justice to nominate three members of a commission and "provid[ing] for judicial apportionment if the commission fails to complete its duty" did not constitute a separate subject. *Advisory Opinion*, 926 So. 2d at 1226.

People lack adequate justification for those conditions. *Id.* They cannot.

As an initial matter, no one has a *right* to serve on a government Commission. *Cf., e.g., Fair v. State Elec. Bd.*, 1994 OK 101, 879 P.2d 1223. Opponents thus rely on a line of so-called "unconstitutional condition" cases, which hold that, although individuals have no *right* to a governmental benefit, the state nevertheless may not *condition* a benefit on political belief and association absent a sufficient government interest. Br. at 13 (citing, *e.g., Elrod v. Burns,* 427 U.S. 347 (1976); *Rutan v. Repub. Party*, 497 U.S. 62, 86 (1990)). But they glaringly ignore the express exception set forth in these same cases: for "***policymaking*** positions," such as the ones at issue here, the state properly *may* consider partisan affiliation—even in a decidedly non-viewpoint-neutral manner—without violating the First Amendment. *Elrod*, 427 U.S. at 367, 372 (explaining that "policymaking positions" can be conditioned on speech and association, so as to "insure that policies which the electorate has sanctioned are effectively implemented"); *Rutan,* 497 U.S. at 74 (reaffirming this exception); *see also Phillips v. Wiseman*, 1993 OK 100, ¶ 4, ¶ 857 P.2d 50, 52 (upholding condition based on political affiliation for the deputy commissioner of labor).

Here, the members of the Commission will undoubtedly be policymakers. And as discussed above, political affiliation—specifically, a balance of party affiliation uninfluenced by extreme partisan conflict of interest—"is an appropriate requirement for the effective performance" of the Commission. *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *see also Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 436 (6th Cir. 2000) (political affiliation is a proper qualification for "positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents"). For this reason, many other states, "as a means to curtail partisan gerrymandering," have established redistricting commissions with similar qualifications.

Ariz. Indep. Redistricting Comm'n, 135 S.Ct. at 2662. Oklahoma, too, has a constitutionally-protected interest in structuring its government and deciding who will be responsible for redistricting. *Gregory v. Ashcroft*, 501 U.S. 452, 462-63 (1991) ("[T]he authority of the people of the States to determine the qualifications of their most important government officials ... is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]," and judicial scrutiny is not "so demanding where we deal with matters resting firmly within a State's constitutional prerogatives").

Opponents' brief studiously avoids stating what type of scrutiny should be applied to the restrictions at issue. This is because, while restrictions on First Amendment rights are typically subject to strict scrutiny, that is not the case for, e.g., state laws that are part of a "State's comprehensive election scheme." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Anderson v. Celebrezze,* 460 U.S. 780 (1983)). Because states are entitled to regulate their own elections to safeguard the democratic process, and such regulations will invariably impose some burden upon political association and expression, "a more flexible standard applies": the court "must weigh the character and magnitude of the asserted injury" against the state's "justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434; *see also, Utah Rep. Party v. Cox*, 892 F.3d 1066, 1076-77 (10th Cir. 2018) (noting the state's "legitimate interest in providing order, stability and legitimacy to the electoral process," and applying the "now-familiar *Anderson-Burdick* balancing test"). And where, as here, "regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.*

Similarly, the U.S. Supreme Court has made clear that laws disqualifying persons from participating in government on the basis of conflict of interest, or the appearance

thereof, are subject to lesser scrutiny. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 119 (2011) (rejecting First Amendment challenge to law requiring legislators to recuse from voting on matters with which they or a family member had a conflict of interest); *see also, e.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 556 (1973); *Broadrick v. Okla.*, 413 U.S. 601, 616 (1973) (upholding Hatch Act and Oklahoma's equivalent, which proscribe public employees from, e.g., serving on a political party committee, running for political office, and making political contributions, because "[n]either the right to associate nor the right to participate in political activities is absolute," and the restrictions served an important state interest—"the impartial execution of the laws").[14] IP420 would (temporarily) exclude from Commission service those most likely to have a conflict of interest in drawing district lines: people whose political careers are most affected by district lines (elected office-holders and candidates); people with a substantial interest in lines being drawn to advantage particular parties or candidates (political party officers and staffers); people whose employment may depend upon lines being drawn to favor particular parties or candidates (employees of the Legislature or lobbyists); and people who have a vested personal and/or financial interest in these individuals (e.g., family members).[15] Such restrictions are permissible under the First Amendment. *Carrigan*, 564 U.S. at 125.

---

[14] Oklahoma has a number of such laws. *See, e.g.*, 74 O.S. Ch. 62, App. 1, Rule 4.7; 74 O.S. Ch. 62, App. 1, Rule 1.6. Indeed, Oklahoma—without constitutional infirmity—disqualifies some individuals from certain positions altogether, to avoid even the appearance of partisan or financial conflict of interest. A judicial officer of Oklahoma shall not "hold office in a political party or organization." Okla. Const. Art. 7B, § 6. An Oklahoma legislator is disqualified, during her term of office, from any state office or commission created or benefitting from emolument increase during the legislator's term, and from any Governor or legislative appointment. Art. 5, § 23.

[15] The Supreme Court has recognized the importance of such measures: "[i]ndependent redistricting commissions ... have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting.] They thus impede legislators from

Opponents complain that, because the Commission will be composed of a balance of members registered with the two largest political parties, it cannot put ***any*** limits on political activity, asserting "[t]here can be no vital interest in requiring some political activity but prohibiting other political activity." Br. at 15. They offer no support for such an assertion. To the contrary: thirty years ago, this Court rejected a First Amendment challenge to the initiative creating Oklahoma's Ethics Commission on the ground of the state's overriding interest. *In re Init. Pet. No. 341*, 1990 OK 53, 796 P.2d 267. Noting that the Commission was set up to, *inter alia*, prevent scandal, "avoid conflict of interest," and ensure that "the operation of government be properly conducted so that public officials are independent and impartial," the Court found that "[n]ot only do states have a legitimate interest 'in fostering informed and educated expressions of the popular will in a general election,' they have a compelling state interest in '[m]aintaining a stable political system.'" 1990 OK 53, ¶¶ 13-14 (cites omitted). Notably, the Ethics Commission, like the proposed redistricting Commission, requires a balance of members registered with the two major political parties, Okla. Const. Art. 29, § 1(B); it also disqualifies from service those who are candidates for elected office, hold public office, are employed by any state agency, or "engage in any political activity" except registering to vote and private expression. 74 O.S. Ch. 62, App. 1, Rule 1.5(A).[16]

The People's interest in setting qualifications for membership on the proposed redistricting Commission similarly justifies the minimal burdens on any otherwise protected

---

choosing their voters instead of facilitating the voters' choice of their representatives." *Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. at 2676 (brackets in original).

[16] Similarly, members of the Judicial Nominating Commission must satisfy both political party balance requirements and similar conflict of interest limitations: they cannot "hold any other public office … or appointment or any official position in a political party" and they are "not [] eligible, while a member of the Commission and for five (5) years thereafter, for nomination as a Judicial Officer." Okla. Const. Art. 7B(a)(3), (d), & (f).

right at issue here. Oklahoma has at least an adequate, and indeed compelling, interest in both political balance and combatting conflicts of interest in drawing the districts from which its citizens elect their representatives. The qualifications, which require equal representation of the largest political parties, exclude career politicians and lobbyists, and otherwise limit conflicts of interest, are aimed at "the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. at 2658. As the U.S. Supreme has recognized, "'partisan gerrymanders ... [are incompatible] with democratic principles.'" *Id.* (brackets in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004)).

Numerous states have independent Commissions like the one proposed in IP420, with similar conditions on Commission membership. Yet, such conditions have never been held to violate the First Amendment. Indeed, in the one state where such qualifications have been challenged (Michigan, where an almost identical challenge is currently pending in district court), the court recently refused to preliminarily enjoin the Commission from taking effect with such conditions because, it found, plaintiffs were unlikely to succeed on the merits. *Daunt v. Benson*, 2019 WL 6271435, *9, 13-15 (W.D. Mich. Nov. 25, 2019). Applying the "*Anderson-Burdick* framework," the court concluded that there, as here, any burden on speech and association rights is both minimal and temporary, and "the State's interests in designating eligibility criteria for an effective redistricting commission are more than sufficient to justify the challenged provisions." *Id.* *15.

B. Even if There Were a First Amendment Concern with Some Provisions of IP420, Moreover, That Would Not Warrant Striking the Petition

In considering Opponents' First Amendment challenge, moreover, it is important to keep in mind two things: 1) the applicable standard at this pre-election stage; and 2) the

remedy. Proponents submit there is no First Amendment violation here under any standard. But even if Proponents are incorrect, it would not warrant striking the Petition.

This is a *pre-election* challenge to an initiative that has not yet even been put to a vote of the People, much less become law. As such, it is essentially a request for an advisory opinion. *Cf., e.g., Initiative Pet. 358*, 1994 OK 27, ¶7. Furthermore, it comes to the Court as an original action, with the attendant space limitations and abbreviated briefing schedule; without having had an opportunity to develop the record or arguments before the trial court; and by parties who may or may not have standing to object to these provisions in the first instance. These inherent limitations—along with the deference given to "the fundamental and precious right of initiative petition," *Thompson*, 2018 OK 26, ¶¶ 5-6—are why this Court has "limited such pre-election review to clear or manifest facial constitutional infirmities." *In re Init. Pet. 360*, 1994 OK 97, ¶¶ 10-11, 879 P.2d 810 (declining to consider First Amendment challenge). There are certainly no such infirmities here: as explained above, "[n]either the right to associate nor the right to participate in political activities is absolute," and similar qualifications have been upheld by numerous courts, including this one.

Finally, Opponents' First Amendment objection applies only to a small part of an initiative that contains a severance clause, allowing any part deemed unconstitutional to be severed without invalidating the whole. IP420, § 7. Initiative Petition 420 should not be withheld from the voters on the basis of Petitioners' First Amendment challenge.

CONCLUSION

Proponents thus respectfully request that the Court deny Opponents' constitutional challenge and permit the commencement of the signature-gathering stage.

Respectfully submitted,

D. KENT MEYERS, OBA #6168
ALISON M. HOWARD, OBA #19835
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
alison.howard@crowedunlevy.com
melanie.rughani@crowedunlevy.com

ATTORNEYS FOR RESPONDENTS/ PROPONENTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served by U.S. Mail, postage prepaid, this 5th day of December, 2019 to:

Robert G. McCampbell
Travis V. Jett
GableGotwals
One Leadership Square, 15th Floor
211 North Robinson Avenue
Oklahoma City, Oklahoma 73102

Office of the Oklahoma Attorney General
313 NE 21st St
Oklahoma City, Oklahoma 73105

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