

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FEB 28 2020

JOHN D. HADDEN
CLERK

- (1) MARC McCORMICK,
- (2) LAURA NEWBERRY,
- (3) ROGER GADDIS, AND
- (4) CLAIRE ROBINSON DAVEY,

PROTESTANTS/PETITIONERS,

v.

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

RESPONDENTS/PROONENTS.

Case No. _____

#118685

**APPLICATION AND PETITION TO ASSUME
ORIGINAL JURISDICTION AND REVIEW THE
CONSTITUTIONALITY OF INITIATIVE PETITION NO. 426**

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

FEBRUARY 28, 2020

I. INTRODUCTION

Come now Protestants/Petitioners and challenge Initiative Petition 426, State Question 810 (“IP 426”), pursuant to 34 O.S. § 8(B) because it violates the U.S. Constitution.

IP 426 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 426, the apportionment decisions would not be made by the voters’ elected representatives in the Legislature, but would be made by an unelected Redistricting Commission or the Supreme Court.

As will be shown below and in the brief in support, IP 426 is unconstitutional.

Counting Prisoners

1. IP 426 proposes an unconstitutional change to the way prisoners are counted in Oklahoma. The United States Census Bureau counts “group quarters” residents, such as prisoners, college students, members of the military, residents of long-term care facilities, and residents of domestic abuse shelters in a similar manner. 83 Fed. Reg. 5525, 5533–36 (Feb. 8, 2018), App. at Tab C; U.S. Census Bureau, Group Quarters/Residence Rules, App. at Tab D. They are counted at the place where they are. *Id.* IP 426, however, would count prisoners differently from the others on the list. IP 426 would count prisoners at the “home address” in the records of the Department of Corrections. IP 426 § 4(C)(2)(e).

2. Counting prisoners differently from other group quarters residents would violate Article I, § 2 of the U.S. Constitution because it will result in unequal population among the different Congressional Districts. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). In Oklahoma, some Congressional Districts have multiple state prisons, federal prisons, and private prisons. However, the First

District does not have any state, federal, or private prisons. The result, then, will be an unequal change in the population of the various districts. Further, because Oklahoma County and Tulsa County are disproportionately the largest in terms of population, but do not have a proportional share of state, federal, and private prisons, the result of the change in counting will be that the areas in which the prisons are located will be undercounted and Oklahoma County and Tulsa County will be over counted.

3. As set forth below, Protestant/Petitioner Roger Gaddis lives in Pontotoc County, in the Fourth Congressional District of Oklahoma. That district has multiple state, federal, and private prisons. However, that district does not include Tulsa County and includes only a small part of Oklahoma County.

Discrimination Based on Exercise of First Amendment Rights

4. As shown below, Protestants/Petitioners here present specific, concrete cases of Oklahomans whose constitutional rights are violated because they would be automatically disqualified from serving on the Redistricting Commission merely because they (or their spouse) had exercised their First Amendment rights.

- Marc McCormick exercised his first amendment right to change political parties on February 6, 2020. Under IP 426 that disqualifies him from being a Commissioner. IP 426, § 4(B)(2)(a).
- Clair Robinson Davey changed political parties on February 6, 2020. Under IP 426 that disqualifies her from serving on the Commission. IP 426, § 4(B)(2)(a).
- Laura Newberry is married to Dan Newberry, who was a State Senator until 2018. Under IP 426 that disqualifies Ms. Newberry from serving as a Commissioner. IP 426, § 4(B)(2)(b).

5. IP 426 is further unconstitutional because Oklahomans would be disqualified 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 Commission 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

6. Protestant/Petitioner Marc McCormick, is a citizen of Oklahoma. He has been a resident of Oklahoma County and registered to vote in Oklahoma County for over 30 years. On February 6, 2020, Mr. McCormick exercised his First Amendment right to change political parties and changed from Republican to Democrat. App. at Tab Q.

7. Protestant/Petitioner Laura Newberry is a citizen of Oklahoma. She has been a resident of Tulsa County for over twenty years and has been registered to vote for over twenty years. Ms. Newberry is married to Dan Newberry who was a State Senator from 2008 to 2018. App. at Tab N & O. Pursuant to section 4(B)(2)(b) of Initiative Petition 426, Ms. Newberry would be disqualified from serving as a Redistricting Commissioner because she is married to a person who was a State Senator until 2018.

8. 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. He lives in and is registered to vote in the Fourth Congressional District of Oklahoma.

9. Protestant/Petitioner Claire Robinson Davey is a citizen of Oklahoma. She has been a resident of Oklahoma County and registered to vote in Oklahoma County for over nine years. On February 6, 2020, Ms. Davey exercised her First Amendment right to change political parties and changed from Republican to Democrat. App. at Tab R.

10. Respondent/Proponent Andrew Moore is one of the proponents of IP 426.

11. Respondent/Proponent Janet Ann Largent is one of the proponents of IP 426.

12. Respondent/Proponent Lynda Johnson is one of the proponents of IP 426.

III. JURISDICTION

13. IP 426 was filed with the Oklahoma Secretary of State on February 6, 2020. App. at Tab A.

14. Pursuant to 34 O.S. § 8, the Secretary of State published notice of IP 426 on February 13, 2020. App. at Tab B.

15. Within 10 business days after notice is published an Oklahoma citizen can file “a protest as to the constitutionality of the petition.” 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. President’s Day, January 17, 2020, was a legal holiday. 25 O.S. § 82.1. The tenth business day after the notice was published is Friday, February 28, 2020.

16. The Protestants/Petitioners are citizens of Oklahoma. 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.

17. This Court has jurisdiction. A citizen, within ten days of the published notice, can file “a protest as to the constitutionality of the petition” with this Court. 34 O.S. § 8(B).

18. “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.

19. This protest attacks the constitutionality of IP 426. A protest is also being filed today on behalf of Protestant Eldon Merklin which attacks the “gist” submitted with IP 426.

IV. SUMMARY OF THE RECORD

20. IP 426 proposes a constitutional amendment to change the procedure for apportioning legislative districts for U.S. House of Representatives, Oklahoma House of Representatives and Oklahoma Senate. First, a “Panel” of three retired Justices or Judges of the Court of Criminal Appeals or Court of Civil Appeals would be selected by the Chief Justice (according to the gist) or by random selection (according to the petition). 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. From a list of those who apply to be a Commissioner, the Panel eliminates all but 20 names in each Group. Three applicants are then randomly selected for each Group from the list of 20. The Commission can adopt a redistricting plan only if six of the nine Commissioners votes in favor and only if at least one Commissioner from each of the three Groups votes in favor. Additionally, the Chief Justice designates a Special Master (the director or an employee of the Administrative Office).

21. IP 426 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.” The Commission would maximize “political fairness.”

V. SUBSTANTIVE ISSUES

A. CONGRESSIONAL REAPPORTIONMENT – ART. I, § 2 & EQUAL PROTECTION CLAUSE

22. Pursuant to Article I, § 2 of the United States Constitution, Congressional Districts should be apportioned such that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). “The ‘as nearly as practicable’ standard requires that the State make a good faith effort to achieve precise mathematical equality.” *Kirkpatrick*, 394 U.S. at 530–31. *See also Karcher*, 462 U.S. 725.

23. The U.S. Census Bureau uses similar standards for counting “group quarters” residents. Group quarters include correctional facilities, college dormitories, military barracks, nursing homes, mental hospitals, group homes, missions, and shelters. U.S. Census Bureau, Group Quarters/Residence Rules, App. at Tab D. The Census counts those group quarters residents at the place where they are at the time the Census occurs. 83 Fed. Reg. 5525, 5533–36 (Feb. 8, 2018), App. at Tab C. IP 426 would count prisoners differently, however. IP 426 would count prisoners at their home address according to the Department of Corrections. IP 426, § 4(C)(2)(e) & (C)(3)(a).

24. Counting prisoners in this manner, will have unequal effects across the state of Oklahoma.

25. Protestant/Petitioner Roger Gaddis is a resident of Pontotoc County in the Fourth Congressional District of Oklahoma. The Fourth Congressional District has four state

correctional institutions and one private prison. Those institutions (and their population) are as follows:

- Joseph Harp Correctional Center, Lexington (1,269)
- Lexington Assessment and Reception Center, Lexington (437)
- Lexington Correctional Center, Lexington (918)
- Lawton Community Corrections Center, Lawton (145)
- GeoGroup, Lawton Correction and Rehabilitation Facility, Lawton (2,505)

Okla. Dep't of Corrections, Incarcerated Inmates Daily Count Sheet (Feb. 18, 2020), App. at Tab G.

26. By contrast, the First Congressional District of Oklahoma does not have any state, federal, or private prisons.

27. There are county and municipal jails in every Congressional District. The counting in the county and municipal jails will have a much lower impact, however, since prisoners' home address and place of incarceration will frequently be in the same congressional district.

28. According to the estimated 2016 population set forth in the *Oklahoma Almanac, 2017-2018*, Oklahoma County (782,970) (19.9%) and Tulsa County (642,940) (16.4%) have a significantly disproportionate share of the population of our state (3,923,561). App. at Tab Y.

29. As a statistical matter, Oklahoma County and Tulsa County, then, will be the home to a disproportionate number of Oklahoma prisoners.

30. The Fourth District of Oklahoma contains no part of Tulsa County and only a small part of Oklahoma County. The vast majority of the population in Oklahoma County is in the Fifth Congressional District. 2011 Okla. Sess. Laws Ch. 194, § 2.

31. Counting prisoners at their listed home address instead of the counting them where they are will artificially decrease the population count in the Fourth District of Oklahoma and artificially increase the population count in the First District of Oklahoma and the Fifth District of Oklahoma.

32. There will further be an anomaly with respect to inmates in federal and private prisons in Oklahoma. Almost all of the federal and private prisoners will be from a state other than Oklahoma, and most other states follow the U.S. Census group quarters rule under which prisoners are counted where they are instead of their previous home address. The effect will be that many of the Oklahoma federal and private prisoners will not be counted at all because they would not be counted in Oklahoma under IP 426, but they would not be counted in their home state either.

33. IP 426's arbitrary method for counting prisoners violates Art. I, § 2 of the Constitution when applied to congressional redistricting and the Equal Protection Clause of the 14th Amendment, when applied to state legislative redistricting. This is not "a good-faith effort to achieve precise mathematical equality." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969)). This is not a reasonable attempt to "ascertain the number of eligible voters in each district and . . . apportion accordingly." *Kirkpatrick*, 394 U.S. at 534–35. This attempt to "correct" the census data is "haphazard, inconsistent, or conjectural . . ." as prohibited by *Karcher*, 462 U.S. at 732 n.4. Choosing only to manipulate prisoners' residences, and not those similarly situated is arbitrary and certainly is not systematic. *Id.*

34. IP 426's arbitrary method for counting prisoners violates the Equal Protection Clause of the 14th Amendment when applied to state legislative redistricting. IP 426 would

reassign people to districts “in which they admittedly did not reside.” *Mahan v. Howell*, 410 U.S. 315, 332 (1973). It singles out prisoners for disparate treatment rather than conducting “careful and comprehensive process free from any taint of arbitrariness or invidious discrimination” which is applicable to similarly situated group quarters residents. *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1095 (D. Haw. 2013), *aff’d*, 571 U.S. 1161 (2014).

**B. DISQUALIFICATION FROM THE COMMISSION BASED ON VOTER REGISTRATION
– EQUAL PROTECTION CLAUSE**

35. Pursuant to § 4(B)(2)(a) of IP 426, an Oklahoman would be disqualified from serving as a redistricting commissioner if he or she changed their political party after IP 426 was filed.

36. Protestants/Petitioners McCormick and Davey both changed their party affiliation after IP 426 was filed. App. at Tab Q and R.

37. IP 426 was filed the morning of February 6, 2020.

38. Protestants/Petitioners McCormick and Davey were aware of the petition and changed their political parties. They seek to vindicate the constitutional rights not only for themselves but for the thousands of other Oklahomans who exercise their constitutional right to change political parties.

39. Data from the Oklahoma State Election Board shows that Oklahomans regularly exercise their constitutional right to change political parties. For example, during a six month period in 2018, over 19,000 Oklahomans changed their political party. App. at Tab Z and AA.

40. Section 1 of 14th Amendment of the U.S. Constitution guarantees equal protection of the laws. Strict scrutiny applies when a legal classification “interferes with the exercise of a fundamental right such as . . . rights guaranteed by the First Amendment”

Hendricks v. Jones, 2013 OK 71, ¶ 8, 349 P.3d 531, 534. “The right to associate with the political party of one's choice” is protected by the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

41. There is no basis for the State of Oklahoma to discriminate against Oklahomans because they changed their political party, much less a compelling state interest. Further, the across-the-board, indiscriminate disqualification of everyone who changed their political party is not narrowly drawn to achieve a compelling state interest.

42. Also, public notice of IP 426 was published by the Secretary of State on February 13, 2020. App. at Tab B.

43. Although the disqualification based on changing political parties applies only back to the date the petition was filed, that disqualification will trap and disqualify many Oklahomans who, unlike Mr. McCormick and Ms. Davey, did not have the advantage of being aware of the contents of the petition. Virtually every Oklahoman who changed their party affiliation on February 6 and 7 would have been unaware that IP 426 even existed, much less that it would discriminate against them if they changed their political affiliation.

**C. DISQUALIFICATION FROM THE COMMISSION BASED ON MARITAL STATUS
– EQUAL PROTECTION CLAUSE**

44. Laura Newberry is and has been married to Dan Newberry. Dan Newberry served as a State Senator for the period 2010 to 2018. For that reason, under IP 426 Laura Newberry is automatically disqualified from serving as a redistricting Commissioner. App. at Tab N & O.

45. Because Mr. Newberry is no longer serving in the State Senate, App. at Tab N & O, the Newbury household has no financial interest in how district lines are drawn.

46. IP 426 § 4(B)(2)(b) automatically disqualifies from serving as a Commissioner any person who has an “immediate family member” who has held partisan elective office in the previous five years. IP 426 § 4(A)(9) defines “immediate family member” to refer to “a spouse.” Therefore, Ms. Newberry is automatically disqualified.

47. Ms. Newberry would not be disqualified if she and Mr. Newberry had never gotten married or were divorced. She is disqualified only because of her status of being married to Mr. Newberry.

48. It is irrational and arbitrary to discriminate against Ms. Newberry because of her status of being married.

49. The State of Oklahoma has no interest in treating Ms. Newberry differently than someone in identical circumstances who is not married.

D. DISQUALIFICATION FROM THE COMMISSION – FIRST AMENDMENT

50. 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.

51. Nevertheless, IP 426 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.

52. In particular, in setting forth the qualifications to be a Commissioner participating in redistricting, IP 426, § 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.

53. 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).

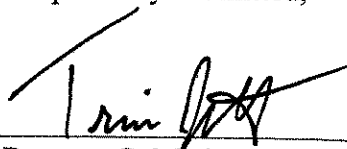
54. A state cannot discriminate against a person for exercising their First Amendment rights.

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

VI. CONCLUSION

IP 426 violates the United States Constitution and 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

Marc McCormick, Laura Newberry,

Roger Gaddis, and Claire Robinson Davey

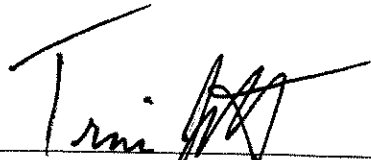
CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 2020, 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

S536330