IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SENATOR JIM WILSON,

Petitioner,

v.

MARY FALLIN, Governor of the State of Oklahoma,

KRIS STEELE, Speaker of the Oklahoma House of Representatives,

BRIAN BINGMAN, President Pro Tempore of the Oklahoma State Senate,

PAUL ZIRIAX, Secretary of the Oklahoma State Election Board,

Respondents.

SC

PRELIMINARY BRIEF IN SUPPORT OF ORIGINAL JURISDICTION SUPREME COURT PROCEEDING TO SET ASIDE THE OKLAHOMA STATE SENATE REAPPORTIONMENT PLAN

RESPECTFULLY SUBMITTED THIS 7th DAY OF JULY, 2011.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SENATOR JIM WILSON, Petitioner, v. MARY FALLIN, Governor of the State of Oklahoma, KRIS STEELE, Speaker of the Oklahoma House of Representatives, BRIAN BINGMAN, President Pro Tempore of the Oklahoma State Senate, PAUL ZIRIAX, Secretary of the Oklahoma State Election Board, Respondents.	)	SC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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COMES NOW THE PETITIONER and shows this Court as follows:

I. - STANDING OF THE PETITIONER AND JURISDICTION OF THE COURT

Although the concepts of standing and jurisdiction are not the same, they will be commonly addressed because both standing and jurisdiction are expressly provided by Okla. Const. art V, § 11(C).

Under both the Oklahoma constitution and pre-existing common law, there can be no doubt that Senator Wilson has standing to bring this action. Okla. Const. art V, § 11(C) which (emphasis supplied) provides as follows:

> **Any qualified elector may seek a review of any apportionment order of the Commission, or apportionment law of the legislature, within sixty days from the filing thereof, by filing in the Supreme Court of Oklahoma a petition which must set forth a proposed apportionment more nearly in accordance with this Article.** Any apportionment of either the Senate or the House of Representatives, as ordered by the Commission, or apportionment law of the legislature, from which review is not sought within such time, shall become final. **The court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promptly for the disposal of the same.**

While no special showing of harm is necessary to grant a qualified elector standing to challenge an apportionment plan, this Court has long recognized– even prior to this constitutional provision-- that malapportionment is a harm in and of itself sufficient to grant standing:

> Respondents next argue that petitioner may not maintain this action because he shows no injury to himself. . . Each citizen has a right to have the state apportioned in accordance with the provisions of the Constitution, and to be governed by a Legislature which fairly represents the whole body of the electorate, elected as required by the provision of the Constitution. . .

Jones v. Freeman, 193 Okl. 554, 146 P.2d 564, 561 (1943) (internal citations omitted).

While it sometimes stated that the issue of gerrymandering is non-justiciable, this is not correct. Even as a matter of federal law– where the courts are of limited jurisdiction–

"intentional discrimination against an identifiable political group" (ie: gerrymandering) is justiciable. ***Davis v. Bandemer***, 478 U.S. 109, 127 (1986).

Even prior to the present constitutional provision, this Court has held that such issues are within the province of this Court to decided:

> We are of the opinion, and hold, that under article 7, sec. 2, above, we have jurisdiction of the present action. As has been well said of similar constitutional provisions, that section gives the Supreme Court original jurisdiction to issue the named writs to safeguard the 'sovereignty of the state, its franchises or prerogatives or the liberties of its people.' ***State v. Frear***, 148 Wis. 456, 134 N. W. 673, L. R. A. 1915B, 569; 7 R. C. L. 1075; 14 **Am. Jur.** 457. And, as was impliedly held by the New York court in the ***Sherill v. O'Brien Case***, above, [former] article 5, sec. 10 (j), above, was not intended to deprive the courts of jurisdiction to pass upon the constitutionality of apportionment acts under authority contained in other provisions of the Constitution. . .

Jones, 146 P.2d at 561.

Thus, Okla. Const. art V, § 11(C) clearly provides that challenges to apportionment acts are justiciable and places exclusive jurisdiction over such questions in this Court.

WHEREFORE, Senator Wilson has standing to bring this action and this Court has exclusive jurisdiction to determine the action.

II. - OKLAHOMA'S CONSTITUTIONAL REQUIREMENTS

The Oklahoma Constitution uniquely provides for consideration of factors designed to reduce, if not eliminate, the impact of partisan politics in the election of State Senators. Okla. Const. art V, § 9(A), emphasis supplied, provides as follows:

> The state shall be apportioned into forty-eight senatorial districts in the following manner: the nineteen most populous counties, as determined by the most recent Federal Decennial Census, shall constitute nineteen senatorial districts with one senator to be nominated and elected from each district; the fifty-eight less populous counties shall be joined into twenty-nine two-county districts with one senator to be nominated and elected from each of the two-county districts. **In apportioning the State Senate, consideration shall be given to population, compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors, to the extent feasible.**

"Constitutional provisions are mandatory unless it appears from the express terms

thereof or by necessary implication in the language used, that they are intended to be directory only." ***State ex rel. Ogden v. Hunt***, 1955 OK 125, 286 P.2d 1088, 1091 (quoting ***Jones v. Freeman***, 193 Okl. 554, 146 P.2d 564, 566 (1943)). Notably, ***Jones v. Freeman*** is a constitutional apportionment case. ***Cf. In re Request for Grand Jury***, 1996 OK CIV APP 150, 935 P.2d 1189, 1193 ("The word 'shall' [in the constitutional provision] is mandatory and leaves no room for discretion." ***Citing State ex rel. Ogden v. Hunt***, 286 P.2d 1088 (Okla. 1955)).

Nor can it fairly be said that the use of the word "consideration" transforms the mandatory "shall" into a matter unbridled discretion not subject to review. A meaningful interpretation of the constitutional provision is incumbent on this Court for "[o]therwise, the constitutional prohibition is dormant, meaningless, and dependent upon legislative discretion". ***Texas Co. v. State***, 198 Okla. 565, 577, 180 P.2d 631, 643 (Okla. 1947).

> An elementary rule of constitutional construction is that, where possible, effect should be given to each word and every part, and unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous nor should a constitutional provision be rendered meaningless by the courts.

Oklahoma Cotton Ginners' Ass'n v. State, 174 Okla. 243, 260, 51 P.2d 327, 346 (Okla. 1935). ***Accord Kiowa Cnty Excise Bd v. St. Louis-San Francisco Ry Co.***, 1956 OK 157, 301 P.2d 677, 683 ("Courts should avoid a construction which would render any portion of the constitution meaningless." Quoting ***Oklahoma Natural Gas Co. v. State ex rel. Vassar***, 187 Okl. 164, 101 P.2d 793, 796 (Okla. 1940)).

In this regard, the Oklahoma Constitution provides meaningful standards to be applied by requiring "consideration [of the named factors] to the extent feasible." Both the terms "feasible" and "to the extent feasible" have clear meanings:

> . . .According to **Webster's Third New International Dictionary of the English Language** 831 (1976), 'feasible' means 'capable of being done, executed, or effected.' Accord, the **Oxford English Dictionary** 116 (1933) ('Capable of being done, accomplished or carried out'); **Funk & Wagnalls New 'Standard' Dictionary of the English Language** 903 (1957) ('That may

be done, performed or effected'). . . .
Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981).

From this sensible premise, the United States Supreme Court rejected the argument that the words "'to the extent feasible' provide no meaningful guidance to those who will administer the law." ***Id.***, 452 U.S. at 546 (Rehnquist, J., dissenting). To the contrary, the United States Supreme Court found that such words provide adequate guidance:

> [Such language] directs the Secretary to issue the standard that 'most adequately assures . . . that no employee will suffer material impairment of health,' limited only by the extent to which this is 'capable of being done.'...

Id., at 509.

Similarly, the Legislature was required in drawing Senate lines to apply "compactness, area, political units, historical precedents, economic and political interests, contiguous territory", Okla. Const. art V, § 9(A), "limited only by the extent to which this is 'capable of being done.'". ***Am. Textile Mfrs***, at 509.

There are, of course, limitations on the extent to which considerations of compactness, political subdivisions and community interests can be accommodated. The United States Constitution requires that legislative districts be apportioned with "one-man, one-vote" being the primary consideration. Nonetheless, the United States Supreme Court in ***Karcher v. Daggett***, 462 U.S. 725, 741 n. 11 (1983) noted that courts "have consistently recognized that small deviations [in the population of districts] could be justified."

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory. . . these are all legitimate objectives that on a proper showing could justify minor population deviations.

Karcher, 462 U.S. at 740 (internal quotation omitted).

Under these considerations,

> the Legislature may not completely and entirely disregard compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors in subsequent redistricting so long as ***population*** is given primacy.

Ferrell v. Oklahoma, 339 F. Supp. 73, 84 (W.D. Okla. 1972) (emphasis by the Court, vacated in part by ***Davis v. Bandemer***, 478 U.S. 109 (1986)).

Petitioner would agree that under federal standards, the considerations imposed by the Oklahoma Constitution would not be controlling. Here, however, the issue one of state legislative districts and the controlling standard is the Oklahoma Constitution.

Although in some jurisdictions, the political motivation of the Legislature in re-drafting districts cannot be challenged, Oklahoma's Constitution specifically offers protections against pure, partisan politics and offers relief against gerrymandering. Our Constitution recognizes that the very bizarre and arbitrary shape of the districts provides evidence that the districts were drawn for improper purposes and in contravention of constitutional mandates. ***Cf. Hunt v. Cromartie***, 526 U.S. 541, 548 n. 3 (1999) (agreeing "that proof of a district's 'bizarre configuration' gives rise equally to an inference that its architects were motivated by politics or race."). Here, the question before the Court does not expressly require determination of the motive (although that may be relevant) because a successful challenge can be made by merely showing that the Legislature ***could have*** drawn districts which respected not only population equality but also county and city lines, compactness and communities of interest. The only burden imposed by the Oklahoma Constitution is that the Petitioner offer a map showing that more appropriate districts can be drawn. It is clear that the Senate disregarded these constitutionally mandated considerations in favor of other reasons having no constitutional protection.

WHEREFORE, this Court should hear the matter, determine that the Oklahoma Constitution was not followed and take the appropriate action to correct such failure.

Signed and executed by:

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CERTIFICATE OF SERVICE

A true copy of the foregoing was filed and served by hand-delivery and by US mail, postage prepaid, with notice as provided by Supreme Court Rule 1.301 and Form No. 14, on this 7th day of July, 2011:

MARY FALLIN, Governor of the State of Oklahoma,
KRIS STEELE, Speaker of the Oklahoma House of Representatives,
BRIAN BINGMAN, President Pro Tempore of the Oklahoma State Senate, and
PAUL ZIRIAX, Secretary of the Oklahoma State Election Board
by mail and hand-delivery to their duly appointed counsel
E. SCOTT PRUITT, Attorney General for the State of Oklahoma
313 Northeast 21st Street
Oklahoma City, Oklahoma 73105

Attested this 7th day of July, 2011:

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